

COPYRIGHT IS HOW CREATORS ARE PAID

Writers should care about copyright reform

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Canada's copyright system is broken. Why should you care? Without a strong copyright law, you don't get paid for your work.

Over 10 years have passed since the *Copyright Act* was amended to reduce writers' rights and about five years since I covered the topic in my first *Write/Right* column (January-March 2018). It's time to revisit the issues for a few good reasons. First: the copyright climate has grown even less hospitable. Second: a new cohort of writers has arisen who are only vaguely familiar with what happened, and why it matters.

Copyright protection doesn't exist apart from statute law. The Canadian *Copyright Act* was enacted in 1924. Like copyright legislation worldwide, the act defines infringement—copying without permission—and provides exceptions for infringement. In the United States, these exceptions are called “fair use,” and in Canada, “fair dealing.” Until 2012, there were five fair dealing exceptions: research, private study, criticism, review, and news reporting. In 2011, the Conservative government tabled legislation that included

three new fair dealing exceptions. Two of these were parody and satire. No problem; adding these just caught Canada up with the rest of the world. However, the third new exception was unique to Canada: educational purposes.

Exceptions for students already exist: research and private study. Creators foresaw that if educational purposes were added, educational institutions may perceive they have free rein to lift creative works without compensating creators. The new educational purposes exception would negatively affect their incomes, stunt the growth of Canadian culture, and deprive Canadian students of quality Canadian content. Almost 70 creator groups presented a unified voice raising these concerns. They were reassured their fears were in vain. The educational purposes exception became law in 2012.

Turned out, the creator groups were right. A 2015 PricewaterhouseCoopers study bore this out (Microsoft Word—2015-06-29-Access Report_FINAL.docx, accesscopyright.ca). Writer income had plummeted. Most publishers downsized, and some closed their doors for good. Universities and other educational



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Copyright is how creators get paid. No one expects anyone else to work for free. Why, of all people, should the historically underpaid creative community? That's why all of us, as writers, should care about copyright reform.

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institutions adopted their own self-serving “fair dealing guidelines,” which allowed them to take liberally from copyright-protected works without permission or payment: for example, an entire poem or a whole chapter of a book. They stopped paying license fees to Access Copyright, the collective for writers, publishers and visual artists and claimed they could opt out of the collective tariff system. Naturally, Access payments to members nosedived.

When York University opted out of the tariff system, Access Copyright sued York in Federal Court. In 2017, the court ruled

that York's internal guidelines were unfair, and the university was not exempt from the collective tariff system. York University appealed the decision to the Federal Court of Appeal, which ruled in 2020 that the tariff system was not mandatory. Both parties then appealed to the Supreme Court of Canada (SCC). In 2021, our nation's top court declined to review York's fair dealing policy, but ruled that tariffs are not mandatory (2021 SCC 32 (CanLII) | York University v. Canadian Copyright Licensing Agency (Access Copyright) | CanLII).

That's how, over the last 10 years, the copyright plight in Canada has gone from bad to worse. Since there is no appeal from the SCC, the remedy now lies with our politicians. This is how the drama is unfolding on the political stage:

In 2017, over 25 creative industry organizations formed a coalition called I Value Canadian Stories. Its potent and persuasive campaign calls on the federal government to restore fair compensation to creators and publishers for use of their works by the education sector (I Value Canadian Stories, ivaluecanadianstories.ca).

In the meantime, from 2017–2019, the first mandatory review of the *Copyright Act* took place. The two ministries charged with the review issued separate reports.

The first report, delivered by Canadian Heritage, acknowledges “the increasing ‘value gap’ whereby wealth has been directed away from creators and toward large digital intermediaries, a decline in the ability of artists to earn a living without taking supplementary employment, and the impact of technology on creative industries.” It asks the federal government to amend the *Copyright Act* “to clarify that fair dealing should not apply to educational institutions when the work is commercially available” and to “promote a return to licensing through collective societies” (Committee Report No. 19 - CHPC (42-1) - House of Commons of Canada, ourcommons.ca).

The second report, delivered by Industry, Science and Technology, does not recommend amendment of the education fair dealing exception. However, it acknowledges a fix is needed. It urges the federal government to establish “facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada,” and to “resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new information and new legal developments.” (Committee Report No. 16 - INDU (42-1) - House of Commons of Canada, ourcommons.ca)

Despite the clear direction provided by both reports, Canada's copyright legislation remains unamended. The I Value Canadian Stories coalition ramped up. Letters were written, petitions were signed, and a day of action was held in November 2022. Blank books were delivered to politicians, sending the message that this nothingness would be the future of Canadian content unless the copyright system is fixed. The decline in revenues for creators and publishers since 2012 has been estimated at over \$200 million. The educational publishing industry has, in effect, subsidized educational institutions, and has now been decimated. High-quality, culturally relevant content continues to disappear.

There's still no action, despite the current government's promise to address the issues. Assurances were made three times: in its 2021 platform document to “protect Canadian artists, creators, and copyright holders by making changes to the *Copyright Act*” (liberal.ca/our-platform, p. 25); in its mandate letters sent in 2021 to Ministers Champagne (Canadian Heritage and of Innovation) and Rodriguez (Innovation, Science and Industry), urging the same words; and in its April 2022 Budget Commitment, which promised to ensure “the *Copyright Act* protects all creators and copyright holders” and “a sustainable educational publishing industry, including

What can you do to help fix the copyright plight?

ADD YOUR VOICE!

- Join I Value Canadian Stories and use the available letter-writing tools (ivaluecanadianstories.ca).
- Write a letter to your member of parliament (ourcommons.ca/members/en) and cc the letter to Ministers Rodriguez (email: pablo.rodriguez@parl.gc.ca) and Champagne (email: francois-philippe.champagne@parl.gc.ca).
- Subscribe to the Hugh Stevens blog—Insights on International Copyright Issues for ongoing copyright updates, hughstevensblog.net.
- Spread the word! Tell your friends and family why copyright must be fixed.

fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users” (Annex 3: Legislative Measures | Budget 2022, canada.ca). ■

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