

LET'S ADVOCATE FOR COPYRIGHT LAW CHANGE

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A recent exchange with an Edmonton university student sliced to the core of the current Canadian copyright debate: is copying legal? As Gina rang up my purchase at a 124th Street denim shop, she enquired as to my profession. When I said I'm a copyright lawyer, she blurted, "When I copy something for a course these days, I've no idea whether I'm breaking the law."

Gina's comment didn't surprise me. The law is in flux. Students, instructors and educational institutions alike struggle today with the legality of copying. The introduction of the educational purposes fair dealing exception in the 2012 *Copyright Modernization Act* led most universities, colleges, school boards and other institutional users to interpret this exception as the right to copy large tracts of literary works freely. "Freely," as in liberally, without seeking permission, and "freely" as in without compensating creators for the resources they are using to teach their students.

In response to my perhaps overly-technical explanation (I confess to being a tad passionate about this), Gina shrugged. "Isn't it also a moral issue? Isn't it like stealing revenue from musicians when we used to download their music without permission?" she asked.

This encounter took place shortly after I agreed to write this *WestWord* column on legal issues for writers. A timely anecdote for my first *Writing Rights* column, I thought as I toted my new jeans to my law office. Timely because, as of this magazine's publication, the federal government will (if all goes as planned) have initiated its review of the *Copyright Modernization Act*, which legislated the new fair dealing exception of educational purposes, which in turn caused universities and other educational bodies to adopt their own self-serving, broadly-written fair dealing guidelines, and to stop paying their Access Copyright license fees. Timely because right now, we writers have a rare opportunity to do something about this law, and I have a chance to explain why our advocacy is so important.

UNDERSTANDING HOW THE LAW WORKS

To change the law, we must first understand how it works. Walking back to the office that Saturday, I began to visualize the complexity of the fair dealing law as a flowchart (see, "Fair Dealing Flowchart") viewed from the perspective of a well-intentioned user like Gina. I invite you to step into Gina's shoes and make your way all the way through to Question 4.



Most users don't know that the enquiry doesn't end at Question 2, or even 3. Isn't the analysis required by Question 4 a bit intimidating? Isn't it easy to see why even educational institutions get fair dealing wrong?

Once you've flowed through my chart, you'll understand why the educational purposes exception is treacherous. You'll see why the international copyright community is watching with dismay to see what happens in Canada, the first nation to introduce the educational purposes exception. To underscore the negative impact of that exception, see "The Educational Purposes Fair Dealing Exception: A Short History." The sidebar chronicles how the exception has affected our community since the 2012 *Copyright Modernization Act* was passed.

The Educational Purposes Fair Dealing Exception:

A SHORT HISTORY

- In 2011/12, the Harper government introduced the *Copyright Modernization Act*, which included a new fair dealing exception: educational purposes.
- Creators foresaw this new fair dealing exception would have a negative impact not only on their incomes, but on the growth and vitality of Canadian culture and availability of Canadian content in Canadian classrooms.
- Almost 70 creator groups presented a unified voice to express these concerns but were reassured their fears were unfounded. The *Copyright Modernization Act* was passed in 2012.
- In time, creators found their apprehensions were correct. An independent economic assessment by PricewaterhouseCoopers in 2015 bears this out (*Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*. accesscopyright.ca/media/94983/access_copyright_report.pdf).
- As well, publishers of Canadian content (such as textbook publishers) have downsized and some have closed their doors.
- Universities and other educational institutions adopted their own “fair dealing guidelines,” which broadly interpret permissible copying for academics and students. From 2012 onward, most institutions failed to renew their copyright licenses with Access Copyright and claimed they could opt out of the copyright collective tariff system.
- In July 2017, the Federal Court of Canada ruled against York University, clearly enunciating that its own internal fair dealing guidelines were unfair and the university was not exempt from the collective tariff system. Instead of complying with the court order, the university appealed the decision to the Federal Court of Appeal.
- Parliament is mandated to review copyright legislation every five years. Since that review process is anticipated to be underway, it is now imperative that MPs realize the damage the educational purposes exception has already caused in the creative community. That damage will continue, and Canadian culture will continue to erode unless a correction is made.
- Creators must ask their MPs to support removal of the educational purposes exception, and to communicate their views to the ministers responsible for copyright review—Minister Mélanie Joly (Canadian Heritage) and Minister Navdeep Bains (Innovation, Science and Economic Development).

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Your copyright law advocacy will help our writing and publishing communities flourish, ensure greater Canadian content in our children’s classrooms, and require educational institutions to pay for the resources they use.

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ADVOCATING FOR COPYRIGHT LAW CHANGE

What can you do to advocate for yourself and your creator colleagues? First, write a letter. Send it to your Member of Parliament (MP), and copy it to Ministers Mélanie Joly (Canadian Heritage) and Navdeep Bains (Innovation, Science and Economic Development). As writers, you well know how to tell your story and pen a missive, but if you would like to include my sidebar facts, feel free to lift them. I give you permission! Letter-crafting tools exist on the Access Copyright, The Writers’ Union of Canada, and I Value Canadian Stories websites. Use one or all to ask Parliament to revoke the educational purposes exception, in addition to your own letter. Then, forward the site links to your friends, including non-writers, and urge them to also advocate for copyright law change. ■

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The Fair Dealing Question:

MAY I COPY A LITERARY WORK WITHOUT THE OWNER'S PERMISSION?

The law says:

Whether you may copy without permission depends upon the answer to these 4 questions:

Ethics and morality ask:

Is it acceptable to steal, or even just use, another person's property without his/her/their permission?

Question 1:

Is the literary work in the public domain? For example, has the creator been dead for more than 50 years?



YES
Then copy freely without permission



NO
Then proceed to Question 2

Question 2:

Does your use of the literary work fall within one of the fair dealing exceptions?

- 1) Research
- 2) Private Study
- 3) Criticism (attribution is required)
- 4) Review (attribution is required)
- 5) News Reporting (attribution is required)
- 6) Parody
- 7) Satire
- 8) Educational Purposes



YES
Then proceed to Question 3



NO
Then you may not copy the work without permission

Question 3:

Will you use the work without motive of gain?



YES
Then proceed to Question 4



NO
Then you may not copy the work without permission

Question 4:

Does your use of the work (your "dealing") meet the Supreme Court of Canada's six-part test?

- 1) Purpose of the dealing must be fair
- 2) Character of the dealing must be fair
- 3) Amount of the dealing must be fair
- 4) There are no reasonable alternatives to the dealing
- 5) What is the nature of the work?
- 6) The effect of the dealing on the work or the market of the work



YES
Then you may copy the work without permission



NO
Then you may not copy the work without permission