

# COPYRIGHT IN COVID TIMES

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**M**arch, April and May 2020 will be remembered in the collective Canadian conscience as the nation's longest months, ever. So much happened. So much changed. And just as COVID-19 exposed the failings in many of our societal systems, the pandemic revealed the deepening disconnect between the value placed on Canadian literary creations, and how their creators are rewarded.

On March 13, Parliament rushed through the ratification of the new Canada–United States–Mexico Agreement (CUSMA, also known as USMCA). “This is something we were able to do to help the Canadian economy at this challenging time,” said Deputy Prime Minister Chrystia Freeland. The deal takes effect on July 1, 2020. For writers, this means the term of copyright protection will be enhanced as of Canada Day from life of the author plus 50 years, to life plus 70. Transition rules will apply.

In mid-March, schools closed across Canada. As teachers and librarians scrambled to implement online learning, Access Copyright (AC), in partnership with the Association of Canadian Publishers (ACP), came to the rescue. On March 26, they launched the Read Aloud Canadian Books Program, whereby front-line educators could read part or all of a book, and share a video of that reading, for online story-time with their students—free. The program allows a temporary waiver of license fees and “empowers educators and librarians to share stories from Canadian publishers with their students during a time when they are needed more than ever,” the AC media release announced. The co-chair of the ACP said, “in difficult times we are proud to support educators and librarians in their extraordinary work in keeping children engaged, informed, and entertained ([accesscopyright.ca/media/announcements/canadian-publishers-](https://accesscopyright.ca/media/announcements/canadian-publishers-)

[launch-read-aloud-canadian-books-program-for-teachers-librarians/](https://scholastic.ca/readaloud/)). Scholastic Canada set up a similar program as a generous response in times of crisis ([scholastic.ca/readaloud/](https://scholastic.ca/readaloud/)).

Instructors at postsecondary institutions grappled with replacing classroom-based instruction with online teaching. One professor wrote that while “most attention is focused on how to use technological tools to accomplish this transition ... [l]ess attention is being given to copyright issues.” However, that encouraging introduction was followed by a disappointing conclusion. His analysis of the Supreme Court of Canada’s six-part test for fair dealing in university teaching deemed a broad interpretation to be justified and said seeking licenses or author permission was not required ([samtrosow.wordpress.com/2020/03/21/fair-dealing-and-emergency-remote-teaching-in-canada/](https://samtrosow.wordpress.com/2020/03/21/fair-dealing-and-emergency-remote-teaching-in-canada/)).

In the U.S., the Authors Guild (AG) dealt with Internet Archive (IA), which is perceived to be a copyright pirate. On March 27, AG stated: “We are shocked that IA would use the COVID-19 epidemic as an excuse to push copyright law further out to the edges and, in doing so, harm authors, many of whom are already struggling” ([authorsguild.org/industry-advocacy/internet-archives-uncontrolled-digital-lending/](https://authorsguild.org/industry-advocacy/internet-archives-uncontrolled-digital-lending/)).

On April 22, the Federal Court of Appeal released its decision in *York University v. The Canadian Copyright Licensing Agency* (Access Copyright). There was good news and bad news.

First, the good news. The higher court affirmed the lower court’s 2017 ruling that York University’s self-styled “fair dealing guidelines” are, in law, unfair. Since many learning institutions have adopted similar rules, the higher court’s judgment on that point confirms that the educational



community must respect creator rights. Educators cannot copy illegally according to their own rules. This balancing of the rights of users and creators leads to a desirable result. If creators are paid for their work, then users such as Canadian schools will continue accessing high-quality Canadian content.

Now, the bad news. The higher court ruled that the Copyright Board tariffs are not mandatory. The tariff process allows educational institutions and collective societies, such as AC, to participate in determining fair rates for the use of creative works. Until now, the tariffs were mandatory. If tariffs are optional, creator collectives are denied a tool to ensure compliance with copyright law.

In summary, the court upheld the lower court ruling that York University’s fair dealing guidelines are unfair, yet deprived collectives from enforcing copyright infringement. Therefore, individual creators now have a personal onus to seek infringements by users such as educational institutions and to enforce their rights. Ideally, collectives will enforce the rights, and creators will devote their valuable time to creating.

Let’s celebrate the CUSMA term of copyright extension as good news for the cultural community—creators and consumers alike. ■

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