

## **Next Steps for Fair Dealing Advocacy Panel: Summary**

### **February 24, 2021 10-11:30am PST**

**Moderators:** Jennifer Zerkee (SFU) and Stephanie Savage (UBC)

**Panelists:** Dr. Brenda Austin-Smith (University of Winnipeg; Canadian Association of University Teachers [CAUT]), Dr. Eli MacLaren (McGill), Dr. Mark McCutcheon (University of Athabasca)

#### **I. Opening remarks from the moderators**

Before we get to our conversation with the panelists, we want to set the stage by providing a brief overview of the Copyright Act review, some of the messaging around fair dealing that came out of it, and what that might mean for those of us in higher education wanting to continue to advocate for changes to copyright.

In 2017 the federal government announced a statutory review of the Copyright Act, and through 2018 the Standing Committee on Industry, Science and Technology (INDU) welcomed written briefs from interested stakeholders and held a series of meetings where witnesses from a variety of sectors were invited to share their concerns and recommendations from copyright and take questions from committee members.

Representatives from the post-secondary sector, including individual instructors and librarians, colleges and universities, and regional and national organizations, contributed substantially to the review process. More than one-quarter of all written submissions to INDU were from parties affiliated with higher education, and this sector also made up the second-highest number of witnesses at INDU's meetings. So this review covered a lot of issues that are vital to teaching, learning, research, and administration at post-secondaries, and had the potential to really impact the ways we do things. Authors, publishers, and organizations representing their concerns were also heavily involved in the review, collectively submitting just under one-fifth of written briefs and making up the largest group of stakeholders to participate in the meetings.

In June, 2019 INDU released its report on the review, providing in-depth committee observations and reflections on the issues raised along with 36 specific recommendations for changes to the Copyright Act, or in some cases for further study of an issue. The federal government was obligated to formally respond to the report and recommendations, but in fall 2019 a federal election was called; this obligation, along with all committee business, was not carried forward to the new Parliament. While the current Minister of Innovation, Science and Industry still has "Copyright Act review" in his mandate, there has been no further action on this since the pandemic shifted everyone's priorities. And it seems likely we won't see anything further on this until the next Copyright Act review is launched, which should happen by the end of 2022.

Copyright at post-secondaries is often administered through the library, so in many cases librarians drafted briefs submitted to INDU by colleges and universities. Being academics, we emphasized data about spending on library collections and licensing of electronic materials, about the declining use of coursepacks, and about copyright supports provided to instructors and students. This contrasts quite starkly with the very emotional arguments put forth by authors

and publishers about loss of livelihood, and the damage to Canadian culture perceived as being a result of higher education's reliance on fair dealing. This messaging went beyond submissions to the review itself and into the public sphere, in op-eds and social media campaigns such as "I Value Canadian Stories," which asked Canadians to stand up for creators in the face of "uncompensated copying" by academic institutions.

We fear we are missing the mark in a way when we use library spending data or quote Supreme Court cases in response to this type of messaging, but as educators and librarians we also believe in the value of Canadian arts and culture, and don't want to contradict this messaging. And this brings us to what we see as a serious disconnect between the higher education community and the publishing community that comes from this artificial dichotomy of creator vs user, which is contributing to polarization around copyright that we've seen in the stakeholder submissions to the review and in the broader discourse about education and publishing. But all creators draw inspiration from the works of others, and all users are creating something – whether it's a novel or artwork, or a thesis or journal article.

What we'd like to get to today is a discussion about how to "do advocacy better" in higher education, meaning more intentionally and more proactively – both for the MPs on the next INDU Committee to undertake a review, and also for the broader public. To focus our conversation a bit more, and because it's Fair Dealing Week, we'd like to consider the role that fair dealing has played as a key site of contention between higher education and Canadian creators since the 2012 Copyright Modernization Act and the 2012 pentology of Supreme Court of Canada copyright cases.

In its report, the INDU Committee recommended moving away from the current list of 8 specific fair dealing purposes to an illustrative list, much like fair use in the United States, which is broader than what we've got now. This was I think the most celebrated recommendation in the report, at least in library and education circles. However, the INDU Report addressed what it called "educational fair dealing" separately from the exhaustive vs illustrative issue, and questioned the education sector's reliance on "bright line criteria" like the 10% rule in many fair dealing guidelines. INDU recommended "establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing" (Recommendation 16). We wonder if these recommendations – on the one hand, to expand the users' right of fair dealing, but on the other, to raise concerns about fair dealing in education – are contradictory, again subscribing to and supporting this user vs creator dichotomy.

With all of this in mind, today we have brought together a panel of speakers who have given much thought to matters of copyright as they pertain to higher education and who, importantly, have directly contributed to copyright advocacy efforts in the past. As scholars, authors, and instructors they can speak to a more nuanced understanding of copyright than is often permitted in copyright debates, which we hope will help us move away from this idea of creators vs users.

## II. Discussion questions

**Question 1. Panelists, tell us a bit about yourself and your experience with copyright and fair dealing, whether from your perspective as an instructor, a researcher, or a creator.**

- **EM** spoke at the Montreal open mic session during the statutory review of the *Copyright Act*. This corresponded with publication of [his article](#) in the journal *Canadian Literature* exploring how Canadian poets make their living and whether fair dealing deprives them of their livelihood. His research asks: how do we create spheres of creativity? Fair dealing is one such mechanism. It invites people into creativity with minimal barriers.
- **BAS CAUT** participated in the statutory review of the *Copyright Act*, both as a witness and through a [written submission](#). She is interested in how fair dealing intersects with educational access and justice.
- **MM** submitted a [written brief](#) for the statutory review of the *Copyright Act*. He is a literary scholar whose research interests include Canadian popular culture and literature, postcolonial studies, copyright, and adaptation studies. He recently published his [first book of poetry](#) and is interested in cento (which reuses passages from other works) as a poetic form.

**Question 2. What is the biggest misunderstanding for fair dealing/use?**

### **Misunderstanding 1: reading is stealing**

- Study and review are two essential activities within the academy that fuel the publishing industry. Authors need readers to take possession of their work imaginatively and enthusiastically. This entails a three step model:
  - a. Threshold of exposure. Students hear about an author through academic conversations and the author begins to form as a concept within the student mind.
  - b. Reading that author for yourself. This often happens as an excerpt for free, by way of scanning, downloading, borrowing.
  - c. The reader is proud to support the author and invests in original works.

### **Misunderstanding 2: fair dealing necessarily pits users against creators**

- This dichotomy is artificial, as most creators are users of copyrighted content and vice versa. Educators, for example, are engaged in an infinity loop of creation and use.

### **Misunderstanding 3: fair dealing is rampant and harms creators**

- There is a deliberate rumour that fair dealing has led to rampant copying. However, this is just a small portion of the richness of exchange of information on university campuses.
- Writers have limited bargaining power with publishers. It should not fall to students and faculty to float cultural industries. Falling incomes for writers speaks to a failure in government policy.

- STEM and the social sciences count for the majority of works that are reproduced on post-secondary campuses. University faculty/researchers are the largest community of creators in this sector. Creative works represent a small portion of works that are reproduced under fair dealing.
- The educational community continues to pay more than ever before to commercial rights holders, often through bundles of licensed materials. These increase exponentially over time, putting stress on library budgets and leaving fewer funds for creative works. Our true opponents are global multi-national vendors (not small Canadian presses).

#### **Misunderstanding 4: copyright law is the only arbiter of use of works**

**Question 3. In your engagement with the Copyright Act review process, What were the key issues/concerns for you? What was your approach to making your arguments with the committee in mind as your audience?**

#### **Key issues**

- Dispelling misinformation about educational fair dealing (that it is rampant, hurts Canadian culture).
- Highlighting and honoring the Supreme Court of Canada's strong support for user rights (i.e. fair dealing as a user right, rather than a defence to infringement).
- Addressing the deep and regrettable fissures that have emerged between education and writers/publishers.

#### **Approach**

- Communicating the key issues for education in plain language for members of the INDU Committee, who came from a variety of different sectors outside of academia.
- Dispelling the artificial user/creator binary.
- Supporting points with evidence/evidence-based approach.
  - For example, EM's research revealed that most poets bring home about \$13,000 annually from their writing; however, this represents one slice of their overall income. They reported additional income from public readings, editor/jury work, public lending right, grants, and work unrelated to writing and publishing.
- Reconnecting with allies in government.
  - Education rested too much after the gains of 2012. Meanwhile, writer and publisher groups were busy lobbying MLAs and other government officials. Education's message was not heard loudly by government nor by the public.
- Developing a clear campaign to protect the gains of 2012, maintain a balanced copyright regime, and address other issues of vital importance to higher education (including copyright term extension under CUSMA, digital locks, crown copyright, and protections for Indigenous knowledge and cultural expressions).

**Question 4. As we begin to prepare for the next Copyright Act Review, how can higher education make our messaging more accessible, relatable, and effective?**

- Higher education needs to mobilize and become a political force with a complex, multi-pronged, and coordinated campaign. We need to meet with key decision-makers and ensure they are clear about what is at stake.
- We need to support open access publishing, open educational resources, and the work of organizations like the Electronic Frontier Foundation. The pandemic has spotlighted the ongoing crisis in scholarly communication, defined by the consolidation of publishing power in the hands of a few private multi-nationals. This leads to cost-related denial of access to knowledge.
- The library is the heart of knowledge exchange on campuses. As such, we need to hear more individual stories from librarians. For example, expensive subscription fees don't lead to sustained access. In the print era, you at least retained past issues if you could no longer afford a journal subscription.
- We need to put out a strong narrative about the purpose and value of copyright within society. Copyright exists to increase the quality and diversity of creative output. It supports creativity within the academy and within society as a whole.
- We need to be aware of how digital platforms/learning management systems over-police copyright and start conversations with stakeholders (i.e. EdTech, IT). Copyright prompts get users thinking, but in a way that deepens the chill and discourages users from leveraging their user rights.
- Faculty should connect with university presses. UPs tend to operate at arms length from the institution and are often aligned with creator/publisher thinking (i.e. fair dealing as a threat to revenue). They require a more nuanced and complex understanding of the issues, and the push for open access publishing.

**III. Questions from the audience**

**Could you comment on the power of commercial publishers and the fact that faculty routinely assign their copyright when publishing?**

- In the print era, authors usually retained copyright (contracts pertained solely to publishing rights). However, the move to digital/aggregated databases led publishers to require that authors sign over their copyrights (as a means of mitigating risk).
- We need to do a better job of educating faculty (and particularly new scholars) about their rights. We can encourage collective mobilization against unfair publishing agreements (i.e. through inclusion of the SPARC author addendum). One panelist noted that they were emboldened by CAUT to negotiate their copyright with an academic publisher; their efforts were not successful, but it is an important political act.
- We also need to push back against the emphasis on metrics (i.e. measuring scholarly value based on things like impact factor).

**How do we engage more with fair dealing within our institutions?**

- Begin with an understanding of your institution's level of risk tolerance.
- You can appeal on two levels:
  - *Culturally*. It's a citizen's duty to practice fair copyright.
  - *Legally*. There is a legal risk to using copyrighted content; yet, it is low in non-profit, educational settings [where the six factors have been applied]. We need to thaw the copyright chill that stems from fear of making missteps.
- Can we convince our colleagues that understanding and leveraging user rights will make their lives easier? Fair dealing allows educators to make nimble use of copyrighted content to effectively support student learning outcomes.
- We need to create a regular, ongoing consulting link between the subject librarian, copyright officer, and academic departments. Librarians and copyright officers serve as facilitators, rather than copyright police.
- We also need a good faith commitment from administrators that they support a strong fair dealing regime in Canada and will not hang us out to dry. Senior leadership/VP Academics should be present in these conversations.

**Can you speak to the difficulties/barriers to communicating how much libraries actually do spend on copyrighted materials?**

- Oftentimes, we simply don't have the data. INDU asked how much libraries spend on Canadian content; however, CanCon is often bundled in large packages, so we don't have granular data.
- Data collected by CARL provides a birds-eye view of expenditures by research libraries. However, a participant in the chat noted that there is a "dearth of national-level library statistics in Canada."
- This is further complicated by the compartmentalization of work on university campuses.
- As such, the public doesn't have a good sense of how much libraries are spending and the tough collections decisions they are forced to make (i.e. e-resource subscription cancellations).