



Today's Fair Dealing Discussion  
in the Federal Parliament  
*Chris George*

# Review of the *Copyright Act*

- Review of *Copyright Act* now before MPs in the Industry Committee
- Potential of comprehensive review engaging a great many stakeholders
- Report produced for Ministers
- Review could lead to new legislation



# *Copyright Act* is a balancing act

- *Copyright Act* is a balance between the rights of users and the rights of creators
- Copyright discussions in Ottawa often become debates with “winners” and “losers”
- 2012 provided greater clarity for education sector, but creators’ groups view the changes as harmful
- 2018 copyright review is the first opportunity for Parliament to look at changes made in 2012



# What is at stake for educators?

- Scope of copyright review may include educational use of fair dealing
- Possible change in law that could reverse more than 10 years of legal activities and decisions
- Review could ultimately force new K-12 copyright tariff(s) that would impose payments for educational resources that elsewhere in the world are accessed by teachers and students without a cost

# Fair Dealing Guidelines (FDG)

- Supreme Court decision permits copying “short excerpts” for students
- FDG describe short excerpts and ensure uniform compliance
- FDG is a focus of criticism (*has withstood claims of “unfair dealing” in courts and at Copyright Board*)

## Fair Dealing

The fair dealing provision in the *Copyright Act* permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties. To qualify for fair dealing, two tests must be passed.

First, the “dealing” must be for a purpose stated in the *Copyright Act*: research, private study, criticism, review, news reporting, education, satire, and parody. Educational use of a copyright-protected work passes the first test.

The second test is that the dealing must be “fair.” In landmark decisions in 2004 and in 2012, the Supreme Court of Canada provided guidance as to what this test means in schools and postsecondary educational institutions.

These guidelines apply to fair dealing in non-profit K–12 schools and postsecondary educational institutions and provide reasonable safeguards for the owners of copyright-protected works in accordance with the *Copyright Act* and the Supreme Court decisions.

## GUIDELINES

..... ©

1. Teachers, instructors, professors, and staff members in non-profit educational institutions may communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire, and parody.
2. Copying or communicating short excerpts from a copyright-protected work under these Fair Dealing Guidelines for the purpose of news reporting, criticism, or review should mention the source and, if given in the source, the name of the author or creator of the work.
3. A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course
  - a) as a class handout;
  - b) as a posting to a learning- or course-management system that is password-protected or otherwise restricted to students of a school or postsecondary educational institution;
  - c) as part of a course pack.
4. A short excerpt means:
  - a) up to 10 per cent of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work);
  - b) one chapter from a book;
  - c) a single article from a periodical;
  - d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works;
  - e) an entire newspaper article or page;
  - f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores;
  - g) an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work.
5. Copying or communicating multiple short excerpts from the same copyright-protected work with the intention of copying or communicating substantially the entire work is prohibited.
6. Copying or communicating that exceeds the limits in these Fair Dealing Guidelines may be referred to a supervisor or other person designated by the educational institution for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.
7. Any fee charged by the educational institution for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the institution, including overhead costs.

 CCBY-NC-SA

# Current lobby

- Publishers, Access Copyright and artists' groups are active in Ottawa claiming economic hardship due to 2012 changes
- They are using unfounded claims of teachers' misuse of fair dealing
- Asking for MPs to reverse 2012 changes to fair dealing respecting education



# Current situation

- Publishers' lobby has been very vocal in Ottawa and elsewhere
- Arguments against education sector's use of fair dealing are not supported by facts
- Educators' argument must make case for benefits to students and include a fact-based rebuttal of publishers' claims



photo by Ed Schipul

# Effectively stating educators' case

- Key messages of education sector's copyright policy position
- Explanation of “10% of a work”
- Rebuttal of publishers' claims
- Relate benefits to Canadian students



# Key messages for educators

- FDG is sound public policy; fair and reasonable; places teachers and students on level playing field
- Teachers are professional and responsible
- Education sector supports Canadian creators
  - paying millions for Canadian content

# Key messages for educators

- MPs are being asked to reverse Supreme Court ruling (*publishers are looking for legislative fix where they are not able to win with legal actions*)
- It is premature to review educational use of fair dealing; everyone still adjusting to “the new normal”

# Explanation of “10% of a work”

- FDG are in accordance with international standards
- U.S. courts have found that copying 10% of a work, or a chapter where the work has 10 or more chapters, is fair use
- Other countries that accept 10% copying limit, or a chapter of a work include Australia and New Zealand
- Israel education sector and publishers established a 20% copying limit in a mediation settlement

# Effectively stating educators' case

- ✓ Key messages of education sector's copyright policy position
- ✓ Explanation of “10% of a work”
- **Rebuttal of publishers' claims**
- Relate benefits to Canadian students

*Arguments against education sector's use of fair dealing are not supported by facts*

# #1: “It’s a legislative loophole.”

- Publishers claim that the FDG are a result of a legislative “loophole” that can be fixed by MPs during the review of the *Copyright Act*
- FACTS: Interpretation of fair dealing is a result of Parliament adding “education” as a new purpose in the fair dealing provision and a Supreme Court of Canada decision interpreting how fair dealing is applied for educational purposes
- It is the Supreme Court decision that permits teachers to copy “short excerpts” for students in their classes

## #2: “Teachers copy textbooks.”

- Publishers have made unsubstantiated claims that teachers are copying whole textbooks
- **FACTS:** The Supreme Court and Copyright Board have found no evidence of textbook reproduction
- The decline of textbook sales is due to other factors:
  - declining enrolment
  - adoption of semester teaching
  - longer lifespan of textbooks
  - increasing use of Internet and electronic resources
  - more resource-based learning

# #3: “We’re in dire straits.”

- Publishers claim that loss of tariff payment places Canadian publishers in dire financial straits
- **FACTS:** A 2014 Statistics Canada report documents that the publishing industry had an operating profit margin of 11.7 %
- The top revenue category is “educational titles”
- Large educational publishers in Canada are internationally owned and industry trends are global

# #4: “The solution is to legislate.”

- Publishers are lobbying MPs to amend the fair dealing provision and restore tariffs, arguing that this will reverse the decline of the publishing industry
- **FACTS:** A legislative amendment would neither address evolving education practices nor bring about a return to the use of textbooks
- The *Copyright Act* is not a tool to adjust rights that have been set down in litigation and decisions made by the Supreme Court of Canada

# #5: “It’s the end of Canadian content.”

- Publishers claim that fair dealing is the end of educational resources with Canadian content
- **FACTS:** The education sector has not reduced its spending on learning resources or its support for Canadian content
- The education sector is developing and purchasing learning resources rather than buying publishers’ textbooks, and in doing so, is directly supporting the development of Canadian content

# New educator-creator relationships

- Education ministries and school boards are entering into direct arrangements with on-line subscription-based resources, creators' groups, and individual creators (*i.e. BC's Digital Classroom Collection*)
- Ministries' programs promote the use of local artistic works in classroom (*i.e. NS's Culture Action Plan, BC's Arts Education Program, ON's Artists in the Classroom*)
- Educators are increasingly using ministry/teacher generated resources in the classroom

# Effectively stating educators' case

- ✓ Key messages of education sector's copyright policy position
- ✓ Explanation of “10% of a work”
- ✓ Rebuttal of publishers' claims
- **Relate benefits to Canadian students**



# 2012 changes were forward looking

- 2012 changes to *Copyright Act* clarified copyright regime and established legal framework for the digital age
- Supreme Court of Canada clarified what fair dealing means when teachers communicate or copy “short excerpts” for their students
- *Fair Dealing Guidelines* established to help educators deal fairly with use of copyright-protected works in the classroom
- 2012 changes balances the rights of students and rights of creators

# Students benefit from available materials

- We are living in a digital age where content creation and technological distribution provide for enriched and current learning resources
- Technology allows for transitioning away from physical print resources to electronic resources, many licensed or within public domain
- Use of new educational and pedagogical opportunities have seen a tremendous rise in online education and electronic content delivery, and use of teacher/student-created materials

# Government's dilemma in changing times

- Need to support industries' transitioning business models through times of change
- Digital age has caused international disruptions to business trends and growth – including in the publishing industry
- There may be political and public policy reasons to subsidize industries via grants and support programs
- However, it is not good public policy to subsidize an industry by amending the *Copyright Act* to reverse decisions made by the Supreme Court of Canada



# Canadian copyright regime has it right

- Copyright law has a history of legal precedence, and a recent set of amendments for education and copyright matters
- Regime places learning Canadians on the same level playing field as students in the U.S. and around the world
- Educational use of fair dealing provides students and teachers with reasonable access to the content they need



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