

**Canadian Copyright Law and Educational Publishers**  
**Notes for presentation to IPA Educational Publishers Forum**  
**Friday, October 11, 2013, Frankfurt**

Linda Cameron and I are pleased to be with you today to share recent developments for educational publishers with respect to copyright law in Canada. This is a complex topic, and neither of us is a lawyer, but we hope to provide you with a snapshot of what the current copyright climate means for publishers that produce materials for education. I'll begin by providing an overview of legal developments that have sparked recent changes, and Linda will share what these changes have meant to her publishing house, a university press. Before we begin I should note that our presentation will focus on English Canada – though new legislation is in effect in all parts of the country, two different agencies handle collective licensing, and the experience in Quebec is not consistent with the rest of the country.

Those of you who have followed this issue over the past several years will know that an update of the Canadian Copyright Act was long overdue. After seeing three bills die on the order paper since 2005, the Act was finally amended in 2012, with the new law coming into effect almost a year ago. Included among the changes was the extension of fair dealing to include education. This extension, along with a 2012 landmark Supreme Court decision, which concluded that the copying of short excerpts for educational purposes is fair, has changed the way Canadian educators are using copyrighted materials in their classrooms. This shift threatens an important stream of revenue for Canadian writers and publishers, and we have already witnessed a dramatic decline in the revenues that flow through [Access Copyright](#), the Canadian collective licensing agency.

The Act now reads: "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." With respect to education, this might sound like a blanket exemption, but a qualification is provided later in the Act. It specifies that the exception does not apply if the work is commercially available, with commercially available being defined as "(a) available on the Canadian market within a reasonable time...for a reasonable price and ... located with reasonable effort, or (b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society with reasonable time and for a reasonable price and...located with reasonable effort."

Despite this qualification, we have quickly seen a shift in the way materials are used in schools, universities and colleges.

To set some of this in context, though the Copyright Act is a federal law, education is under the jurisdiction of Canada's provinces. Following the passage of the new copyright bill, the [Council of Ministers of Education](#), an interprovincial body, updated its guide, [Copyright Matters!](#), which is intended to be a user-friendly guide for teachers to inform their use of copyrighted material in the classroom. The guide, which is available online, includes a very broad definition of fair dealing for education, and puts forward that the copying of short excerpts by educators is fair. The question that naturally arises is, "how short is short?" According to CMEC's guidelines, 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."

The thing about this definition, which has been widely distributed, is that it appears nowhere in the Copyright Act. Similar guidelines have been adopted by many universities and colleges, which Linda will speak more about in a few minutes. With the publication of these guidelines, educational institutions have decided unilaterally that 10% of a work can be copied without compensation. This arbitrary figure has never been endorsed by the courts, nor even cited in their decisions; in the recent Supreme Court decision, reference was made only to "brief excerpts" being eligible for a fair dealing claim, with one example of a brief excerpt used by the court was a single page from a supplementary math book, which is objectively much shorter than 10% of a 500 page text or anthology.

Canadian writing and publishing associations hold the position that 10% of a work cannot be considered a brief excerpt, and its use without compensation is not fair. A simple example can illustrate the

absurdity of this notion. Consider the Canadian writer Alice Munro, who has published more than a dozen collections of short stories over the past forty years. Her stories are taught frequently in university literature courses, and in high schools too. An educator could, using the fair dealing provisions that have been endorsed by educational institutions, take one short story from each collection -- provided each story was less than 10% of the total in its volume -- and package them to create a new Alice Munro reader. This volume could then be distributed to students, without any money being paid to the publisher or author.

In light of legal developments surrounding fair dealing, Ministries of Education have ceased paying Access Copyright the tariffs for kindergarten to Gr. 12 students, which had been previously certified by the [Canadian Copyright Board](#), the regulatory body that establishes royalties to be paid to collectives for the use of copyrighted works in educational institutions when a negotiated agreement is not possible. This has resulted in a loss of \$18 million Canadian dollars (about 12.9 million euros at the current exchange rate) this year alone. That \$18 million represents 100% of the collective licensing revenues that were previously collected to cover use by elementary and secondary school students in English Canada.

Access Copyright will again file tariffs for K-12 in April 2014, though a ruling is not expected until the end of 2015, and based on the current circumstances, an appeal is almost guaranteed. In the meantime, there is no indication that teachers will change their practices given the guidelines that the Ministers of the Education have endorsed. Educators will continue to copy materials for their students' use, with the belief that they are acting within the law -- why would they believe otherwise, given the guidelines that have been promoted by their governments.

As you might expect, the way these events have unfolded is extremely distressing to rightsholders, and will damage publishers' bottom lines. The Canadian market is small, and the dramatic reduction of any revenue stream does not go unnoticed. We do not believe that, in extending fair dealing to education, the government intended the law to be interpreted in this way, but there is little appetite within government to revisit the legislation at present. The Act does include provisions for a review of the law in 2017, but in the meantime the only recourse rightsholders have is litigation -- a time consuming and expensive exercise. It's already begun.

I know that copyright reform is in the air around the world, and Canada is being held up and examined by governments as an example. For publishers and writers, it would be wiser to look to what's happened in Canada as a cautionary tale, rather than something to be emulated.