

**International Publishers Association  
Educational Publishers Forum  
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The challenges facing Canadian publishers go far beyond the changes in Copyright legislation. Library purchasing models involving increased purchase and sharing of digital formats; the relentless gouging of north American retailers for both print and digital books; ever increasing demands on staff to deal with multiple formats and all the metadata associated with each format; and the unending need to stay current with software both for production and distribution purposes also inform the world of Canadian educational publishers.

Kate provided a good summary of the legislation and touched on the Council of Ministers of Education’s (CMEC) position. Her example using Alice Munro’s work was especially consciousness-raising. I, too, will speak a little about the CMEC and the other national body of interest and concern with regards to copyright, the Association of Universities and Colleges of Canada (AUCC). I’ll touch briefly on several post secondary institutional positions and share with you the insights of our publishing intern, Katy Moore, regarding fairdealing. I’ll also share with you my personal experience with the Alberta Minister of Education (who is set to become the new chair of the CMEC) and finally, a suggestion for partnerships.

In Canada there are two national bodies that are key to the way copyright and fairdealing is understood and practiced by educators. They are the Association of Universities and Colleges of Canada (AUCC) and the Council Of Ministers of Education (CMEC). The AUCC statement on “Fair dealing policy for universities” is available on line as is the CMEC document entitled “Copyright Matters” published in 2012.

The **AUCC** policy states: 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 or 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 educational institutions.

According to the AUCC “This Fair Dealing Policy applies fair dealing in non-profit universities and provides reasonable safeguards for the owners of copyright-protected works in accordance with the Copyright Act and the Supreme Court decisions.”

#### The AUCC Guidelines

1. Teachers, instructors, professors and staff members in non-profit universities 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 or parody.

2. Copying or communicating short excerpts from a copyright-protected work under this Fair Dealing Policy for the purpose of news reporting, criticism or review must mention the source and, if given in the source, the name of the author or creator of the work.

3. A 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 the university

(c) As part of a course pack

4. A short excerpt means:

(a) Up to 10% 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

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

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 this Fair Dealing Policy may be referred to a supervisor or other person designated by the university 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 university for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the university, including overhead costs.

My home institution, the **University of Alberta's** online resources for copyright are located at the footer of the library website, more easily found via Google. U of A offers their own PDF citing the generally accepted fair dealing "rules". The "Copyright Primer" available on the front page of the website, in contrast, explicitly denies the accepted rules:

"There is no set rule for what is a "substantial" portion and therefore an infringement. Contrary to popular belief, there is no exception to infringement based on using only certain minimum amounts, for example, less than three lines from a song, less than one paragraph from an article, or less than one page from a book. Even the copying of a few lines from a book of several hundred pages can be "substantial", and therefore a copyright infringement, if those few lines are qualitatively significant to the book.

While there is now an "education" fair dealing right, and some specific infringement exceptions for educational uses, there is no general right to freely use the copyright works of others without consent, merely because the use is for educational purposes."

While this seems to be a step in the right direction, it's hardly clear-cut what fair dealing means with this interpretation, and probably encourages professors to just go blindly ahead, or email the copyright office to determine the best course of action, or (more likely) they haven't even come across this primer and instead pay attention to the visually appealing (though less accurate) fair dealing PDF noted above.

Another concern with U of A's "Copyright Primer" is its claim that any exceptions to the "life plus 50" rule are shorter, not longer (without any mention of how internationally copyright is typically longer). This may not affect the average student too much, but any researcher publishing in other countries could easily be misled by the primer.

Another Alberta institution is **MacEwan University**. MacEwan U has a very thorough set of copyright guidelines available directly from the library homepage, including guidelines for students, faculty, the fair dealing provision, and how to obtain copyright permissions. The options are available on line and there is also a PDF of the fair dealing guidelines which includes the 10%/chapter of a book/article within a journal "rules". This allows for posting the content on the BlackBoard or through eReserves, which both require student authentication to view (but can be easily saved onto a personal computer from those sites).

Other Canadian universities websites highlight the fair dealing information over their more general copyright overviews and information, indicating that's what they're getting the most questions. Also, I didn't find much variation between their wording, as they all seem to have reached the "short excerpt" definition consensus noted above. This might be due to the **AUCC's posted guidelines** for universities detailed above.

The **University of British Columbia** is on the same page as MacEwan and U of A and explicitly allows the use of these "short excerpts" for class handouts, online posting for e-learning (requiring student authentication), or as part of a coursepack (with no additional fee beyond the actual cost of the copy). UBC also provides a separate list of guidelines for the UBC Library, which is generally the same but offers more info on interlibrary loan processes, and ultimately allows sharing the excerpts with other university libraries in Canada, but not public libraries, commercial libraries, or anyone outside of Canada. General copyright requirements are available on line. Because all this is probably horribly confusing for faculty, staff, and students alike, UBC also offers copyright workshops fairly regularly.

**York University** obviously has fair dealing guidelines that have been challenged by Access Copyright, stating basically the same as the other universities. There is also an area of the website devoted to "Copying for Classrooms" which encourages use of the fair dealing guidelines. York also offers copyright workshops.

**Dalhousie University** has more of the same guidelines and also has a "fair dealing analysis" which addresses the "amount" factor: a very subjective test of the "significance" of the amount being taken from the work.

The **University of Manitoba's** fair dealing guidelines are again nearly identical and their copyright basics are available on line as are the **University of Saskatchewan's**. And more general copyright information is available on line. **University of Toronto** guidelines are on line.

The **University of Calgary** specifically says they adapted their fair dealing guidelines from UACC's, and fair dealing is given the most visible location on their general copyright information page.

The **Memorial University of Newfoundland** has general copyright info on line. This links to the UACC document on fair dealing, which MUN has adopted outright.

As I mentioned currently at the University of Alberta Press we have a student intern from the School of Library and Information Studies. Her name is Katy Moore<sup>1</sup> and I asked her about her point of view as a student. I think you will find this interesting. She said:

- First of all, I had no idea how arbitrary the 10% rule was. I worked at SUBprint (the University of Alberta Student Union Printing Service) for a month and we used that rule all the time to determine if we could copy chapters for students. People would seriously do the math to make sure we were "legal" in this regard, which is just insane now that I know the truth! Also, I've started working at MacEwan as a (library) reference desk assistant and I've heard all the librarians there also using this number among themselves and with students. How did this lie pervade academic ranks so quickly?
- I completely agree that some standards need to be determined and agreed upon which takes into account the context of the usage. One of our professors last term was sharing aspects of the new copyright law with us which meant that he would have to destroy his powerpoint files after each term since they contained copyrighted images which he was only allowed to use for a single term. By extension, students were not supposed to keep electronic copies of the powerpoints beyond the term (despite the fact that they were PDFs and the image couldn't be taken, at least not with any semblance of quality). This seems a bit extreme and also detrimental to the learning process: I often look back on old classes' notes and materials to jog my memory about something that I'm learning about later, but I don't want to be a scofflaw by keeping those materials. The professor in question was sharing all this as an explanation for his text-heavy and rather dull powerpoints: without the images, he wouldn't have to deal with this limitation. I guess what I'm trying to say here is that while creating "contextualized fairness" is ideal, is it practical? People tend to do better following hard-and-fast rules (or apparently making their own a la the 10% "rule"), and taking into account the actual usage in academic environments (which is ever-changing right along with the technology) just doesn't seem feasible to me. However, the appeal of the "record-keeping" to determine fees paid sounds so amazing that it would be worth a shot on a small scale to see how it played out.
- I was also curious about how this affects informal "reserve items": we have boxes for each course in the SLIS students' lounge that contains hard copies of assigned readings, placed there by the professor of the course. Sometimes it's full chapters, sometimes full articles, and usually about 3-4 copies of each so students can read them without purchasing the textbook. Is this considered fair dealing? It seems like it's breaking some rules about changing the format (i.e. if the professor just prints off copies from EBSCO, isn't there a rule about changing from e- to hard copy and vice versa?), and also generally providing access if it's not something that's provided through the library databases.

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<sup>1</sup> I'd like to acknowledge and thank Katy for allowing me to share her opinions in the paper and also for the research work she did for the paper.

- I guess the bottom line here is I'm totally overwhelmed by the nuances of copyright law and fair dealing.

In the K to 12 sectors under the heading “Why is copyright important?” the Council Of Ministers of Education booklet states: Just as you would want to protect anything that you own, creators want to protect their works. As students, we were all taught the value of original thinking and the importance of not plagiarizing the works of others. Since teachers use copyright-protected materials as well as educate the copyright owners and users of tomorrow, they have a unique responsibility to set the right example. The works of others should not be used without their permission unless the use is permitted by the *Copyright Act*. Teachers must be cognizant of the copyright status of resource materials in their possession.

It goes on to state, under the heading “What is fair dealing?”: The *Copyright Act* provides that it is not an infringement of copyright to deal with a work for the purposes of research, private study, criticism, review, news reporting, education, satire, and parody, provided the dealing is “fair.”

The guidelines describe the activities that are permitted under fair dealing in non-profit K–12 schools and provide reasonable safeguards for the owners of copyright-protected works in accordance with the *Copyright Act* and decisions of the Supreme Court.

The CMEC Fair Dealing Guidelines state:

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.

For many years I have chosen to write to all Alberta Members of Parliament and Senators (national) and all Alberta Members of the Legislature (provincial). The subject of copyright has been featured in many of my letters. In January this year I wrote a letter to the Alberta Minister of Education, Jeff Johnson, who, as I mentioned, is the incoming Chair of CMEC. In my letter I outlined my concerns about copyright and fair dealing. He replied:

The Government of Alberta supports a fair balance between the rights of creators and users. Alberta has championed fair and reasonable access for students and teachers in their educational pursuits throughout the federal copyright reform process.

In the recent case of *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013, the Supreme Court of Canada decided that photocopies made by teachers for students as part of class instruction could qualify as fair dealing under the *Copyright Act* (Canada). It is understood that teachers' use of copies of short excerpts will not substitute for the purchase of copyright-protected work.

The Ministry of Education has provided Kindergarten to Grade 12 schools with Fair Dealing Guidelines that describe the uses of copyright-protected works permitted without permission from the copyright owner or payment of copyright royalties under fair dealing. Fair dealing does not that a teacher can make unlimited use of any copyright-protected work without permission or payment. Rather, it permits the use of "short excerpts" for educational purposes.

Given the Minister's remarks I believe the prospect of a reasonable consideration of copyright and fair dealing by the Ministers of Education in Canada is unlikely.

While it may be necessary to continue with legal action and tariff filings, I don't think those activities alone will change our landscape. Additionally they cost incredible amount of money. In Canada Access Copyright was successful with a tariff application for K-12 (which has now expired). It took years and millions of dollars (\$8m) to achieve success. That kind of action is not sustainable. Therefore, we need to supplement it with other activities.

My suggestion is that we work together to bring all the stakeholders to the table, the publishers, the educators and the librarians. We need to talk and help them to understand that without the content we provide they are looking at an ever increasing "black hole" of knowledge or lack thereof. This is important for students to know and they should be invited into the conversation, too.

References:

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