

Copyright Update

A Brief History of Fair Dealing in the 21st Century

Every time you choose readings for a coursepack, post an article on Moodle for your students to read, show a video clip in class, or distribute handouts in person or by email, chances are you are making use of fair dealing.

Fair dealing is the provision in Canadian copyright law that allows for fair and legal use of a limited amount of copyright-protected works without permission or payment. It has not been clearly defined in Canadian law, but in the past few years new legislation and case law have begun to shape the boundaries of fair dealing, and helped post-secondary institutions provide clearer [guidelines](#) regarding purpose, amount, effect of copying, and other criteria.

The copyright landscape in Canada changed dramatically in 2012 after two major events. In June 2012, Bill C-11 was passed to amend the *Copyright Act*, including the revision of Section 29: “Fair dealing for the purpose of research, private study, **education**, parody or satire does not infringe copyright.”¹ This is the first time that education has been included as a legal purpose for fair dealing.

In July 2012 the Supreme Court of Canada issued rulings on five copyright cases in one day, in what is often called the “copyright pentalogy,” a series of judgments that, among other things, clarified and broadened the understanding of fair dealing. As law professor Michael Geist says, “the cases provided an unequivocal affirmation that copyright exceptions such as fair dealing should be treated as users’ rights.”²

In response to these precedents, the post-secondary institutions in Canada began to define and implement fair dealing guidelines in order to provide a framework for analysis of fair dealing use based on the expanded understanding of fair dealing in education within the parameters of the law. Prior to 2012, there was very limited consideration of fair dealing in post-secondary copying for educational purposes.

Access Copyright, the organization that has collectively licensed copying in Canada for years, has struggled with the rebalancing of creator/publisher rights and user rights in the Canadian education sector based on the new legal information of 2012. Access Copyright strongly disagrees with the interpretation of fair dealing that most post-secondary institutions have adopted. In 2013, they also increased copy licensing fees from \$3.38 per FTE student (plus 10 cents/page for copying) to \$26 per FTE. This combination has led many post-secondary institutions, including UBC, York University, U of T, and Western to opt out or to let their Access Copyright licenses expire.

In April 2013 Access Copyright filed a lawsuit against York University, alleging that the university’s fair dealing guidelines authorize and encourage copying not supported by the law. The trial date has been set for May 16, 2016. The outcome of this court case will further define copyright and fair dealing in a Canadian context.

In the meantime, when you’re trying to assess fair dealing for your own teaching and classroom purposes, please refer the University of Lethbridge “[Guidelines for Copying Under Fair Dealing](#)” and, as always, feel free to contact the Copyright Office with any questions at copyright@uleth.ca or 403-332-4472.

Copyright Update continued...

¹ Parliament of Canada. (2012). *An Act to amend the Copyright Act*.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5697419&File=39#5>

² Geist, M. (2013). *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian Copyright Law*. Ottawa: University of Ottawa Press, 2013. (An open access version of this book available for free download under a Creative Commons license [here](#) or through the Library catalogue.)

<http://www.press.uottawa.ca/sites/default/files/9780776620848.pdf>

Sandra Cowan
Acting University Copyright Advisor