

## **COPYRIGHT FOR WRITERS**

**Hugh Stephens, Author, *In Defence of Copyright*, Cormorant Books (August 2023)**

Most writers are broadly aware of the importance of copyright. We automatically hold the rights in the works we create as soon as they meet the three basic criteria for copyright protection in Canada; citizenship of the author (must be citizen of a Berne Convention country), originality, and fixation. If we are fortunate enough to have a publisher, we will assign our copyright to that entity in return for certain contractual obligations, such as an advance on the royalties on our advance and once “earned out”, royalties for as long as the copyright lasts. Beyond that, I suspect that many authors don’t give a lot of thought to copyright—but they should. Not only that, believe it or not, copyright is *interesting*!

For one thing, you may need to learn more about copyright to protect your rights if they are infringed. Piracy is rampant and comes in many forms. Today, increasingly copyright infringement occurs on the internet. Check and you might find unauthorized copies of your work for sale on Amazon. And what about artificial intelligence (AI)? Right now, the jury is out on whether the practices of the AI developers of training their AI models by scooping up and ingesting anything they can find on the internet--copyrighted or not—is legal. There are several lawsuits in the US and UK against AI developers brought by authors and artists. The most prominent case is probably the New York Times v OpenAI and Microsoft, where the Times is alleging that OpenAI not only has ingested copyrighted material owned by the Times, but regurgitates it verbatim if given the right prompt, thus circumventing the paywall established by the paper to enable it to compensate the journalists who have produced the content.

Many authors may not know that in addition to the reproduction right (i.e. right to copy a work), copyright gives an author a bundle of rights; the right of public performance, the right of publication, the rights of adaptation, translation and making available, among others. Copyright has evolved and adapted significantly over the years, from its inception in Britain with the passage of the Statute of Anne in 1710 which, for the first time in modern history, vested ownership of works in authors rather than printers. The initial term of protection was just 14 years from publication, with a series of requirements for registration. Today in Canada, there are no registration requirements (although one can voluntarily register with the Canadian Intellectual Property Office), and the term of protection is the life of the author plus an additional 70 years. This term only came into effect in Canada at the end of 2022 and was one of the conditions that Canada agreed to in the updated NAFTA Agreement, bringing Canada’s copyright term into alignment with that of the United States, EU, UK and others. Works under the previous “life plus 50 year” term that had already fallen into the public domain did not have their copyright revived.

The public domain is one of the major exceptions to copyright protection, but there are a series of user exceptions that are built into Canada's copyright laws. There are some statutory exceptions, such as allowing the LAM sector (Libraries, Archives and Museums) the right to copy works without authorization for preservation purposes, but most exceptions are governed by fair dealing. Since 2012, the specified fair dealing purposes in Canada are research, private study, parody, satire, criticism, review, news reporting and education.

This latter use, added in 2012, has led to extensive litigation between Canada's copyright collective for authors and publishers, Access Copyright, and the educational sector, represented by post-secondary institutions and Ministries of Education. Prior to 2012, reproduction and distribution of content represented by Access Copyright and used (copied without authorization) by educational institutions was covered by a collective licence agreement. Under this system, for a set amount per student per year, educational institutions were permitted a wide amount of copying for students, although there were still limits regarding the amount of any given work that could be reproduced. But when education was added to the fair dealing exceptions, educational institutions (outside Quebec) refused to renew the collective licences, arguing that their use was now covered by fair dealing and no licence was needed.

This has ended up in litigation with mixed results. Collective licences were ruled to be non compulsory, but the fair dealing guidelines established by Universities Canada have not been given the green light. However, for an author to assert their rights, individual actions have to be launched against individual institutions, a practical impossibility which was a principal reason for the establishment of the collective licence system in the first place. In the meantime, Access Copyright estimates that over \$200 million in licence fees that would have been paid to authors over the past decade has been pocketed by the educational industry.

Another challenge to authors' rights is the increasing use of so-called "controlled digital lending" whereby libraries will make an (unauthorized) digital copy of a work they have purchased, and then lend the digital copy or copies, holding the original book as a form of security. A digital edition of a work is a different product from a soft or hard cover book; it can be loaned indefinitely and there is no "borrower friction" related to having to pick up or return the work. Moreover, a digitally scanned copy competes directly with licensed digital editions of works produced by publishers. The issue of whether controlled digital lending is legal in Canada has not been tested in court. In the US, a major case between four international publishers and the Internet Archive, which widely practices controlled digital lending, resulted in a finding against the Archive for the works in question. That decision is now being appealed.

These and many other issues demonstrate why copyright is important to authors and why writers and prospective writers should have a working knowledge of this important concept. You don't have to be a copyright expert or intellectual property lawyer, but it is helpful to have a broad understanding of what copyright is, where it came from, how it works, why it matters in a modern, democratic society and what new challenges it faces. This was why I wrote my recently published book "[In Defence of Copyright](#)".

*In Defence of Copyright* is not a legal text nor a scholarly treatise. It is a practical explanation of copyright in Canada and around the world written for the informed public, illustrated with stories and anecdotes drawn from my award-winning copyright blog, Hugh Stephens Blog—Insights on International Copyright. The book is available on [Amazon](#) and [Indigo](#) for under \$20 or from leading independent bookstores across Canada.

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Thanks for reading---and writing.

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