

FQPPU
FÉDÉRATION QUÉBÉCOISE DES PROFESSEURES ET PROFESSEURS D'UNIVERSITÉ

December 2018

Statutory Review of the Copyright Act

Brief presented to the Standing Committee on Industry, Science and Technology

Credits

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About us

The Fédération québécoise des professeures et professeurs d'université (FQPPU) is a political organization whose mission is to maintain, defend, promote and develop universities as a public service. It represents 8,000 university professors in Quebec across 17 unions and associations.

Background

In the field of copyright, academics occupy a unique position at the crossroads of creation and use. Through their research and creation, professors are involved in the production and dissemination of knowledge. Since the progress of scientific knowledge is based not only on data analysis but also on a corpus of knowledge that new publications help improve, professors are also avid users of peer-generated content. Moreover, through their teaching activities, they bring students into contact with works that promote learning.

Submitted at the end of the hearings by the Standing Committee on Industry, Science and Technology, this brief argues for the full maintenance of the principle of fair dealing for the purpose of education, a position already defended by organizations representing Canadian faculty.

However, from the minutes of the hearings, it appears that some of the questions that committee members are asking themselves deserve clearer answers. We will therefore take a pedagogical approach in the hope that our demonstration allows for more informed decision-making and facilitates the complex work of reviewing the Copyright Act.

Chronology of the concept of fair dealing

Fair dealing's origins can be traced back to English case law from the 18th century. Fair dealing was formally incorporated into Canadian law in 1921. At that time, paragraph 16.1(i)¹ allowed fair dealing "for the purposes of private study, research, criticism, review or newspaper summary."²

While it is now understood that Parliament is committed to balancing the rights of creators and users, it was only in 2002 that the Supreme Court provided clear guidance on fair dealing, in *Théberge v. Galerie d'Art du Petit Champlain Inc.*:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.³

Then, in 2004, in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Court went further by providing six factors with which to determine the fairness of the use of a copyrighted work: "purpose, character, amount, alternatives, nature and effect."⁴

¹ Section 29 today.

² Canadian Association of Research Libraries, *Fair Dealing in Canada: Myths & Facts*. Ottawa: CARL.

³ [Théberge v. Galerie d'Art du Petit Champlain Inc., \[2002\] 2 SCR 336, 2002 SCC 34.](#)

⁴ [CCH Canadian Ltd. v. Law Society of Upper Canada, \[2004\] 1 SCR 339, 2004 SCC 13.](#)

Assented to on June 29, 2012, the Copyright Modernization Act introduced several amendments, including the addition of education as a ground for fair dealing. The six factors from the CCH case were confirmed in a series of decisions rendered on July 12, 2012, by the Supreme Court.⁵ In particular, *Alberta (Education) v. Access Copyright*⁶ dealt with the fairness of photocopying short excerpts of copyrighted work by teachers for their students.

Distinguishing collective licences from transactional licences

Table 1 shows that the amounts allocated to the acquisition of content by university libraries in Quebec and Canada have steadily increased since 2010-11. It is therefore inaccurate to argue that the universities' defence of fair dealing aims to save money at the expense of creators.

Table 1: Acquisition expenditures of university libraries in Quebec and Canada from 2010-2011 to 2016-2017 (x \$1,000)

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Quebec	57 089	66 376	65 976	68 912	72 885	66 853	75 209
Canada	324 562	338 340	348 180	360 563	374 280	394 448	415 219

Source: Statistics Canada, Table 37-10-0027-01, [Expenditures of universities and degree-granting colleges \(x 1,000\)](#).

During its study, the committee sought to understand why rights-holders' revenues have fallen since 2012, while university libraries have increased their acquisition expenditures. To clarify the matter, it is necessary to distinguish collective licences from those obtained directly from publishers.

To obtain a collective licence, academic institutions pay a fixed annual tariff per full-time equivalent student of \$13.50 to Copibec or \$35 to Access Copyright,⁷ which allows them to reproduce and disseminate up to 15% of the total number of pages of a publication or up to 20% in the case of a magazine article or book chapter.⁸ However, the purchase of work is made in addition to the collective license, since it does not include a right of reproduction.

Given that approximately 92% of the content of a university's library is work "other than literature"⁹ and mainly from scientific journals, several libraries have started negotiating

⁵ See *SOCAN v. Bell Canada, Alberta (Education) v. Access Copyright, Re:Sound v. MPTAC, Entertainment Software Association v. SOCAN and Rogers Communications v. SOCAN*

⁶ [Alberta \(Education\) v. Access Copyright, \[2012\] 2 SCR 345, 2012 SCC 37](#)

⁷ https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2013/Supplement_18_may_2013.pdf.

⁸ *Ibid.*

⁹ Universities Canada. (2018). *The changing landscape of Canadian copyright and universities*. Brief presented to the Standing Committee on Industry, Science and Technology as part of its statutory review of the Copyright Act. Ottawa: Universities Canada, p. 3.

directly with academic publishers¹⁰ to obtain transactional licences, which include both the acquisition of work and the right to reproduce them.

The decision to move away from collective licensing is because some universities find it more advantageous to subscribe to a targeted offer to meet the demand from their community. Of course, institutions that make this decision must hire additional staff to negotiate these piecework agreements and carry out the necessary follow-up with publishers, which requires more complex work. In these circumstances, several Canadian universities, including all those in Quebec,¹¹ continue to do business with Copibec or Access Copyright.

Government's role in supporting creators

The FQPPU is committed to the vitality of culture. It recognizes that the ability of authors in Quebec and Canada and their publishers, particularly those in the Francophonie, to continue their work is essential to the development of society and constitutes a source of wealth that must be preserved. We are sensitive to the challenges creators face, *a fortiori* in a context where digital technologies have revolutionized their business models and reduced their income.

That said, the education sector, particularly at the post-secondary level, must be able to count on optimal conditions for access to content that promotes the advancement and transmission of knowledge. Reducing the scope of fair dealing in education would increase the financial pressure on institutions, when they already struggle to acquire sufficient resources to carry out their mission. It is also likely to constitute an additional burden on students, who are already struggling with financial insecurity.

The salvation of creators should not be based on breaking a fragile balance between their rights and those of users in the education sector, but on improved direct government support. This can take various forms, such as more generous support programs for culture, tax incentives, creative grants or competitions. Initiatives to support publishing companies in their efforts to adapt to new paradigms related to dematerialized knowledge and increased international competition are also to be considered so that they are able to diversify their sources of revenue without undermining the education sector.

Key recommendations

The FQPPU calls for the fair dealing provisions for the purpose of education to be fully maintained in the Act.

¹⁰ For example, through the Canadian Research Knowledge Network.

¹¹ Unlike Access Copyright in Canada, Copibec has maintained its relevance to Quebec universities. The significant differences in tariffs, as well as the increased sensitivity of the Quebec education sector to maintaining a strong cultural industry, probably had something to do with it. Laval University is the only Quebec university to have withdrawn, in 2014, from the licence with Copibec. A class action by the rights-holders resulted in an out-of-court settlement in June 2018 and the university subsequently renewed its agreements with Copibec. For more information, see: <https://www.copibec.ca/en/settlement-agreement>.

However, we believe that fair dealing for the purposes of education and research should not be considered an open counter by users. For universities, this means that they must act responsibly by ensuring that they have adequate oversight compliance with the Act, put in place appropriate accountability mechanisms and provide clear information on copyright compliance. In practice, this means committing resources to staff training and ensuring vigilant monitoring of the use of copyrighted works, whether under a licence or under fair dealing provisions.¹²

Finally, FQPPU finds it regrettable that the education sector and the creation sector are in opposition, since they are intrinsically linked and would benefit from supporting each other. To do so, the government must fully assume its role of supporting culture, which involves various measures to assist creators and the industry that supports them. While it is important to maintain fair dealing so as not to put universities and their students in precarious situations by imposing additional financial constraints on them, it is also important to ensure that creators have the capacity to produce content that resonates with Quebeckers and Canadians. This is crucial to the sustainability of our identity and our ability to maintain a common cultural heritage.

¹² In a recent decision concerning the dispute between York University and Access Copyright, the issue of the university's intention to comply not only with the Act, but also with its own copyright policy, appears to be a central element of the judges' reasoning, which was in favour of the rights-holders. The judges criticized the university's failure to put in place effective mechanisms to monitor the use of works. The case is under appeal. For more information, see: *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, 149 CPR (4th) 375 [Access Copyright].