

access©

**Access Copyright's Submission  
to the Standing Committee  
on Canadian Heritage  
for the Study on Remuneration Models  
for Artists and Creative Industries**

Submitted: December 14, 2018

## Table of Contents

Introduction .....	1
Role of Collective Licensing in Remunerating Creators .....	1
Collapse of Collective Licensing following the <i>Copyright Modernization Act</i> .....	2
Education Sector’s Copying Policies Have Led to Litigation .....	4
Free Educational Copying Has Had a Detrimental Impact on the Incomes of Authors and Visual Artists .....	4
The Economic Impact on Creators and Publishers .....	7
Writers and Visual Artists Are Not Being Paid Royalties Owing Under Certified Tariffs .....	8
Recommendations .....	9
1. Amend the Fair Dealing Exception to Distinguish Between Individual and Institutional Copying .....	9
2. Introduce the Artist Resale Right .....	10
3. Harmonize Statutory Damages Available to Collectives .....	10
4. Confirm Tariffs Set by the Copyright Board Are and Have Always Been Mandatory .....	11

## **Introduction**

Canadian stories hold a mirror up to our nation. They provide us with a reflection of the landscape, our diversity, who we were and who we may become. As a nation, we celebrate Canadian writing and visual arts and yet the future of these works is at risk.

We can only have a rich and vibrant Canadian culture if the nation's writers, poets and visual artists can make a living creating this work. Unfortunately, it's becoming increasingly challenging for them to do so.

Many find their lives balanced on the poverty line, even though their poems, paintings, plays and novels are copied and used extensively in classrooms across the country, at every level.

As the Standing Committee on Canadian Heritage considers Remuneration Models for Artists and Creative Industries, the committee must take measures to redress the impact of the addition of education to fair dealing in Canada.

We recommend the Committee take action in four concrete areas:

1. Amend the Fair Dealing Exception to Distinguish Between Individual and Institutional Copying;
2. Introduce the Artist Resale Right;
3. Harmonize Statutory Damages Available to Collectives;
4. Confirm Tariffs Set by the Copyright Board Are and Have Always Been Mandatory.

## **Role of Collective Licensing in Remunerating Creators**

Access Copyright is a copyright collective representing over 600 Canadian publishers and 12,000 authors and visual artists. We facilitate the reuse and sharing of content by licensing copying from books, magazines, newspapers and journals to schools, universities, colleges, governments and businesses.

Copyright collectives exist to make it easy for users of creative works to clear rights and creators to receive compensation for the use of their works in situations when effective control by an individual copyright owner is virtually impossible. In the case of writers, visual artists and publishers, the need for a copyright collective first arose with the advent of photocopiers, which made it possible to make unauthorized reproductions with relative ease. Over the last 30 years, the advent of the Internet and digital reproduction has exacerbated unauthorized and uncompensated reproductions.

The high-volume and dispersed nature of the reproductions, paired with low individual transaction value, makes it both difficult to enforce and economically unfeasible to do so unless managed on a collective basis. Similarly, absent a "one-stop" clearance organization, the burden associated with clearing rights would be unworkable for users.

The importance of collective licensing to provide fair payment to creators for the copying of their works has only increased over time. Today, it has never been easier to copy and share creative works, while a creator's ability to control and monitor these uses and enforce his or her rights has become increasingly difficult.

**Collapse of Collective Licensing following the *Copyright Modernization Act***

Collective licensing in the writing and publishing industry worked well for over 20 years, resulting in the distribution of approximately \$450 million to creators and publishers by Access Copyright.<sup>1</sup> Unfortunately, the collective administration of published works has been under significant threat since the *Copyright Modernization Act* (the “CMA”) came into force in 2012. The addition of “education” as an enumerated purpose to fair dealing (the “Education Exception”) combined with weakened statutory damages for non-commercial infringement has severely damaged creators’ ability to enforce their rights and receive fair compensation for the education sector’s use of their works.

Within months of the new legislation coming into force, schools, colleges and universities across Canada outside of Quebec adopted self-defined copying policies<sup>2</sup> (“Copying Policies”) which promote widespread and systematic free copying of published works. While the legislation does not define the scope of the Education Exception, the education sector unilaterally developed its own definition, purportedly ending the need to pay for licences or permissions for most educational copying activities.

These Copying Policies claim that 10% of a book, magazine or journal, or an entire chapter or article, whichever is greater, can be copied for free without permission. There is no restriction on copying entire short stories, works of art, photos, essays or poems. The copies are often shared with all students in a class, compiled in a coursepack with other articles or chapters, or posted on a password-protected learning management system. These paper or digital coursepacks may be the sole resource for an entire course.

The implementation of these Copying Policies had an immediate and direct impact on royalty payments for the copying of published works by the education sector. Prior to their introduction, most of these copying activities were paid for through licences and tariffs administered by Access Copyright (in Canada outside of Quebec) and Copibec (in Quebec). Since their implementation, most post-secondary institutions and elementary and secondary (“K-12”) public schools outside of Quebec stopped paying royalties for the reproduction of published works.

Royalties collected by Access Copyright from the education sector have declined by 89% since 2012, resulting in an approximate 80% decrease in royalties distributed to creators and publishers.<sup>3</sup>

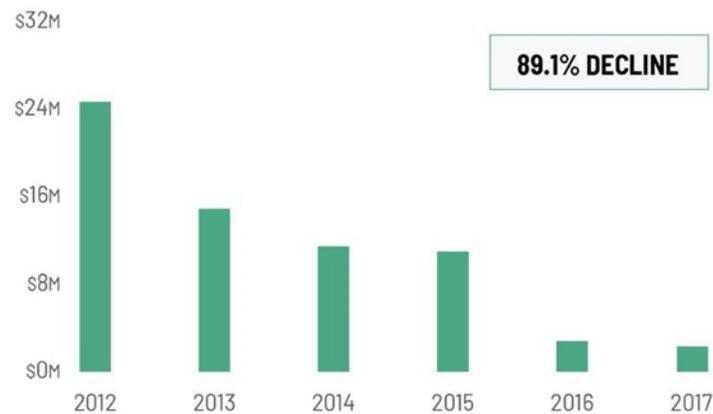
---

<sup>1</sup> 2017 Access Copyright Annual Report, p.18: [http://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](http://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

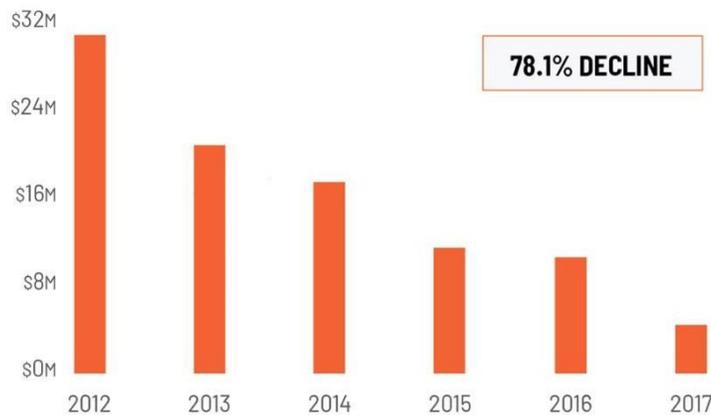
<sup>2</sup> Referred to by the education sector as “Fair Dealing Guidelines”, e.g.: <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>

<sup>3</sup> 2017 Access Copyright Annual Report, p.13: [http://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](http://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

**Royalties collected by Access Copyright from the education sector (2012-2017)**



**Royalties distributed by Access Copyright to creators and publishers (2012-2017)**



Although most educational institutions in Quebec remained licensed and did not adopt the Copying Policies referenced above, the Education Exception has nevertheless resulted in decreased royalty payments in the province for the educational copying of published works. In Quebec, the annual fee per student paid by universities has dropped by almost 50%.<sup>4</sup> Royalties received by Copibec from the Quebec education sector decreased by 23% between 2012 and 2017.<sup>5</sup> Moreover, Quebec authors are not receiving remuneration for the copying of their works by educational institutions outside of Quebec.

<sup>4</sup> Testimony of Frédérique Couette, Copibec, before the Standing Committee on Canadian Heritage, November 29, 2018: <http://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-134/evidence>

<sup>5</sup> *Ibid*

### **Education Sector's Copying Policies Have Led to Litigation**

The uncertainty over the scope of the Education Exception has led to litigation, the cost of which is mostly borne by creators. In July 2017, the Federal Court released its decision in an action launched by Access Copyright against York University.<sup>6</sup> The Court declared unequivocally that York's copying policies and practices are not fair in either their terms or their application.<sup>7</sup> The copying policies at issue in the York litigation are virtually identical to the policies implemented by the entire education sector outside of Quebec. The Court also confirmed that tariffs approved by the Copyright Board are mandatory.<sup>8</sup> The York Decision is currently under appeal.

Despite the Court's clear and definitive judgement, the education sector's behavior and practices remain unchanged. Most Canadian educational institutions continue to copy under policies virtually identical to York's and do not pay royalties for that copying.

In February 2018, the majority of Canadian Ministries of Education launched a lawsuit against Access Copyright seeking a return of royalties they claim were overpaid for the years 2010-2012.<sup>9</sup> In July 2018, Access Copyright filed a Statement of Defence and Counterclaim,<sup>10</sup> defending the action and seeking payment of the royalties set out in the tariffs for January 1, 2013 onwards. To date, after adjustments for amounts previously paid, the Ministries of Education (excluding BC, Ontario and Quebec) and Ontario school boards owe over \$24 million in royalties to creators and publishers whose works are copied in K-12 classrooms.

In Quebec, Université Laval was the only institution to adopt a copying policy and refuse to pay licensing royalties. In 2018, Copibec and Université Laval reached an out-of-court settlement to end a class action launched by Copibec in 2014.<sup>11</sup> As part of the settlement, Université Laval has suspended its copying policy and agreed to enter into a licence agreement with Copibec.<sup>12</sup>

### **Free Educational Copying Has Had a Detrimental Impact on the Incomes of Authors and Visual Artists**

Collective licensing royalties are an important source of income for creators. A 2015 economic impact study conducted by PricewaterhouseCoopers ("PwC Report") revealed that these royalties represented 20% of creator income from writing and 16% of publisher profits.<sup>13</sup> The loss of this income has been devastating for creators. A recent study by The Writers' Union of Canada found that writers earned an

---

<sup>6</sup> *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669: <https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.html> ("York Decision")

<sup>7</sup> York Decision, para. 14

<sup>8</sup> York Decision, paras. 7-11. 188-220

<sup>9</sup> <https://www.accesscopyright.ca/media/announcements/education-sector-forces-canadian-creators-to-defend-why-their-works-should-not-be-used-for-free/>

<sup>10</sup> <https://www.accesscopyright.ca/media/announcements/update-on-k-12-legal-action/>

<sup>11</sup> <https://www.copibec.ca/en/nouvelle/179/copibec-et-l-universite-laval-concluent-une-entente-hors-cour-en-matiere-de-droits-d-auteurs> ; <https://www.copibec.ca/en/nouvelle/193/copibec-and-universite-laval-resolve-their-legal-dispute-over-copyright>

<sup>12</sup> [https://www.copibec.ca/medias/files/Action\\_collective/Settlement%20agreement.pdf](https://www.copibec.ca/medias/files/Action_collective/Settlement%20agreement.pdf)

<sup>13</sup> *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*, PricewaterhouseCoopers LLP, June 2015 at p. 7 & 10: [https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)

average income of only \$9,384 in 2017, representing a 27% decline since 2014 and a 78% decline since 1998.<sup>14</sup>

The numbers tell a bleak and disheartening story; one that is echoed by creators when they tell their stories first hand:

Guy Vanderhaeghe<sup>15</sup>

Let me emphasize that under the old licensing agreement sums paid to writers and artists were hardly lavish. A poet I know, the author of six books, and a woman who has a distinguished publication record in journals such as the New Yorker, used to receive approximately \$600 a year from Access Copyright. This was money that she used to pay for her annual trip to the dentist because most of the rest of her income was and is a pittance earned cleaning houses. Her most recent cheque had shrunk to a pitiful \$125. This tiny amount will surely plummet even further unless the government takes steps to stop schools' and universities' cavalier disregard of copyright.

A.J.B. Johnston<sup>16</sup>

Previously, payments from Access Copyright were a significant source of income for many authors, me included. They no longer are... Canada needs to support its creators in all aspects. We all want to build a strong and flexible creative economy. One step toward that goal is to tighten the Copyright Act so that Canada's writers are always compensated when their creative output is copied and/or distributed by any technology. There are many who are currently profiting from the distribution of authors' works, but it is all too often not the authors.

Monica Graham<sup>17</sup>

My net income in 2017 was less than \$10,000, including \$371.87 in copyright payment – for a total of nine books and more articles. In 2009, before so-called “fair dealing” was initiated, my net income was \$20,137, including \$612 in copyright fees.

[...]

I hesitate to encourage young people to become writers. I do encourage them to learn to write well because whatever their future careers, solid communication skills are important. The people who cannot bear NOT to write, will write anyway. They will also be among the working poor, like me.

---

<sup>14</sup> *Diminishing Returns: Creative Culture at Risk*, The Writers' Union of Canada:

<https://www.writersunion.ca/sites/all/files/DiminishingReturns-Web.pdf>

<sup>15</sup> Submission by Guy Vanderhaeghe to the Standing Committee on Industry, Science and Technology, May 22, 2018:

<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9875194/br-external/VanderhaegheGuy-e.pdf>

<sup>16</sup> Submission by A.J.B. Johnston to the Standing Committee on Industry, Science and Technology, May 18, 2018:

<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9861176/br-external/JohnstonAJB-e.pdf>

<sup>17</sup> Submission by Monica Graham to the Standing Committee on Industry, Science and Technology, May 25, 2018:

<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9894068/br-external/GrahamMonica-e.pdf>

Sylvia McNicoll<sup>18</sup>

I may not be the most famous writer, but I have one of the longest publishing careers in my genre, which is writing for children and young adults... But as I told emerging Colombian writers in a Bogota library talk, the secret of the longevity of my career is, sadly, my ability to accept less money.

This year, with two novels out, school visits, teaching, and including Canada Council travel expense money, which is considered taxable income, I will earn \$17,000. Writers have always had to struggle to cobble together a livelihood, but never like this... My 2012 Access Copyright payment of \$3,000 dropped to \$300 in 2018.

Schools have not paid a licensing fee since 2013 and they're suing Access Copyright for alleged over-payment. Schools at all levels continue to buy fewer books and copy without licences. Yesterday I visited a Canadian school, grades three to six in a gym, 200 kids. Not one of those children held my book in their hands. None of my novels were on display, nor were they in the library.

Every page I create requires research, writing, rewriting, as well as editing and design. Not one of these pages is free to produce. I love my role as cultural ambassador. I'm proud to do this work even if I can't live on it. But with the current compensation models for writers and artists, our culture is not sustainable.

The loss of income caused by free educational copying is untenable for creators. Today, creators are not paid for the copying of 600 million pages of published works by the education sector annually. It's important to note these 600 million pages do not include content licensed through academic libraries or open access content.<sup>19</sup> This is content previously covered and paid for under Access Copyright licences that is now copied for free under the education sector's Copying Policies.

Most of the content that was previously paid for under collective licences – content which continues to be copied today under the Copying Policies – is *instructional* content rather than the *research* content typically purchased by academic libraries. Historically, over 80% of the copying paid for under collective licences was from books. This is content produced predominantly by professional authors who rely on royalties to pay their bills and published by educational and independent publishers who do not license

---

<sup>18</sup> Testimony of Sylvia McNicoll, before the Standing Committee on Canadian Heritage, November 29, 2018:

<http://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-134/evidence>

<sup>19</sup> 600 million pages is derived from analyses vetted by the Copyright Board in the 2010-2015 Elementary and Secondary Schools ("K-12") tariff proceedings and the Federal Court in the York University litigation. In both cases, all copying of open access or public domain works and works covered by publisher licences were excluded from the calculation of the volume of copying at issue in the proceedings. Note that 600 million is a conservative estimate. The Copyright Board found that 380 million pages of unlicensed published works were photocopied by K-12 schools. Although 380 million was based on a comprehensive 2005/2006 study, a more recent study filed as part of those proceedings confirmed that over 400 million pages were photocopied in 2012, indicating that copying has actually increased over time. The study of York copying found that professors copied 360 pages/student of unlicensed published works in 2013. The estimate of 600 million discounts the York copying to estimate that the post-secondary sector copies on an average of only 220 pages/student. This number is highly conservative in comparison to all available studies of post-secondary copying: the volume of copying found in the York study, a study of college copying filed as part of the Copyright Board tariff proceedings that found colleges copied over 950 pages/student, and a study of another university which found its professors copied approximately 400 pages/student.

much of their content through academic libraries.<sup>20</sup> Moreover, this is largely Canadian content. When the education sector was licensed and paying royalties, 70% of the royalties Access Copyright distributed were paid to Canadian creators and publishers.

### **The Economic Impact on Creators and Publishers**

Canadian creators and publishers have experienced substantial – and proven – economic harm because of the education sector’s interpretation of the Education Exception.

The 2015 PwC Report was the first comprehensive economic assessment of the impact of the education sector’s Copying Policies and practices on the Canadian writing and publishing industry. Key findings include:<sup>21</sup>

- Educational licensing income has declined drastically since 2012 and represents a loss of \$30 million/year for creators and publishers. Licensing royalties are an important source of income for creators and publishers, enabling them to continue investing in the production of quality Canadian resources and innovative digital solutions for Canadian classrooms.
- The education sector’s Copying Policies and practices directly substitute for the sale of published works. PwC found an acceleration in the decline of book sales to the educational sector since the Copying Policies were adopted.
- Over the long term, PwC found the education sector’s Copying Policies and practices would result in lower investment in educational resources, a loss of jobs and a negative impact on the diversity and quality of Canadian content available for the classroom.

The impact of York University’s copying policy (which is virtually identical to the policies in place at most Canadian educational institutions) on the publishing industry was also closely examined in the York Decision. The York litigation involved a four-week trial during which the trial judge heard extensive evidence presented by both sides, including the evidence of economic experts, on the impact of York’s copying policy on the writing and publishing market. After careful examination, the Court found “*overwhelming*” evidence of harm, concluding that “*any suggestion that the Guidelines have not and will not have negative impacts on copyright owners or publishers is not tenable.*”<sup>22</sup> The trial judge concluded that there was clear evidence that the free copying under these policies substituted for the sale of works.<sup>23</sup>

While the litigation persists, the Canadian writing and publishing industry continues to suffer. Book sales to educational institutions declined 41% between 2010-2016<sup>24</sup> (47% once adjusted for inflation). In response to the loss of licensing royalties and poor market conditions, at least three publishing companies

---

<sup>20</sup> The scope of York’s library licences was examined in detail in the York litigation. York ultimately conceded it could not prove any content captured in the copying study of its professors was licensed. York Decision, para. 287. Moreover, by York’s own admission, 99% of the pages of books copied on its learning management system were not covered by licences.

<sup>21</sup> PwC Report, pages 7-11

<sup>22</sup> York Decision, para. 143

<sup>23</sup> York Decision, paras. 133 & 349

<sup>24</sup> 2010 & 2012: <https://www150.statcan.gc.ca/n1/pub/87f0004x/2013001/t039-eng.htm>

2014: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2110020301>

2016: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2110004201>

– Oxford University Press, McGraw-Hill Education and Emond Montgomery – have ceased publishing resources for the elementary and secondary school market,<sup>25</sup> which has resulted in reduced opportunities and royalties for creators. Statistics Canada data reveals that the Canadian book industry shed over 3,800 jobs between 2012 and 2016<sup>26</sup> – a decline of 27%.

### **Writers and Visual Artists Are Not Being Paid Royalties Owing Under Certified Tariffs**

Since 2012, a troubling pattern has also emerged where educational institutions are refusing to pay tariffs certified by the Copyright Board. The Copyright Board is a quasi-judicial tribunal responsible for setting fair and equitable tariff rates for the use of works protected by copyright. In the context of educational copying, payment of a tariff is not required **if** all copying of published works is otherwise licensed or covered by an exception.<sup>27</sup> Otherwise, as the Federal Court in the York Decision has recently confirmed,<sup>28</sup> payment of a tariff is mandatory.

Despite this, the majority of the education sector outside of Quebec claims they can simply “opt out” of tariffs certified by the Copyright Board. In particular, most of the K-12 sector refuses to pay royalties dating back to 2013 owing under the 2010-2015 Elementary and Secondary School Tariff. In February 2016, the Copyright Board issued its decision and certified the tariff to be paid by K-12 schools outside of Quebec.<sup>29</sup> After applying a significant discount to account for fair dealing and other exceptions, the Board determined that Ministries and school boards were required to pay \$2.46/full-time equivalent (“FTE”) student for 2010-2012 and \$2.41/FTE for 2013-2015.<sup>30</sup> This tariff is valued at over \$9 million per year. However, despite having participated in the tariff process including filing evidence, legal argument and expert testimony, the majority of the K-12 sector outside of Quebec is refusing to pay royalties owing from 2013 onwards. As mentioned above, they are instead suing Access Copyright seeking a return of royalties they claim were overpaid for the years 2010-2012.<sup>31</sup> Not only are creators deprived of the \$9 million/year owing under this tariff, but they have been forced to incur additional legal costs to defend this claim.

The root cause of this behavior is the weak remedies available to rightsholders and collectives in the CMA, which have in turn minimized the risk exposure of the education sector. As mentioned above, the CMA reduced statutory damages for cases of non-commercial infringements, such that the cost of enforcement for individual rightsholders often exceeds the potential award of damages. Collectives, on the other hand,

---

<sup>25</sup> Submission of the Canadian Publishers’ Council to the Standing Committee on Industry, Science and Technology, May 29, 2018: <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10002773/br-external/CanadianPublishersCouncil-e.pdf>

<sup>26</sup> Statistics Canada. Table 36-10-0452-01 Culture and sport indicators by domain and sub-domain, by province and territory, product perspective: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610045201>

<sup>27</sup> York Decision, paras. 13 & 220

<sup>28</sup> York Decision, paras. 7 & 218

<sup>29</sup> *Access Copyright Elementary and Secondary School Tariff, 2010-2015*, Copyright Board of Canada, February 19, 2016: <https://cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2016/TAR-2016-02-20.pdf>

<sup>30</sup> *Fact Sheet: Access Copyright Elementary and Secondary School Tariff, 2010-2015*, Copyright Board of Canada, February 19, 2016: <https://cb-cda.gc.ca/decisions/2016/FAC-2016-02-19-Fact-Sheet-EN.pdf>

<sup>31</sup> <https://www.accesscopyright.ca/media/announcements/education-sector-forces-canadian-creators-to-defend-why-their-works-should-not-be-used-for-free/>

can seek to enforce an unpaid tariff in the Federal Court. The challenge is that certain collectives, including Access Copyright, are only entitled to collect the royalties owing under the tariff. Simply put, there is no effective penalty for refusing to pay royalties owing under a tariff. The current situation is tantamount to a parking ticket regime where the cost of parking is the same as the fine for a parking ticket. Any reasonable person would take a chance and not pay for parking because the fine would be the same as the cost of parking.

The situation is untenable. Fortunately, the solution is simple and has been in place for over 20 years for two music industry copyright collectives: SOCAN and Re:Sound. If a user of one of their tariffs refuses to pay, these collectives can seek statutory damages between 3 to 10 times the value of the tariff. This means there is a real and quantifiable penalty to not paying the tariff. This deters infringement, encourages settlement and ultimately reduces the need for litigation.

All collectives should be entitled to collect the same statutory damages as SOCAN and Re:Sound. The writing and publishing industry was deeply disappointed that statutory damages available to collectives were not harmonized as part of the recently announced reforms to modernize the Copyright Board. The proposed reforms to the Copyright Board address the steps preceding the certification of a tariff, but fail to address the fact that some users will ignore the tariff once it is certified. For writers, visual artists and publishers, the proposed reforms will not meet the stated objective of “reducing costs for participants and ensuring timely remuneration for creators”.<sup>32</sup>

## **Recommendations**

### **1. Amend the Fair Dealing Exception to Distinguish Between Individual and Institutional Copying**

It is imperative Parliament amends the Education Exception to restore a functioning marketplace that encourages the continued creation of content for Canadian classrooms. This will ensure students across the country will have access to quality content that reflects our experiences and values as Canadians.

A guiding principle should be to establish a system that distinguishes between personal and institutional copying, in line with the models in place in the United Kingdom and Australia. Students would remain free to make individual copies of reasonable portions of works for personal educational use, but widespread institutional copying would be paid for when the market offers licences for such use.

To this end, Access Copyright submits that the *Copyright Act* be amended<sup>33</sup> such that the fair dealing exception for the purposes of research, private study and education not apply to

---

<sup>32</sup> Letter from Minister Bains and Minister Rodriguez to Chairs of Standing Committee on Industry, Science and Technology and Standing Committee on Canadian Heritage, October 29, 2018: [http://www.ourcommons.ca/content/Committee/421/INDU/WebDoc/WD9341854/421\\_INDU\\_reldoc\\_PDF/INDU\\_BainsNavdee-p-RodriguezPablo-2018-10-29-e.pdf](http://www.ourcommons.ca/content/Committee/421/INDU/WebDoc/WD9341854/421_INDU_reldoc_PDF/INDU_BainsNavdee-p-RodriguezPablo-2018-10-29-e.pdf)

<sup>33</sup> Proposed amendment:

educational institutions in respect of works that are commercially available. Such amendment would stipulate that a work is “commercially available” if it is available to the user from a collective society or by the rightsholder within a reasonable time and for a reasonable price and may be located with reasonable effort.

This would bring fair and certain scope to the exception for the benefit of rightsholders and users alike by ensuring students have access to a wide range of materials, while creators and publishers are fairly compensated for the educational use of their works.

## **2. Introduce the Artist Resale Right**

Access Copyright supports the submissions of Canadian Artists Representation (CARFAC), Copyright Visual Arts and others that recommend introducing an Artist Resale Right. The Artist Resale Right would entitle visual artists to receive royalties when their works are resold through auction houses and commercial galleries.

Currently, visual artists receive no compensation when their works are resold. As visual art often appreciates in value over time, the lack of an Artist Resale Right deprives visual artists of the ability to benefit from the growing commercial success of their works. Artist Resale Rights are in place in at least 93 countries, including all members of the European Union. Canadian visual artists deserve to share in the ongoing profits made from their works in the same way as their international counterparts.

## **3. Harmonize Statutory Damages Available to Collectives**

Authors and publishers should have the same ability to enforce their rights as musicians and songwriters. Refusal to pay a certified tariff in *any* sector should be subject to the same penalties.

The current lack of penalties available to certain collectives, such as Access Copyright, has led users to refuse to pay royalties owing under approved tariffs, despite continuing to make copies that are subject to the tariff. This has undermined the effectiveness of the tariff regime and resulted in an unacceptable situation where authors, visual artists and publishers are not getting paid.

The statutory damages available to collectives should be harmonized. All copyright collectives should be entitled to seek statutory damages between 3 to 10 times the value of the tariff. This system of statutory damages has worked well for performing rights music collectives SOCAN and Re:Sound for 20 years and should be extended to all collectives. There is no reason musicians and songwriters deserve to be paid for the use of their work while authors and visual artists do not.

---

Add subsection 29.01 to the Act:

29.01 The exemption from copyright infringement for research, private study, or education provided by Section 29 does not apply to educational institutions, or a person acting under the authority of one, if the work or other subject-matter is commercially available within the meaning of the definition of commercially available in section 2 including in the case of paragraph (b) of that definition, by a collective society or other person for the dealing.

Extending statutory damages to all collectives will deter infringement, encourage settlement and, in line with one of the key goals of the reform of the Board, “enable creators to get paid properly and on time.”<sup>34</sup>

#### 4. Confirm Tariffs Set by the Copyright Board Are and Have Always Been Mandatory

The legitimacy of the *Copyright Act* and the viability of the collective management regime depend on the legal certainty of the Copyright Board’s decisions and tariffs.

In the York Decision,<sup>35</sup> the Federal Court confirmed that tariffs are mandatory and users cannot simply “opt out” of a tariff. In the Court’s view, the legislative history confirmed Parliament’s intent to provide copyright collectives with effective enforcement mechanisms against users who reproduce the works of rightsholders without their authority. Such mechanisms would work only if the tariffs were mandatory.

Regrettably, despite the York Decision, the education sector continues to suggest that major users of copyright materials can “opt out” of a tariff set by the Copyright Board, despite making millions of copies that are not licensed or covered by an exception. In fact, the action launched by the K-12 sector against Access Copyright in 2018 seeks a declaration that tariffs are not mandatory. The outcome is that major users of copyright works have declined to pay **any** royalties to creators despite vigorously contesting the underlying tariffs before the Copyright Board.

This cynical approach ignores the longstanding history behind the collective management regime. In the 1980s lead-up to the modernization of the collective management regime, the then-Minister of Communications explained the impetus for the new law:

*Technology has greatly increased the ease and amount of copyright infringement: effective control by an individual copyright owner has been rendered virtually impossible. Therefore, the formation of copyright societies – organizations which acquire, exercise and enforce rights on behalf of their member copyright owners – will be encouraged.*<sup>36</sup>

In the same review, the Standing Committee on Communications and Culture recognized that the formation of collectives promoted balance and efficiency by providing users with quick and easy access to a large volume of copyright materials while better enabling creators' exercise of rights which could not be effectively administered individually. The Committee expressly foresaw the demise of the proposed collective exercise of copyright “if users are permitted to circumvent the tariff system and bargain with the essentially weaker individual creator, rather than pay an approved tariff.”<sup>37</sup> The tariff system has always been mandatory: it would not function efficiently

---

<sup>34</sup> Consultations launched on reforming Copyright Board of Canada, Department of Innovation, Science and Economic Development, August 9, 2017: [https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations\\_launchedonreformingcopyrightboardofcanada.html](https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations_launchedonreformingcopyrightboardofcanada.html)

<sup>35</sup> York Decision at paras. 7-11, 188-220.

<sup>36</sup> *Copyright and the Cultural Community*, at p. 4, © Minister of Supply and Services Canada, 1984; *Desputeaux v. Éditions Chouette*, 2003 SCC 17 at para. 57: “the Copyright Act deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it.”

<sup>37</sup> *A Charter of Rights for Creators*, at pp. 85, 87, © Minister of Supply and Services Canada, 1985

or fairly if it permitted users to challenge the entire basis for a tariff before the Copyright Board, then contend that the Copyright Board's tariff did not apply to them.

Access Copyright submits that the *Copyright Act* should be amended to confirm that tariffs set by the Copyright Board are and have always been mandatory.

In light of the continued behaviour by certain users to fight tariff proceedings and then ignore their results, the current review is an opportunity to confirm definitively that tariffs are and always have been mandatory. This would strengthen the effectiveness of the Copyright Board tariff process, discourage unnecessary and costly litigation and ensure creators are paid fair and equitable royalties set by the Copyright Board under certified tariffs.