

Council of Ministers of Education, Canada (CMEC) Copyright Consortium

Submission to the Standing Committee on Canadian Heritage regarding the Parliamentary review of remuneration models for artists and creative industries

The Council of Ministers of Education, Canada (CMEC) Copyright Consortium (“the Consortium”) includes all provincial and territorial education ministers with responsibility for K-12 education, with the exception of Quebec.

Provincial and territorial ministers of education have the constitutional authority for education. Education ministers’ core mission is to safeguard what is best for Canadian students. Ministers consider it essential that any federal copyright reform process strikes the proper balance between the rights of teachers and students and the rights of copyright owners.

Since the early 2000s, the Consortium has been active in the federal government’s successive copyright reform processes. It has recently participated in the House of Commons Industry Committee’s study of copyright, specifically its review of publishers’ claims relating to educational use of the fair dealing provision in the *Copyright Act*. The Consortium appreciates the opportunity provided by the Canadian Heritage Committee to make a statement on remuneration of artists and creative industries, as this relates to possible amendments to the *Copyright Act*.

As stated to the Industry Committee submission, the Consortium is opposed to the changes to copyright law proposed by Canadian publishers, Access Copyright, and the Writers’ Union of Canada. The Consortium does not consider it appropriate to disrupt the current balance of rights of copyright owners and users. Fair dealing permits the use of a copyright-protected work for educational purposes only if the dealing is “fair.” The Consortium opposes amending the fair dealing provision in the *Copyright Act* or establishing mandatory copyright tariffs. Making tariffs mandatory would amount to a subsidy for the publishing industry, at the expense of Canadian students.

The Honourable Zach Churchill, the Consortium Chair and Nova Scotia Minister of Education and Early Childhood Development, when appearing before the Industry Committee on May 22, 2018, stated: “I think it’s important to note that this is not an education sector versus the creative industry issue, although there is some disagreement. We have a vested interest in the success of a vibrant, robust, healthy, successful, innovative, creative sector in this country. In fact, our education system is dependent on that.”

Education ministers are supportive of Canadian cultural industries. The education sector supports Canadian culture. Indeed, educators view themselves as mentors preparing the next generation of Canadian creators, cultural entrepreneurs, and audiences. Many educators are themselves creators.

Education Ministers' Policy Statement on Fair Dealing

In March 2018, the Consortium released the *Education Ministers' Policy Statement on Fair Dealing* (attached). This statement underlines the provincial and territorial education ministers' support for teachers' and students' use of the fair dealing provision in the *Copyright Act* for classroom learning.

The statement reflects the *Copyright Act* and the 2012 Supreme Court of Canada's interpretation of fair dealing, which gives teachers the right to copy short excerpts from copyright-protected materials for the students in their classes, without obtaining permission from the copyright holder. This Supreme Court decision prompted the Canadian education sector to develop and implement the *Fair Dealing Guidelines*.¹

In advancing the educational use of fair dealing, the ministers' statement explains that the *Fair Dealing Guidelines* respects the rights of authors and publishers. Fair dealing does not mean that an educator can make unlimited use of any copyright-protected work without permission or payment. Fair dealing only permits the use of "short excerpts" for educational purposes. As responsible stewards of copyright in schools, ministries and school boards are consistently raising teachers' awareness of the rights and limitations of the fair dealing provision.

With respect to the MPs' review of creative industries' remuneration and copyright, the Consortium ministers wish to reiterate the last few sentences of their statement: "The current *Copyright Act* works to support Canadian students without harming the publishing industry... Promoting a continued, vibrant publishing industry in Canada does not require a change to the fair dealing provisions that have been developed by the Supreme Court of Canada and Parliament."

Fair dealing for educational purposes is good public policy

Education ministers appreciate that the publishing industry and groups representing authors are challenged by the difficult transitions to new and evolving business models. However, Consortium ministers suggest the *Copyright Act* is not a tool to help subsidize an industry or a cultural sector. The *Copyright Act* balances rights between users and copyright owners and the fair dealing provision is an important provision in establishing that balance for Canadians. Fair dealing for educational purposes has provided teachers with reasonable access to short excerpts from a whole range of diversified learning materials to support student learning. Fair dealing enriches Canadian students' learning experiences. It is good public policy.

Canadian publishers, the Writers' Union of Canada, and Access Copyright have mischaracterized the use of fair dealing for educational purposes as a legislative loophole created by MPs in 2012. The fact is the interpretation of fair dealing is the end result of almost a decade of jurisprudence that was ultimately decided by the Supreme Court of Canada. What Canadian

¹ https://cmec.ca/docs/copyright/CMEC_POSTER_FDG_EN.pdf

publishers, the Writers' Union of Canada, and Access Copyright are asking of MPs is to reverse the Supreme Court decisions of 2004 and 2012. They are attempting to win from MPs what they could not attain in Canada's highest court.

Canadian education sector continues to support Canadian culture – and it is doing so in new ways

The education sector continues to pay millions of dollars for Canadian content each school year. Ministries and school boards continue to purchase Canadian resources. However, the nature of the resources purchased to support student learning has evolved to reflect a greater understanding of effective pedagogy, and to better address the diversity of student-learning needs in the classroom.

The advance of technologies and availability of excellent digital resources are shifting the kind of content used by elementary and secondary school educators. The education sector does not purchase as many textbooks as previous years, as digital disruption is shifting the kind of content used by K–12 educators. Increasingly, educators purchase or access a wide range of sources including:

- Web-sites with publicly available materials
- open educational resources
- on-line sharing sites where teachers share resources with each other
- repositories with licensed content
- subscriptions to databases of educational resources, and
- access portals to content that is licensed by ministries and school boards.

These changes are a result of technological change. It does not constitute an unbalancing of Canada's *Copyright Act* regime.

On a related point, there are many new programs introduced in schools that are designed to highlight Canadians' creative works. These include: Writers in the Schools programs; school touring programs; digital classroom initiatives in BC; and Indigenous Artists in Communities and Schools projects.

There is a growing demand for showcasing local artists and authors in our schools. With programs such as Writers in the Schools, artists and authors are remunerated directly, rather than paid through collectives such as Access Copyright.

Mandatory licenses that would impose a tariff on education institutions are not in the public interest

The Consortium opposes mandatory tariffs that would require ministries of education and school boards to make annual payments on a per-student basis to Access Copyright. A

mandatory tariff would be a tax on the school system that will take money away from the many new and preferred resources teachers are using today. To impose a mandatory tariff payment in this situation is akin to legislators in the early 1900s imposing a special tax on the sale of automobiles to pay the horse-and-buggy industry.

Furthermore, mandatory tariffs would be a very inefficient way to support Canadian publishers and authors. **Access Copyright's 2017 annual report states that of the \$10.8 million collected in tariff revenues that year, only \$1.5 million (or 14%) was paid directly to Canadian creators.** Clearly, there are more effective methods to support authors and artists. They would be better supported with direct payments via government subsidies and grants, rather than paid with tax dollars redirected through the education budgets of ministries of education and school boards and processed through an inefficient and expensive tariff regime.

Amending the *Copyright Act* and making tariffs mandatory are ineffective ways to support authors, artists, and Canadian cultural industries

There is a disconnect between the fact that provincial and territorial education ministries are maintaining and, in some cases, increasing dollars spent on classroom resources and the claims of creators and cultural industries that their income is decreasing. As has been revealed in testimony before the Industry Committee, the Canadian publishers' claims of economic hardship are not supported by Statistics Canada figures for the publishing sector or author/writer sectors. Data produced by Statistics Canada show that elementary and secondary education sector spending with Canadian publishers has increased since the Supreme Court decision of 2012. Similar data show that, since 2011, the average income of authors and writers over five years has increased. Therefore, publishers and creators have not been negatively impacted by the Canadian education sector's use of fair dealing in the aftermath of the 2012 Supreme Court decision. This Statistics Canada data is reliable evidence that the current structure of copyright regulations continues to be appropriately balanced.

The Consortium maintains the *Copyright Act* should not be used as a tool to subsidize an industry interest

Access Copyright, Canadian publishers, and the Writers' Union of Canada seek to narrow or limit the ability of teachers to copy short excerpts for students in their classes. They also ask MPs to establish mandatory payments to copyright collectives whose product, in the case of Access Copyright, is being used by teachers less and less. From the Consortium's ministers' perspective, neither request is appropriate.

Canadian courts have not completed their work on fair dealing

The education sector's use of the fair dealing provision is a pivotal point in numerous legal challenges, including a pending Federal Court of Appeal case *Access Copyright v. York University*. Provincial and territorial governments are spending large numbers of dollars as a result of Access Copyright's continued court challenges and proceedings at the Copyright Board.

Clearly, Canadian courts have not completed their work on educators' use of fair dealing. With fair dealing still before Canadian courts, education ministers do not wish, nor expect, the federal parliament to legislate amendments to the fair dealing provision or to make tariffs mandatory. This would preempt the ongoing work of the courts.

Conclusion

The Consortium does not consider it good public policy to disrupt the established copyright balance in the *Copyright Act*, or to establish a mandatory Access Copyright tariff with the objective of subsidizing the authors, artists, or the publishing industry. There are more effective and efficient ways to ensure vibrant, successful creative industries in Canada.

Education Ministers' Policy Statement on Fair Dealing

Ministers of education strongly support copyright

The ministers of education comprising the Council of Ministers of Education, Canada (CMEC) Copyright Consortium¹ believe that they play an important role in ensuring that educators comply with copyright law. As responsible stewards of copyright, ministers actively promote compliance with fair dealing in schools.

Current copyright law strikes a good balance between the needs of Canadian students and the publishing sector

Five years ago, the federal government changed the *Copyright Act* to include “education” as a stated purpose in the “fair dealing” provision of the act. This approach gives students access to a wide range of material they need to obtain 21st-century learning outcomes. Education ministers view the current *Copyright Act* as good public policy that achieves an important balance between user rights and creator rights.

The *Fair Dealing Guidelines* were developed to ensure that teachers know how to apply fair dealing in the classroom

The Supreme Court of Canada has ruled that it is fair for teachers to communicate or make copies of “short excerpts” from a copyright-protected work for students in their classes without having to purchase a copy of the entire work for each student in a class. This decision recognizes that students benefit when teachers can use short excerpts for educational purposes, such as one article from a newspaper. When longer excerpts are used, such as more than a single chapter of a book, schools pay a fee or a copyright tariff.

The consortium developed the *Fair Dealing Guidelines* to help teachers understand the Supreme Court of Canada’s interpretation of how fair dealing applies in the classroom. It also developed an on-line tool—www.CopyrightDecisionTool.ca—that allows teachers to quickly see how fair dealing applies. The *Fair Dealing Guidelines* ensure consistent application of the Supreme Court decision and are relied on in schools, school boards, and ministries/departments of education across Canada (outside of Quebec) to determine whether particular dealings with copyright-protected works for others are “fair” or “unfair.”

The *Fair Dealing Guidelines* respect the rights of authors and publishers

Fair dealing does not mean that an educator can make unlimited use of any copyright-protected work without permission or payment. Fair dealing only permits the use of “short excerpts” for educational purposes. The *Fair Dealing Guidelines* describe “short excerpts.”

Canadian copyright law is aligned with copyright law around the world

The current *Copyright Act* and the *Fair Dealing Guidelines* place Canadian students on a level playing field with students in other countries. For example, copying up to 10 per cent of a work or a single chapter of a book is considered to be fair dealing in other countries, including the United States.

¹ The CMEC Copyright Consortium is composed of the ministers of education of the provinces and territories, with the exception of Quebec.

Canadian students and creators can compete with the best in the world

Ministers want to ensure that Canadian students are able to access the very best educational content available. They believe that we have the capacity in Canada to compete on an international stage as well as to develop high-quality materials specifically focused on Canada.

The challenge for developers and publishers of Canadian content is to stay current with advancing technology and new ideas about teaching and learning

The way textbooks and other resources are used in the classroom is very different from what it was even five years ago. Many factors have affected textbook sales, including the adoption of semester teaching, declining enrolment in some areas, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, increasing use of open access resources, the huge transition from print to digital learning resources, new media players like Google and Apple, more resource-based learning, and the development of Open Textbooks, as they have in Ontario.

The current *Copyright Act* works to support Canadian students without harming the publishing industry

Statistics Canada reported that the publishing industry in Canada showed an operating profit margin of 11.7 per cent in 2014. Promoting a continued, vibrant publishing industry in Canada does not require a change to the fair dealing provisions that have been developed by the Supreme Court of Canada and Parliament.



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