



Professional Photographers of Canada
Photographes professionnels du Canada

June 27, 2018

Submitted via email (indu@parl.gc.ca)

To: Standing Committee on Industry, Science and Technology (the “Committee”)

Re: Brief Submitted on Behalf of the Canadian Association of Professional Image Creators (CAPIC) and the Professional Photographers of Canada (PPOC) for Statutory Review of the *Copyright Act*

Dear Committee:

This brief is being submitted on behalf of the Canadian Association of Professional Image Creators (CAPIC) and the Professional Photographers of Canada (PPOC) as part of the Committee’s statutory review of the *Copyright Act* (the “Act”).

CAPIC and the PPOC greatly appreciate the opportunity to provide this submission. Given their unique role in representing image creators, who rely on copyright for their livelihoods, it is vital that CAPIC and the PPOC are invited to contribute to this process and future reviews and initiatives so that the voices of their members – and all image creators – are heard. As evidenced by the amendment to the *Act* in 2012 reversing the discriminatory presumption that clients owned commissioned photographs, your work has a profound impact on Canadian image creators.

1. The Expansion of Fair Dealing to Education

The addition of “education” as a fair dealing exception in 2012¹ has resulted in most Canadian universities, colleges and school boards outside Quebec adopting guidelines setting out their interpretation of what can be copied without compensating Access Copyright, which has had a devastating impact on Access Copyright royalties.² Many Canadian visual artists receive royalties from Access Copyright and they have seen significant declines in this important revenue stream. In 2012, Access Copyright distributed more than \$30 million in royalties to publishers and creators (excluding a special dividend) while in 2017, its royalty distribution was less than \$7 million.³

¹ R.S.C., 1985, c. C-42, Section 29.

² <http://www.accesscopyright.ca/media/news/the-cbc-on-impact-of-fair-dealing-in-education/>;
<http://www.accesscopyright.ca/media/bulletins/impacts-of-the-education-sector%E2%80%99s-interpretation-of-fair-dealing/>

³ http://www.accesscopyright.ca/media/35847/2012_annual_report.pdf (page 8);
http://www.accesscopyright.ca/media/115217/access_2017ar.pdf (page 7).



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In addition to the steep decline in Access Copyright revenues, the expansion of fair dealing to education has created a landscape in which educational institutions have attempted to justify the use of any content as educational (and qualify as fair dealing) even where the use of the content itself does not satisfy an educational purpose.

Fair dealing cannot be examined in a legal vacuum. Image creators are confronted with severe challenges in monetizing and licensing images in the digital environment where images are copied and reproduced through “right-clicking, saving and posting” from search engines without any regard to copyright. The expansion of fair dealing to include education has further eroded the ability for image creators to earn their livelihoods and contribute to the Canadian economy.

2. Establishing a Small Claims Track for Copyright Claims

In the global digital environment, CAPIC and PPOC members need to monitor the use of their images in Canada and around the world. Through this monitoring, image creators have discovered that many unauthorized uses of their work involve the use of a single image found on a search engine, downloaded and posted on a commercial website. Unfortunately, because of prohibitive legal costs, it is generally impractical for CAPIC or PPOC members to enforce their rights in Canadian courts.

In 2015, the average cost of a two-day civil trial in Canada exceeded \$30,000, making it unfeasible to pursue a claim where the total damages at stake may not exceed \$5,000.⁴ However, rightsholders cannot ignore these claims or it will appear that they are not serious about protecting their rights. This leaves creators in the unenviable position of having to choose between incurring substantial fees and potentially losing money – even in cases of clear-cut commercial infringement – or doing nothing while their work is used for profit without any payment. As noted in a recent study, “[i]f creators and authors recognize that enforcing their copyright claims in court is an unworkable prospect (i.e., for cost reasons), copyright law’s ability to induce creative expression begins to automatically diminish.”⁵

For these reasons, CAPIC and the PPOC recommend that the Committee examine pending bipartisan legislation in the United States to create a Copyright Small Claims Court entitled the *Copyright Alternative in Small-Claims Enforcement Act of 2017* (the CASE Act), H.R. 3945,⁶

⁴ <http://www.canadianlawyermag.com/author/michael-mckiernan/the-going-rate-2913/>

⁵ *Copyright Infringement Markets*, by Shyamkrishna Balganes, 113 COLUM. L. REV. at 4 (2013).

⁶ The full text of the proposed bill can be found at <https://www.congress.gov/bill/115th-congress/house-bill/3945/text> and a summary of the bill can be found at <https://petapixel.com/2017/10/05/house-bill-introduced->



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which proposes an expedited process with damages capped at \$15,000 per work and \$30,000 in total. The U.S. legislation is consistent with the recently established Intellectual Property Enterprise Court (“IPEC”) small claims track (“SCT”) in the United Kingdom that limits damages to £10,000.⁷ A recent study concluded that “overwhelmingly, the [UK’s] SCT serves the needs of especially small plaintiffs suing to enforce rights in their own creations against defendants engaged in easy-to-prove infringing acts that would not have been worth pursuing before the SCT’s creation.”⁸

Establishing a similar process in Canada would provide an effective and realistic alternative for many copyright infringement claims. It would encourage unauthorized users of images to resolve claims by making it a realistic possibility that the creator will assert an action instead of ignoring the claim. It will also help defendants to avoid incurring unnecessarily high legal costs in defending a claim. This process could be administered by the Copyright Board, which has the required expertise and this mandate would be consistent with our Senate’s recommendation to increase resources made available to the Board.⁹ We understand the complexity involved in establishing such a process, which is why we need to start moving so that it is feasible for more Canadian rightsholders to enforce their rights under the *Act*.

3. Extend the Term of Copyright for All Works to Life plus 70 Years

The recent extension of copyright in sound recordings from 50 to 70 years after the release date of the recording should be extended to all works protected by copyright so that our copyright term is consistent with the EU and the United States to ensure that Canadian creators receive the same copyright protection as their counterparts.

Under the *Berne Convention for the Protection of Literary and Artistic Works* (the “Berne Convention”), to which Canada is a signatory, countries that prescribe a life plus 70-year term of copyright are only required to protect Canadian copyrights for a life plus 50-year term based on the principle of national treatment.¹⁰ This creates an unfair situation for Canadian copyright owners as Canada is required to protect the rights of non-Canadian copyright owners when Canadian creators no longer receive protection in those countries. Canadian creators are therefore at a disadvantage with their competitors who can earn revenues from their works for

[copyright-small-claims/](https://www.dpreview.com/news/0573574685/congress-is-considering-a-copyright-small-claims-bill-you-should-know-about) and <https://www.dpreview.com/news/0573574685/congress-is-considering-a-copyright-small-claims-bill-you-should-know-about>.

⁷ <https://www.gov.uk/defend-your-intellectual-property/take-legal-action>

⁸ *Who Needs a Copyright Small Claims Court? Evidence from the U.K.’s IP Enterprise Court*, by Christian Helmers et al, Santa Clara University School of Law, Legal Studies Research Papers Series No 2018-01 (abstract and downloadable copy can be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104940).

⁹ https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf

¹⁰ Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).



longer time periods in Canada and throughout the world. This unbalanced playing field can be leveled by extending the term of copyright for all works.

Harmonizing the term of copyright with the EU and the United States will also reduce costs associated with having to manage intellectual property rights that expire at different times. By not having the same term of copyright as our primary trading partners, we are also sending a message to Canadian creators that we do not value their work as greatly as other countries. The current life plus 50-year term of copyright should be extended by an additional 20 years for all works so that Canadian image creators are no longer at an unnecessary disadvantage to their international colleagues and competitors.

4. Increase Maximum Statutory Damages Available under Section 38.1(a)

Under Section 38.1(a) of the *Act*, rightsholders are entitled to maximum statutory damages of \$20,000 per work when the infringement is for commercial purposes.¹¹ This limit, which has remained unchanged for many years, needs to be increased to deter egregious bad faith conduct by commercial infringers.

It is difficult to measure actual damages in many copyright infringement cases, which is why rightsholders will often elect to claim statutory damages. This is particularly true in cases where the defendant in a commercial infringement case has acted in bad faith. The outdated limit of \$20,000 is not proportionate to the kind of malicious conduct that warrants a significant statutory damages award. This is especially true when viewed in comparison with remedies available in the United States where rightsholders can recover up to US\$150,000 per infringed work in cases of willful copyright infringement – approximately 10 times the maximum recovery in Canada.¹²

Without a stronger deterrent and disincentive against copyright infringement, having such a low limit tells creators that their work is not highly valued and it indirectly sends a message to willful infringers that they will not face significant penalties even if they engage in bad faith conduct. Raising the maximum statutory damages to at least \$50,000 would provide a true deterrence for “bad actor” commercial infringers who should face more severe consequences for their conduct.

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¹¹ R.S.C., 1985, c. C-42, Section 38.1(a).

¹² 17 U.S.C. §504(c)(2) (see <https://www.law.cornell.edu/uscode/text/17/504>); as of June 20, 2018, US \$150,000 converts to CAD \$199,515 (see <https://www.bankofcanada.ca/rates/exchange/currency-converter/>).



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CAPIC and the PPOC understand that the Committee's mandate is limited to the statutory review of the *Act*, but we urge the Committee to view its work through the lens of the thousands of Canadians who earn their revenue through creating images, the majority of whom are small business owners and sole proprietors. Without professional image creators, the digital landscape would lack the vibrant content that educates and enriches our unique culture. Image creators provide the window for Canadians and the world to see our stunning country as they are the visual chroniclers of our culture and history. Strong legal support for image creators will help ensure that our members can sustain their livelihoods and contribute to the economy by employing Canadians.

It is vital that this Committee view any changes to the *Act* from the perspective of Canadian image creators to help address the significant challenges confronting them in the digital environment where people are increasingly communicating through images. This not only involves having robust copyright laws, but also educating the public on respecting copyright and the economic importance of our creative industries.

About CAPIC and the PPOC

Formed in 1978, CAPIC is a Canadian association of professional image creators (photographers, illustrators and digital artists) working in the field of visual communications. CAPIC is dedicated to maintaining fair and equitable industry standards and acting as a strong advocate for economic growth and copyright protection on behalf of all image creators. CAPIC has six chapters across Canada with its main office in Toronto.

The PPOC represents Canadian professional photographers as an advocate to address relevant legal issues and legislation and to elevate and maintain professional standards and ethics for all professional photographers. The PPOC offers a wide range of services to its members, including accreditation, education and legal resources. The precursor organization to the PPOC was originally formed in 1946.

In 2001, CAPIC and the PPOC worked together through the Canadian Photographers Coalition (CPC) to amend the *Act* in 2012.



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Summary of Submissions

CAPIC and the PPOC respectfully request that the Committee recommend the following:

1. Remove “education” as an enumerated purpose of fair dealing under Section 29 of the *Act*.
2. Investigate establishing a small claims track for copyright claims based on adjudicative processes already established or pending in the United Kingdom and the United States.
3. Extend the term of copyright to life plus 70 years to all works protected under the *Act*.
4. Increase the maximum statutory damages available to rightsholders to at least \$50,000 under Section 38.1(a) of the *Act* for commercial copyright infringements.

Respectfully submitted,

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