

Statutory Review of the *Copyright Act*
Submission to the Standing Committee on Industry, Science and Technology
Prepared by the Association of Canadian Publishers
July 2018

Introduction

The Association of Canadian Publishers (ACP) represents 115 independent English-language book publishing firms. Our members are Canadian-owned and operate in communities across Canada. Along with our francophone counterparts, we publish 80% of the new books published by Canadian writers each year. These books cross all genres in both print and digital formats. Almost all firms who belong to ACP supply content to the educational market.

Copyright is a key pillar of the creative economy and an essential policy tool. It upholds the intellectual property rights of publishers and creators, while allowing all Canadians ready access to the content they rely on for work, entertainment, and education. As creative partners in new works, independent publishers invest financial and human resources in thousands of new books each year. Some are purpose-built educational texts that address provincial curricula or post-secondary course material, while others are trade, scholarly, children's, and literary works that are included on reading lists or copied and distributed for instructional use. A functioning marketplace supports the continued creation of these valuable works; a broken marketplace undercuts the cultural, artistic, educational, and economic contributions of this vibrant sector.

We recognize that the way students and educators access and consume content continues to evolve in a digital environment, and Canadian publishers respond with a variety of print and digital formats. Print books and paper copies are still widely used in schools and on campuses, as are digital copies of both print and digital books. In aggregate, Canadian K-12 and post-secondary institutions copy 600 million pages annually without payment. This copying provides educators and students with flexible, valuable resources that support curriculum delivery and propel academic achievement, often serving as a substitute for finished books—with no compensation to copyright holders. This arbitrary appropriation has broken our marketplace. Publishers cannot continue to produce educational materials for free.

Summary of ACP recommendations

1. Clarify fair dealing for education
2. Promote a return to licensing through collective societies
3. Increase the limit on statutory damages
4. Ensure Canada's international treaty obligations are met
5. Promote the operation of an effective Copyright Board

Recommendation #1: Clarify fair dealing for education

“Education” was not defined when it was added as a purpose for fair dealing under the *Copyright Modernization Act*. In response, the education sector unilaterally adopted unfair copying guidelines in late 2012 and early 2013, and ceased paying licensing fees to rightsholders. The resulting estimated loss of licensing royalties to Canadian creators and publishers is \$30 million per year.¹ The loss of this licensing revenue has had a greater impact than would an equivalent loss of sales of finished books. Ten million dollars in lost book sales is the equivalent of approximately \$1 million in lost profit. Because licensing revenue is received by publishers net of all expenses, \$10 million in lost licensing revenue is \$10 million in profits lost to authors and publishers. Lost licensing revenue is exacerbated by an unknown loss of primary book sales.

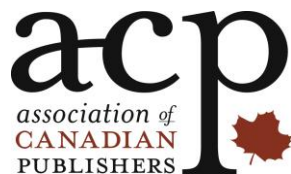
The Act's ambiguity has led to litigation. In *Access Copyright v. York University*, the Federal Court of Canada (FCC) scrutinized the education sector's copying policies and practices, assessing those guidelines against the six-step test for fair dealing established by the Supreme Court of Canada (SCC) and taking into account users' rights. Where the *Copyright Act* is vague on the subject of fair dealing, the FCC's findings are clear and unequivocal: York's copying guidelines, which mirror those adopted by other institutions and schools, are unfair in both their terms and in their application, and tariffs set by the Copyright Board are mandatory.²

Despite the FCC's clear direction, litigation continues. York is appealing the FCC decision, and provincial governments and school boards outside of Quebec are suing Access Copyright. We emphasize that the education sector's copyright training for students and instructors is based on policies and procedures that have been found by the FCC to be outside the law.

The education sector continues to point to *Alberta (Education) v. Access Copyright* as having removed its obligation to pay for educational copying. They fail to acknowledge, however, that the case examined only the copying of “short excerpts” of textbooks, not the widespread and systemic copying that has

¹ PwC, [Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines](#), June 2015, p. 58.

² *The Canadian Copyright Licensing Agency (“Access Copyright”) v. York University*, Federal Court of Canada, 2017.



taken hold since 2012. The wholesale application of SCC decisions to justify system-wide, coordinated copying without remuneration, and the education sector’s belief that they can “opt out” of Copyright Board tariffs, remain points of deep concern for independent Canadian publishers, for whom ongoing litigation is unsustainable.

In the absence of a collective licence or tariff, “bright line” limits for fair dealing—such as 10% of a work—do not work. The bright line limits, unilaterally set by the education sector’s copying policies, do not take into account the purpose or impact of copying, and in fact systematize uncompensated copying.

Clarification around fair dealing for education is urgently needed, either in the form of amendments to section 29 of the *Copyright Act*, or through the introduction of regulatory language. In establishing whether a use is fair, factors including commercial availability and market damage must be considered, and international models could be emulated. For example, the United Kingdom, Australia, and Nordic countries allow for fair dealing, but in a context that ensures creators and publishers are compensated.

Recommendation #2: Promote a return to licensing through collective societies

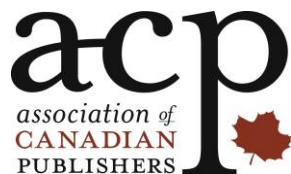
Collective licensing remains the most effective means of ensuring that students and educational institutions can easily and inexpensively access the published materials they need while providing creators and publishers with fair remuneration for use of these works. Collective licensing regimes continue to operate effectively in dozens of countries around the world. These include countries with fair dealing provisions, such as Australia, which has recently provided the Standing Committee with a useful submission on how statutory collective licensing complements fair dealing there.³ The World Intellectual Property Organization (WIPO) views collective licensing organizations as essential infrastructure for ensuring both access and compensation.⁴

The repertoires of Access Copyright and Copibec bring students and educational institutions legal and convenient access to millions of titles from Canada and around the world, at predictable and affordable prices. In the context of rising Canadian educational expenditures, collective licensing offers incredible value to the education sector, while ensuring creators and publishers are paid for use of their work.

Now that Copibec and Laval University have reached agreement on their litigation regarding collective licensing, the entire education sector in Quebec has agreed to collective licences. In the rest of Canada,

³ Australian Copyright Council, Australian Publishers Association, Australian Society of Authors, and Copyright Agency, “[Australian Copyright Law Overview](#),” May 2018.

⁴ See, for example, WIPO’s [An Introduction to the Economics of Collective Management of Copyright and Related Rights](#) (2016), by Dr. Richard Watt.



the education community has abandoned collective licences through Access Copyright on the pretext that they are no longer needed, while continuing to copy large amounts of copyright-protected materials for instructional use. At the same time, the education sector has spent millions on in-house copyright offices and training that promote the use of copying policies found by the FCC to be unfair.

The education sector defends its copying policies by pointing to money spent on research materials, which are often heavily weighted to international journals. This spending does not entitle them to copy instructional and literary materials in large quantities for classroom use without compensation. Paying for some things does not entitle a copyright user to everything.

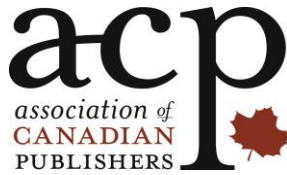
We stress that collective licensing does not oblige schools and institutions to pay twice for works they have already acquired through direct purchasing or licensing for their libraries, nor does it require payment for uses allowed under fair dealing. Negotiated licences and Copyright Board tariffs take those issues into account before setting a rate.

ACP would welcome legislative or regulatory change around fair dealing and collective licensing, but in the short-term we believe that leadership on the part of the education sector could bring Canadian educational institutions back under licence. The creative sector repeatedly invites them to resume negotiations.

The federal government provides significant funding to the post-secondary education sector each year, and has influence and tools short of legislation that could encourage a return to collective licensing. For example, when a book publisher applies for government funding, it typically must verify that it regularly pays royalties to authors. In the same manner, those government departments that provide funding to the education sector could require as a condition of funding that universities and colleges verify that they have obtained the appropriate collective licences and are in compliance with Canadian law. This active approach to the government's stated commitment to copyright and fair remuneration for creators would ensure that recipients of public funds operate within Canadian law. It would also demonstrate leadership to provincial ministers of education and higher education.

Recommendation #3: Increase the limit on statutory damages

The *Copyright Modernization Act* reduced statutory damages for infringement for non-commercial use to \$5,000 per instance of infringement [section 38.1(1)]. This low penalty has compounded the problems stemming from the Act's poorly defined fair dealing provisions, and it has encouraged infringement. Educational institutions do not see this penalty as a risk, and have no incentive to negotiate licences or conform to tariffs set by the Copyright Board. For publishers, the legal fees required to assert their rights



exceed the damages they are likely to collect. ACP recommends that the limit be raised to a level that will discourage infringement.

Recommendation #4: Ensure Canada meets its international treaty obligations

Canada's *Copyright Act* and the SCC's interpretation of fair dealing are widely viewed as inconsistent with international treaty obligations, including the Berne Convention, the TRIPs Agreement, and the WIPO Copyright Treaty.⁵ These inconsistencies have damaged Canada's reputation internationally and have been highlighted by foreign governments as impediments to trade. In general, the law positions Canada as a copyright user seeking to extract value from protected works, rather than as a country with both a robust copyright-creating sector and active users who benefit from that creation. We urge the government to ensure conflicts between Canada's copyright regime and international law are resolved.

Recommendation #5: Promote the operation of an effective Copyright Board

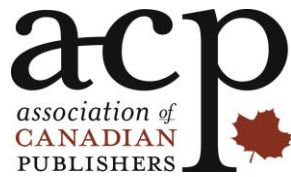
In July 2017, the federal government announced its intention to reform the Copyright Board. Though beyond the scope of this review, ACP refers committee members to our brief on Board reform.⁶ In summary, ACP believes that the Board plays an important role in ensuring creators and publishers are remunerated for use of their work when licences cannot be reached through negotiation. However, uncertainty surrounding Board proceedings and lack of participation on the part of the education sector have made it difficult for rightsholders to predict and collect payment for the institutional copying of their work. This damages publishers' businesses and the livelihoods of their authors. For these reasons, the Board's procedures and authority should be refined.

The Board's inability to enforce decisions and the inconsistency of the remedies offered to collective societies by section 38.1(4) of the *Copyright Act* also put independent publishers in an unsustainable position. Harmonizing the remedies for collective societies under the Act would level the playing field among Canada's creative industries and encourage respect for Board tariffs.⁷

⁵ See "Conflict of the Canadian legislation and the case law on fair dealing for educational purposes with the international norms, in particular with the three-step test," by Hungarian legal scholar Mihály J. Ficsor for an overview and analysis of the current Canadian copyright regime in the context of international law.

⁶ See "[A Consultation on Options for Reform to the Copyright Board of Canada](#)," Association of Canadian Publishers, September 2017.

⁷ Access Copyright and Copibec fall under the Copyright Board's general tariff regime, while other collective societies, like SOCAN and Re:Sound fall under the mandatory regime. Failure to pay tariffs under the general regime results in a maximum penalty equal to 1X the value of the tariff, while the mandatory regime provides for a penalty of 3X-10X the tariff. In other words, the penalty for failure to pay a tariff for educational copying is the same as the tariff itself, which offers no incentive for educational institutions to pay.



Conclusion

As Canadian publishers, we take pride when our works are adopted for courses or shared with students in Canadian schools. We publish so that our works will be read and appreciated. But unless we earn enough from the sale or licensing of that content to reinvest in new works and pay royalties to authors, we cannot continue to do this important work.

Since 2012, the *Copyright Act* has contributed to an unsustainable business environment for publishers, and it has left a previously functioning marketplace broken. The damage to our industry has been documented, the copying policies and practices of the education sector have been found by the FCC to be illegal, and the ACP and other rightsholder groups have repeatedly recommended possible remedies to this impasse. If the Government of Canada does not intend harm to the publishing industry, it must work swiftly to end and reverse this damage.

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