

Council of Ministers of Education, Canada (CMEC) Copyright Consortium
Submission to the Standing Committee of Industry regarding
the Parliamentary review of the *Copyright Act*

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.

The Consortium recommends that:

- 1) no changes should be made to fair dealing for education, and**
- 2) Access Copyright tariffs for K–12 schools should not be made mandatory.**

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.

As responsible stewards of copyright within elementary and secondary schools, the Consortium has been actively engaged in federal copyright reform since the 1990s. It has been active in the advance of copyright legislation to ensure the rights of teachers and students are appropriately considered in the reform of the copyright law. The Consortium has implemented comprehensive copyright education programs for teachers and principals on copyright. Considerable resources are committed to these programs through at least 2021.

As a result of ministries’ copyright education programs, there is greater understanding of copyright law and greater compliance by teachers across Canada. The Consortium can report to federal members of parliament that teachers respect copyright and that respect is taught to students. Teachers are responsible professionals who serve as an example for their students when it comes to respectful use of copyright-protected works in their classrooms.

Fair dealing and education

The Consortium views fair dealing for educational purposes as good public policy that supports learning, fosters research, and drives knowledge creation and an innovative economy. Fair dealing for educational purposes provides teachers with reasonable access to short excerpts from a range of diversified learning materials that support student learning. Fair dealing enriches Canadian students’ learning experiences. It provides the framework for Canadians to acquire the knowledge and skills needed to be globally competitive. As a result of the amendments to the *Copyright Act* and the Supreme Court decision interpreting how fair dealing applies in the classroom in 2012, Canadian teachers and students are now on a level playing field with those in many other countries.

The most significant event of 2012 for education and copyright was not the passage of the *Copyright Modernization Act*, but rather the Supreme Court decision finding that it is fair for teachers to copy “short excerpts” from copyright-protected works for students in their classes without having to ask for copyright permission or pay copyright royalties.

In 2004, the Supreme Court stated that fair dealing ought to be interpreted “broadly and liberally.” In 2012, the Supreme Court pronounced that it is fair dealing for teachers to copy short excerpts for students in their classes. This Supreme Court decision was a result of a lengthy legal process between a copyright collective, Access Copyright, and the ministers of education. It is a landmark decision for education.

The 2012 Supreme Court decision prompted the ministers and other national education associations to establish the *Fair Dealing Guidelines*, a set of responsible guidelines that outline limited and reasonable access to copyright-protected works for teachers and students. The *Fair Dealing Guidelines* are used as an institutional policy by schools, school boards, and ministries/departments of education to guide classroom teachers in their interpretation of fair dealing.

The *Fair Dealing Guidelines* describe the uses of copyright-protected works that, in the opinion of legal counsel, are permitted under fair dealing. It is important to note that the guidelines describe a safe harbour, not absolute limits. Copying or communicating a copyright-protected work within the prescribed limits will, according to the advice of legal counsel, almost certainly be fair. Copying or communicating beyond those limits may, or may not, be fair. Fair dealing does not mean that a teacher can make unlimited use of any copyright-protected work without permission or payment. Rather, fair dealing permits the teachers to use short excerpts for educational purposes.

The *Fair Dealing Guidelines* represent a practical approach to implementing the 2012 changes to the copyright law. From the education ministers’ position, the *Fair Dealing Guidelines* were necessary to articulate in plain language the Supreme Court decision permitting the copying of short excerpts. There are over 300,000 teachers in elementary and secondary schools across Canada. Without the *Fair Dealing Guidelines*, individual teachers would reach widely varying conclusions as to what is and is not fair dealing. One teacher, for example, could consider 5% of a work to be fair while another could set their threshold at 25%. Therefore the guidelines are necessary to avoid different and conflicting interpretations as to what teachers are permitted to copy under fair dealing.

The Industry Committee has heard from many stakeholders about the disagreement between educators, Access Copyright and publishers on what is permitted by fair dealing. The *Fair Dealing Guidelines* have been at the centre of numerous legal challenges at the Copyright Board, the Federal Court and the Federal Court of Appeal since they were adopted in January 2013.

When Consortium Chair the Honourable Zach Churchill appeared before the Industry Committee on May 22, 2018, he described how publishers and Access Copyright have mischaracterized the fair dealing and education issue as a legislative loophole created by MPs in 2012. In fact, the current balance found within the *Copyright Act* is an end result of almost a decade of jurisprudence that was ultimately decided by the Supreme Court of Canada. The Association of Canadian Publishers, the Writers' Union of Canada, and Access Copyright are asking MPs 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.

MPs will have seen the Education Ministers' Policy Statement on Fair Dealing (attached). With respect to the MPs' review of copyright, the Consortium ministers' parting statement on this matter is: *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.*

Mandatory tariffs

Education ministries, on behalf of their provincial and territorial governments, are continually engaged in a Copyright Board of Canada process to determine fair and reasonable tariff fees for use of copyright-protected works in schools. Education ministries, Ontario school boards representing the K–12 education sector together with the collective Access Copyright participate in proceedings before the Copyright Board to set the rate to be paid in the form of a tariff to Access Copyright.

Access Copyright has continually challenged the education sector's *Fair Dealing Guidelines* at the Copyright Board, the Federal Court and the Federal Court of Appeal. In each case, with one exception—the Federal Court's York decision—the court has found the copying limits in the guidelines to be reasonable. Access Copyright, publishers, and creators groups wish to use the York decision as the defining decision. However, on many legal points, the York decision is inconsistent with the 2004 Supreme Court's interpretation of fair dealing as well as with the 2012 *Alberta* decision. Not surprisingly, this decision is now being appealed. The Consortium has been granted leave to intervene in the appeal.

In the legal challenges since 2012, the Copyright Board determined that 97.2% of copying from books, 98.1% of copying from newspapers, and 98.5% of copying from periodicals qualified as "fair" under its fair dealing analysis. The Board's fair dealing findings were confirmed by the Federal Court of Appeal. Virtually all teachers' copying of books, in the large sample reviewed by the Board, was found to be "fair" and did not require an Access Copyright license. Also, in this decision, the Copyright Board found that copying one to two pages from a book is insubstantial and does not require a fair dealing analysis.

In arguing for an amendment to the *Copyright Act* to make tariffs mandatory, Access Copyright, publishers, and writers' groups have claimed that the education sector is no longer supporting Canadian publishers and writers. Yet, as MPs heard from many stakeholders testifying before the Industry Committee, the education sector continues to pay millions of dollars for Canadian content each school year. It is incorrect to suggest the education sector is "saving money" because it is no longer paying the Access Copyright tariff. Ministries and school boards continue to purchase resources and to negotiate clearances for the use of copyrighted material.

However, the nature of the resources purchased to support student learning has evolved to reflect our greater understanding of effective teaching methods and to better address the diversity of student learning styles in the classroom. The textbook is no longer the sole resource for learning in the classroom, nor should it be.

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.

Given the wider range of information sources necessary for student learning today, the value of an Access Copyright license has diminished. What Access Copyright is offering is not what teachers are using in the classroom or what students want to read and learn from. In not entering into an Access Copyright license, the Consortium's ministers of education are affirming the rights of teachers and students—and taxpayers—in Canada. The ministers' primary concern is to provide students with an enriched learning environment. Ministers also have an important responsibility to Canadian taxpayers to ensure there is value in every dollar spent on education.

For these reasons, mandatory tariffs that would impose an Access Copyright tariff are not in the public interest. A mandatory tariff would be a tax on the school system that will take money away from the many new and preferred resources available to teachers 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 industries. In this specific case, a mandatory Access Copyright tariff would be a disservice to educators and to students who are looking for enriched materials beyond the textbook.

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

The courts have not completed their work on fair dealing. Governments (and taxpayers) are spending huge amounts of dollars as a result of Access Copyright's continued court challenges and their proceedings at the Copyright Board. Education ministers do not wish, nor expect, the

federal parliament to legislate an amendment to the *Copyright Act* that is being argued in Canadian courts. The Consortium trusts MPs will permit the courts to complete their work on fair dealing before any new legislation is recommended.

Mandatory tariffs would be a very inefficient way to support Canadian publishers and authors. There are more effective methods to support them. Publishers and authors 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.

As the Education Ministers' Policy Statement on Fair Dealing states, Canada's *Copyright Act* should not be used as a tool to subsidize the publishing industry or authors. Access Copyright, publishers, and writers' groups, in effect, are asking MPs for a legislative fix for the legal arguments they did not win in the Supreme Court. They seek to narrow or limit the users' rights of educators and/or set new mandatory licenses. From the Consortium's ministers' perspective, neither request is appropriate.

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.



cmec

Council of
Ministers
of Education,
Canada

Conseil des
ministres
de l'Éducation
(Canada)