CANADIAN COPYRIGHT INSTITUTE

SUBMISSION TO THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY FOR THE STATUTORY REVIEW OF THE COPYRIGHT ACT

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INTRODUCTION

The Canadian Copyright Institute is an association of creators, producers, publishers and distributors of copyright works. Founded in 1965, the Institute seeks to encourage a better understanding of the law of copyright. Members of CCI have made representation to various levels of government on changes to copyright law and the copyright landscape in Canada and have participated in international discussions including the Stockholm revision of the Berne Convention and more recently meetings of the World Intellectual Property Organization (WIPO).

This brief summarizes and expands on our appearance before your Committee on May 10, 2018.

Views on copyright in Canada have been in flux since 2012 changes to the law. We supported some of the changes, but our members were very worried about the inclusion of "education" as a "fair dealing" purpose. Lobbyists for the educational sector assured Parliamentarians that inclusion of education as a category of fair dealing would have no effect on payment to creators and publishers. However, there has been considerable reduction of income to the creative sector and debate about the extent of damage to the market for selling and licensing copyright material, and any reduction of revenues in an industry such as ours with narrow profit margins for publishers and low income for most writers and artists is significant. Educators claim that they spend more than ever on published materials without acknowledging that they spend less than previously on Canadian publications and more on foreign publications, notably journals. Damage to Canadian publishing is apparently invisible to them.

What is happening in educational institutions is large-scale systematic copying of copyright content, without any compensation to the rightsholders, as a substitute for purchasing books and other publications and for obtaining licences to copy excerpts from publications, including textbooks and other material produced specifically for use by educators. It is important to remember that getting permission to make copies of copyright content was onerous prior to the existence of Access Copyright, originally called CanCopy, a copyright collective society that today represents more than 12,000 Canadian authors and 600 publishers and, through agreements with other collectives, represents countless authors and publisher rightsholders worldwide. Before there were Access Copyright licences, some educators conscientiously cleared copyright for copied excerpts that they distributed to students – but most didn't bother. Those who did had to contact publishers and other rightsholders individually. When Access Copyright's "blanket

licences" became available in the 1990s, this arduous task was eliminated and individual permissions were replaced by negotiated collective licences covering most published copyright material. Educators told Access Copyright that they did not want to keep detailed records of what they actually copied, so sampling and other methods of determining what was copied were devised to facilitate payment to rightsholders. Collective licensing became the norm and, at its highest, the annual fee per student was $27. It was easy, efficient and cheap for educators to access content from both Canadian and foreign publications, and rightsholders were paid.

But about 20 years after their adoption of collective licensing, educational institutions decided arbitrarily, emboldened by the 2012 amendment extending fair dealing to include education as a purpose, that most of what they were copying should not be paid for at all. They promulgated arbitrary "fair dealing guidelines" (for example, 10% of a work. a chapter from a book, an article from a periodical or newspaper, or an entire poem or artistic work from a publication containing other works) that are not, in our view, "fair". Their guidelines more or less reflect guidelines in Access Copyright licences that educators had agreed with Access Copyright and complied with for many years. Whether copying is fair depends on an assessment of various contextual factors, according to a 2004 Supreme Court of Canada decision, and not on arbitrary, administratively convenient percentages of works. The Federal Court's 2017 decision in Access Copyright's suit against York University (under appeal by York) upholds this position.

OUR RECOMMENDATIONS

1. First of all, we recommend that "education" as a category of fair dealing have parameters either in the Copyright Act or in regulations. These parameters must provide some latitude for personal copying by individuals, but not be so broad as to encourage large-scale systematic copying unless with a licence from a collective or, alternatively, a tariff determined by the Copyright Board. For example, fair dealing may apply when an individual student goes to the library to copy a short excerpt from a book, but not if the student is in a class that was told to do so by an instructor. Institutional copying of material should require payment – either to a collective society or an individual rightsholder.

Australia provides us with the example of a statutory licence for educational institutions. The United Kingdom provides an example where fair dealing or similar exceptions from copyright infringement for education are subject to restrictions, including a limitation on copying excerpts by an educational institution to not more than 5% of a work in any 12-month period for the "purpose of instruction" for a non-commercial purpose, but not if or to the extent that licenses are available for copying. The UK copyright act also shows how regulations can be used to elaborate on legislative provisions without new legislation.

2. Our second recommendation concerns a copyright owner's right to elect an award of statutory damages for infringement - avoiding the necessity of proving actual damages suffered and greatly reducing litigation costs for everyone. We urge repeal of a provision inserted into the

Copyright Act in 2012 that reduces awards of statutory damages against non-commercial infringers to trivial amounts: not less than $100 and not more than $5,000 for all infringements of all works involved in a proceeding. In addition to that low cap on statutory damages, the copyright owner and all other owners are barred from electing statutory damage awards against the same defendant for non-commercial infringements that occurred prior to commencement of the first lawsuit against that defendant. We think that any copyright owner whose work is infringed should be entitled to damages sufficiently high to be a deterrent, regardless of whether the infringer had a commercial or non-commercial purpose or whether any other copyright owner has elected to receive statutory damages from the same defendant. Few independent writers and publishers have the resources to engage in litigation if it is necessary to prove their actual damages, and doing so may in any case be difficult or impossible.

Another provision, new in 2012, caps any damage awards against educational institutions that make and telecommunicate digital copies of print publications of a work (though not digital publications) to the amount of royalties that would have been payable under a licence from a collective society covering either the work infringed (deemed covered if covered under a collective photocopying licence) or a work of the same category. However, yet another 2012 provision eliminates the possibility of statutory damages in this circumstance. If intended to encourage more copyright owners to affiliate with collectives, these provisions should be clarified – but otherwise, repealed.

Performing rights collectives, like SOCAN, may opt for an award of statutory damages between 3 and 10 times the amount of the applicable royalties. This seems to us an effective remedy and we see no reason why it is not available to all collectives including collectives like Access Copyright.

3. Our third recommendation is to extend the term of copyright to 70 years after the author's death – an extension which would have been required by the Trans-Pacific Partnership Agreement if the US had remained on board initially. People live longer than they did when 50 years was established as the appropriate period. The UK and all the other European Union countries protect copyright for 70 years following death. Canada is out of sync with the new norm being established. If there are concerns about difficulty in locating deceased rightsholders, we can look to improvements in the unlocatable copyright owner provision in the Copyright Act. As well as enabling an author to leave a legacy that may benefit grandchildren as well as children, an additional reason for the extension is that it is advantageous for a Canadian author to publish first in the United States or elsewhere outside Canada because some countries provide 70 years of protection following the author's death only on the basis of reciprocity.

4. Our fourth recommendation is to revise the definition of "publication" to recognize today's reality that some copyright owners publish their works only by telecommunication. If a book, journal or other publication has only been available online, its content are considered to never have been published! This is ridiculous, as well as problematic because of other provisions of the

Copyright Act. For example, a person who reads an extract from an "unpublished" work in public infringes copyright, and a library infringes copyright by providing year-old digital newspaper articles to library patrons for research or private study. The most unfortunate result may be that the Copyright Board is not entitled to license publication of a so-called "orphan work" if never published (that is, in print form), even after a diligent search for the unlocatable copyright owner by the potential publisher.

5. We affirm our support for the role of the Copyright Board in setting tariffs and mediating disputes on licensing terms – most important to us, between educational institutions and collective societies representing authors and publishers producing creative content for Canadian schools. However, we think that the effectiveness of the Board has been compromised, not just by lack of resources to expand the size of the Board and its staff. In order to realize the Board's objective to establish "fair and equitable royalties", the market relation between creators and consumers needs to be in balance. Because this balance has been badly disrupted, the work of the Board is more important than ever. There needs to be more incentive for the educational sector – both at the K-12 and post-secondary level – to negotiate seriously with collective societies about use of copyright materials. Educational institutions can simply delay licence negotiations or Board proceedings, knowing that their worst case scenario would be that they will have to pay the fees retroactively.

Launching the consultations on the reform of the Copyright Board, former Heritage Minister Joly said: "The Government of Canada recognizes the invaluable contribution of Canadian creators to our economy and society and is committed to ensuring fair remuneration for artists. Through these consultations, we seek concrete improvements to the Copyright Board that enable creators to efficiently access new, diverse and stable streams of revenue." We agree.

In our view, the Board's effectiveness requires improvement in at least three respects:

(i) The time for tariff decisions to be reached by the Board is far too long. The expiry of a licence before a tariff is set results in uncertainty and delayed payment that badly hurts rightsholders, particularly in an industry like ours where incomes are precarious. A requirement for case management in regulations could help.

(ii) Claims by the education community that tariffs established by the Board are "voluntary" are, in our view, absurd. If voluntary, then the education sector will, of course, not pay them. The Federal Court, in its decision in Access Copyright's suit against York University (now being appealed by York), determined that tariffs are indeed mandatory. This needs to be clarified in the Copyright Act.

(iii) Our second recommendation addresses the need for meaningful statutory damages to be available to all collective societies to ensure better compliance with tariffs and licences certified by the Board.

CONCLUSION

We urge your Committee to consider these recommendations. We believe that changes to the Copyright Act along the lines we recommend will help to provide both fair remuneration for creators and publishers and excellent access to creative works for users, will go a long way towards restoring a functioning marketplace for Canadian content, and will benefit all Canadians.