Visual Arts: Recommendations

1. Discrimination in the application of exhibition rights

1.1 Background

Since exhibitions rights were established in the Copyright Act in 1988, many visual artists have seen a significant increase in their revenues. The payment of royalties for the exhibition of their works for purposes other than sale or rental has gradually become the norm. The amounts they receive are increasing every year, although they are still insufficient.

Unfortunately, the date of June 8, 1988 mentioned in the act means that all works produced before then are not subject to exhibition rights, which is absurd. As a result, artists who are seniors and the heirs of deceased artists are excluded.

This date clearly results in indirect age-based discrimination since the works produced before June 8, 1988 are by older artists.

In our opinion, this limitation based on the date could be a violation of section 15 of the Charter.

This limitation does not intentionally or directly discriminate based on age, but in our view constitutes indirect discrimination. This seemingly neutral provision is disproportionately prejudicial to a specific group of visual artists owing to their age, a prohibited ground of discrimination.

Over time, this date is becoming increasingly arbitrary and further isolates older artists.

1.2 A few facts

Visual artists are older than the general population. A quick survey of our membership showed that the average age of our members is about 59 years and over, and that more than a third of our members were born before 1965 and likely created works of art before June 1988. As a result, a significant number of visual artists are deprived of a right for their older works of art, while young artists who created their works after than date can claim exhibition rights.

Older artists can always try to negotiate exhibition rights for those works, but they are usually unsuccessful since there is no legal basis. Note that certain distributors pay those rights voluntarily.

1.3 Our request

Remove the words "created after June 7, 1988" from subsection 3(1)(g) of the Act.

2. Fair Dealing and Education

2.1 Background

Prior to its amendment in 2012, the Copyright Act already gave schools and universities access to all artistic, literary, and musical works, often by establishing collective licenses with management companies representing artistic creators. Educational bodies and institutions therefore already had ready access to works at a modest price.

An incredibly vague concept that is nonetheless exceedingly broad in scope, the education exception in section 29 of the Copyright Act has had a huge impact since 2012, as it has been both interpreted and applied very broadly by various users to avoid paying copyright fees. This exemption has two main effects: some users did not renew their licenses with collective societies, and the royalties paid under those agreements have decreased substantially, owing to a balance of power that is now sharply skewed in favour of users.

Several educational institutions reacted drastically, establishing their own guidelines for fair dealing soon after the adoption of the amendments in 2012. Laval University, for instance, did not renew its collective licenses with collective societies and drafted its own policy on the use of works by others.[1] This policy defined fair dealing as allowing the reproduction of up to 10% of a protected work without seeking permission from the copyright holder. This in turn skewed the balance of power between other educational institutions and the copyright collectives, which were forced to negotiate reduced royalties.

It took a class action by Copibec for Laval University to suspend this policy and sign a license retroactive to the date the suit was launched. This situation, along with various lawsuits between Access Copyright and various users such as York University and the ministries of education of various Canadian provinces, in our view clearly illustrate the need to review and more clearly regulate the concept of fair dealing, especially for educational purposes.

2.2 A few facts

When the Act was last reviewed in 2012, some parties, such as the representative of the Council of Ministers of Education, Canada,[2] stated that adding the education exception would not affect the revenues of rights holders. On the contrary, our fears have been borne out: the royalties collected by creators are in freefall and the types of commercial use by users is at the very least concerning.

a. Users
   - Reaction by the universities

The education exception has led to lawsuits involving collective societies and governments and universities, among others. In 2016, for example, the Federal Court heard the case between Access Copyright and York University. York had filed a counterclaim seeking a ruling that its use of reproductions was fair, under section 29 of the Act. In his decision, however, Justice Phelan ruled, that "York's own Fair Dealing Guidelines are not fair in either their terms or their application.[3]

The concept of fair dealing and its practical application have proven to be flexible, as well as completely unpredictable and unmanageable. York University did not explain much less justify why the use of 10% of a work, a single article or any other restriction is deemed fair under its guidelines. Like the Laval

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[1] Université Laval, 2014. "Politique et directives relatives à l'utilisation de l'oeuvre d'autrui aux fins des activités d'enseignement, d'apprentissage, de recherche et d'étude privée à l'Université Laval", https://www.bibl.ulaval.ca/fichiers_site/bda/politique-oeuvre-autrui-ca-2014-85.pdf, [French only], consulted on 2018-10-16.

[2] As quoted in LACROIX, Caroline, Copibec, 2016. "Au Canada, le droit d'auteur fond plus vite que les glaciers." https://www.copibec.ca/fr/nouvelle/118/au-canada-le-droit-d-auteur-fond-plus-vite-que-les-glaciers, [French only], consulted on 2018-10-16.

[3] Canadian Copyright Licensing Agency v. York University, 2017, FC 669 (CanLII), paragraph 14, https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.html, consulted on 2018-10-16.

University guidelines, York's guidelines completely overlook the qualitative nature of the excerpt of the work used.

These various lawsuits demonstrate the need to clarify the concept and the exception for education and for fair dealing.

- Reaction by the ministries of educations

It is the same ministries of education, excluding those in Quebec, Ontario and British Columbia, that contributed to these tremendous losses by terminating the reproduction licenses with Access Copyright in 2013. By dropping the licences and establishing their own standards, the provincial governments grossly devalue the works and the creativity of copyright holders.

b. Copyright holders and collective societies

Copyright visual arts / Droits d'auteur arts visuels (COVA-DAAV, formerly CARCC)

This group was founded in 1990 to help artists administer their copyright, including exhibition and reproduction rights and by extension their fees for professional services. COVA-DAAV redistributes for its members the reproduction rights collected by Access Copyright. From 2003 to 2012, the average annual royalties to be distributed by COVA-DAAV were $298,034.50. Once this exception came into effect, the average annual royalties paid to the artists represented by COVA-DAAV dropped to $77,150.25 for the period from 2013 to 2017.[4]

Access Copyright, which redistributes reproduction rights for visual artists and other copyright holders, saw losses of the same magnitude, with revenues falling by 48% since 2015 and by 68% since 2012.[5]

2.3 Our requests

The RAAV is not asking for the outright elimination of the education exception. Looking at other models around the world, however, we think it is possible to more clearly define, regulate and limit the scope of this exception to restore balance in the rights of the parties involved.

a. Fair dealing and impact on the market

The concept of fair dealing for educational purposes must be better regulated. Drawing on the American model, the impact of the dealing on the market should be the essential criterion in determining whether the dealing is fair. The list of six factors cited by the Supreme Court in CCH distorts this concept and opens the door to abuse. The legislation must be corrected.

Once again, fair dealing itself must be regulated, and so too and above all must the education exception, as illustrated in the Federal Court decision by Justice Phelan in the York University case. The legislator must establish keys for interpreting this exception to prevent the kind of problems we have seen with internal policies such as the one developed by Laval University. The quality and the size of excerpts must be considered to ensure that the dealing is truly fair for everyone.

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[4] Copyright Visual Arts Droits d'auteurs visuels, 2018, "Reprographic Rights 2013-2017".
[5] Collectif, Access Copyright, 2016, "2016 Annual Report," http://www.accesscopyright.ca/media/112021/annualreport_2016.pdf, consulted on 2018-10-16

The education exception must be limited to prevent any further decrease in creators' revenues.

b. British and Australian models

While recognizing the concept of fair dealing, the British and Australian models provide that, in the case of reproduction for educational purposes, there must be a mechanism to guarantee fair compensation when licenses are available from copyright collectives. In this regard, RAAV fully endorses the proposals put forward by Copibec and Access Copyright.

Under the proposed model, the fair dealing exception would not apply to educational establishments when a work is available on the market under a license issued by a copyright collective. To this end, section 29 of the Act must be amended by including a reference to section 2 b).

The British and Scandinavian models could also be considered.

3. Resale rights

For years, RAAV and its Canadian partner, CARFAC, have been lobbying for the inclusion of resale rights for works of art in the Copyright Act. This right exists in more than 90 countries around the world and seeks to give visual artists a portion of the sales revenues for a work after its initial sale. This is usually about 5% of the resale price of the work. We will leave it to CARFAC to develop more detailed terms and conditions for this right.

Canada should follow what has become the international standard recognized by the Berne Convention and a mandatory item on the agenda of the standing committee on copyright and related rights of the World Intellectual Property Organization. Canada's failure to recognize this right results in discrimination against Canadian artists who sell their works abroad and are unable to collect these rights.

4. Other requests
    a. Private copies

In view of technological developments, it is obvious to us that royalties for private copies must be broadened to include digital media. In practice, no one can dispute that the use of audio media has become marginal and that the right to fair compensation must be guaranteed in the same way in the era of digital downloads, whether on smart phones or tablets.

Moreover, works of art are regularly shared on digital media, whether smart phones or tablets. We maintain therefore that royalties on private copies should also apply to works of art used on all electronic or digital media.

b. Damages

The amount of predetermined damages should be substantially increased to better reflect the need to appropriately punish violations and to create a real deterrent.

Regroupement des artistes en arts visuels du Québec
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