

## **Brief to the Standing Committee on Industry, Science and Technology – December 2018**

### **IFRRO**

This brief is submitted on behalf of IFRRO - the International Federation of Reproduction Rights Organisations. IFRRO is the international network of collective management organisations in the text and image sector, also known as Reproduction Rights Organisations (RROs). We have 150-member organisations in over 80 countries worldwide, and our Canadian members are Access Copyright and Copibec.

This brief explains that the current approach to educational copying and fair dealing for education in Canada is out of step with the situation in other developed countries. In those countries, copying by educational institutions is licensed by RROs, and the fees they collect are on-paid to authors and publishers. As a result of not receiving revenue from secondary licensing Canadian authors and publishers are at a disadvantage compared to authors and publishers in other countries. The current situation also risks Canada being in breach of its international treaty obligations in the Berne Convention and the TRIPS Agreement.

### **Collective management of text and images**

In other countries around the world, collective management organisations, or RROs collect and distribute around one billion USD to authors and publishers when their works are copied and communicated by educational institutions, businesses and governments.

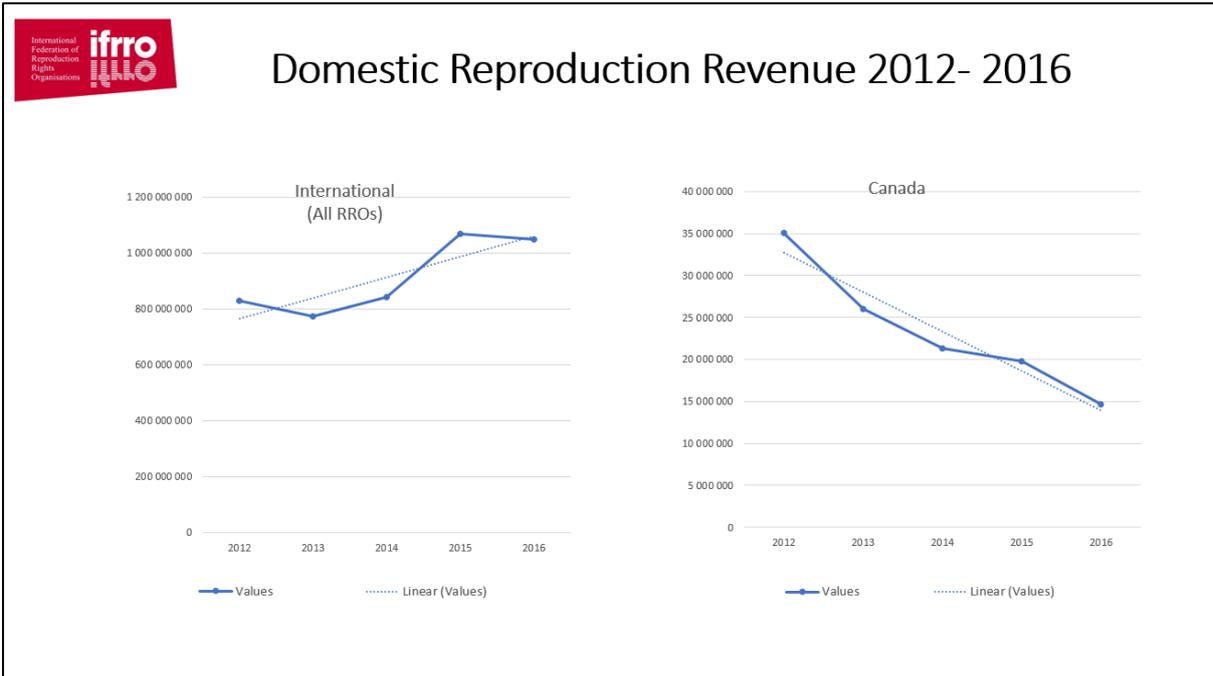
A significant proportion of this revenue is payments for usage (including digital uses) of published content by schools and universities. This secondary licensing revenue is distributed to authors and publishers, who reinvest it in the production of new content. This revenue enables those authors and publishers to enrich the learning experiences of students with culturally relevant content, leading to improved learning outcomes.

Other submissions to this review, such as that from Access Copyright, have detailed the economic impact that the loss of revenue from secondary use licensing has had in Canada—relying on both a study by PwC and also on the findings at first instance in the York University<sup>1</sup> decision.

Using data provided by our members, we have compiled the following information comparing the payments made in Canada for secondary uses of copyright content with those made in the rest of the world. The figures demonstrate that since the 2012 amendments to the Canadian Copyright Act, revenue collected in Canada by RROs for secondary uses has dramatically declined, compared to the rest of the world, where the income over the same period has grown.

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<sup>1</sup> Canadian Copyright Licensing Agency v York University, 2017 FC669  
<https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.pdf>



It is only in Canada that educational institutions, in all provinces except Quebec, do not accept that they should enter into collective licences for secondary uses of content or acknowledge that secondary licensing revenue through collective licences is a legitimate and important source of income for authors and publishers. They maintain this position even though the York University decision has found that the extent of their copying goes beyond legitimate fair dealing purposes.

Consequently, the Canadian Copyright Act urgently requires amendment to clarify the scope and extent of fair dealing for education. In IFRRO's view it is important that such copying be distinguished from fair dealing copying by individual students and that sufficient constraints, reflecting approaches in other countries, are placed around unremunerated educational usages to ensure that the markets of authors and publishers are protected and the requirements of international treaties, such as the Berne Convention, are met.

### Licensing of educational usage of copyright content

In other common law countries such as Australia, Ireland, Jamaica, New Zealand, Singapore and the UK, fair dealing copying by individual students is permitted, alongside a collective licensing system for compensating authors and publishers for large-scale institutional educational copying.

In each of these countries, legislators recognise the impact that large-scale educational copying has on authors and publishers. For example, in both **Australia** and **Singapore** a compulsory licence for educational use requiring payments exists alongside fair dealing provisions for student copying. This is because of the concern that allowing unremunerated use for educational purposes would not comply with either country's international obligations such as the three-step test in the Berne Convention.

In **Ireland** and the **UK**, the copyright law requires educational institutions to take a licence if one is offered, rather than relying on unremunerated exceptions.

In addition, in the UK the legislation makes it clear that fair dealing cannot apply if it would involve

*copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose<sup>2</sup>*

In the **USA**, many educational institutions have either an annual or transactional (pay-as-you-go) licence for the use of copyright content in course packs and e-reserves with CCC.

We understand that our members in Australia (Copyright Agency), New Zealand (CLNZ) and UK (CLA) have provided information to the Committee explaining how the secondary licences in each of their countries work.

When reviewing the compensation systems in place in other countries, it is important to note that in many European countries exceptions are remunerated – that is, an exception to copyright for educational uses exists, but it is compensated through collective means by either fees being collected from the educational institution (such as in France) or via levies (such as in **Germany**).

There is also a system of voluntary collective licences with legislative support (called extended collective licensing) for educational use in the **Nordic** countries, and similar systems are being adopted to supplement existing voluntary collective licensing systems in countries such as **Jamaica**.

In some countries the shift to digitally supported learning has led to a re-evaluation of the importance of secondary use licensing. For example, in **Japan**, a new compulsory collective licensing system for education will be introduced in the next years, due to concerns about the impact of unremunerated secondary digital usage on authors and publishers.

Although these systems vary in their approaches, they include the common element that when copying, storage and communication of copyright works are undertaken by educational institutions, payments are made to the copyright owner. We would be happy to provide further information about the collective licensing schemes in other countries if the Committee is interested.

In contrast to the situation in many other countries, many Canadian universities and schools rely on their own fair dealing guidelines, which suggest that the copying of an amount of around 10% of a book can be considered as a fair dealing for education. This amount is generally the same as the proportion of a book (10%) that can be copied under the secondary use licences requiring payment mentioned above.

Ongoing litigation in the USA<sup>3</sup> highlights the issue with arbitrary fairness guidelines, with the Court saying that each copying instance should be assessed:

*individually, considering the quantity and the quality of the material taken*

Consequently, there is no set percentage of a work the copying of which can be considered fair.

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<sup>2</sup> S29(3)(b) Copyright, Designs and Patent Act 1988 <https://www.legislation.gov.uk/ukpga/1988/48/section/29>

<sup>3</sup> Cambridge University Press v Albert (No.16- 15726, Eleventh Circuit 2018 ) <https://law.justia.com/cases/federal/appellate-courts/ca11/12-14676/12-14676-2018-10-19.html>

In the same litigation, the Court also considered whether the purported fair use copies would have a market substitution effect, and concluded that as it was verbatim copying, serving

*the same intrinsic purpose for which the works were originally published*

that threat was significant and weighed strongly against fair use. In this analysis, the availability of secondary use licences was a relevant factor.

## **Digital Environment**

Many submissions to this review have discussed how trends such as the availability of pre-licensed digital content, the increased availability of open educational resources and freely available internet content mean there is no need for collective secondary use licences. They also say that overall spending on content is increasing and put these facts together to justify the decision not to pay collective licensing fees.

Canada is not unique. Similar trends in content delivery are occurring all around the world. The IFRRO data referred to above demonstrates that secondary use licences for published content continue to be relevant and necessary for educational institutions.

The reason collective licences are still needed is that pre-licensed content and open educational resources are used in education alongside content for which secondary use licences are required. Payments for secondary uses are only included in subscription costs for some content. For example, it is not generally included in the initial purchase cost of books, which are heavily copied for instructional purposes. In the UK, over 80% of content used by education through the Digital Content Store<sup>4</sup> managed by CLA is book content. This is also the case in Canada, as demonstrated in the Copibec submission.

Systems can and are put in place to ensure that content that is either freely available to educational institutions or pre-licensed is not counted in the volume of content paid for under collective secondary use licences.

Universities Canada's submission mentions an example of the content profile of an e-reserve at a mid-sized university. This example illustrates how easily usage information can be extracted from learning management systems commonly in use in universities and increasingly in schools.

The RROs in the UK, Australia, New Zealand and Singapore all collect licensing data by extracting it from learning management systems. This means that the applicable licence fee can be adjusted to take account of the use of pre-licensed or open access content and payment only made in respect of content for which a collective licence is required.

Further, although the proportion of content purportedly used under the fair dealing exception in the example mentioned in the Universities Canada submission at 16% seems relatively small, the actual volume could amount to millions of pages of copyright content – content which in comparable countries and in Quebec is licensed, and for which authors and publishers receive compensation when it is accessed by students. If this same level of usage was consistent across all the members of Universities Canada, then massive and systematic unremunerated use of copyright content is taking place, which raises concerns as to whether such extensive use could be justified as complying with Canada's international treaty obligations.

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<sup>4</sup> <https://www.cla.co.uk/digital-content-store>

## The Berne Convention and the Three-Step Test

Many submissions have mentioned Canada's international obligations contained in Article 9(2) of the Berne Convention, and Article 13 of the TRIPS Agreement. We draw the Committee's attention to the study undertaken by Dr Mihaly Ficsor concluding that the introduction of an educational fair dealing exception in Canada, means that Canada is in breach of its international treaty obligations. The study is available in full [here](#). An unofficial summary is also available on IFRRO's [website](#).

In essence his analysis is:

- The characterisation of fair dealing as a *user's right* in the CCH case fundamentally altered the balance that is inherent in fair dealing as a defence to infringement,
- That the large and liberal interpretation of exceptions in the CCH case conflicts with the requirement that each element of the three-step test must be individually assessed, as confirmed by the WTO dispute settlement panel,
- The relative value placed on each of the six fair dealing factors, such as the reduced importance of market impact and lack of relevance of licence availability, means that the outcome of the fairness assessment in Canada is less likely to meet the requirements of the three-step test,
- The situation is exacerbated by the decision in the Alberta case to characterise teachers' usage as facilitating an individual student's fair dealing for research or private study, rather than for the separate purpose of educational instruction,
- The introduction of education into the Copyright Act as a fair dealing purpose without also including the requirement that it be construed narrowly and in compliance with the three-step test, means that Canada is in breach of its international obligations.

## Recommendations

IFRRO submits that the Committee recommend that the fair dealing provisions be amended to distinguish institutional educational uses from fair dealing copying by individual students.

Sufficient constraints, such as the licence override which applies in the UK and Ireland, must be placed around unremunerated educational usages to ensure that the markets of authors and publishers are protected and the requirements of international treaties, such as the Berne Convention are met.