

Review of the Copyright Act

Brief by the Association nationale des éditeurs de livres (ANEL) to the
Standing Committee on Industry, Science and Technology

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The Association nationale des éditeurs de livres (ANEL) represents a hundred or so of Canada's French-language publishers, large and small, across four provinces. They publish more than 5,000 titles every year, ranging from novels to how-to manuals, as well as poetry, essays, scientific works, textbooks and art books.

ANEL has always called on the federal government to reassert the importance of copyrights and strengthen the country's copyright regime by bringing Canada's legislation in line with global trends, so that creators are supported by a legal framework that provides the stability to innovate in creating, producing, and distributing Canadian books. In 2009 and 2012, during consultations for C-32 and C-11, we proposed a number of amendments in our briefs.¹ None of those amendments were made. Five years later, we see the impacts of the 2012 modernization on creators. We hope that our efforts today will be more fruitful and that the government will be more receptive to the concerns of the book sector and the cultural sector in general.

What the Copyright Act achieved

Passed by the previous government in 2012, the “modernization” of the copyright regime sought to reflect changes brought about by digital technology in the protection and distribution of intellectual works. By adding several exceptions, including one on fair dealing for educational purposes (section 29), questioning the role of collectives, not deterring piracy and refusing to extend the private copying regime, the Copyright Act undermined the balance in which creators create and innovate.

An internationally derided law

For the past five years, ANEL has witnessed other countries' concerns about the damage Canada's legislation is doing. The critics are unanimous and include France's publishers association—the Syndicat national de l'édition—the Federation of European Publishers, the International Federation of Reproduction Rights Organisations, known as IFFRO, which brings together collective management organizations around the world (hundreds of members), and the International Publishers Association, to which we belong. Canada's legislation is the model to avoid. Even worse, it contaminates the sector by encouraging other countries to integrate copyright infringement exceptions in their regimes, such as the fair dealing for education provision. Moreover, since 2012, the Act no longer complies with the three-step test of the Berne Convention,² to which Canada is a signatory.

Considerable losses due to the legalized promotion of “free” culture

Although it is not easy to quantify the impact of the Copyright Act on Canada's book industry, some figures leave little room for interpretation. Statistics Canada reported that written and published works posted a loss in 2016 for a fourth consecutive year.³ Under the Canada Book Fund, net sales for Canadian works fell by more than \$63 million between 2010 and 2017, with a decrease of more than \$41 million between 2011 and 2013. French-language publishing alone fell \$30 million (charts 1 and 2).

¹ <https://www.anel.qc.ca/wp-content/uploads/2018/09/Memoire-CC11-Senat-22juin-2012.pdf>
[https://www.anel.qc.ca/wp-content/uploads/2018/11/Le-droit-dauteur-a-CC%80-le-CC%80re-
nume%CC%81rique_Septembre-2009.pdf](https://www.anel.qc.ca/wp-content/uploads/2018/11/Le-droit-dauteur-a-CC%80-le-CC%80re-
nume%CC%81rique_Septembre-2009.pdf)

² The reproduction must be permitted in the legislation in the country, it must not conflict with a normal exploitation of the work and it must not prejudice the author's interests.

³ <https://www150.statcan.gc.ca/n1/daily-quotidien/180227/dq180227a-eng.htm>

Chart 1
Total Net Sales of Canadian Publishers (\$)

Chart 2
Net Sales in Canada and Exports of French-Language Publishers (\$)

According to a study by PricewaterhouseCoopers (2015), only 18 months after the Act came into force, the fair dealing for educational purposes exception was solely responsible for losses of \$30 million/year for the reproduction of excerpts from works, not to mention fewer sales, job losses and the shuttering of publishing houses. From 2013 to 2015, the economic footprint of educational, technical and scientific publishers alone fell from \$740 million and 7,650 direct jobs to \$640 million and 6,400 direct jobs.⁴ Access Copyright royalty payments plummeted 80% in five years.⁵ As for Copibec, even though the educational institutions and Quebec's Ministry of Education renewed their licenses,⁶ royalties fell while the student population rose. The university fee per student decreased by almost 50% and the amount collected by a rightsholder per page reproduced decreased by 23%⁷ (charts 3 and 4).

Chart 3
Overall Royalties Collected by Copibec

Chart 4
Royalties Distributed per Page from 2013-2014 to 2015-2016 (licence year)

Excessive involvement of the courts in copyright matters

Our copyright collectives have been dealing with a growing number of cases since 2012. Money is being gobbled up in legal fees to defend the rights of copyright owners and publishers. At the same time, universities—who could put the money to better use—are also pouring money into court actions that the modernized act should have sought to prevent. How does Parliament define education? We are still asking this question. If, as a result of this review, the word “education” is not removed from section 29, Parliament must provide clarification in order to deliver clear legislation.

These court actions are weakening copyright collectives, which are being egregiously depicted as greedy, when their mission is simply to ensure that rightsholders are fairly compensated. According to Erika Bergeron-Drolet, the “2012 amendments to the exceptions in the Copyright Act are significant, not only in terms of their number, but in that they ignore the collective management mechanisms and the payment of royalties as tools for offsetting the increased rights granted to users” [Translation].⁸ Ysolde Gendreau points out that “compulsory licensing is a form of exception to copyright, and the use of this mechanism

⁴ http://accesscopyright.ca/media/94983/access_copyright_report.pdf

⁵ <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921730/br-external/AccessCopyright-e.pdf>

⁶ The legal dispute between Laval University and Copibec was settled on November 14, 2018, <https://www.copibec.ca/fr/nouvelle/194/fin-du-litige-entre-copibec-et-l-universite-laval-en-matiere-de-droit-d-auteur7>

⁷ [broken link]

⁸ <https://cpi.openum.ca/files/sites/66/CPI-28-2-mai-2016-53-76-1.pdf>

is mentioned in the analyses of the Berne three-step test to judge an exception's validity" [Translation].⁹ In Quebec, even though the compensation set out in the agreements is being scaled back, the government and educational institutions have at least shown a willingness to respect the role of copyright collectives.

Broken collaboration between the education and publishing sectors

For more than 50 years now, the education and publishing communities have been working together to provide the school network (from elementary to university) with access to educational resources and a wide range of high-quality national literature. Publishers have developed expertise in the creation and development of teaching materials and have made major investments in the development of educational digital content. But the belief conveyed by the education sector that the current copyright regime has allowed, since 2012, for a more innovative and affordable education for students through fair access (or rather free) is illusory. More and more, users are buying software and electronic devices, whose short lifecycle requires periodic reinvestment, and subscribing to online services. Since 2012, the education sector has portrayed fair dealing for educational purposes as a factor that encourages greater access to knowledge and educational success, but how was the Copyright Act, before 2012, a barrier to the free dissemination of intellectual works?

Worse still, the Council of Ministers of Education¹⁰ (CMEC) considers copyright a subsidy for the book industry, which is totally false. Copyright contributes to the country's economy, and is not at the expense of innovation or the creation of knowledge. On the contrary, if the publishing sector disappears, it is expertise in the creation of educational and scientific works (paper and digital) that will be lost, as well as all related jobs (authors, language revisers, proofreaders, graphic designers, printers, etc.), not to mention the millions of dollars generated by the publishing industry, primarily academic publishers, in copyright fees. Let us not forget that knowledge grows through books, and that ministries of education ensure the quality of programs taught.

What the 2012 Act failed to achieve

Curb piracy

Not only is piracy proliferating, but the tools deployed to deter violators are ineffective and the amounts invested in legal fees by publishers are increasing. By placing the burden of proof on owners whose copyright has been infringed, by keeping penalties to a minimum, and by imposing an obligation to notify on Internet service providers through the notice-and-notice system, lawmakers have missed the mark. If the government is unable to tighten the rules to combat piracy, the only alternative will be to expand the private copying regime and replace the notice-and-notice system with a notice-and-takedown system, as recommended by the Canadian Bar Association.¹¹

Raise public awareness of the value of digital works

⁹ <https://cpi.openum.ca/files/sites/66/Aspects-internationaux-de-la-LMDA.pdf>

¹⁰ <http://www.noscommunes.ca/Content/Committee/421/INDU/Brief/BR10008279/br-external/CouncilOfMinistersOfEducation-e.pdf>

¹¹ <http://www.noscommunes.ca/Content/Committee/421/INDU/Brief/BR10234054/br-external/CanadianBarAssociation-e.pdf>

Today, publishers publish both print and digital formats. The book industry should not be defined by a format, but judged on the value of its content. Whether the work is paper or digital, the financial risk lies with the publisher and is no less because the book is digital, on the contrary. However, users accept less value for this type of product. Publishers will adapt their business models to meet the growing demand for digital works, especially from the academic sector, but what price are users willing to pay for innovative, high-quality Canadian content?

Publishers argue that investments in digital technology are in no way offset by increased revenues. Many believe that their rightful share of the value chain does not correspond to the importance of the work they do. Money usually earmarked for culture is increasingly directed towards the purchase of Internet services and technological devices. Add to this the free-culture movement often associated with content available on the Internet and the equation no longer holds. It is therefore urgent that the Government of Canada involves all those who benefit from the work of Canadian creators. The publishing industry is willing to adapt to changes in society, the market and digital business models to make works accessible, but this innovation will not happen without a copyright act that recognizes the value of creative and cultural industries to the country's social and economic development.

What do we expect from lawmakers?

- that they review the principle of fair dealing for the purpose of education by setting out a narrow definition for education and restricting the interpretations of the educational sector;
- that they review the Act to counter piracy by replacing the notice-and-notice system with a notice-and-takedown system and extend the private copying regime to reading devices (readers, electronic tablets, mobile phones, etc.);
- that they recognize the vital role copyright collectives play on behalf of creators and accept that mandatory exceptions, such as fair dealing for the purpose of education, must go hand in hand with mandatory compensation.

Copyright is the very foundation of book publishing. Recognizing its importance and ensuring its respect is to guarantee a rich Canadian literature.