

# **An evidence-based analysis of the education sector's copying policies and practices**

Submitted by: **The Partnership for the Future of Canadian Stories**

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Access Copyright

Association nationale des éditeurs de livres

Association of Book Publishers of British Columbia

Association of Canadian Publishers

Association of Manitoba Book Publishers

Atlantic Publishers Marketing Association

Book Publishers Association of Alberta

Canadian Association of Learned Journals

Canadian Artists' Representation (CARFAC)

Canadian Authors Association

Canadian Copyright Institute

Canadian Publishers' Council

Canadian Society of Children's Authors, Illustrators and Performers

Canadian Association of Professional Image Creators

Copibec

Copyright Visual Arts

Federation of British Columbia Writers

League of Canadian Poets

Literary Press Group

News Media Canada

Outdoor Writers of Canada

Playwrights Guild of Canada

Professional Writers Association of Canada

Quebec Writers' Federation

Regroupement des artistes en arts visuels

Saskatchewan Publishers Group – Saskbooks

The Writers' Union of Canada

Union des écrivaines et des écrivains Québécois

Writers' Alliance of Newfoundland and Labrador

Writers' Federation of New Brunswick

Writers' Guild of Alberta

## **An evidence-based analysis of the education sector’s copying policies and practices**

Members of the Standing Committee on Canadian Heritage and the Standing Committee on Industry, Science and Technology have spent many months hearing from stakeholders to determine if the *Copyright Act* is working as it should to facilitate access to content and allow creators and publishers to be fairly-compensated when their work is used.

We, **The Partnership for the Future of Canadian Stories**, represent people who create, read and care about Canadian stories. These stories are an essential part of Canadian culture, help Canadian students discover who they are and grant us all perspective on Canada’s past, present and future.

We are concerned by the inaccurate and misleading statements opponents of effective copyright have presented as fact, most of which have been disproven before the Copyright Board of Canada and the Federal Court of Canada. Regrettably, they paint a false picture of current content practices in education and minimize the impact on Canadian creators and publishers.

This evidence-based analysis corrects these claims.

1. **Claim:** The estimate of 600 million uncompensated pages copied annually by the education sector is inaccurate.

**Fact:** The estimate of 600 million uncompensated pages copied annually is a reliable and conservative reflection of current copying of published works in education.

**Evidence:** The 600 million figure relies on data that has been subject to review by the Federal Court and the Copyright Board; assertions that this figure is inaccurate or unreliable are simply false. Indeed, it is a conservative estimate of the volume of uncompensated copying that is not otherwise licensed taking place each year in the Canadian education system.

### **380 million pages are copied for free annually in K-12 education outside of Quebec:**

- This figure comes directly from the Copyright Board’s decision in the 2010-2015 K-12 tariff proceedings.<sup>1</sup> It is based on a study the Board subjected to rigorous evaluation. The Board deemed the study a sufficiently reliable indicator of copying practices to be used to set a tariff rate for the years 2010-2015. It is important to note the 380 million figure includes only works in Access Copyright’s repertoire that are not covered under licence or via open access.
- This figure, which does not factor in digital copying, likely understates current copying levels. A 2012 study found K-12 schools photocopied over 400 million pages of works in Access Copyright’s repertoire in that year alone.<sup>2</sup>

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<sup>1</sup> Tables 32 & 33: <https://cb-cda.gc.ca/decisions/2016/DEC-K-122010-2015-19-02-06.pdf>

<sup>2</sup> Exhibit AC-11, filed as part of 2010-2015 K-12 tariff proceedings

**220 million pages are copied for free annually in post-secondary institutions outside of Quebec:**

- This figure comes from the York University copying study, conducted as part of legal proceedings between Access Copyright and York.<sup>3</sup> The study revealed York copied 360 pages per student in 2013. York could not demonstrate that the copied pages were licensed. To be conservative, a lower estimate of 220 pages per student was used in the calculation of 600 million pages.<sup>4</sup>
- Notably, two other studies of post-secondary copying (filed as part of the 2011-2017 Copyright Board post-secondary tariff proceedings)<sup>5</sup> found an average of over 950 pages per student copied annually at colleges and over 400 pages per student copied annually by the sampled university.

2. **Claim:** The education sector copies fewer books now than before 2012 changes to the *Copyright Act*.

**Fact:** There is a clear and demonstrated pattern of mass, systemic and free copying in education amounting to hundreds of millions of pages from books.

**Evidence:** Copyright opponents frequently cite percentages when discussing current copying levels in education. This both obscures and discounts the extent of the clear and demonstrated mass, systemic and free copying occurring in education at the direct expense of Canadian creators and publishers.

For example, copyright opponents often reference a study<sup>6</sup> that found books comprise “only” 35% of college copying. They fail to mention this copying represents over 340 pages per student and 100 million pages of books per year by colleges alone. See the following table from the study:

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<sup>3</sup> *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, <https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.html> (“York Decision”). Note: This decision is currently under appeal at the Federal Court of Appeal.

<sup>4</sup> There are approximately 1 million full-time equivalent students outside of Quebec. 220 pages/student translates to 220 million pages/ year.

<sup>5</sup> Exhibits AC-4 and AC-14, filed as part of the 2011-2017 post-secondary tariff proceedings

<sup>6</sup> Exhibit AC-4

**Table 3.2 – Annualized Weighted Compensable Exposures of Published Works by Genre Based on Responses to Interrogatories 105 to 108**

Genre	Number of transactions	Weighted total exposures	Percent of weighted total exposures	Weighted total exposures per FTE	Average number of unweighted exposures per transaction	Standard deviation of the number of unweighted exposures per transaction	Precision at a 95% confidence level
Books	398	99,500,298	34.6%	341.5	487.9	1,316.7	±27%
Journal articles	92	94,361,847	32.8%	323.8	1,152.6	1,726.0	±31%
Magazine articles	57	5,173,831	1.8%	17.8	189.0	201.1	±28%
Newspaper articles	108	85,779,457	29.8%	294.4	1,112.2	1,045.9	±18%
Other published works	0						
Unknown genre	1	4,829	0.0%	0.0	22.0		
<b>TOTAL by genre</b>	<b>686</b>	<b>287,381,466</b>	<b>100.0%</b>	<b>986.3</b>	<b>639.5</b>	<b>1,299.8</b>	<b>±15%</b>

In addition, the Copyright Board found the K-12 education sector copies 380 million pages of unlicensed content yearly. Of this, 93% (or 357 million pages) consists of books and workbooks.

In Québec, about 80% of university copies and 90% of copies by CEGEPs and schools are made under Copibec licence come from books.<sup>7</sup>

**3. Claim:** Most educational copying is covered by “other” licences.

**Fact:** Hundreds of millions of pages are copied annually that do not fall under open access or library licences.

**Evidence:** Today, hundreds of millions of pages of published works are copied by educational institutions that are neither open access nor covered under library licences. The claim that most education sector copying is licensed has not withstood legal scrutiny.

To illustrate, it is useful to revisit the 2013 study conducted as part of the York litigation. The study quantified the amount of copying of published works done by professors and how much of it was licensed. By York’s admission, the majority (99%) of the books shared on York’s learning management system were not covered under licences. Moreover, York failed to prove that *any* of the works copied in the study were done under licence. The Court stated, “York has conceded that its evidence on licensing information is inaccurate and its ability to marry up copies with the relevant licence or permissions is impossible to rely upon.”<sup>8</sup> Nevertheless, copyright opponents continue to cite York’s evidence without qualification, even though the Federal Court dismissed it.

<sup>7</sup> From Copibec’s analysis of declarations from licensed universities, CEGEPs and schools for its November 2017 education royalty payment <https://www.copibec.ca/en/infolettre/55> (“Copibec Distribution Analysis”)

<sup>8</sup> York Decision, para. 287

Where content licensed by academic libraries tends to be for research purposes, content copied by instructors in coursepacks and learning management systems (LMSs) tends to be instructional content. This is not the same content and should not be confused as such. That libraries pay for research content does not excuse the education sector from its obligation to pay for copying unlicensed content on LMSs and in coursepacks.

In the K-12 sector, the Copyright Board found schools outside of Quebec copy 380 million pages annually from Access Copyright's repertoire that are not open access or covered by licences.

In Quebec, most copies declared to Copibec, by all levels of education, show these works are not available under library licence or open access.<sup>9</sup>

**4. Claim:** Educational spending on content has increased.

**Fact:** Data on total educational spending on content is not available. However, book sales to the education sector have decreased dramatically while uncompensated copying continues.

**Evidence:** We have heard many times that the education sector is spending more than ever on content. Some even suggest that everyone agrees.

These claims are misleading.

The data presented by the education sector relates specifically to purchasing and licensing by academic libraries, which is only a portion of the total educational publishing market. It does not reflect sales to students or K-12 educational institutions. More comprehensive data exists on the educational publishing market as it relates to book sales, and it shows a declining trend:

- Statistics Canada data<sup>10</sup> reveals book sales to educational institutions have declined by 41% since 2010 (47% once adjusted for inflation).
- A PwC study conducted as part of the York litigation found unit sales of books to the post-secondary sector (including libraries and students) decreased 27% since 2010.

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<sup>9</sup> Copibec Distribution Analysis

<sup>10</sup> 2010 & 2012: <http://www.statcan.gc.ca/pub/87f0004x/2013001/t039-eng.htm>;

2014: <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=3610091&tabMode=dataTable&p1=-1&p2=9&srchLan=-1>

2016: <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=3610117&tabMode=dataTable&p1=-1&p2=9&srchLan=-1>

5. **Claim:** The Supreme Court *Alberta (Education) v. Access Copyright* decision justifies the education sector's current copying practices.

**Fact:** The *Alberta (Education)* decision does not validate the education sector's current copying practices.

**Evidence:** This claim has been examined and rejected by the Federal Court. In the York Decision, the Court concluded the education sector's guidelines were not supported by Supreme Court precedent. Regarding the *Alberta (Education)* decision, the Court stated:

*"However, the situations contemplated in Alberta (Education) bear little resemblance to the facts of this case. It is one thing for a teacher to have the school librarian run off some copies of a book or article in order to supplement school texts, and it is quite another for York to produce coursepacks and materials for distribution through LMSs, which stand in place of course textbooks, through copying on a massive scale."*<sup>11</sup>

6. **Claim:** Most works copied by education are not in Access Copyright's repertoire.

**Fact:** The education sector copies hundreds of millions of works in Access Copyright's repertoire annually without compensation.

**Evidence:** Comments on Access Copyright's repertoire are misleading and intended to distract from the fact that creators and publishers are not compensated for the copying of hundreds of millions of pages of their works.

The scope of Access Copyright's repertoire was thoroughly examined by the Copyright Board in tariff proceedings. In the 2010-2015 K-12 tariff decision, the Board excluded works for which Access Copyright did not have a direct grant of rights. The Copyright Board found K-12 schools outside of Quebec copy 380 million pages of unlicensed published works each year from Access Copyright's repertoire.

The fact Access Copyright does not represent all works copied by the education sector does not excuse uncompensated copying of the works it does represent. Nor does it excuse free copying of authors and publishers' works that Access Copyright does not represent.

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<sup>11</sup> York Decision, para. 324

7. **Claim:** Canada’s writing and publishing industry has not been harmed by 2012 changes to the *Copyright Act*.

**Fact:** The impact to Canadian creators and publishers is real and growing. The continued creation of Canadian content hangs in the balance.

**Evidence:** The negative impact of free copying under the education sector’s “fair dealing guidelines” is not a question for debate – it was proven at the Federal Court. In the York litigation, the Court examined evidence and heard expert testimony from both sides and found clear evidence that free copying was substituting for sales.<sup>12</sup> The Court concluded “any suggestion that the Guidelines have not and will not have negative impacts on copyright owners and publishers is not tenable”<sup>13</sup> and the guidelines were resulting in a wealth transfer from copyright owners to educational institutions.

Beyond income and profit declines, what does this mean for Canadians?

It means the individuals who’ve made it their profession to unearth, document and share Canadian stories are being forced to the margins.

It means professional writers and artists are becoming hobbyists because they cannot make a living from their work.

It means publishers won’t have the means to invest in uniquely Canadian stories.

It means Canadian content is in peril.

This is not in the public interest and the Committee should question representations that suggest otherwise.

## Recommendations

We close with two recommendations to redress the problems facing Canadian creators and publishers due to the *Copyright Act*.

1. **Clarify that fair dealing does not apply to educational institutions when the work is commercially available.** This will ensure creators are justly compensated for the mass and systemic use of their works by the education sector.
2. **Harmonize statutory damages available to collectives.** We were disappointed that recent reforms to modernize the Copyright Board did not extend statutory damages to all collectives. There is no rationale that justifies why musicians and songwriters should have the means to ensure that they are paid for the use of their work while authors and visual artists do not. Granting all collectives access to statutory damages will make the Copyright Board’s certified tariffs meaningful and ensure writers, visual artists and publishers are compensated when their works are copied under these tariffs.

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<sup>12</sup> York Decision, paras. 133 & 349

<sup>13</sup> York Decision, para. 143