

access©

**Access Copyright's Submission  
to the Standing Committee  
on Industry, Science and Technology  
for the Statutory Review of the *Copyright Act***

Submitted: July 20, 2018

## **Introduction**

Access Copyright is a copyright collective that represents over 600 Canadian publishers and 12,000 authors and visual artists. We facilitate the reuse and sharing of content by licensing copying from books, magazines, newspapers and journals to schools, universities, colleges, governments and businesses.

Access Copyright had consensual licensing agreements in place with the education sector for close to 20 years. This mutually beneficial relationship provided educational institutions with the ability to copy a broad repertoire of published works in paper and digital format for educational purposes, while ensuring fair compensation to the creators and publishers of those works. This relationship deteriorated following the *Copyright Modernization Act* (the “CMA”) coming into force in 2012, due largely to the education sector’s interpretation of the addition of “education” as an enumerated purpose to fair dealing (the “Education Exception”).

## **Collapse of Collective Licensing following the CMA**

During the hearings on Bill C-32 in 2011, education sector representatives repeatedly assured the legislative committee that the Education Exception would not undermine the payment of royalties for the copying of published works or harm the market in any way. Education representatives categorically stated that “*copyright reform law is not about getting material for free*” and the Education Exception would not alter the “*current relationship among education, publishers, content providers, copyright collectives, and the Copyright Board.*”<sup>1</sup>

As it turns out, those representations were categorically wrong. Within weeks of the coming into force of the CMA, Universities Canada, Colleges and Institutes Canada and the Council of Ministers of Education, Canada (“CMEC”) began promoting copying policies<sup>2</sup> (“Copying Policies”) which set out arbitrary and self-defined amounts (i.e., 10% or a chapter of a book or an entire article) they claim can be copied for free for all students in a class. These policies were developed without the input of the writing and publishing industry and essentially mimicked the copying limits previously paid for under collective licences. Shortly after these policies were adopted, the majority of educational institutions outside of Quebec abandoned their licensing agreements with Access Copyright.

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<sup>1</sup> Testimony of Hon. Ramona Jennex, CMEC, March 24, 2011:

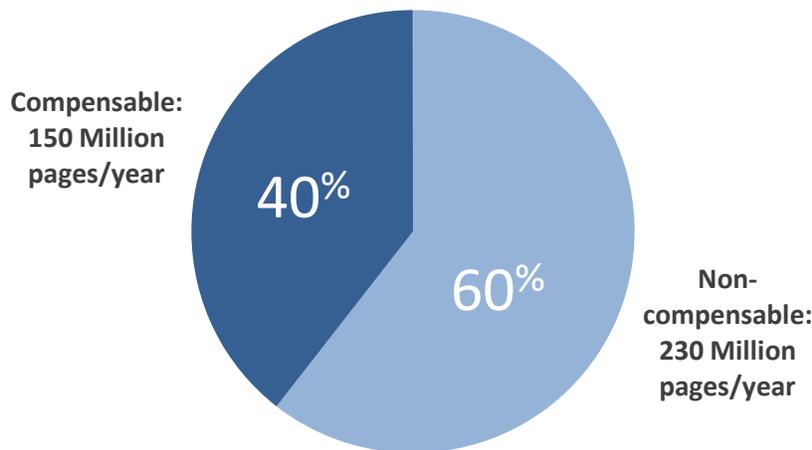
<http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-20/evidence>

<sup>2</sup> Referred to by the education sector as “Fair Dealing Guidelines”, e.g.: <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>

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Today, only 12% of full-time equivalent post-secondary students outside of Quebec are covered under collective licences. The situation is even more dire in the K-12 context, where the entire K-12 public education sector outside of Quebec is refusing to pay royalties. This refusal is despite having participated in a Copyright Board tariff-setting process where the Board found – *after* applying a deduction for fair dealing – that K-12 schools copy over 150 million pages of published works each year that require compensation.<sup>3</sup> Rather than paying creators royalties owing under these mandatory tariffs, CMEC testified that they are spending \$5 million on “compliance” and “copyright education”, which appears to be aimed at educating teachers how to copy for free under their self-defined Copying Policies.<sup>4</sup>

**Copyright Board assessment of K-12 copying volume**



**Total copying of published works: 380 million pages/year**

As a result, the Canadian market for reuse rights for published works has virtually collapsed. Royalties collected by Access Copyright from the education sector have declined by 89% since 2012, resulting in an approximate 80% decrease in royalties distributed to creators and publishers.<sup>5</sup>

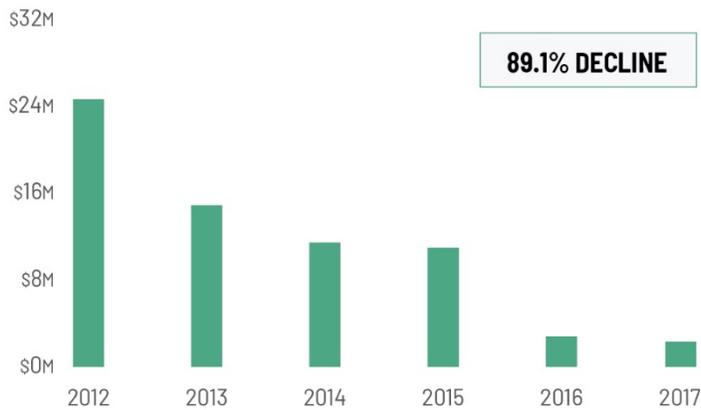
<sup>3</sup> See Tables 32-35: <http://www.cb-cda.gc.ca/decisions/2016/DEC-K-122010-2015-19-02-06.pdf>. Note that the Board did not find that 98% of K-12 copying is fair dealing, as representatives for CMEC testified. See testimony of Hon. Zach Churchill, May 22, 2018: <http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-116/evidence> (“CMEC Testimony”)

<sup>4</sup> CMEC Testimony

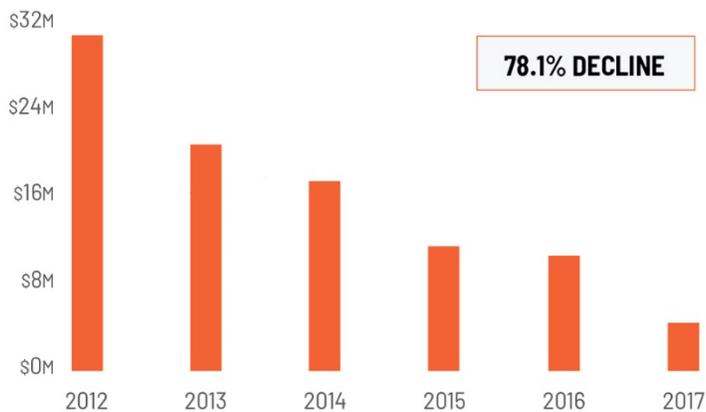
<sup>5</sup> 2017 Access Copyright Annual Report, p.13: [http://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](http://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

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**Royalties collected by Access Copyright from the education sector (2012-2017)**



**Royalties distributed by Access Copyright to creators and publishers (2012-2017)**



Meanwhile, compliance costs for creators and publishers have increased significantly. The lack of clarity over the scope of the Education Exception has resulted in costly litigation, including litigation between Access Copyright and York University and a lawsuit launched by most provincial Ministries of Education in Canada against Access Copyright.<sup>6</sup>

<sup>6</sup> <http://www.accesscopyright.ca/media/announcements/education-sector-forces-canadian-creators-to-defend-why-their-works-should-not-be-used-for-free/> ; <http://www.accesscopyright.ca/media/announcements/update-on-k-12-legal-action/>

### Economic Impact on Writing and Publishing Industry

Canadian creators and publishers have experienced substantial – and proven – economic harm because of the education sector’s interpretation of the Education Exception.

In a 2015 report commissioned by Access Copyright, PricewaterhouseCoopers (PwC) estimated that the Copying Policies would lead to a \$30 million loss of licensing royalties paid to Canadian publishers and creators.<sup>7</sup> These royalties were an important source of income for the industry, representing 20% of creator income and 16% of publisher profits (and often the difference between profit and loss).<sup>8</sup> The impact on creators and publishers is even greater when the ripple effect of uncompensated copying on primary sales is taken into account. The copying allowed under the Copying Policies promotes the creation of royalty-free paper and digital compilations, which substitute for the sale of published works. PwC found that there has been an acceleration in the decline in sales to the education sector since the adoption of these policies.<sup>9</sup>

The impact of York University’s copying policy (which is virtually identical to the policies in place at most Canadian educational institutions) on the publishing industry was also closely examined in the 2017 Federal Court decision in the litigation between Access Copyright and York University (“York Decision”).<sup>10</sup> The York case involved a four-week trial during which time the judge heard extensive evidence presented by both sides, including the evidence of economic experts, on the impact of York’s copying policy on the writing and publishing market.

After careful examination, the Court found “*overwhelming*” evidence of harm, concluding that “*any suggestion that the Guidelines have not and will not have negative impacts on copyright owners or publishers is not tenable.*”<sup>11</sup> The trial judge concluded that there was clear evidence that the free copying under these policies substituted for the sale of works.<sup>12</sup>

Ultimately, the Court found in favour of Access Copyright and determined that York’s copying policy and practices were not fair “*in either their terms or their application*” and result in an unfair

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<sup>7</sup> *Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines*, PwC, June 2015 (“PwC Report”), p.7: [https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)

<sup>8</sup> PwC Report, p.7 & 10

<sup>9</sup> PwC Report, p.8

<sup>10</sup> Canadian Copyright Licensing Agency v. York University, 2017 FC 669: <https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.html>

<sup>11</sup> York Decision, para. 143

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

“wealth transfer” from creators to educational institutions.<sup>13</sup> In arriving at this decision, the trial judge examined Supreme Court of Canada (“SCC”) precedents and concluded York’s policy does not meet the test for fair dealing established by the SCC.<sup>14</sup>

Despite the clear ruling of the Court, the behavior of the education sector remains unchanged. Most Canadian educational institutions continue to copy under policies virtually identical to York’s and do not pay royalties for that copying.

While the litigation persists, the Canadian writing and publishing industry continues to suffer. Book sales to educational institutions declined by 41% between 2010-2016<sup>15</sup> (47% once adjusted for inflation), in contrast to overall spending by educational institutions which did not decline during this period.<sup>16</sup> In response to the loss of copying royalties and poor market conditions, at least three publishing companies – Oxford University Press, McGraw-Hill Education and Emond Montgomery – have ceased publishing resources for the elementary and secondary school market.<sup>17</sup> Perhaps hardest hit are Canadian creators, who now earn an income from writing below \$13,000 per year, which is a 27% decrease since 1998.<sup>18</sup>

Internationally, the treatment of educational fair dealing in Canadian legislation is considered an outlier and a model to be avoided.<sup>19</sup> In 2018, the Education Exception was identified in the Office of the United States Trade Representative Special 301 Report as a reason for placing Canada on the Priority

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<sup>13</sup> York Decision, paras. 14 & 119

<sup>14</sup> York Decision, para. 14

<sup>15</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>

<sup>16</sup> 2011-2012: <https://www150.statcan.gc.ca/n1/pub/81-604-x/2015001/t/tblb1-1-1-eng.htm>

2013-2014: p.52 of report retrieved from <https://www150.statcan.gc.ca/n1/pub/81-604-x/81-604-x2016001-eng.htm>

2014-2015: p.54 of report retrieved from <https://www150.statcan.gc.ca/n1/pub/81-604-x/81-604-x2017001-eng.htm>

<sup>17</sup> <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10002773/br-external/CanadianPublishersCouncil-e.pdf>

<sup>18</sup> *Devaluing Creators, Endangering Creativity*, The Writers’ Union of Canada: [https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity\\_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less](https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less)

<sup>19</sup> Testimony of Hugo Setzer, International Publishers Association, May 9, 2018:

<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence>

Watch List.<sup>20</sup> In a recent paper, IP expert Dr. Mihály Ficsor outlines his view that the Education Exception has put Canada in breach of its international obligations due to its failure to comply with the three-step test.<sup>21</sup>

### **Canadian Creators are not Benefitting from Increased Educational Spending**

In appearances before the INDU Committee in Spring 2018, several education sector representatives testified that academic expenditures on content are increasing. The education sector testimony related primarily to academic library expenditures, which is money spent on acquiring content – predominantly journals – for *research* purposes. Most of this content is published by international publishers<sup>22</sup> and is often created by salaried academic authors whose livelihoods do not depend on royalties.

In contrast, most of the content that was previously paid for under collective licences – content which continues to be copied today under the Copying Policies – is *instructional* content. Historically, over 80% of this copying was from books. This is content produced predominantly by professional authors who rely on royalties to pay their bills and published by educational and independent publishers who do not license their content through academic libraries.<sup>23</sup> This is largely Canadian content. When the education sector was licensed, 70% of the royalties distributed by Access Copyright was paid to Canadian creators and publishers. Currently, 600 million pages of *this* content is being copied for free each year without permission under the Education Exception.<sup>24</sup> It is this “*mass systemic and systematic*”<sup>25</sup> uncompensated copying that is destroying the Canadian market for educational works.

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<sup>20</sup> <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>, p.60

<sup>21</sup> *Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test*, Dr. Mihály Ficsor:  
<http://www.copyrightseesaw.net/en/archive/conflict-of-the-Canadian-copyright-law-on-educational-fair-dealing-with-the-three-step-test>

<sup>22</sup> For example, \$122M out of \$125M spent by CRKN is with international publishers. Testimony of Carol Shepstone, CRKN and Mark Swartz, CARL, April 24, 2018: <http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-102/evidence>

<sup>23</sup> The scope of York’s library licences was examined in detail in the York litigation. York ultimately conceded it could not prove any content captured in the copying study of its professors was licensed. York Decision, para. 287

<sup>24</sup> Testimony of Roanie Levy, Access Copyright, May 22, 2018:  
<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-116/evidence>

<sup>25</sup> York Decision, para. 262

## Recommendations

It is imperative that Parliament amend the Education Exception to restore a functioning marketplace that encourages the continued creation of content for Canadian classrooms that reflects our experiences and values as Canadians.

A guiding principle should be to establish a system that distinguishes between personal and institutional copying, in line with the models in place in the United Kingdom and Australia. Students should remain free to make individual copies of reasonable portions of works for their personal educational use, but widespread institutional copying should be paid for when the market offers licences for such use.

To this end, Access Copyright submits that the *Copyright Act* be amended<sup>26</sup> such that the fair dealing exception for the purposes of research, private study and education not apply to educational institutions in respect of works that are commercially available. Such amendment would stipulate that a work is “commercially available” if it is available to the user from a collective society or by the rightsholder within a reasonable time and for a reasonable price and may be located with reasonable effort.

This would bring fair and certain scope to the exception for the benefit of rightsholders and users alike, and would accord with representations made by the education sector in 2011 for an exception that facilitates teachable moments without adverse economic consequences. Ultimately, this would ensure that students have access to a wide range of materials, while creators and publishers are fairly compensated for the educational use of their works.

As a final matter, Access Copyright urges Parliament to take immediate action to harmonize the statutory damages available to collectives as part of the current efforts to reform the Copyright Board.<sup>27</sup> The current lack of penalties available in the general regime has led users to refuse to pay royalties

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<sup>26</sup> Proposed amendment:

Add subsection 29.01 to the Act:

29.01 The exemption from copyright infringement for research, private study, or education provided by Section 29 does not apply to educational institutions, or a person acting under the authority of one, if the work or other subject-matter is commercially available within the meaning of the definition of commercially available in section 2 including in the case of paragraph (b) of that definition, by a collective society or other person for the dealing.

<sup>27</sup> For further detail, see:

[https://www.ic.gc.ca/eic/site/693.nsf/vwapi/CBconsultations\\_2017\\_Submission\\_Access\\_Copyright.pdf/\\$FILE/CBconsultations\\_2017\\_Submission\\_Access\\_Copyright.pdf](https://www.ic.gc.ca/eic/site/693.nsf/vwapi/CBconsultations_2017_Submission_Access_Copyright.pdf/$FILE/CBconsultations_2017_Submission_Access_Copyright.pdf)

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owing under approved tariffs, thereby undermining the effectiveness of the tariff regime and the legitimacy of the Board. Closing this loophole will deter infringement, encourage settlement and, in line with one of the key goals of the reform of the Board, “*will enable creators to get paid properly and on time.*”<sup>28</sup>

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<sup>28</sup> [https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations\\_launchedonreformingcopyrightboardofcanada.html](https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations_launchedonreformingcopyrightboardofcanada.html)