



Geneva, 18 May 2018

## REPORT TO THE HOUSE OF COMMONS STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

### COPYRIGHT AND PUBLISHING

The International Publishers Association (IPA) is the world's largest federation of national, regional and specialist publishers' associations. Its membership comprises 76 organizations from 65 countries in Africa, Asia, Australasia, Europe and the Americas. Through its members, IPA represents thousands of individual publishers around the world who service markets containing more than 5.6 billion people. IPA has three Canadian members, the Association of Canadian Publishers, the Canadian Publishers' Council, and L'Association nationale des éditeurs de livres.

IPA was founded in 1896, with an initial aim of promoting respect for copyright and proper implementation of the (then) new international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works. Today, the promotion and defence of copyright is still one of IPA's main objectives. It pursues that objective by working with its members to ensure the adequacy of domestic legislation in light of international norms and to advocate for the effective enforcement of copyright. IPA is accredited to the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization (WIPO).

### Background

IPA participated in the consultations in 2010 and 2011 around the Copyright Modernization Bill, supporting its Canadian members. Regrettably, our concerns regarding overbroad exceptions and limitations in the Bill were not taken into account. This review presents Parliament with the opportunity to amend the statute in order to address the harm done to the educational publishing sector and to align Canada's copyright protection regime with international copyright norms.

The IPA endorses and supports the submissions of its Canadian members as well as of the Canadian authors' association (TWUC), which note the damage suffered by their members as a result of the bringing into effect and implementation of these provisions.

IPA also participated in the 2017 consultations on the reform of the Copyright Board.

### **Fair dealing for education in the international context**

IPA has a special interest in educational publishing. Educational publishers produce and supply quality textbooks and learning materials, and develop a wide range of innovative new tools and content in digital, print and 'blended' formats.

Education is a legitimate market for publishers and the protection of their investment by copyright encourages and promotes investment in quality educational material.

The Copyright Modernization Act 2012 expanded the scope of the fair dealing exception by adding 'education' as a permitted purpose, with the result that 'fair dealing' in copyright works for education could be undertaken without permission from the rightsholder and without remuneration.

In no other industrialized country is 'education', in the generic sense of the word, a legislated permitted purpose for a fair dealing exception (not even under the 'fair use' provisions in the United States). On the contrary, education is a legitimate, primary market for publishers, who can only invest in producing quality material for educational purposes precisely because their investment is protected by copyright. As a result, the fair dealing exception in Canada conflicts with the normal exploitation of educational works.

Publishers accept that exceptions for specific, narrow and well-defined educational purposes have their place in a well-balanced ecosystem. The seminal work undertaken by Prof Daniel Seng for WIPO, 'Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities' (2017) illustrates the exceptions around the world that have a purpose involving education or which could be used for such a purpose.

Publishers' experience is that those exceptions that are designed for a certain special case result in copyright owners and users of their works having a common understanding of the exception. However, when there are too many exceptions or when they are too broad, they undermine the

business model that produces high quality educational content in the first place. When considering educational exceptions, legislators should consider broader policy objectives; notably, to establish a sustainable local publishing ecosystem that supports a knowledge- and information-based economy. Too broad and ‘open’ exceptions invariably result in publishers and some of their customers taking different views of what is permitted under the exception, often followed by litigation.

### Fair dealing in Canada

An examination of Prof Seng’s study indicates that Canada’s unremunerated fair dealing exception for ‘education’ is unique in its liberality and scope. As feared, this has resulted in litigation, which is still not resolved.

Canada’s position in relation to its fair dealing exceptions is unique in another respect, with the decision of the Supreme Court of Canada *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 holding that fair dealing was a ‘user right’, subsequently elaborated upon in *Alberta (Education) v Canadian Copyright Licensing Agency* [2012] 2 SCR 345 where ‘private study’ was redefined as simply ‘study’ and then holding that ‘study’ was the same as education, such that (unlike in the United Kingdom, for example) copying by a teacher for a class was nonetheless fair dealing. It was with this background that the Copyright Modernization Act added ‘education’ as a fair dealing purpose.

This and other changes in the Copyright Modernization Act were intended primarily to reflect technological developments, as evidenced by these statements made during the public consultation process:

- the legislation ‘enables the use of copyrighted materials for the purpose of education, provided the use is “fair” (i.e. it does not harm the market for a work)’;
- ‘...these activities are subject to clear common-sense rules to respect the interests of rights holders’;
- ‘balance between enabling uses and respecting the legitimate interests of copyright owners, and to maintain conformity with Canada’s international obligations’;
- ‘teachers will be allowed to digitally deliver course materials to students, subject to fair compensation to copyright owners’.

Notwithstanding these assurances, our members report that Canadian publishers have experienced very significant declines in their licensing revenues, sharply reducing their profitability

and threatening their commercial viability, as evidenced by an analysis from PwC commissioned by Access Copyright (2015) and subsequently noted by the trial judge in *Access Copyright v. York University* (2017) FC 669. As a further consequence of these developments, the absence of licensing combined with what are viewed as extremely broad fair dealing definitions, copying is increasingly used as a substitute for the purchase of published materials, including those made specifically for the Canadian markets. Canadian educational publishers have already seen a sharp decline in their revenues due to copying substituting for textbook purchases. It begs the question: From where will educational materials that impart Canadian values and culture be sourced?

Following the introduction of the Copyright Modernization Act and several Copyright Board and lower court rulings, collective licensing administered by Access Copyright has ground to a halt as schools, colleges and universities have decided they no longer need the previously existing school and public sector licenses. The experience in Québec has been less severe, due to its Provincial Ministry of Education having a view of fair dealing which is different from that of the other Provinces.

### **Collective licensing**

A well balanced educational publishing infrastructure includes collective licensing. Collective licensing in the educational field is done at a very low cost per head.

For IPA, the concern is that Canada is on the verge of being the only developed country without functional collective licensing of published works. This has the following implications:

- No blanket mechanism for securing permission to make lawful copies of published works;
- Resultant significant decline in licensing revenues for publishers and authors;
- Free of licensing constraints, copying in educational institutions will rapidly substitute for purchasing published works;
- Copyright management organizations in other countries which have bilateral agreements with collecting societies in Canada express concern that they receive little or no royalties from the uses of the published works they represent.

Publishers rely on collective licensing to safeguard their interests. Without legislative intervention to respond to the introduction of fair dealing for education, the precedents set by the Supreme Court on fair dealing and its notion of ‘users’ rights’ as well as other decisions which have had the effect of unduly limiting the scope for collective licensing of uses of copyright work that

legitimately need to be licensed, will see the inevitable demise of collective licensing in Canada, impacting publishers and authors from Canada and other countries.

### **Digital interlibrary 'loan'**

The provisions of section 30.2(5.02), introduced by the Copyright Modernization Act, which allow libraries to make copies of articles in scholarly, scientific or technical periodicals without permission, conflict with the normal exploitation of those works. If the intention was to limit the beneficiaries of this exception to public, not-for-profit libraries in Canada, there is no definition that confirms this. The provisions neither specify the 'measures' the fulfilling library has to take to ensure compliance with 5.02(a), (b) and (c), nor require the measures be effective. Because the legality of the copying depends entirely on what would be fair dealing on the part of the patron, there is nothing to prevent a library from making requests for copies in digital form that in effect substitute for a subscription to a journal.

IPA asks that publishers be consulted on the proper scope of the exception. IPA also asks that it be clarified that the beneficiaries of the exception, both the providing and receiving libraries, are limited to public, not-for-profit institutions in Canada.

### **Canada's obligations under International Treaties relating to Copyright**

As Canada is out of step with the rest of the world with its copyright law, both as to the abovementioned provisions introduced by the Copyright Modernization Act and with the case law developed by its Supreme Court, IPA is conscious of serious academic opinion concluding that the fair dealing exceptions, as interpreted by its Supreme Court, has caused Canada to no longer be compliant with its international treaty obligations under article 9(2) of the Berne Convention, Article 13 of the TRIPs Agreement, and Article 10 of the WIPO Copyright Treaty. Given the word-limit on submissions, we cannot offer a full analysis here, but instead refer to the in-depth study by Mihály J. Ficsor, former Assistant Director General of WIPO, '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' (2018).

The introduction of the fair dealing exception for education and the judicial interpretation of fair dealing exceptions has had an effect beyond the borders of Canada. In supporting its members in copyright reviews in countries as far afield as Australia, Ireland, Nigeria, Singapore and South Africa, IPA has explained the negative impact of the Canadian approach on the local publishing industry as well as the nature of the conflicts with international norms.

We are also aware of the recent Section 301 Report of the United States Trade Representative, which places Canada on its Priority Watch List, with countries like Venezuela, Kuwait and China, because:

*The United States also remains deeply troubled by the ambiguous education-related exception to copyright that has significantly damaged the market for educational publishers and authors. While Canadian courts have worked to clarify this exception, confusion remains.*

### **Recommendations**

To restore a viable copyright regime, start to repair the damage done to the domestic publishing industry, prevent the collapse of collective licensing, and ensure compliance with international treaties, IPA asks the Government of Canada to:

1. Amend the fair dealing provisions of the Copyright Act by enacting a narrower exception or exceptions for specific educational purposes that are not open to varying interpretations and that meet Canada's international treaty obligations;
2. Confirm that the reproduction of copyright-protected works by educational institutions needs to be licensed within international best practice and recognizing the role of collecting societies and their tariffs;
3. Restore a balance in the copyright system by reviewing remedies for copyright owners and confirming that the tariffs of the Copyright Board are binding;
4. Amend the digital interlibrary loan exception after consultation on its proper scope and so that supplying and receiving libraries that can benefit from the exception are confirmed to be limited to public, not-for-profit institutions in Canada.



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