

# **Brief to the Standing Committee on Industry, Science and Technology regarding the 2018 Statutory Review of the *Copyright Act***

Submitted by The Writers' Union of Canada, June 4, 2018

## **Who We Are**

The Writers' Union of Canada (TWUC), founded in 1973, is a not-for-profit organization with approximately 2100 professional writer members working in every region of Canada, and earning their living in whole or part by writing books. A significant number of its members are also teachers, though mostly on a part-time or occasional basis. TWUC works to unite writers for the advancement of their common interests, and to foster a diverse and vibrant writing profession in Canada.

Since its founding, the Union has been engaged in advocacy issues affecting copyright law. It took part in the consultative process preceding amendment of the *Copyright Act* in 1988. That amendment authorized the collective licensing of copyright works in Canada by collectives like Access Copyright, which opened for business as CanCopy in 1989. TWUC was also an active advocate on behalf of writers prior to the 1997 amendment of the *Copyright Act*. It has previously made representations to the federal government on issues of copyright reform, intervened in and supported many court cases related to the protection of creator rights, and appeared before parliamentary committees struck to review amendments to the *Copyright Act*, including submission prior to the 2012 amendments and a recent presentation to the current Statutory Review of the *Copyright Act*.

As well, TWUC has chaired the International Authors Forum (IAF) for the past five years. The IAF was created as an umbrella organization of author associations worldwide. It now counts 66 organizations as members, and represents close to 700,000 individual writers and visual artists around the globe. The IAF regularly attends meetings of the Standing Committee on Copyright and Related Rights (SCCRR) at the World Intellectual Property Organization (WIPO) in Geneva, and advocates for clarity and fairness in author contracts within the publishing industry.

## **What We Know**

In our 2011 submission to the *Copyright Modernization Act* consultations, TWUC wrote:

*Extending "fair dealing" to education significantly interferes in the market dynamics of writing and publishing in Canada. This new exception would legislate away revenues from primary markets for publishers and writers. It could also legislate away up to 80% of the monies collected by reproduction rights organizations ("collective societies") on behalf of their affiliated publishers and writers under*

*“blanket licences,” which will be increasingly important in the digital economy and often the only practical licensing mechanism.*

As has now been thoroughly documented at the Copyright Board, in Federal Court, and through various sector studies and market analyses, TWUC’s prediction about the imposition of an education category in the Fair Dealing section of the Copyright Act was correct in every detail. In short, it has meant the collapse of an educational market for Canadian writers.

In a country with such a small commercial opportunity for book sales, artificial interference in the marketplace can only be destructive. Since 2012, educational copying royalties have collapsed,<sup>i</sup> costing the sector an estimated \$30 million per year. What’s more, book sales in Canada have decreased in this era of radically increased free copying.<sup>ii</sup> According to Statistics Canada, the share of total book sales that went to educational institutions in Canada fell 6% between 2010 and 2016. This translates to a 41% decrease in the net value of book sales to the Canadian educational sector — a further loss of over \$132 million on top of the \$30 million per year since 2012.<sup>iii</sup>

As predicted, the average educational royalty decline for authors now stands at 80%,<sup>iv</sup> and income from writing as a profession now stands at an average below \$13,000, which is a 27% decrease since 1998.<sup>v</sup>

The Standing Committee has heard compelling testimony from individual Canadian authors who are suffering from this loss of earned income. Authors are leaving the business and, in many cases, are contemplating a future without adequate retirement savings<sup>vi</sup> — this, after long and fruitful careers providing excellent Canadian content to Canadian readers, teachers and students.

While the 2012 change to the Act was sold as a benefit to students and educators, students now pay more for their education, including for materials — the cost of which has risen sharply even as administrations claim more and more copied work for free.<sup>vii</sup> With clumsy and expensive in-house copyright clearance rules and procedures that can only be applied on a case-by-case basis, teachers now have far less certainty around access and narrower choice in the materials they may use. Educational institutions have effectively off-loaded legal liability for infringement to individual teachers.

With help from public funders, TWUC and many of our provincial sister organizations administer programs that pay Canadian authors to present their work in public venues such as libraries, and directly to students in schools across the country. Many authors report arriving for these presentations to find their work photocopied or scanned into *ad hoc* free class sets for the students. This reveals the gulf of misunderstanding about copyright law and common practice within Canada’s educational system. A gulf that only widens when the educational sector is left to unilaterally declare what their copying guidelines should be.

It is TWUC's position that such extreme damage to both the marketplace and the education system was not the intention of Parliament at the conclusion of the 2012 amendment process. The testimony of educational representatives throughout that process, the assurances made around the continuation of a respectful licensing structure for copied work,<sup>viii</sup> is at odds with the immediate and damaging withdrawal from licensing by this sector after passage of the *Copyright Modernization Act*.

Parliament has heard from the education sector that the manner in which it accesses materials has radically changed from print to digital, and that somehow this alone accounts for the devaluing of collective licensing. Copyright is, and should remain, platform-agnostic. While evidence from recent Federal Court and Copyright Board deliberations shows that photocopied print product is actually still a major source of material for education, the eventual shift to digital should have no implications for copyright law and those expected to abide by it.

Neither should the acquisition of foreign journal content by educational libraries be considered a relevant factor in whether or not schools must sign a licence for industrial-scale copying from books. Journal subscriptions to academic libraries are primarily acquired for research purposes, not for instruction. The vast majority of materials used in print or digital course packs and on digital learning management systems continues to be sourced from books, and therefore must be subject to a licence. Evidence combined from the York University trial (*Canadian Copyright Licensing Agency v. York University*) and recent Copyright Board tariff proceedings shows that over 600 million pages of published writing is copied for use in Canadian education each year.

Canada's authors lead innovation within writing and publishing. Disruption and market evolution are challenges writers embrace, and they are nimble enough to evolve their own businesses as the sector changes. TWUC accepts and encourages self-published authors, and has invested considerable time and energy into studying and designing contract evolution for an industry that more and more expects the individual author to carry entrepreneurial risk. But no contract works without a strong *Copyright Act* as the core of its architecture. Licences for educational copying are themselves contracts, and since 2012 the *Copyright Act* has failed them.

## **What We Need**

Since 2012, when "education" was added as a category of fair dealing in Section 29 of the *Copyright Act*, one major lawsuit against a university has made its way (successfully) through Federal Court, a class action lawsuit against a second university has been approved, a desperate appeal has been launched in the first lawsuit, and a separate lawsuit has been launched by education ministers and schools against authors and publishers. Various Copyright Board tariff proceedings have continued at a painfully slow pace, and rulings from the board have been ignored by the education sector. Also since 2012, all costs related to education have risen, including and especially student costs. Meanwhile book sales to the education sector are

suffering, and authors are leaving a professional practice that is increasingly expected to operate as a hobby.

TWUC believes the solution to all this is clear. The “education” category of fair dealing must be removed from the *Copyright Act*, and regulations inserted to make sure the claim of fair dealing is no longer available as a defence for industrial-scale copying. In particular, fair dealing should not apply for educational institutions when a licence is available within a reasonable time and at a reasonable price from a collective or rights holder. The Writers’ Union of Canada joins our industry partners in recommending to Parliament the statutory licence model of Australia or the approach used in the United Kingdom and New Zealand that limits copying by educational institutions to situations where licences are not available. These are reasonable, affordable models for Canada to consider in designing regulation.

In the interim, changes to the efficiency and effectiveness of the Copyright Board must be immediately implemented as part of the Government’s commitment to reform the Copyright Board tariff process in 2018. A climate of delay has made proceedings at the Copyright Board ineffectual, and a lack of meaningful, enforceable consequences for non-compliance with Board rulings means that even after tariffs are set, they are often not respected. Clarity around the mandatory nature of Copyright Board tariffs must be inserted into the copyright framework, and statutory damages must be harmonized across all of the tariff regimes – a concrete improvement that will better enable creators to efficiently access stable streams of revenue, and reduce the amount of money being spent on legal fees (by all parties).

Finally, while it makes no claim to speak on behalf of indigenous communities in Canada, TWUC joins with its sectoral partners in calling for Parliament to make room for and incorporate concepts of traditional knowledge and indigenous community ownership into Canada’s copyright framework. This is a long-overdue amendment to the *Copyright Act*.

Respectfully submitted,



Marjorie Doyle, Chair  
The Writers’ Union of Canada

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<sup>i</sup> [https://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](https://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

<sup>ii</sup> [Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines, Section 8.2](#)

<sup>iii</sup> Calculated from:

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>iv</sup> [https://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](https://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

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<sup>v</sup> <https://www.writersunion.ca/news/canadian-writers-working-harder-while-earning-less>

<sup>vi</sup> [Sylvia McNicoll before the Copyright Review](#)

<sup>vii</sup> <http://www.thevarsity.ca/2014/09/21/after-access-copyright>

<sup>viii</sup> Testimony before Legislative Committee on Bill C-32: Hon. Ramona Jennex, Chair of the Council of Ministers of Education Canada (CMEC) Copyright Consortium, March 24, 2011,

<https://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-20/evidence>; Paul Davidson, President, Association of Universities and Colleges of Canada, February 15, 2011,

<https://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-13/evidence>