

**Written Submission for the Pre-Budget Consultations in
Advance of the 2022 Budget**

By: Access Copyright

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List of Recommendations

1. **Recommendation 1:** That the government amend the *Copyright Act* so that fair dealing for education only applies to educational institutions where a work is not commercially available under licence by the owner or a collective.
2. **Recommendation 2:** That the government amend the *Copyright Act* to clarify that tariffs approved by the Copyright Board of Canada are enforceable against infringers of copyright protected works subject to a tariff.
3. **Recommendation 3:** That the government amend the *Copyright Act* so that statutory damages are available to all collectives.

Submission

Introduction

Access Copyright is a copyright collective that represents over 13,000 Canadian publishers, 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.

Creators and the creative industries have long been recognized as important drivers of economic growth, national culture, and national pride. One of the pillars of copyright law that has enabled this success is the collective management of rights. Collective licensing in the writing and publishing sector worked well for over 20 years, resulting in the distribution of approximately \$450 million to creators and publishers by Access Copyright. Unfortunately, the collective administration of published works and the continued creation of Canadian content has been under significant threat since the *Copyright Modernization Act* (the “CMA”) came into force in 2012. The CMA expanded the fair dealing exception to include uses made for educational purposes – provided that those uses are fair.

When the 2012 CMA came into force, it caused a change in the behaviour of educational institutions outside Quebec. In unison, much of the education sector abandoned the collective licence and adopted self-defined copying policies which promote widespread and systematic free copying of approximately 600 million pages of published works annually. The education sector essentially adopted the copying limits in Access Copyright’s licences, called them “Fair Dealing Guidelines” (Copying Policies), and claimed a user was now able to do for free what they were previously paying for.

This change in behaviour was not intended by the legislation. When the CMA was under review, representatives of the education sector repeatedly reassured the Legislative Committee that fair dealing for education would not impact collective licensing or the livelihood of creators and publishers. But that’s precisely what happened.

We urge the government, on behalf of Canadian creators, to ensure your economic recovery plan includes a commitment to amend the *Copyright Act* to repair the educational marketplace for published works. This submission includes three recommendations that will together achieve that goal.

Economic Impact on Writing and Publishing Industry

The implementation of the education sector’s Copying Policies had an immediate and direct impact on royalty payments for the copying of published works by the education sector and ripple-out effects on the sales of published works. Royalties collected by Access Copyright from the education sector have declined by 86% since 2012, resulting in an approximate 75% decrease in royalties distributed to creators and publishers.

Collective licensing royalties are an important source of income for creators and publishers. They represent 20% of creator income from writing and 16% of publisher profits.¹ The concrete impacts of the loss of these royalties and the accompanying effect on primary sales include the reduction of investment in Canadian works, the elimination of publishing positions, and the exit of publishers from the marketplace. At least three major publishers have exited the elementary and secondary school market and at least one major publisher has exited the post-secondary market since 2012. Overall employment in the Canadian book industry has dropped by 31% since 2012. This has meant a loss to Canada's economy of 4400 jobs.²

Although these royalties are critical to the livelihoods of creators and publishers, they do not pose an undue burden on the education sector. A post-secondary institution could have most of its copying needs met by paying \$14.31 a year per student and the K-12 sector would have to pay \$2.41 per student per year.³

While most educational institutions in Quebec remained licensed and did not adopt the Copying Policies referenced above, the 2012 changes have nevertheless resulted in decreased royalty payments in the province for the educational copying. In Quebec, the annual fee per student paid by universities has dropped by almost 50%. Royalties received by Copibec from the Quebec education sector decreased by 23% between 2012 and 2017. Moreover, Quebec authors and publishers are not receiving remuneration for the copying of their works by educational institutions outside of Quebec.

Current Situation – Legal Uncertainty Over the Scope of Fair Dealing for Education

The uncertainty over the scope of fair dealing for education has led to almost a decade of protracted proceedings before the Copyright Board and litigation in the courts.

In 2013, Access Copyright launched legal action against York University, who had ceased paying copying royalties to Access Copyright and was instead relying on the education sector's Copying Policies. The Federal Court concluded that the Copying Policies did not meet the test for fair dealing and lead to illegal copying. The trial judge found that the Copying Policies have accelerated a decline in sales of works and have reduced the publishing industry's ability and incentive to invest in content. These conclusions were upheld by the Federal Court of Appeal.

York appealed the lower courts' rulings on fair dealing to the Supreme Court of Canada. The decision was issued on July 30, 2021.⁴ The Court dismissed York's request for a declaration that copying in accordance with its Copying Policies was fair dealing. The Court, however, did not endorse the reasoning of the lower courts with respect to fair dealing. The ultimate outcome is continued uncertainty over the

¹ [Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines](#), PricewaterhouseCoopers LLP, June 2015 at p. 7 & 10:

² [Culture and sport indicators by domain and sub-domain, by province and territory, product perspective](#), Table 36-10-0452-01, Statistics Canada.

³ These are the rates certified under Copyright Board tariffs.

⁴ [York University v. Canadian Copyright Licensing Agency \(Access Copyright\)](#), 2021 SCC 32

scope of fair dealing for education, to the ongoing detriment of creators and publishers.

After almost a decade of litigation and economic harm to the writing and publishing sector, creators are still left fighting for fair compensation for the use of their works by educational institutions. It is time for the government to take action to restore a functioning market and ensure the continued creation of content for Canadian classrooms.

Harm Caused by Ruling that Copyright Board Tariffs are Voluntary

The decision of the Supreme Court has not only reinforced uncertainty over the scope of fair dealing, but it has also undermined the ability for creators to meaningfully enforce their rights. The Supreme Court found that tariffs approved by the Copyright Board are not enforceable against infringers. This has damaged creators' ability to enforce their rights and receive fair compensation for the use of their works.

Collective management of copyright and the tariff system were encouraged and enhanced in 1988, 1997 and 2019 to address the ineffective individual enforcement of rights caused by mass unauthorized reproductions and use of copyright protected works by multiple users, which was resulting in a market failure. Parliament remedied the situation by significantly expanding the purpose and scope of the *Copyright Act's* "collective administration of copyright" by allowing a much wider group of collectives to file tariffs with the Copyright Board of Canada. The tariffs, upon their approval by the Board, could then be relied on in the courts by the collectives to recover royalties from users who refused to pay them voluntarily, without having to engage in lengthy, ineffective and expensive infringement proceedings.

The tariff system established by Parliament has been upended by the Supreme Court's ruling and has created an access to justice issue. According to the Supreme Court, the only available remedy for rights holders is an action for infringement, with all the costs, inefficiencies and challenges inherent in such action. When justice is not accessible, there is a real economic cost.

Royalties generated by Copyright Board tariffs were \$503 million in 2018⁵ – a critical source of revenue for rights holders. The ramifications of the Supreme Court decision stand to affect virtually all collective societies that file tariffs with the Copyright Board and the hundreds of thousands of rights holders they represent. It undermines the viability of the entire collective administration system and introduces numerous inequities and inefficiencies that will negatively affect the revenue streams of individual rights holders and discourage investment in new works.

⁵ [Copyright Board 2019-2020 Annual Report](#), p. 9

Recommendations

The simplest way to end the conflict and restore fair compensation to creators is to amend the *Copyright Act*. As part of the statutory review of the *Copyright Act*, the Standing Committee on Canadian Heritage studied the impact of fair dealing on the writing and publishing sector and issued unanimous recommendations to address the problem in its May 2019 *Shifting Paradigms*⁶ report.

Consistent with Recommendations 18-21 of the *Shifting Paradigms* report, the government should amend the *Copyright Act* as follows:

Recommendation 1: That the government amend the *Copyright Act* so that fair dealing for education only applies to educational institutions where a work is not commercially available under licence by the owner or a collective.

The surest way to end the protracted conflict and restore fair compensation to creators and publishers is to adopt the UK, Ireland and New Zealand approach and limit the availability of fair dealing for educational institutions to when a work is not commercially available through a licence from a collective society or rights holder.

Students would remain free to make individual copies of reasonable portions of works for personal educational use, but widespread institutional copying would be paid for when the market offers licences for such use. This would bring fair and certain scope to the exception for the benefit of rightsholders and users alike by ensuring students have access to a wide range of materials, while creators and publishers are fairly compensated for the educational use of their works.

Recommendation 2: That the government amend the *Copyright Act* to clarify that tariffs approved by the Copyright Board of Canada are enforceable against infringers of copyright protected works subject to a tariff.

The Government needs to remedy the damage caused by the Supreme Court's finding that tariffs approved by the Copyright Board are not enforceable against infringers.

The Government of Canada must act now to clarify that tariffs approved by the Copyright Board are enforceable against infringers of copyright protected works subject to a tariff. This clarification is critical to restore access to justice and preserve the pivotal role of the Copyright Board in fostering the growth of Canada's creative economy by balancing the market power between users and rights holders and ensuring fair payment for the use of copyright protected works.

⁶ [Shifting Paradigms](#), Standing Committee on Canadian Heritage, May 2019

Recommendation 3: That the government amend the *Copyright Act* so that statutory damages are available to all collectives.

Authors, visual artists and publishers should have the same ability to enforce their rights as musicians and songwriters. Historically, the lack of penalties available to Access Copyright led users to refuse to pay royalties under fair and equitable tariffs set by the Copyright Board, despite continuing to make unauthorized copies. In conjunction with making tariffs enforceable, the statutory damages available to collectives should be harmonized.

All copyright collectives should be entitled to seek statutory damages between three to ten times the value of the tariff. This system of statutory damages has worked well for performing rights music collectives for 20 years and should be extended to all collectives. There is no reason musicians and songwriters have tools designed to incentivize users to pay for the use of their work while authors, visual artists and publishers do not.