

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

By: Access Copyright

Submitted October 7, 2022

List of Recommendations

1. **Recommendation 1:** That the government implement, without further delay, its Budget 2022 commitment “to ensuring that the *Copyright Act* protects all creators and copyright holders... [and] work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.”
2. **Recommendation 2:** 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.
3. **Recommendation 3:** 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.
4. **Recommendation 4:** 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.

Canadian creators and publishers are an indispensable part of Canada's culture. They tell us who we are, where we come from and where we are going. Their work inspires and educates our students. Yet even as we entrust them with this important role, creators and publishers have not been paid for the mass and systematic copying of their works by most of the education sector outside of Quebec since 2012.

In Budget 2022, the government committed to address the damage caused by a decade of uncompensated copying by the education sector:

The government is committed to ensuring that the Copyright Act protects all creators and copyright holders. As such, the government will also work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.¹

Canadian creators and publishers welcome this important commitment from the federal government. Since the Budget was released, however, there have been no further announcements on the government's plans to implement this critical promise. On behalf of the Canadian writing and publishing community, we urge the government to act quickly to fulfil its commitment by implementing the recommendations outlined in this submission.

Background

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 approximately \$470 million in distributions 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.

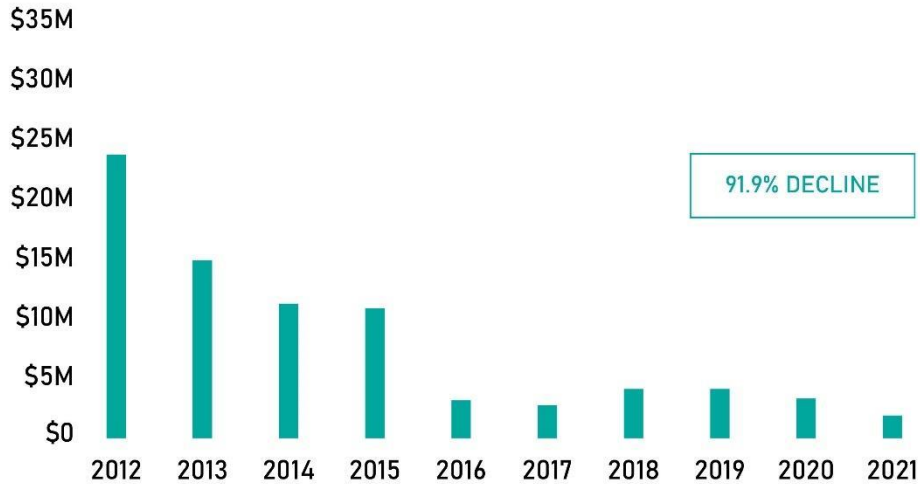
The CMA expanded the fair dealing exception to include uses made for educational purposes – provided that those uses are fair. This caused a change in the behaviour of educational institutions outside Quebec. In unison, much of the education sector abandoned the collective licence and adopted self-defined 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.

¹ 2022 Federal Budget, p. 274

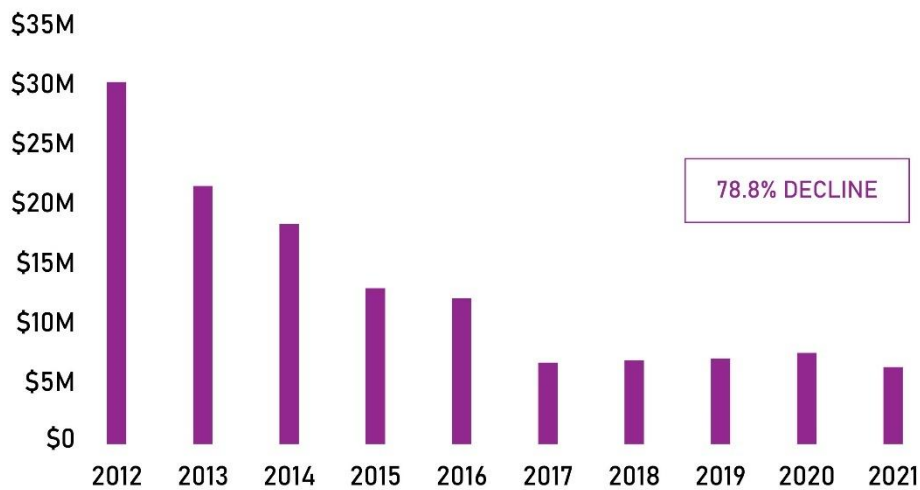
Economic Impact on Writing and Publishing Industry

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. The charts below depict the impact on royalties collected from the education sector and distributed to creators and publishers by Access Copyright:

ROYALTIES COLLECTED BY ACCESS COPYRIGHT FROM EDUCATION SECTOR

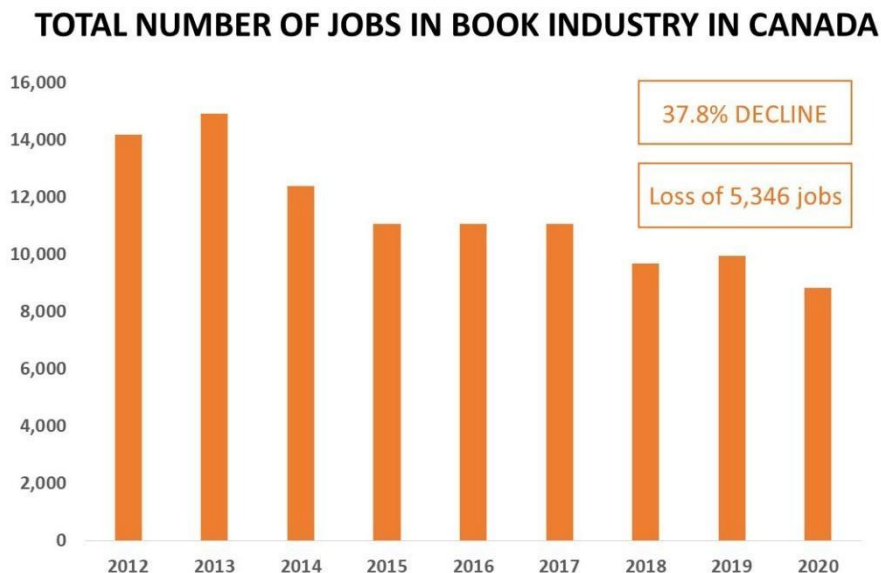


TOTAL DISTRIBUTIONS BY ACCESS COPYRIGHT TO CREATORS AND PUBLISHERS



Over the last decade, creators and publishers have been deprived of approximately \$190 million in unpaid royalties under tariffs certified by the Copyright Board of Canada.

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.² The loss of these royalties and the accompanying effect on primary sales has led to the reduction of investment in Canadian works, the elimination of publishing positions, and the exit of publishers from the marketplace. Three major publishers in Canada have exited the elementary and secondary school market and one major publisher has exited the post-secondary market since 2012. Employment in the Canadian book industry has dropped dramatically since 2012:³



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 per student per year and the K-12 sector would have to pay \$2.41 per student per year.⁴ A recent survey⁵ of post-secondary students revealed that they would be willing to pay \$37 on average for copies of excerpts of books and articles for their studies – a rate more than two times greater than the rate universities are refusing to pay.

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.

² [Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines](#), PricewaterhouseCoopers LLP, June 2015 at p. 7 & 10

³ [Culture and sport indicators by domain and sub-domain, by province and territory, product perspective](#), Table 36-10-0452-01, Statistics Canada

⁴ These are the rates certified under Copyright Board tariffs.

⁵ *Post-secondary student finances and the subjective reasonableness of the fair compensation to authors for access to their works*, Circum Network Inc., November 2021, p. 8-9

In 2013, Access Copyright launched legal action against York University who had ceased paying 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 led to illegal copying.⁶ 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.⁷ 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 "SCC"). The decision was issued on July 30, 2021.⁸ The SCC dismissed York's request for a declaration that copying in accordance with its Copying Policies was fair dealing. The SCC, however, did not endorse the reasoning of the lower courts with respect to fair dealing. After a decade of litigation and economic harm, the ultimate outcome is continued uncertainty over the scope of fair dealing for education, to the ongoing detriment of creators and publishers.

Harm Caused by Ruling that Copyright Board Tariffs are Voluntary

In its decision in the York litigation, the SCC also 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. Parliament remedied the situation by 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. Upon approval by the Board, the tariffs could then be relied on in the courts by collectives to recover royalties from users who refused to pay, without having to engage in lengthy and expensive infringement proceedings.

The tariff system established by Parliament has been upended by the SCC's ruling which has created an access to justice issue. According to the SCC, the only available remedy for rightsholders 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.

⁶ [Canadian Copyright Licensing Agency v. York University](#), 2017 FC 669

⁷ *Ibid*, para. 351

⁸ [York University v. Canadian Copyright Licensing Agency \(Access Copyright\)](#), 2021 SCC 32

Recommendations

The only way to fulfil the Budget commitment is to amend the *Copyright Act* to ensure that the mass and systematic copying of published works by the education sector is paid for. The blueprint for a solution has already been provided by the Standing Committee on Canadian Heritage in its May 2019 *Shifting Paradigms*⁹ report which was unanimously adopted by the members of that Committee.

The following recommendations align with Recommendations 18-21 of the *Shifting Paradigms* report:

Recommendation 1: That the government implement, without further delay, its Budget 2022 commitment “to ensuring that the *Copyright Act* protects all creators and copyright holders... [and] work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.”

Creators and publishers have already sustained a decade of economic harm. It is critical that the government act quickly to restore a functioning market and ensure the continued creation of content for Canadian classrooms.

Recommendation 2: 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.

This solution is based on models currently in place in countries such as the UK and Ireland. It provides guardrails to ensure that the mass and systematic copying by educational institutions is paid for when rightsholders and/or collectives offer reasonable licences for those uses.

Students would remain free to rely on fair dealing 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 3: 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 must act now to clarify that tariffs approved by the Copyright Board are enforceable against infringers. 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

⁹ [Shifting Paradigms](#), Standing Committee on Canadian Heritage, May 2019

power between users and rightsholders and ensuring fair payment for the use of copyright protected works.

Recommendation 4: That the government amend the *Copyright Act* so that statutory damages are available to all collectives.

In conjunction with making tariffs enforceable, the statutory damages available to collectives should be harmonized. Historically, the lack of penalties available to Access Copyright led users to refuse to pay royalties under tariffs set by the Copyright Board, despite continuing to make unauthorized copies.

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.