

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

By: Access Copyright

Submitted: August 4, 2023

<https://www.accesscopyright.ca/>

- **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.
- **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, recognizing that this recommendation is not a standalone solution and requires the concurrent implementation of Recommendation 1 to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders.
- **Recommendation 3:** That the government amend the *Copyright Act* so that statutory damages are available to all collectives, recognizing that this recommendation is not a standalone solution and requires the concurrent implementation of Recommendation 1 to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders.

Overview

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 Canadian 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 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.

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 decline of copying royalties is directly attributable to the adoption of these copying policies by the education sector.

The harmful policy environment has led to a dramatic drop in the number of jobs in Canada’s book publishing sector, and several major publishers in Canada leaving the elementary, secondary or post-secondary school markets altogether. Employment in the Canadian book industry has also dropped dramatically since 2012.¹ It will also lead to the painful downsizing and restructuring of Access Copyright by Q4 of 2023 if no action is taken to fix fair dealing in the *Copyright Act*.

As alluded to above, Quebec is an exception to this trend. The provincial government in Quebec has always supported strong copyright legislation and their educational institutions continue to compensate creators and publishers for the use of their works. In Quebec, there is a mindset that institutions have an obligation to respect copyright. However, Quebec is not immune to what is going on in the rest of Canada. It remains possible that educational institutions in Quebec may look at the rest of Canada and at the current federal legislation around fair dealing and decide to adopt the same approach. Furthermore, creators and publishers in Quebec do not receive compensation when their work is copied by educational institutions in the rest of Canada.

The government seemed to acknowledge these challenges by tasking both the Minister of Canadian Heritage and the Minister of Innovation, Science and Industry through their 2021

¹ [Culture and sport indicators by domain and sub-domain, by province and territory, product perspective](#), Table 36-10-0452-01, Statistics Canada

mandate letters to correct this inequity. However, to date, nothing has changed.

It appears there is no consensus within government on moving forward with its Budget 2022 commitment² to ensure the *Copyright Act* protects all creators and copyright holders and provides 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. Canadian creators cannot wait any longer.

Creators and publishers have already sustained over a decade of economic harm. It is estimated that writers, visual artists and publishers are owed annually \$21 million in unpaid royalties. The calculation of \$21 million owed to the sector is based on two inputs: the most recent royalty rates set by the Copyright Board of Canada and the most recent data on full-time-equivalent students (FTE) in unlicensed institutions, as reported by educational institutions (post-sec) and Ministries of Education/Ontario school boards (K-12), to Access Copyright. Many of these institutions have not reported FTEs to Access Copyright for several years, so these calculations may underestimate the number of FTEs in unlicensed institutions.

It is critical that the government act quickly to restore a functioning market and ensure the continued creation of content for Canadian classrooms.

In order to restore Canada's educational publishing marketplace Access Copyright advocates that the three recommendations below be implemented for the government to fulfil, without further delay, its Budget 2022 commitment "to [ensure] 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."

It is crucial to note that Recommendations 2 and 3 are not standalone solutions and require the concurrent implementation of Recommendation 1 to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders.

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.

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

² [2022 Federal Budget](#), p. 274

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, recognizing that this recommendation is not a standalone solution and requires the concurrent implementation of Recommendation 1 to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders.

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

Recommendation 3: That the government amend the *Copyright Act* so that statutory damages are available to all collectives, recognizing that this recommendation is not a standalone solution and requires the concurrent implementation of Recommendation 1 to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders.

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.

Access Copyright additionally supports the implementation of the recommendation by national visual-arts organizations, including Canadian Artists' Representation (CARFAC), of an amendment to the *Copyright Act* to introduce an Artist's Resale Right for the secondary, public sale of the artwork of visual artists through intermediaries.

Conclusion

To ensure the survival of the writing and publishing sector in Canada, urgent amendments to the *Copyright Act* are needed. Other countries, including the UK, have implemented a ready-made solution with widespread political support. Implementing recommendations 18-21 within

the *Shifting Paradigms*³ report released by the Standing Committee on Canadian Heritage will enable the federal government to fulfil its promise to creators and publishers and fix the broken marketplace.

The industry is calling on the federal government to ensure creators and publishers are fairly compensated by introducing amendments to the *Copyright Act* that will restore a functioning marketplace. These amendments should include clarifying fair dealing for education, making Copyright Board-approved tariffs enforceable, and strengthening compliance by making statutory damages available to all copyright collectives. The emergence of artificial intelligence (AI) and the uncertainty created by its further evolution make this a critical time to clarify fair dealing in the *Copyright Act*.

³ [Shifting Paradigms](#), Standing Committee on Canadian Heritage, May 2019