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Impact of Fair Dealing for Education on Canadian Writing and Publishing Industry

This submission has been prepared by a group of organizations from the Canadian writing and publishing industry, including Access Copyright, the Association of Canadian Publishers, the Association nationale des éditeurs de livres (ANEL), the Canadian Publishers' Council, Copibec and The Writers' Union of Canada, with regards to the current copyright modernization consultation being conducted by the Department of Communications and the Arts of the Australian government. We understand that the Australian government is considering additional fair dealing exceptions and we believe the experience of the Canadian writing and publishing industry in the aftermath of the addition of "education" as a fair dealing purpose to the Canadian *Copyright Act* in 2012 to be a relevant example for the government to consider.

Introduction

On November 7, 2012, the Canadian *Copyright Modernization Act* came into force. While the legislation was intended to "help protect and create jobs, stimulate the Canadian economy, and attract new investment to Canada"¹, it has instead caused substantial and proven harm to the Canadian writing and publishing industry. In particular, the addition of "education" as a permitted fair dealing purpose under the fair dealing exception and its interpretation by the education sector has led to a virtual elimination of payment for collective licensing by educational institutions outside of Quebec, a loss of jobs and a reduction in investment in educational resources for Canadian students.

Adoption of "Fair Dealing Guidelines" and Collapse of Licensing Royalties

Within months of the new legislation coming into force, schools, colleges and universities across Canada outside of Quebec adopted self-defined "Fair Dealing Guidelines", which promote widespread and systematic free copying of published works. While the legislation does not define the scope of the fair dealing for the purposes of education, the education sector unilaterally developed its own definition, purportedly ending the need to pay for licences or permissions for most copying activities in education.

These copying policies claim that 10% of a book, magazine or journal, or an entire chapter or article, whichever is greater, can be copied for free without permission. That photocopy, or digital copy, is often shared with all the students in a class, compiled in a course pack with other articles or chapters, or posted on a password-protected learning management system. Those paper or digital course packs may be the sole resource for an entire course.

The implementation of these self-defined copying policies has had an immediate and direct impact on the payment of royalties for the copying of published works by the education sector. Prior to their introduction, most of these copying activities were paid for through licences and tariffs administered by the copyright collectives Access Copyright (in Canada outside of Quebec) and Copibec (in Quebec). Since their implementation, most post-secondary institutions and all elementary and secondary public schools outside of Quebec have stopped paying royalties for the reproduction of published works. As a result, over 600 million pages of published works are copied each year by the education sector without

¹ Harper Government Delivers on Commitment to Reintroduce Copyright Modernization Act, September 29, 2011. <https://www.canada.ca/en/news/archive/2011/09/harper-government-delivers-commitment-reintroduce-copyright-modernization-act.html>

compensating the creators and publishers of these works.² These are works that are not distributed under open access and are not licensed through academic institution licences or otherwise.

Royalties collected by Access Copyright from the education sector have declined by 89% since 2012.³ These royalties were an important source of income for the industry; historically, these royalties represented 20% of creator income and 16% of publisher earnings.⁴

Although most educational institutions in Quebec did not adopt the same copying policies as the rest of Canada, the change to the legislation has nevertheless caused a decrease in the royalties paid for the educational copying of published works. In Quebec, the annual fee per student paid by universities has dropped by almost 50% (from \$25.50 to \$13.50 per year per student) and the amount paid by CEGEPs has decreased by almost 15%. The royalties collected in Quebec in the education sector by publishers and authors thus fell overall by 16.2% between 2012 and 2016, despite the political will to compensate rights holders and an increase in the student population.

The lack of clarity over the scope of educational fair dealing has also resulted in costly litigation, including litigation between Access Copyright and York University and a lawsuit launched by most provincial Ministries of Education in Canada against Access Copyright.⁵ Copibec and Université Laval recently reached an out of court settlement to end a class action launched by Copibec in 2014.⁶ Copibec and the University believe the agreement meets the needs of the university community while respecting the rights of copyright owners and recognize that collective licensing is beneficial and promotes academic freedom.

Economic Impact of Fair Dealing for Education on Canadian Publishing Industry

The economic impact of the education sector's copying policies has been examined in a 2015 report by PricewaterhouseCoopers ("PwC Report")⁷ and in the 2017 Federal Court decision in the litigation between Access Copyright and York University ("York Decision").⁸

Key findings from the PwC Report:

- Educational licensing royalties have declined drastically and represent a loss of \$30million/year to creators and publishers.
- Sales have also been impacted due to the substitutive impact of the free copying allowed under the education sector's copying policies. The rate of annual decline in unit sales in the education sector has accelerated since the implementation of these policies.

² Testimony of Roanie Levy, CEO and President of Access Copyright before the Standing Committee on Industry, Science and Technology as part of Statutory Review of the Copyright Act, May 22, 2018.

<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-117/evidence>

³ 2017 Annual Report of Access Copyright. http://www.accesscopyright.ca/media/115217/access_2017ar.pdf

⁴ *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*, PricewaterhouseCoopers LLP, June 2015 at p. 7 & 10. https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf

⁵ <http://www.accesscopyright.ca/media/announcements/education-sector-forces-canadian-creators-to-defend-why-their-works-should-not-be-used-for-free/>

⁶ <https://www.copibec.ca/en/nouvelle/179/copibec-et-l-universite-laval-concluent-une-entente-hors-cour-en-matiere-de-droits-d-auteurs>

⁷ *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*, PricewaterhouseCoopers LLP, June 2015. https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf

⁸ Canadian Copyright Licensing Agency v. York University, 2017 FC 669.

<https://www.canlii.org/en/ca/fct/doc/2017/2017fc669/2017fc669.html>

- The GDP contribution of the educational publishing industry declined from \$740 million in 2011 to \$620 million in 2013 and jobs declined from 7,600 to 6,400.
- Over the long term, PwC found that the education sector’s copying policies and practices would result in lower investment in educational resources, a loss of jobs and would negatively impact the diversity and quality of Canadian content available for the classroom.

The impact of York University’s copying policy⁹ on the Canadian writing and publishing industry was also closely examined in the York Decision. The York case involved a 4-week trial during which time the Federal Court trial judge heard extensive evidence, including the evidence of economic experts, presented by both sides on York’s copying policies and their impact on writing and publishing.

After careful examination, the Court found overwhelming evidence of harm, concluding that *“any suggestion that the Guidelines have not and will not have negative impacts on copyright owners and publishers is not tenable.”*¹⁰

In arriving at this finding, the trial judge acknowledged that there are many factors that influenced the decline in sales in recent years and, as conceded by York’s economic expert witness,¹¹ it is not possible to quantify the specific impact of the free copying allowed under the education sector’s copying policies on the market decline. Nevertheless, the trial judge concluded that there was “overwhelming” evidence that the free copying under these policies substituted for the sale of works¹² and found that the copying policies *“contributed to a drop in sales and accelerated the drop in unit sales – up to 6.9% per year and 3.4% in revenues between 2012 and 2015. Precise allocation of the amounts attributable to the Guidelines is not possible, but it was a material contribution.”*¹³

Ultimately, the Court found in favour of Access Copyright and determined that York’s copying policies and practices were not fair “in either their terms or their application” and result in an unfair “wealth transfer” from creators to educational institutions.¹⁴

Despite the clear ruling of the Court, the behavior of the education sector remains unchanged. They continue to copy under copying policies virtually identical to York’s while refusing to pay royalties for that copying. The York Decision is currently under appeal at the Federal Court of Appeal.

While the litigation drags on, the educational writing and publishing industry continues to suffer. Book sales to educational institutions declined by 41% between 2010 and 2016.¹⁵ At least three publishing companies – Oxford University Press, McGraw Hill and Emond Montgomery – have ceased to invest in

⁹ York’s copying policy is virtually identical to the policies in place at most educational institutions in Canada (outside of Quebec). See York Decision, para. 107

¹⁰ York Decision, para. 143

¹¹ York Decision, paras. 141-142

¹² York Decision, paras. 133, 349

¹³ York Decision, paras. 351

¹⁴ York Decision, paras. 14 and 119

¹⁵ Statistics Canada data: 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>

producing resources for the elementary and secondary school market. Perhaps hardest hit are Canadian creators, who now earn an income from writing below \$13,000 per year, which is a 27% decrease since 1998.¹⁶

Prospects for Reform

The *Copyright Modernization Act* included a provision that the *Copyright Act* be reviewed every five years. At this writing the Parliamentary Review is underway, and a variety of issues, including fair dealing for education, are being examined by the Standing Committee on Industry, Science and Technology, with support from the Standing Committee on Canadian Heritage. A report is anticipated in early 2019, but with a federal election scheduled for October 2019, it is unlikely that any recommendations from the committees will result in legislative or regulatory change in the near future.

Submitted on behalf of:

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ACCESS COPYRIGHT

For almost 30 years, Access Copyright has facilitated content use for educational and professional purposes. We have helped people make customized use of published materials combined with an assurance that the original creators and publishers also benefit, so that they can continue creating new and innovative works. This is vitally important to a strong Canadian culture and to all who rely on quality publications.



ASSOCIATION OF CANADIAN PUBLISHERS

The Association of Canadian Publishers (ACP) represents approximately 115 Canadian-owned and controlled book publishers from across the country. The membership is diverse and includes publishers from a variety of genres. Over 80% of Canadian-authored titles are published by the Canadian-owned sector. This means a strong Canadian-owned sector is vital to the development of new Canadian authors and writers.



ASSOCIATION NATIONALE DES ÉDITEURS DE LIVRES (ANEL)

The Association nationale des éditeurs de livres (ANEL) was created in 1992 and is now made up of some 100 francophone publishers from Quebec and throughout Canada. ANEL works to promote freedom of expression, respect for intellectual property rights, and universal access to books as a basis of knowledge and a learning tool. ANEL acts as a representative for the publishing industry in the cultural milieu and among political bodies.

¹⁶ *Devaluing Creators, Endangering Creativity*, The Writers' Union of Canada.

https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less



CANADIAN PUBLISHERS' COUNCIL

Founded in 1910, the Canadian Publishers' Council (CPC) represents the interests of publishing companies that publish books and other media for elementary and secondary schools, colleges and universities, professional and reference markets, the retail and library sectors. Members employ more than 3,000 Canadians and collectively account for nearly three-quarters of all domestic sales of English language books, with a significant presence in French-language publishing in Quebec. As importantly, member firms pay over \$36 million in royalties to Canada's writers and creators.



COPIBEC

Copibec, whose official name is the *Société québécoise de gestion collective des droits de reproduction*, is a not-for-profit organization created in 1997 by the *Union des écrivaines et des écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL) to manage the reproduction rights for content published in print and digital formats. It has the authority to manage the reproduction rights for thousands of Quebec authors and publishers as well as the authors and publishers represented by reproduction rights organizations in 33 countries, including the United States, France and Belgium.



THE WRITERS' UNION OF CANADA

The Writers' Union of Canada is our country's national organization representing approximately 2100 professional authors of books. The Union is dedicated to fostering writing in Canada, and promoting the rights, freedoms, and economic well-being of all writers.