

CANADIAN COPYRIGHT INSTITUTE

Established to promote a better understanding of copyright and to encourage its use in the public interest

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SUBMISSION TO THE STANDING COMMITTEE ON CANADIAN HERITAGE IN CONNECTION WITH A STUDY ON REMUNERATION MODELS FOR ARTISTS AND THE CREATIVE INDUSTRIES, AS PART OF THE STATUTORY REVIEW OF THE COPYRIGHT ACT

Submitted November 22, 2018

I appear before you today on behalf of The Canadian Copyright Institute, an association of authors, producers, publishers and distributors of copyrighted works. Founded in 1965, the Institute seeks to encourage a better understanding of copyright law.

We strongly support two basic models for the remuneration of authors and publishers: first, the traditional model of the publisher who holds and manages the rights of professional authors, whose works they edit, design, produce, market, sell and distribute. Second, the exercise and management of some rights by collective societies representing authors and publishers. Both basic models are important, as they support each other. Collective societies engage in experiments to provide educators with convenient sources of copyright material from a variety of publishers and resources, and publishers continue to experiment with new methods of delivery, including new ways of making works available.

Getting permission to make copies of published copyright content was onerous prior to the formation in 1988 of Access Copyright, a collective society that today represents more than 12,000 Canadian authors and 600 publishers and, through agreements with other collectives, countless authors and publisher rightsholders worldwide. When Access Copyright's "blanket licences" became available in the 1990s, the arduous task of clearing individual permissions from individual rightsholders was replaced by negotiated collective licences covering most published copyright material. Collective licensing became the norm for copying in schools and other educational institutions. It was easy, efficient and cheap for educators to access content from both Canadian and foreign publications from Access Copyright, and in Quebec, mainly from Copibec, and authors and publishers were paid by these collective societies.

Today, widespread, large-scale systematic copying of copyright content in educational institutions, without compensation to the rightsholders, damages the remuneration models I have described and hurts both authors and publishers. Copying substitutes for purchasing books and other publications from publishers and for obtaining licences, mainly from collective societies, to copy excerpts from publications. Emboldened by the 2012 copyright amendment extending "fair dealing" to include "education" as a purpose, educators decided that most of what was being copied should not be paid for at all. They promulgated arbitrary "fair dealing guidelines": for example, permitting copying of 10% of a work, a chapter from a book, an article from a periodical or newspaper or an entire poem or artistic work from a publication containing other works. These guidelines more or less reflect the guidelines in the licences that educators had negotiated with Access Copyright and complied with for more than 20 years. The market for selling and licensing copyright material is now badly damaged, both for publishers and for Access Copyright. A reduction of revenues in an industry such as ours, with narrow profit margins for publishers and low income for authors, is significant.

Before moving to our specific recommendations, let me say that we welcome the amendments in the budget Bill C-86 intended to accelerate Copyright Board proceedings, including case management and new timelines, and generally affirm our support for the role of the Copyright Board in setting tariffs and mediating disputes on licensing terms between users and collective societies representing rightsholders producing creative content.

Our recommendations to you today fall into two categories, both essential for the functioning of the two remuneration models we have described. The first recommendations address what may be licensed by collective societies, and the last recommendations concern enforceability and remedies that will deter infringement and encourage users to negotiate seriously with collective societies on uses of copyright material.

OUR RECOMMENDATIONS FOR COPYRIGHT AMENDMENTS

1. We recommend that copying for the purpose of education in educational institutions be clarified by clear parameters either in regulations or in the *Copyright Act* itself. There are already a number of specific exceptions designed for educational institutions but “fair dealing for the purpose of education” is a wide-open door for large-scale infringement.

Australia provides the example of a statutory licence for educational institutions managed by a collective society designated by the Australian government and subject to guidelines. The United Kingdom provides an example where copying of excerpts from a work for the purpose of instruction for non-commercial purposes without a licence is restricted to not more than 5% of a work in any 12-month period, but only to the extent that licences are not available for that copying. This is a precise exception, not a category of “fair dealing.”

Copying for the purpose of “education” in Canada should require permission, either from a collective society or a rightsholder. For most educational institutions, this permission should again be a comprehensive, or “blanket,” licence, which is either an agreement negotiated by a collective society and users of its repertoire (subject to the oversight of the Copyright Board) or a tariff administered by a collective society (requiring the approval of the Copyright Board, usually following a hearing).

2. We recommend clarification that tariffs approved by the Copyright Board Act are mandatory. There should be no uncertainty regarding the enforceability of royalties set by the Copyright Board. The education sector will of course not pay voluntary tariffs.

3. We recommend the repeal of a provision inserted into the *Copyright Act* in 2012 that reduces awards of statutory damages against non-commercial infringers to trivial amounts. Awards may not be less than \$100, nor more than \$5,000, for all infringements of all works involved in a proceeding. Any copyright owner whose work is infringed should be entitled to damages sufficiently high to be a deterrent, whether the infringer had a commercial or non-commercial purpose or whether any other copyright owner has elected to receive statutory damages from the same defendant. Few authors or publishers have the resources to engage in the litigation necessary to prove their actual damages, if provable at all. Electing statutory damages avoids the necessity of proving actual damages and greatly reduces litigation costs for all.

4. We recommend harmonizing the statutory damages available to collective societies at a level sufficiently meaningful to ensure better compliance with licences and tariffs approved by the Copyright Board. Currently performing rights collectives, like SOCAN, may opt for an award of statutory damages between 3 and 10 times the amount of the applicable royalties. This remedy should be available to all collectives including collectives like Access Copyright. Otherwise, the **worst-case scenario for a user is retroactive payment of applicable royalties.**

There is no reason musicians and songwriters deserve to be paid for the use of their work while authors and visual artists do not. We recommend that all copyright collectives should be eligible to collect statutory damages between 3-10 times the value of the tariff. This system has worked well for performing rights music collectives for 20 years and should be extended to collectives representing other rights holders.

CONCLUSION

It is our view that changes to the *Copyright Act* along the lines we recommend will provide fairer remuneration for authors and publishers and better access to creative works for users, and will go a long way towards restoring a functioning marketplace for Canadian content, and will benefit all Canadians.

Respectfully,

Bill Harnum
Chair, Canadian Copyright Institute

