

## IFRRO MEMORANDUM

### Re Canada, after the changes to the copyright legislation

The IFRRO Secretariat has worked out this Memorandum on the situation in Canada after the changes to the copyright legislation in 2012, based on publicly available information and a legal analysis presented to the IFRRO Board by former General Counsel Anita Huss-Ekerhult.

#### EXECUTIVE SUMMARY:

- The results of the changes to the Canadian Copyright Act in 2012 clearly demonstrate the need for collective rights management to be a part of a healthy copyright framework. Access to educational material through agreements with Reproduction Rights Organisations (RROs), such as Access Copyright and COPIBEC, and rightholders, is what best meets dynamic user needs to legally access high quality teaching material in constantly changing environments. There will be no winners if the changes to the copyright legislation lead to the standing down of the Canadian RROs
- We hold that the changes to the Canadian Copyright Act in 2012 had consequences that were neither anticipated, nor intended. Rightholders were correct to anticipate that the changes to the fair dealing provisions in the Canadian Copyright Law would jeopardise rightholders' existing and future revenue streams and the local Canadian text-publishing sector.
- Canada's new fair dealing for "education" provision, together with the implementing legal and policy framework, seems to depart from the internationally recognised norms, may well breach Canada's international commitments, and exposes Canada to complaints from rightholders in and outside Canada.

#### 1. RECENT CHANGES TO THE CANADIAN COPYRIGHT LEGISLATION: THE 'COPYRIGHT MODERNIZATION ACT'

The Canadian Copyright Act (R.S.C. 1985), the federal statute that governs copyright law in Canada, contains provisions that allow the use of a copyright-protected work for specific purposes; one of these rights is known as "fair dealing".

On June 29, 2012, the Copyright Act was amended with the passage of the Bill C-11, the "Copyright Modernization Act" (S.C. 2012, c.20).<sup>1</sup> A key amendment in the Copyright Modernization Act expanded the fair dealing provision to add education as one of the eligible purposes for fair dealing. The relevant section now reads: "*Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.*" This Bill introduced several additional new exceptions without any compensation for authors and publishers.

#### 2. COMMENTS FROM VARIOUS GROUPS ON THE DRAFT LEGISLATION, LEADING TO THE NEW LAW

The Canadian government and legislators were warned by several authors, publishers and other organisations that the proposed 2012 amendments would risk infringing the "3-step test" in Article 9(2) of the Berne Convention, which is echoed in other international treaties.

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<sup>1</sup> Bill C-32 failed to pass in 2010 when an election was called. In 2011, with a majority in the House of Commons, the Conservative Party introduced Bill C-11, titled the *Copyright Modernization Act*. Bill C-11 was passed and received Royal Assent on June 29, 2012.

Also, French-speaking Canada urged for a more cautious approach. The Quebec National Assembly unanimously passed a resolution calling for the Bill to ensure that it gives *“Québec creators the full recognition of their rights, adequate protection against illegal copying of their works, the application of the private copying principle, and income in accordance with the value of their intellectual property.”* (The IFRRO member COPIBEC<sup>2</sup> grants similar licences as Access Copyright, the IFRRO member in English-speaking Canada, to educational institutions in Quebec.)

Already in the 2010 digital economy consultation, Access Copyright, the Collective Management Organisation (CMO) for text- and image-based works in English-speaking Canada, told the Canadian government<sup>3</sup>: *“New exceptions, which create a sudden increase in uncompensated uses of works, will result in significant lost sales and millions of dollars in revenue losses to Canadian content owners from collective licences alone.”*

Access Copyright was asked during the Bill C-32 committee hearings to specify the likely cost. It responded as follows<sup>4</sup>:

*“Based on our study, we believe that about \$60 million is at risk as a result of the scope of fair dealing in the education sector, as well as other education-related exemptions provided for in Bill C-32. This is revenue that COPIBEC and Access Copyright collects today for the copying of a chapter here, a page there, for the distribution of works in class, for the use of works in exams. It also includes the royalties that certain film distributors collect from the education sector. So we’re talking about a minimum of \$60 million at risk, but you also have to consider that, when a use or reproduction becomes free of charge, an increase in that type of reproduction follows. There will also be a revenue shortfall that will be more difficult to quantify as a result of a decline in sales of texts intended for schools.”*

IFRRO (the International Federation of Reproduction Rights Organisations<sup>5</sup>), the worldwide umbrella organisation for CMOs in the text- and image-based sector, the RROs, also expressed its concerns, in a letter to Canadian Government ministers<sup>6</sup>, that the educational and other non-commercial exceptions in the Copyright Modernization Act would seriously affect the existing and future sales market for educational material and prejudice authors’ and publishers’ legitimate interests. IFRRO concluded that the Bill would put Canada outside the existing agreed international legal framework on copyright. Also, international authors and publishers associations made submissions, in which they pointed out the likelihood of negative consequences of the proposed changes to the copyright legislation for locally created works, in particular for education, and the development of the Canadian creative and publishing sector.

However, in spite of several voices, across and outside Canada, questioning the “fairness” to creators and publishers of this unqualified exception, Bill C-11 (“the Copyright Modernization Act”) was passed without amendments.

### 3. CONSEQUENCES

What were the precise consequences of the changes to the Canadian copyright legislation?

An immediate consequence was that, since summer 2012, educational institutions in Canada (excluding those in Québec) claimed that all employees and students in elementary and secondary

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<sup>2</sup> <http://www.copibec.qc.ca/>

<sup>3</sup> See: <https://www.ic.gc.ca/eic/site/028.nsf/eng/00343.html>

<sup>4</sup> See: <https://openparliament.ca/committees/bill-c-32-40-3/40-3/6/roanie-levy-1/?page=1>

<sup>5</sup> [www.ifrro.org](http://www.ifrro.org)

<sup>6</sup> See: <http://ifrro.org/content/canada-ifrro-comment-canadian-copyright-modernization-act>

school settings are able to use copyright-protected works, within set conditions and limits, without obtaining permission and without paying a fee to the copyright owner or to a CMO. With this interpretation of the new law, they established their own fair dealing guidelines. Basically, the result of this has been as cautioned against in submissions by the rightholder communities: a severe negative impact on the creative and publishing sector, with reduced local production and contribution to the Canadian employment and economy.

### 3.1 CONSEQUENCES BY USERS: SELF-ESTABLISHED GUIDELINES ON FAIR DEALING

Following the coming into force of Canada’s Copyright Modernization Act in 2012, there were increasingly aggressive assertions from user advocates on what should be regarded as “fair dealing” in Canada, and what could be copied without permission from rightholders<sup>7</sup>. Several statements, based on a broad interpretation of “fair dealing”, have been widely disseminated, and most educational institutions have adopted their own broad fair dealing guidelines. Several users no longer concluded any licences with Access Copyright<sup>8</sup>.

In the Fall of 2012, all English-language provincial governments in Canada adopted fair dealing guidelines developed by the Council of Ministers of Education, Canada, which largely cover the same copying permitted under an Access Copyright licence. The guidelines state:

1. *Teachers, instructors, professors, and staff members in non-profit educational institutions may communicate and reproduce, in paper or electronic form, short excerpts from a copyright protected work for the purposes of research, private study, criticism, review, news reporting, education, satire, and parody.*
2. *Copying or communicating short excerpts from a copyright-protected work under these Fair Dealing Guidelines for the purpose of news reporting, criticism, or review should mention the source and, if given in the source, the name of the author or creator of the work.*
3. *A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:*
  - a. *as a class handout;*
  - b. *as a posting to a learning- or course-management system that is password protected or otherwise restricted to students of a school or postsecondary educational institution;*
  - c. *as part of a course pack.*
4. *A short excerpt means:*
  - a. *up to 10 per cent of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work);*
  - b. *one chapter from a book;*
  - c. *a single article from a periodical;*
  - d. *an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works;*
  - e. *an entire newspaper article or page;*
  - f. *an entire single poem or musical score from a copyright-protected work containing other poems or musical scores;*
  - g. *an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work.*

<sup>7</sup> See, for instance: <http://www.univcan.ca/fair-dealing-policy-for-universities/>, <http://www.usask.ca/copyright/basics/copyright-policy/fair-dealing-guidelines/index.php>, <http://www.dal.ca/dept/copyrightoffice/fair-dealing/fair-dealing-guidelines.html>

<sup>8</sup> <http://accesscopyright.ca/>

5. Copying or communicating multiple short excerpts from the same copyright-protected work with the intention of copying or communicating substantially the entire work is prohibited.
6. Copying or communicating that exceeds the limits in these Fair Dealing Guidelines may be referred to a supervisor or other person designated by the educational institution for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.
7. Any fee charged by the educational institution for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the institution, including overhead costs.

As of January 1, 2013, all provincial governments outside of Quebec, stopped paying the Access Copyright licence.

In the Fall of 2012, the Association of Universities of Colleges Canada (AUCC, now “Universities Canada”) and the Association of Community Colleges of Canada (ACCC, now “Colleges and Institutes Canada”) published guidelines that authorized faculty, instructors and staff to copy and communicate, in paper or electronic form, “short excerpts” from copyright-protected works. Similar to the CMEC guidelines, short excerpts are defined as:

- (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work);
  - (b) one chapter from a book;
  - (c) a single article from a periodical;
  - (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works;
  - (e) an entire newspaper article or page;
  - (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores;
  - (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work
- provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose..

The vast majority of Canadian universities and colleges outside of Québec subsequently adopted these guidelines. In Québec, most universities have renewed their licence at a substantially lower royalty rate. However, one university, Université de Laval, has chosen not to, and decided to establish its own guidelines based on the same model as the AUCC/Universities Canada guidelines.

### 3.2 CONSEQUENCES BY RIGHTHOLDERS AND RROS

The Association of Canadian Publishers released its own fair dealing guidelines in December 2013, with a much more balanced approach. It states, *inter alia*:

““Textbook-like collections” are created by instructors during their course planning and are most often presented as course outlines. For any resource that appears as required material on an instructor’s course outline, copyright owners should be paid. Although the copying of short excerpts to complement core resources may be fair, fair dealing is not intended to enable the assembly of textbook-like collections, whether digitally or on paper. That is not fair.”<sup>9</sup>

<sup>9</sup> See: <http://publishers.ca/images/downloads/ACP-HigherEd-Statement-FairDealing-December-2013.pdf>

The Association of Canadian Publishers' guidelines were immediately attacked by the user community, claiming that the educational community should ignore these “*misstatements – or perhaps use them as a teaching tool about how NOT to inform the Canadian public accurately about copyright law*”<sup>10</sup>.

#### 4. ANALYSIS OF THE LEGISLATION AGAINST CANADA'S INTERNATIONAL OBLIGATIONS

Serious doubts can be raised as to whether Canada complies with its international obligations.

##### 4.1 THE COPYRIGHT MODERNIZATION ACT

The *Copyright Modernization Act* creates an unprecedented breadth of new exceptions. By way of example, to our knowledge, no other country in the world has a copyright law that expressly exempts format- and time-shifting of any type works, for personal use and without compensation; creating and disseminating user-generated content (UGC) for non-commercial purposes; fair dealing for educational purposes without express limitations on the users, the categories of use, or associated conditions; broad rights of educational institutions to make copies of publicly available materials; and reverse engineering for encryption research and security testing. Some countries may have one or more of these exceptions – usually, however, in a much narrower form; and / or combined with an obligation to pay remuneration to authors and publishers; and most have none. Some of the exceptions are without precedent.

Overall, the exceptions in the “Copyright Modernization Act” prompt questions about Canada's compliance with its international obligations, given its potential to – and, indeed, *de facto* impact, not least according to the PwC study referred to below – seriously affect the market for educational material, thereby prejudicing authors' and publishers' legitimate interests. At least the following exceptions raise doubts as to its compliance with the three-step test enshrined in international law:

- Is the provision for **Fair Dealing for the Purposes of Education [s. 29]** too broad in scope to define a special case, and would thus conflict with a normal exploitation of the work? Also, does ‘education’ qualify as a ‘special case’ as set out as a criteria for exception in Article 9.2 of the Berne Convention?
- The **Display Exception [s. 29.4(1)]** and the **Tests and Examination Exception [s. 29.4(2)]** could be in direct conflict with the normal exploitation of a work by removing the relevance of the availability of a licence and the right for any rightholder to make his/her work commercially available through other means than direct sales.
- Since the **Interlibrary Loan Exception [s. 30.2(5)]** has the potential to significantly reduce the size of the library market in Canada, would that also mean that it conflicts with the normal, well-established market for the exploitation of a work?
- The exception for **Reproduction for Private Purposes [s. 29.22]** goes far beyond format shifting, without any compensation foreseen for authors and publishers.
- With the **Non-Commercial User Generated Content provision [s. 29.21]**, Canadian law permits the use of any published work in order to create a new work for non-commercial purposes as long as the use does not have a “substantial adverse effect, financial or otherwise” on the exploitation of the original work. “Substantial adverse effect” is not the proper test according to international norm settings: the test is normal exploitation. By exempting these uses, the law deprives rightholders of potential and actual economic gains,

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<sup>10</sup> See: <http://excesscopyright.blogspot.se/2014/02/the-acps-misstatement-of-principles-on.html>

which could conflict with the normal exploitation of the work. This exception could cover, for instance, course packs. The possibility to make course packs by teachers and professors is one of the different types of licences that are offered by RROs around the world.

#### 4.2 THE FAIR DEALING GUIDELINES OF CANADIAN UNIVERSITIES

Substantial doubts may also be raised whether the fair dealing guidelines implemented by Canadian universities are in compliance with the “three-step test” enshrined in international conventions / treaties.

- a) The way the three-step test is provided in Article 9(2) of the Berne Convention, implies a cumulative approach, i.e. all three factors need to be fulfilled<sup>11</sup>: *“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”*
- b) Furthermore, the resolution of the joint session of the Subcommittees of the Berne Executive Committee and the Intergovernmental Committee of the UCC held in Washington in June 1975<sup>12</sup>, included the findings: (i) that widespread reprographic reproduction is in conflict with the normal exploitation of the works concerned and unreasonably prejudice the legitimate interests of owners of rights; and that (ii) governments should encourage the establishment of collective systems to exercise and administer the right of remuneration.

It should be noted that these observations are at least as valid in the digital environment. Against this background, it should be highlighted that only certain criteria may be provided for establishing what is and what is not in accordance with the test.

Firstly, it is questionable whether ‘education’ qualifies as ‘special case’, as required by Article 9.2 of the Berne Convention.

Secondly, generally speaking, it is not a reliable method to determine precise percentages of works copied – unless it is based on, or supported by, an agreement with the owners of rights or, in particular, with their RROs.<sup>13</sup> For instance, in the UK, as regards reprographic copying by educational establishments of passages from published works, Section 36(3) of the CDPA limits the copying of copyright works in educational institutions under fair dealing provisions to cases when a licence is not available. The licence can be available from the rightholder (author or publisher) directly, or offered by the RRO. Similar stipulations are found in the legislation of several countries in Africa, Asia, the Caribbean and Europe, where copyright legislation is inspired by the UK copyright laws.<sup>14</sup>

Moreover, also in the U.S., the Court of Appeals for the 11th Circuit ruled, in the case launched by publishers against Georgia State University, that the application of a general ‘10%’ and ‘complete chapter’ rule is not compatible with “fair use”.<sup>15</sup> One would expect the same to be true for fair dealing under the Canadian legislation.

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<sup>11</sup> See, for instance, Dr. *Ficsor*, [http://www.copyrightseesaw.net/archive/?sw\\_10\\_item=15](http://www.copyrightseesaw.net/archive/?sw_10_item=15), based on the Records of the Diplomatic Conference for the revision of the Berne Convention.

<sup>12</sup> Cf. statement by Prof. *Ulmer* in Stockholm as the Chairman of Main Committee I, [http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo\\_pub\\_120\\_1983\\_03.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1983_03.pdf)

<sup>13</sup> [http://www.ifro.org/sites/default/files/a\\_quick\\_guide130911.pdf](http://www.ifro.org/sites/default/files/a_quick_guide130911.pdf)

<sup>14</sup> See: <http://www.ifro.org/node/1575/>

<sup>15</sup> <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>

In addition, Article 10(2) of the Berne Convention offers some further guidance: works may only be used for *illustration for teaching*, and only to the extent justified by the purpose and in accordance with “*fair practice*”.<sup>16</sup> In accordance with the principles reflected in Article 10(2) of the Berne Convention, in certain cases, “free” reprographic reproduction may be allowed – but based on a very narrow scope only. Also, there are several examples of national regulations and/or collective agreements under which the scope of free uses is far narrower than what is determined in the Canadian fair dealing guidelines.<sup>17</sup> Overall, national copyright legislation needs to be in harmony with commonly accepted international and regional norms. It may include “free uses”, i.e. no prior consent with or without remuneration, only in carefully designed special cases, when the reproduction does not conflict with the normal exploitation of the work and does not prejudice the legitimate interests of the rightholders.

In this vein, it appears that if Canadian universities wanted to engage in reproductions that allow stated percentages or other parts of works, and even certain categories of entire works, which might be covered by the possibility of free copying in narrow and limited circumstances, this should be stipulated in an agreement with a RRO, with copying being facilitated by licensing, in order to avoid conflicts with the three-step test. Also, the RRO should have the possibility to apply some monitoring mechanisms to ensure the legality of the widespread copying by users.

#### 4.3 FAIR DEALING CRITERIA – DOES THE BALANCING TEST STILL EXIST IN CANADA?

Copyright, and fair dealing in particular, requires a balancing of the interests of stakeholders. The way the Canadian legislation has been implemented largely ignores the interests of rightholders by effectively negating the requirement to sign a licence with the rightholders or a RRO for the copying of portions of copyright-protected works. The interpretation thus seems to risk infringing Canada’s international obligations in view of the three-step test, in particular because the interpretation ignores the balancing factors necessary to ensure that copying is fair..

An option could be to apply the “test of spontaneity” when balancing the interests of the stakeholders involved. It has been frequently used and interpreted in other jurisdictions, for instance, in the U.S. and Hong Kong.

The **U.S. Fair Use Guidelines**<sup>18</sup> refer to the “test of brevity and spontaneity” in case of multiple copying (not exceeding more than one copy per pupil in a course), and define spontaneity (section II., definitions) as:

*“Spontaneity: i. The copying is at the instance and inspiration of the individual teacher, and ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.”*

The **U.S. Basic Guide to Policy Considerations, “Campus Copyright Rights and Responsibilities”**<sup>19</sup> also addresses spontaneity:

*“Spontaneity means that the copying is done at the instigation of the individual teacher and that the decision to reproduce the work is made so close in time to the moment the faculty member wants to use the work that it would be unreasonable to expect timely reply to a request to the copyright*

<sup>16</sup> See: IFRRO Memorandum on “*Illustration for teaching and fair practice*”, <http://ifro.org/content/illustration-teaching-and-fair-practice>

<sup>17</sup> See, for instance: [http://www.ifro.org/sites/default/files/a\\_quick\\_guide130911.pdf](http://www.ifro.org/sites/default/files/a_quick_guide130911.pdf)

<sup>18</sup> <http://www.unc.edu/~uncclng/classroom-guidelines.htm>

<sup>19</sup> <http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=472>, cf. pages 11 *et seq.*, and page 27.

owner for permission. (...) Some argue that the reproduction and distribution of a coursepack cannot be fair use when the selections are pre-planned and constitute the primary assigned reading. Although ad hoc supplemental selections are more likely to be considered fair use, others believe analysis of the four fair use factors could still lead to a finding of fair use even for primary assigned readings.”

The **Hong Kong Guidelines for Photocopying of Printed Works by Not-for-profit Educational Establishments**<sup>20</sup> state in Section D.4:

*“The time of the decision to use the work and the proposed time of its use in the classroom should be so close that it would be unreasonable to require the teacher to obtain permission for the copying. If the time between the decision and the proposed use is 3 working days or less, then, for the purpose of this clause, it will be deemed unreasonable to require the teacher to obtain permission for the copying.”*

The **Canadian Copyright Institute**, in its fall 2013 paper “A Fair and Better Way Forward”, states that “multiple copying for educational purposes *can* be fair dealing”<sup>21</sup>, but that taking a chapter of 92 pages of a book of 180 pages and four chapters is not fair dealing<sup>22</sup>. There is no direct reference to spontaneous or planned/structured behaviour. The **Association of Canadian Publishers (ACP)** however, in their Statement of Principles on Fair Dealing in Education<sup>23</sup>, state that (cf. principle 4): *“Fair dealing is spontaneous – not planned, organized, coordinated for maximum value gained, or designed specifically to avoid payment. If copying is not spontaneous, it is not fair dealing.”* The **Canadian Educational Resources Council** argues that fair dealing is limited to “spontaneous, situational uses”<sup>24</sup>. All in all, however, there does not seem to be such limitation, based on spontaneity, in either the law or court decisions in Canada<sup>25</sup>.

It seems that, in Canada, any reasonable balancing test has been eliminated: It is all about users’ rights, so why should one try to find a balancing approach, anyway?

Overall, the legislative and policy framework in Canada may indicate an infringement of the three-step test in Article 9(2) of the Berne Convention, also as transplanted into TRIPS (Article 13), the WIPO Copyright Treaty (Article 10), and WPPT.

Considering all these developments in Canada, it would not be surprising if there were to be a future trade challenge by other countries. A successful challenge under the TRIPS Agreement was brought by the EU against the US because of an excessively broad 1998 amendment to the US Copyright Act, creating an exception, which a WTO Panel found (in 2000) to be inconsistent with Articles 11(1)(ii) and 11bis(1)(iii) of the Berne Convention as incorporated into Article 9(1) of the TRIPS Agreement, thereby violating TRIPS.<sup>26</sup> . It is difficult to understand that the Canadian government sees any benefit in these uncertainties; rather, it should consider how to remedy the situation.

## 5. RESULTS OF THE CHANGES TO THE CANADIAN LEGAL FRAMEWORK

What are the results of the changes to the Canadian legal framework? It seems clear that it has created substantial legal uncertainty, impacted on the user, including the student economy and

<sup>20</sup> [http://www.ipd.gov.hk/eng/intellectual\\_property/copyright/workshop/clarifying/Eng\\_guidelines\\_040604.pdf](http://www.ipd.gov.hk/eng/intellectual_property/copyright/workshop/clarifying/Eng_guidelines_040604.pdf)

<sup>21</sup> Available here: [http://thecci.ca/a\\_fair\\_and\\_better\\_way\\_forward.html](http://thecci.ca/a_fair_and_better_way_forward.html), cf. page 2.

<sup>22</sup> *Ibidem*, page 5.

<sup>23</sup> See: <http://publishers.ca/images/downloads/ACP-HigherEd-Statement-FairDealing-December-2013.pdf>

<sup>24</sup> See: <http://www.marketwired.com/press-release/-1861490.htm>

<sup>25</sup> See: <http://www.michaelgeist.ca/content/view/7029/125/>

<sup>26</sup> See:

[http://www.law.columbia.edu/center\\_program/law\\_economics/wp\\_listing\\_1/wp\\_listing?exclusive=filemgr.download&file\\_id=64212&rtcontentdisposition=filename%3DWP207.pdf](http://www.law.columbia.edu/center_program/law_economics/wp_listing_1/wp_listing?exclusive=filemgr.download&file_id=64212&rtcontentdisposition=filename%3DWP207.pdf)

possibility to legally access published works, and it has had severe negative impact on the local Canadian creative sector and publishing industry. As to the latter, it may prove difficult to reverse the negative trend and downward spiral if changes are not brought about quickly, which includes securing that collective rights management through RROs continues to be a part of the Canadian copyright framework also in the future.

### 5.1 LEGAL UNCERTAINTY AND COURT CASES

The changes to the Canadian legal framework have led to legal uncertainty, both in English- and French-speaking Canada. Below is a selection of a few pending cases.

#### a. *Access Copyright v. York* litigation

One court case is pending in the Federal Court, concerning the English-speaking Canada *The Canadian Copyright Licensing Agency (Access Copyright) v. York University* litigation<sup>27</sup>. Access Copyright claims that “*these new policies authorize and encourage copying based on a definition of ‘fair dealing’ that is not supported by the law. Instead, they represent what some of the education sector’s lawyers and administrators would like the law to be.*”<sup>28</sup> It therefore filed a lawsuit against York University over its fair dealing guidelines, claiming that the policy is unfair.<sup>29</sup> The trial in this matter is set to begin on May 16, 2016.

#### b. *COPIBEC v. Université Laval*

COPIBEC, the Quebec RRO, filed a motion in Quebec Superior Court for authorisation to launch a class action on behalf of thousands of authors and publishers from Quebec, the rest of Canada, and other countries around the world, because their copyright-protected works have been copied without permission by Université Laval. On an annual basis, the Quebec City-based university copies more than 11 million pages from 7,000 different works published in Quebec, the rest of Canada or abroad and includes them in coursepacks sold to students or distributes them online via its secure internal computer network.

Until May 2014, Université Laval, like all other Quebec universities, held a comprehensive licence issued by COPIBEC, allowing it to make those copies legally. However, the university’s board of directors decided not to renew its licence and on May 21, 2014 put into effect a policy concerning the use of third-party works for teaching, learning, research and private study purposes (“*Politique et directives relatives à l’utilisation de l’oeuvre d’autrui aux fins des activités d’enseignement, d’apprentissage, de recherche et d’étude privée à l’Université Laval*”<sup>30</sup>) with copying guidelines similar to those of English-speaking Canadian universities.

### 5.2 EFFECT ON – AND REACTIONS FROM – STUDENTS, AS A RESULT OF HIGHER COURSE PACKS AND STUDENT COSTS

In spite of the alleged “user-friendly” development, Canadian students reported substantially higher course-pack costs as a result of the new copyright regime, which replaced Access Copyright’s licences<sup>31</sup>. Also, students have been recently asked to pay for photocopy paper, even though, under a 2006 B.C. Supreme Court decision, public school parents do not have to provide “essential” classroom supplies or pay fees for extra programs.<sup>32</sup>

<sup>27</sup> See: [http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp\\_RE\\_info\\_e.php?court\\_no=T-578-13](http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-578-13)

<sup>28</sup> See: <http://www.accesscopyright.ca/media/bulletins/what-is-educational-fair-dealing-video/>

<sup>29</sup> See: <http://www.universityaffairs.ca/news/news-article/access-copyright-lawsuit-against-york-is-first-test-of-fair-dealing-guidelines/>

<sup>30</sup> See: <http://ifro.org/content/copibec-launches-4-million-class-action-lawsuit-copyright-infringement> and <http://ifro.org/content/quebec-rightholders-and-teachers-oppose-canadian-university%E2%80%99s-decision-not-renew-license>

<sup>31</sup> See: <http://thevarsity.ca/2014/09/21/after-access-copyright/>

<sup>32</sup> See: <http://www.ctvnews.ca/mobile/canada/it-s-crazy-frustrated-b-c-mom-refuses-to-pay-for-school-s-photocopy-paper-1.2581031>

### 5.3 EFFECT ON THE PUBLISHING SECTOR, AUTHORS AND PUBLISHERS

The effect on the publishing sector, on authors and publishers, has been stern.

#### a. PwC Study on the impact on educational publishing in Canada

A study carried out by PricewaterhouseCoopers (PwC) on the economic impact of the guidelines on fair dealing, established by educational institutions in Canada, has been published<sup>33</sup>. Its main outcomes are worrisome, since they show that educational publishing is in danger, and for some publishers, could eventually disappear, if fair compensation is not paid to rightholders.

The PwC study assesses the impact of the Guidelines on the educational content market in Canada and on the Canadian economy<sup>34</sup>. Some of the key findings of the study are:

1. The Canadian educational publishing industry is engaged in the process of transitioning from print to digital, which obliges publishers to invest a lot of effort and money into the development of new products and technologies – a costly process, especially for small-medium enterprise (SME) publishers. At the same time, in the elementary and secondary school sector, the governments have reduced their spending on educational content, making the current situation particularly challenging for publishers.
2. With the implementation of the guidelines, the annual loss of revenues to authors, including visual artists, and publishers, is expected to amount to an immediate \$30 million loss.
3. For many SME publishers, “licensing revenues represent the difference between profit and loss”; losing these revenues may force some of them to simply exit the educational publishing market, and some have already indicated that the decrease of income from licensing will hamper investment in the production of digital products and content.
4. Fewer works tailored for the Canadian market will be created: imports of foreign materials are expected to increase.
5. Educational publishers in Canada have already started exiting the market: Oxford University Press has exited the K-12 market as a consequence of the adoption of the guidelines and subsequent loss of licensing income.
6. Further declines in sales in the educational publishing market are expected, and have already been witnessed, as the Guidelines encourage teachers to create their own royalty-free course packs, instead of buying textbooks: as a result, since the introduction of the fair dealing guidelines, “the rate of annual decline in K-12 sales has accelerated, on average, by about 0.7 percentage points per annum”.
7. Fewer works will be created, since authors will lose an incentive to create content for the educational publishing market; as shown in the study, licensing represents 20% of the income of creators affiliated to Access Copyright, and some of them have already indicated that they will reduce the number of works created, and their focus on creating content for the education, if licensing revenues were to decrease.
8. Additionally, the diversity of content created is expected to decrease, given that publishers, facing a loss of revenues, will have to decide on which subject areas they want to focus on, leading to “fewer titles per course subjects and fewer course subjects served”.
9. Another natural consequence stemming from the implementation of the guidelines is that jobs in the educational publishing sector will be at risk; a 16% reduction of the economic footprint of this industry, both in terms of jobs and GDP, has already been recorded between 2011 and 2013.

<sup>33</sup> [http://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)

<sup>34</sup> Find here the full PwC report, an executive summary, an infographic and a one-page overview: <http://www.accesscopyright.ca/media/bulletins/impacts-of-the-education-sector's-interpretation-of-fair-dealing/>

10. Finally, students and teachers are those that will eventually have to bear the weight of the deteriorating situation: with less competition between publishers, less content produced and sold, and a new responsibility for teachers to create their own content, students will pay a higher price to have access to quality materials and will study outdated copied materials, while teachers will spend more time compiling and creating their own teaching materials, all of this leading to a “greater disparity in the quality of learning sources”.

The conclusion of the study is that the small gains made by provincial governments and educational institutions through the non-payment of royalties to rightholders will turn out to be a great loss for everyone: rightholders, students and teachers, and the society at large. The development clearly documents the need for a system of collective rights management to be maintained, both to facilitate the preparation of course packs and other teaching material, and to ensure a viable local publishing industry and income to authors and publishers for usages of their works.

## **b. Writers**

### **(i) Writers’ Union of Canada, income survey report**

Similarly, the Writers’ Union of Canada’s (TWUC) recent income survey report shows a terrible downward trajectory for author earnings in Canada, much of which can be laid at the doorstep of the last changes to Canadian copyright law<sup>35</sup>.

In April 2013, TWUC circulated a survey questionnaire to all 2023 names on its membership e-mail list. TWUC members are all professional book authors with at least one book credit to their name. Many also work as educators in both the K-12 and post-secondary sectors. Of the over 580 respondents, a full 86% felt these new definitions were markedly unfair. A recurring theme behind the responses was that the work of Canadian writers has value: if it is good enough to be copied for educational purposes, then it is good enough to be paid for.

Further, 83% anticipated that writers’ incomes would suffer because of this change. This bears out the findings of a recent PwC report in the UK<sup>36</sup>, which showed that almost 25% of the UK authors derived more than 60% of their income from secondary licensing. The same study indicated that a 10% decline in income from secondary uses for creators would result in 20% less output, whilst a 20% decline would mean a drop of 29% in output, or the equivalent of 2,870 works per year.

### **(ii) Margaret Atwood’s call to universities**

The renowned writer *Margaret Atwood* also called out Canadian universities on copyright<sup>37</sup>:

*“Canadian writers sit on library boards, often we are librarians and library workers, we read our work in library reading series, we write, teach, and mentor other writers in libraries, our works are collected and generously lent for free through libraries, and we regularly hit the streets to demand better funding for our public library systems. These activities and our demand that copyright be vigorously protected are not in conflict. In fact, they are mutually supportive. What will we collect in libraries if writers can no longer afford to write, and publishers can no longer afford to publish? That free culture theorists would try to pit libraries against writers while offering nothing in terms of increased budgets or lowered costs tells you everything you need to know about the real agenda here.”*

<sup>35</sup> [http://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity\\_0.pdf](http://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity_0.pdf); see also: <http://www.ifro.org/sites/default/files/canadian-authors-survey.pdf>

<sup>36</sup> <http://www.cla.co.uk/data/corporate-material/submissions/an-economic-analysis-of-education-exceptions-in-copyright-pwc-final-report.pdf>

<sup>37</sup> See: <http://johndegen.blogspot.ca/2014/12/margaret-atwood-calls-out-canadian.html>

## 5.4 EFFECT ON COLLECTIVE LICENSING

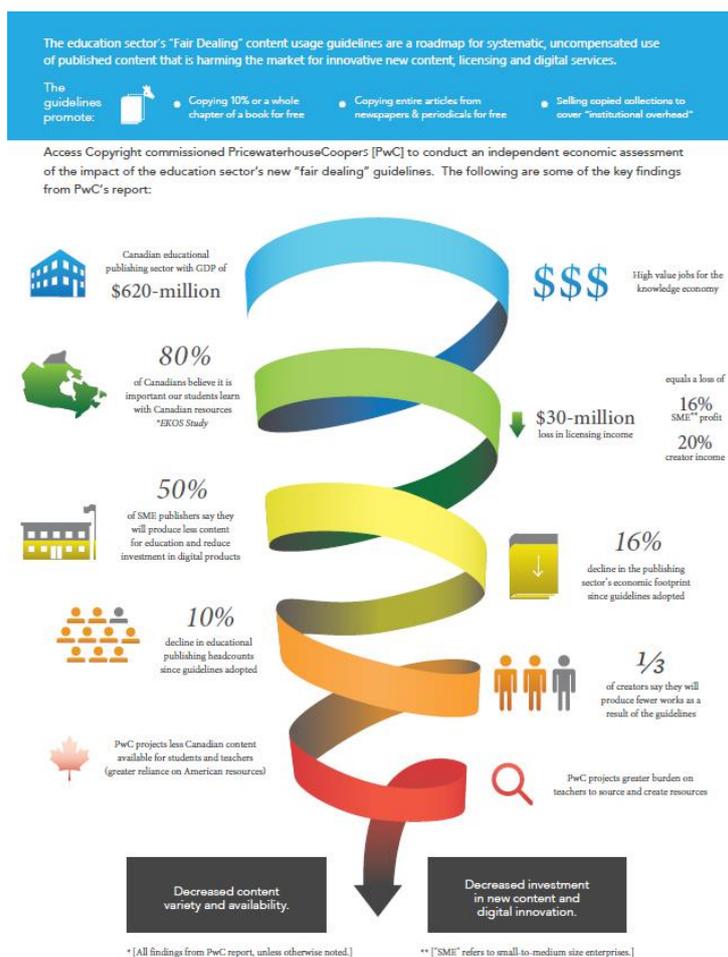
The effect on the collective licensing sector in English-speaking Canada has also been examined.

### a. Canadian Copyright Institute

In May 2014, the Canadian Copyright Institute<sup>38</sup>, an association of authors and publishers, released a paper<sup>39</sup> that calls on the Canadian education community to negotiate a collective licence with Access Copyright.

### b. Shift in Access Copyright's approach

Access Copyright also published a related downward spiral graphic<sup>40</sup>:



As a result of the recent developments, Access Copyright also announced<sup>41</sup> a shift in its licensing approach for universities and colleges, offering "new market-focused services":

- Lower prices to reflect the current market uncertainty and
- more options for universities and colleges.

While the current model licence costs \$26 per full time student at universities, its new "Premium" service drops the fee to \$15 per student on a three-year commitment. That licence covers paper and

<sup>38</sup> See: [http://thecci.ca/about\\_us.html](http://thecci.ca/about_us.html)

<sup>39</sup> [http://thecci.ca/a\\_fair\\_and\\_better\\_way\\_forward.html](http://thecci.ca/a_fair_and_better_way_forward.html)

<sup>40</sup> See: <http://accesscopyright.ca/media/bulletins/impacts-of-the-education-sector%E2%80%99s-interpretation-of-fair-dealing/>

<sup>41</sup> See: <http://www.accesscopyright.ca/educators/new-offerings/>

digital copying of up to 20% of a work (i.e., more than the 10% standard established in most fair dealing guidelines). Alternatively, Access Copyright is also offering a “Choice” service that costs \$5 per student. It covers handouts and e-mail attachments. Course-packs and digital uploads are charged at 12 cents per page, designed for universities that have centralised their copyright management.

## 6. CONCLUSIONS

Rightholders were correct to anticipate that the changes to the fair dealing provisions would lead to user interpretations that would jeopardise rightholders’ existing and future revenue streams. Canada’s new fair dealing for “education” provision departs from the internationally recognised norms that Canada acknowledges in the preamble to the amending legislation, could breach Canada’s international commitments, and has exposed Canada to complaints from rightholders and their organisations worldwide.

The results of the changes to the Canadian Copyright Act in 2012 clearly demonstrate the need for collective rights management to be a part of a healthy copyright framework. Access to educational material through agreements with RROs and rightholders is what best meets dynamic user needs to legally access high quality teaching material in constantly changing environments. It offers the safest, simplest, fastest, most innovative, most convenient and most cost efficient way to seamlessly access content from multiple rightholders. Flourishing local cultural industries and a healthy educational system with broad access also to local resources helps to build a sustainable national creative industry and a range of teaching materials adapted to local and special user needs. And this, in turn, enables a nation, in the best way, to educate its population in a sustainable way that is founded in local culture and traditions.

IFRRO Secretariat / November 2015

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