

BRIEFING NOTE

DATE: September 18, 2020

TO: Fred Lagrandeur, Senior Policy Advisor, Office of the Minister of Canadian Heritage

FROM: Susan Haigh, Executive Director, Canadian Association of Research Libraries

SUBJECT: Government Response to the Statutory Review of the Copyright Act

Purpose: Current context and recommendations for amending the *Copyright Act* (the Act).

Background: The Canadian Association of Research Libraries (CARL) has participated in the evolution of Canada’s copyright policy, contributing to reviews of the Act, promoting and undertaking copyright and author rights education, and working to ensure that Canadian scholarly publishing is sustainable and open. Libraries value a vibrant Canadian publishing sector, are a major market for all types of creative works, and provide preservation and access infrastructure for all types of creative works.

Current Situation: Canada’s copyright legislation and jurisprudence is balanced, clearly supports users’ rights of copyrighted works, and specifically allows fair dealing for education.

- **Legislation:** The 2012 legislative changes to the Act in part intended to: a) permit businesses, educators, and libraries to make greater use of copyright material in digital form; and b) allow educators and students to make greater use of copyright material.¹ While fair dealing already existed in the Act, in 2012, user rights were expanded to include fair dealing for education specifically, including copying publicly available internet materials for education.
- **Jurisprudence:** Three supportive Supreme Court of Canada decisions on fair dealing since 2004 have established that fair dealing is a “user’s right” that must be given a “large and liberal interpretation.”² Also, in 2015, the Court ruled that Copyright Board tariffs are not mandatory, and in 2020, this was reaffirmed by the Federal Court of Appeal in the *Canadian Copyright Licensing Agency v. York University* decision.³ Both decisions confirm that universities’ approach to copyright compliance is legitimate.
- **Practice:** Canadian universities maintain fair dealing policies and guidelines to communicate appropriate limits on copying and use of copyrighted works, and to

¹ Copyright Modernization Act, SC 2012, c 20 <https://www.canlii.org/en/ca/laws/astat/sc-2012-c-20/latest/sc-2012-c-20.html>

² CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <http://canlii.ca/t/1glp0> at Para 51.

³ York University v. The Canadian Copyright Licensing Agency (Access Copyright), 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb>, retrieved on 2020-09-18.

educate instructors, students, and staff on the application of those policies. Copying that is not clearly within those guidelines is assessed on a case-by-case basis against the six-step text set out by the Supreme Court.⁴ Transactional licenses are purchased and royalties are paid in cases where fair dealing does not apply. Research libraries also continue to spend significantly on purchasing or licensing copyrighted content. For example, CARL's member-libraries spent \$363 million on information resources in 2018-19. University libraries also clear copyright, obtain transactional licenses, and pay royalties as required to support reserve services that provide course resources electronically to students. The vast majority of content made available through electronic reserve services is purchased by the library.⁵

Key Policy Considerations: Educational fair dealing is not the cause of the decline of Canadian scholarly publishing: A 2017 white paper demonstrates that the shift to digital materials across the publishing industry has been highly disruptive to the global print market, beginning long before the word "education" was explicitly added to the Act in 2012.⁶

Recommendations: The INDU report [Statutory Review of the Copyright Act](#) provides a reasoned and balanced path forward for amendments to the Act. The Report quoted CARL extensively and notably refrained from recommending changes to educational fair dealing. Many of the recommendations in the CHPC report on remuneration models for artists and creative industries did not align with either the INDU report or CARL's positions, but CARL does support Recommendation 14 that calls for rights to revert to creators 25 years after assignment.

CARL's recommendations for copyright, following on the aforementioned two reports are:

1. Retain education as a fair dealing purpose and amend the Act to make the list of purposes allowable under the fair dealing exception illustrative rather than exhaustive.
2. Amend the Act to make it clear that no exception to copyright (e.g. fair dealing) can be waived or overridden by contract. (Currently, libraries are often faced with paying for licences to content that stipulate stringent limits on use.)
3. Amend the Act to allow text and data mining (TDM) without permission from the copyright holder. TDM – automated identification of patterns in data extracted from large quantities of material – is an essential tool for 21st century research.
4. Amend the Act to clarify that the circumvention of technological protection measures (TPMs) is only illegal for acts that are an infringement of copyright. TPMs are

⁴ CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <http://canlii.ca/t/1g1p0>.

⁵ For example, in their opening remarks, the University of Calgary states that only 250 out of a sample of 3200 learning items used in courses like book chapters, articles and internet resources were made available using fair dealing (<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-117/evidence>). Likewise, the University of Guelph states that in addition to textbooks, students "also access materials placed on reserve in the learning management system including 54% through direct links from licensed materials, 24% open and free Internet content, 6% via transactional licences, with the remaining 16% under fair dealing" (<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence#Int-10122492>).

⁶ Copyright and the Evolving Learning Materials Market" (Campus Stores Canada) <https://www.scribd.com/document/363248925/Copyright-and-the-Evolving-Learning-Materials-MarketCampus-Stores-Canada>.

increasingly used to impede fair dealing for education, preservation, and library lending.

5. Consistently apply an open licence (Creative Commons) to Crown material. This would address issues of unnecessary restriction and uneven administration of Crown copyright. Further, study the implications of amending the Act to abolish Crown copyright.
6. Retain the \$5000 cap on non-commercial statutory damages, which is a key tool for protecting the public from disproportionate damages for minor infringements of the Act.
7. As supported by Supreme Court and Federal Court jurisprudence,⁷ uphold that tariffs for literary works are non-mandatory for the user.
8. Remove unnecessary limitations and expand the scope of some of the exceptions in the Act for educational institutions, libraries, archives, and museums. Specific changes to sections 30.01 (5), 30.1, 30.2 (2), 30.2 (2) (b), and 30.5 (a) of the Act are [outlined here](#).
9. Recognize and protect Indigenous knowledge and perspectives on rights.
10. Amend the Act so that creator rights automatically revert back to creators 25 years after assignment and so that the rights reversion cannot be waived or overridden by contract.

Greater detail on many of these recommendations can be found in:

- [CARL brief to the INDU Committee as Part of the Review of the Copyright Act](#)
- [CARL's Opening Remarks to the Standing Committee on Industry, Science and Trade](#)
- [CARL Statement on the INDU Report on the Copyright Act](#)
- [CARL/CFLA brief to the CHPC Committee as Part of the Study on Remuneration Models for Artists and Creative Industries](#)
- [Other CARL documents that relate to Canadian copyright policy](#)

Additional CARL statement:

- [CARL Statement on Optimal Equitable Access to Post-Secondary Learning Resources During COVID-19](#)

Conclusion: Research libraries and universities - and the learning and research that they support - thrive under a copyright framework that ensures that creators are fairly compensated and that users can make limited use of copyrighted works in specific situations where permission is not required. This balance between creator and user rights is an essential element of any copyright legislation that is fair to users and creators, and workable for libraries. CARL believes that the Government of Canada struck the right balance in 2012, and is on the right path again with the recommendations in the INDU report [Statutory Review of the Copyright Act](#).

⁷ Canadian Broadcasting Corp. v. SODRAC 2003 Inc., [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> paras. 101-113, and York University v. The Canadian Copyright Licensing Agency (Access Copyright), 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb>.

About CARL: CARL is the voice of Canada's research libraries. The Association's members include Canada's twenty-nine largest university libraries and two federal institutions. CARL provides leadership on behalf of Canada's research libraries and enhances capacity to advance research and higher education. It promotes effective and sustainable knowledge creation, dissemination, and preservation, and public policy that enable broad access to scholarly information. As CARL members, our two federal member institutions contribute to Canada's research enterprise and collaborate in coordinated efforts with the academic library community, but do not engage in any lobbying activities.