

**Statutory Review of the Copyright Act, Report of the Standing Committee on Industry, Science and Technology Parliamentary Report, June 2019**  
(the “**Report**” or “**Committee Report**”)

At the 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session in June 2019, the Standing Committee on Industry, Science and Technology (the “**Committee**”) released its statutory review of the *Copyright Act* (the “**Act**”). While the lengthy Report includes a variety of recommendations for copyright law reform, this short summary focuses on the recommendations that relate to the fair dealing exception under Section 29 of the Act and the collective licensing regime.

**Scope and Application of Educational Fair Dealing**

The Committee provides a summary of alternate views on the scope and application of fair dealing, including those from publishers, copyright collectives and educational institutions. The Committee also highlights the main positions of these stakeholders regarding the impact of fair dealing on publishers, creators and educational institutions.<sup>1</sup>

The Committee indicates the position of various publishers and copyright creators that they experienced a major loss of revenues following the introduction of “education” into Section 29 of the Act as part of the legislative amendments that took effect in 2012, coupled with educational institutions opting out of collective licensing to rely on the fair dealing exception. Evidence received by the Committee refers to a resulting loss of \$30 million in collected royalties for the Canadian publishing industry.

The Report also reflects submissions received from various educational institutions that rely on various means to ensure copyright compliance across campus, and continue to spend significant amounts on the licensed acquisition of learning materials from publishers and subscription-based content aggregators.

The Committee notes that the decline in collective licensing in education is arguably attributable to technological change (for example, increased digital content, open educational resources, and practices such as textbook rentals and peer-to-peer selling), rather than fundamental flaws within the fair dealing framework.<sup>2</sup> The Committee also noted that given the case-by-case nature of the fair dealing test under case law, use of a bright-line test and “one-size-fits-all” approach under applicable fair dealing guidelines may be questionable.

Though certain stakeholders suggested that the fair dealing exception only apply to educational institutions when a work is not “commercially available”, the Committee explicitly rejected this proposition on the basis that this would reduce flexibility and favour blanket versus transactional licensing.<sup>3</sup> It was also encouraging that the Report indicated that the role of Parliament was not to compel provincial institutions into specific licensing relationships, supporting our institutional position that collectively licensing should not be mandatory and binding on educational institutions that choose to opt out of this regime and comply with copyright in other ways.

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<sup>1</sup> *Statutory Review of the Copyright Act*, Report of the Standing Committee on Industry, Science and Technology, June 2019 (the “**Committee Report**”), Pages 55-63.

<sup>2</sup> Committee Report, Page 64.

<sup>3</sup> Committee Report, Page 64.

Due to the ongoing York proceedings, upcoming negotiations, and potential changes in licensing models, the Committee did not make any current recommendation for specific amendments to the Act with regard to educational fair dealing. Instead, the Committee made the following recommendations:

- That the Government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada; and
- That the Committee resume its review of the implementation of educational fair dealing in the Canadian educational sector within 3 years, based on new and authoritative information as well as new legal developments.<sup>4</sup>

The Report recognises that more discussion and analysis is required and to review the issue again within 3 years, based on new information and case law.

### **Fair Dealing Purposes**

Another notable discussion with respect to fair dealing relates to the list of purposes under the Act. The Committee considered the suggestions of various stakeholders, which included adding the term “such as” in front of the list of purposes in Section 29 of the Act to make it illustrative rather than exhaustive.

The purpose of this amendment would be to harmonize Canadian copyright legislation with other similar countries, such as the US. The Committee also comments that an illustrative purpose list allows for the courts to develop the current list, making it more adaptable as other developments and technological advances arise in the future.<sup>5</sup> Other stakeholders opposed this suggestion noting that broadening the acceptable purposes would increase litigation in this area and lead to further uncertainty regarding the application of the fair dealing exception.<sup>6</sup>

The Committee recommend that the Government of Canada introduce legislation amending:

- section 29 of the Act to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one; and<sup>7</sup>
- the Act to facilitate the use of a work or other subject-matter for the purpose of informational analysis,<sup>8</sup> where informational analysis is intended to cover artificial intelligence and other technology that includes text and data analysis. The purpose of this exception would be to allow for these types of technologies to develop and process copyrighted data without being subject to infringement under the Act.<sup>9</sup>

Both of these recommendations support the expansion of the fair dealing exception, and that it be afforded a large and liberal interpretation.

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<sup>4</sup> Committee Report, Page 65.

<sup>5</sup> Committee Report, Page 69.

<sup>6</sup> Committee Report, Pages 67-68.

<sup>7</sup> Committee Report, Page 69.

<sup>8</sup> Committee Report, Page 87.

<sup>9</sup> Committee Report, Pages 85-87.

## **Statutory Damages**

The Committee considered submissions regarding criticism of Section 38.1 of the Act, and the ability for collective societies to recover an award of statutory damages. Despite concern expressed by stakeholders as to the consequences of opening up statutory damages to all collective societies, the Committee did not find a principled reason why the remedy would only be available to some collective societies and not others.<sup>10</sup> However, the Report acknowledged that allowing any collective society to recover a “blanket form” of statutory damages may result in excessive damages that are disproportionate to the actual infringing acts. The Committee made the following recommendations, to:

- amend the Act to increase the respective upper and lower limits of statutory damages under the Act to account for inflation; and
- evaluate the forms of statutory damages available under the Act to a collective society or a rights-holder who has authorized a collective society to act on their behalf where applicable royalties are set by the Copyright Board of Canada and the defendant has not paid them.<sup>11</sup>

The objective of the latter recommendation is to implement a more sophisticated statutory damages regime that would encourage fair licensing practices, deter copyright infringement, promote efficient Copyright Board procedures, and enable courts to award proportional statutory damages that account for a variety of tariffs.

## **Collective Administrative of Rights**

Stakeholders raised various issues including the delay of proceedings before the Copyright Board, uncertainty around tariff certification and retroactive application, transparency of collective societies and the lack of clarity around enforcement of their rights through the Copyright Board.<sup>12</sup> In response to such comments, the Report recommended group negotiations with collective societies (to increase efficiencies around resources and proceedings) and supported more transparency to provide justification for Parliament to increase the means and remedies available to collective societies.<sup>13</sup> To address these issues, the Committee recommended:

- amending the Act to clarify that users can negotiate with a collective society as a group and to allow users to jointly apply to the Copyright Board of Canada, if deemed appropriate by the Board;
- that the Copyright Board of Canada review whether the Act empowers the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and Report back to the Committee within 2 years; and
- considering the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations (which may include the filing of existing licensing agreements by Access Copyright with the Board for consideration to assist the Board’s with its process, and their distribution schemes ) and the disclosure of

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<sup>10</sup> Committee Report, Page 112-113.

<sup>11</sup> Committee Report, Page 114.

<sup>12</sup> Committee Report, Page 117.

<sup>13</sup> Committee Report, Page 119.

their repertoire content (which has always been a concern expressed by educational institutions since this is not publicly available in the case of Access Copyright).<sup>14</sup>

### **Conclusion**

The Report appears to be a step in the right direction in terms of providing a balanced approach to copyright reform, moving towards greater transparency from Access Copyright and other collective societies, recognising that collectively licensing should not be necessarily mandatory, and acknowledging existing inefficiencies in the current collective licensing regime. Based on the Report, the Committee intends to resume its review of the implementation of educational fair dealing in the Canadian educational sector within the next 3 years, and has recommended some potential amendments that will benefit educational institutions.

Other notable issues covered in the Committee Report include specific recommendations regarding the notice-and-notice regime, the private copying regime, digital locks, copyright term extension, user-generated content and Crown copyright under the Act.

If the universities would like RBS to review and provide you with a more comprehensive summary of the full Report (which can be accessed [here](#) or in our document library), please let us know. Thank you.

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<sup>14</sup> Committee Report, Page 120.