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Canada's Copyright Act Review: Implications for Fair Dealing and Higher Education

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Abstract

Beginning in late 2017, the Standing Committee on Industry, Science and Technology (INDU Committee) undertook a statutory review of Canada's Copyright Act. This article examines the recommendations made by higher education and academic library stakeholders in order to determine their copyright priorities. More specifically, the analysis highlights recommendations relating to fair dealing and addresses the tension between higher education and the Canadian publishing community. The article also explores the three fair dealing recommendations made in the INDU Committee's final report, raises questions about the INDU Committee's support for use of fair dealing in higher education, and proposes increased advocacy by the higher education community, including a cohesive strategy that engages directly with the public interest aspect of education's role and the representation of its user groups. Ultimately, educational institutions are as much a part of the Canadian cultural landscape as any other copyright stakeholder. Improved advocacy is vital as Canada heads towards the next statutory review, expected to be launched in 2022.

Keywords: Canada, copyright, legislation, policy development, higher education, advocacy, Copyright Act, fair dealing



Introduction

Canada's Copyright Act was reviewed by a Parliamentary committee beginning in 2017, presenting an opportunity to access and analyze the copyright priorities and concerns of various stakeholder communities, including higher education and the publishing sector. Fair dealing in education is a particularly contentious issue in Canada, with vocal lobbying from author and publisher groups. The higher education sector needs to be more active in advocating for its user groups and their user rights.

The 2012 Copyright Modernization Act (CMA) introduced a requirement that the Copyright Act be reviewed every five years (CMA s. 58; see also Copyright Act s. 92)—the first such review was launched in late 2017. The Standing Committee on Industry, Science and Technology (INDU Committee) was responsible for the review; they invited any interested parties to submit written briefs with input and recommendations, and held hearings throughout 2018 involving stakeholder witnesses (INDU Committee, 2018).

Over the course of the review, the INDU Committee held 52 meetings during which they heard from a total of 263 witnesses and received 192 written briefs as well as over 6,000 emails (INDU Committee, 2019, p. 1).¹ The INDU Committee presented its report, *Statutory Review of the Copyright Act* (INDU Report), to the House of Commons in June 2019 (INDU Committee, 2019).

The INDU Committee also requested that the Standing Committee on Canadian Heritage (Heritage Committee) conduct a supplementary study on “remuneration models for artists and creative industries” and provide the INDU Committee with a summary of the outcomes of this study (Ruimy, 2018). The Heritage Committee accepted written briefs on this topic and held hearings throughout 2018, presenting its report, *Shifting Paradigms* (Heritage Report), to the House of Commons in May 2019 (Heritage Committee, 2019).

A federal election was called in fall 2019, which ceased all committee work; the new government was no longer required to respond to past committee work or reports. As of spring 2021, none of the INDU Committee's or Heritage Committee's recommendations have been enacted though there has been further study of copyright-related issues, which is discussed in the conclusion.

Examining the recommendations made by stakeholders to the INDU Committee can provide a detailed snapshot of a particular community's copyright

¹ All INDU Committee Copyright Act review materials, including briefs and meeting transcripts, are available at <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>.

concerns and priorities. This study aims to highlight the recommendations made by higher education, including academic libraries, to explore the reasons this community focuses on particular copyright topics, and to make connections to the recommendations made by the INDU Committee on these key topics.² This paper looks at fair dealing specifically and makes comparisons between stakeholder recommendations and the INDU Committee's discussion and recommendations in its report.

Out of the 36 recommendations made by the INDU Committee, three address fair dealing. Recommendation 16 states 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. (INDU Committee, 2019, p. 65)

Recommendation 17 states that

the House of Commons Standing Committee on Industry, Science and Technology resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments. (INDU Committee, 2019, p. 65)

Finally, Recommendation 18 states that

the Government of Canada introduce legislation amending section 29 of the Copyright Act to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one. (INDU Committee, 2019, p. 69)

The higher education community appeared to understand the INDU Committee's recommendations as fully supportive of broad fair dealing; the authors question this interpretation and make recommendations for needed advocacy since the next review of the Copyright Act is expected to be launched in 2022.

Background

Fair Dealing, Higher Education, and Access Copyright

The fair dealing exception in the Copyright Act (Copyright Act s. 29) is available to any user and consists of a list of specific purposes for which a dealing may be fair: research, private study, education, parody, satire, criticism, review, and news reporting. The act itself does not contain criteria or guidelines for determining

² Jennifer Zerkee and Stephanie Savage were each involved in drafting their respective institutions' briefs for submission to the INDU Committee.

whether a dealing is fair. The Copyright Act also contains exceptions for specific activities by not-for-profit educational institutions and their members for the purposes of education and training (Copyright Act ss. 29.4–30.04) and for libraries, archives, and museums (Copyright Act ss. 30.1–30.4).

Since 1988, copyright management organization Access Copyright (then CanCopy) has provided Canadian postsecondary institutions outside of Quebec with a “one-stop solution to licens[ing] the photocopying of published works while ensuring rightsholders would be fairly compensated for that copying” (Access Copyright, 2018a, para. 1), and many postsecondary institutions had license agreements with Access Copyright. Starting in 2010, many institutions have opted out of such an agreement, choosing instead to independently manage copyright compliance and licensing (Knopf, 2011).

The justifications for institutions managing copyright outside of a license agreement stem initially from the 2004 case *CCH Canadian Ltd. v. Law Society of Upper Canada (CCH)* (Henderson et al., 2018), which found that the Law Society’s Great Library did not infringe copyright when copying materials for patrons under the terms of its access policy, which required that the copying be for a fair dealing purpose and the amount of a work copied must be reasonable (quoted in *CCH, 2004*, para. 61). The court found that copying on behalf of researchers was fulfilling the fair dealing purpose of research (*CCH, 2004*, para. 64). *CCH* established the requirement for a “large and liberal interpretation” of the research purpose and of fair dealing more generally (*CCH, 2004*, para. 51; see also D’Agostino, 2008, pp. 324–325). This case also established the six factors that provide “a useful analytical framework to govern determinations of fairness” and which form the basis of many higher education fair dealing policies: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work (*CCH, 2004*, paras. 53–60). *CCH* provided educational institutions with confirmation that they could rely on fair dealing. In addition to this, Access Copyright proposed a drastic increase in tariff rates in 2010, which was another significant factor for institutions deciding to opt out (Hudson, 2020, pp. 268–269).

The publishing sector, however, has blamed the opt-outs on the addition of the education purpose to fair dealing in the CMA in 2021, ignoring the fact that the earliest opt-outs predate this legislation. This disconnect is seen in briefs submitted to the INDU Committee by authors and publishers who focused their recommendations on the limitation or repeal of the education purpose specifically (see, e.g., Access Copyright, 2018b, p. 7; Association of Canadian Publishers, 2018, p.

2; The Writers' Union of Canada, 2018). This issue is explored further in the results and discussion sections.

Building on *CCH*, the 2012 Supreme Court of Canada case *Alberta (Education) v. Canadian Copyright Licensing Agency (Alberta [Education])* provided further jurisprudence for education. It addressed photocopying by K–12 teachers and found that “the teacher/copier . . . shares a symbiotic purpose with the student/user” that can allow for fair dealing to be considered from the perspective of the student even when an instructor copies and assigns the content (2012, para. 23). This decision was reached before education was added as a fair dealing purpose and relied on the purposes of research and private study. Once education was added as a purpose in the CMA in 2012, higher education then also relied on it as one part of an institution’s approach to fair dealing.

Many educational institutions provide fair dealing guidelines to instructors and students, with more than half of higher education institutions outside Quebec using the template guidelines created by Universities Canada (then the Association of Universities and Colleges Canada) in 2012 (Henderson et al., 2018, p. 17; for guidelines, see Universities Canada, 2012).³ Along with education and support for instructors and students using the guidelines, Universities Canada also promotes the use of openly licensed material and material already licensed by an institution’s library. Colleges and Institutes Canada (then the Association of Canadian Community Colleges) adapted the same guidelines for its members (see, e.g., North Island College, 2012). The fair dealing guidelines delineate the amount of a work that can reasonably be considered fair to distribute to students within a course, permitting use of a “short excerpt” including a general rule of thumb of “up to 10% of a copyright-protected work” (Universities Canada, 2012). Henderson et al. (2018) found that two-thirds of higher education institutions outside Quebec referred to this “10% rule” (p. 18).

The ongoing *York v. Access Copyright* case is of vital importance to higher education institutions because it deals directly with the validity of guidelines based on the Universities Canada template. Two questions have been at issue in this case: whether Access Copyright’s tariffs are mandatory for educational institutions and whether York University’s fair dealing guidelines are in fact fair. The Federal Court found that the tariffs are mandatory, and that York’s fair dealing guidelines are not fair (*Canadian Copyright Licensing Agency [Access Copyright] v. York University*, 2017, para. 14). On appeal, the Federal Court of Appeal found that the tariffs are not

³ In Quebec, unlike the rest of Canada, most higher education institutions continue to operate under an agreement with collective licensing organization Copibec (Kohn & Lapierre, 2017, slide 8).

mandatory (*York University v. Canadian Copyright Licensing Agency [Access Copyright]*, 2020 paras. 204–206) but affirmed the Federal Court’s finding that York’s fair dealing guidelines are not fair (paras. 309–312). Both parties were granted leave to appeal to the Supreme Court of Canada, and this case was heard on May 21, 2021; at the time of writing a decision had not yet been released (see addendum for update).

Reactions to the Review

Responses to the INDU Report have been published by various stakeholders, and they are polarized along the same lines as the briefs, with higher education and publishing communities at odds over the INDU Committee’s recommendations. Not all participants that submitted briefs or made meeting appearances published reactions to the report. For example, neither Universities Canada nor Colleges and Institutes Canada issued a statement on either the Heritage or INDU Reports.

Law professor and copyright scholar Michael Geist called the INDU Report a “balanced, forward-looking report on the future of Canadian copyright law” and noted that fair dealing dominated the report based on the length of the footnotes alone (Geist, 2019). Copyright law scholar Carys Craig commented on the polarity between the Heritage Report, largely dominated by industry lobbyists and suggestions to strengthen creator rights, and the INDU Report, calling the INDU Report and review “eminently sensible” (Craig, 2019, para. 11). She went on to state that the “well-balanced report . . . paves the way for measured, public-interest oriented copyright reform” (para. 6).

Other reactions praised the report’s “reasoned analysis and balanced conclusions” (Canadian Association of Research Libraries [CARL], 2019, para. 1), considered the INDU Report “a thoughtful response to a challenging and complex set of issues” (Canadian Federation of Library Associations [CFLA], 2019), and deemed it “a breath of fresh air for copyright policy making” (Vollmer, 2019, para. 3). Higher education stakeholders welcomed the recommendations on fair dealing, in particular Recommendation 18 to make the list of fair dealing purposes illustrative rather than exhaustive (CARL, 2019; CFLA, 2019). Both CARL and CFLA also endorsed Recommendation 17 to further study educational fair dealing, which we explore further in the discussion section.

Dissenting voices included government and international business commentator Hugh Stephens (2019), who called portions of the INDU Report “problematic” and “particularly worrisome.” The International Publishers Association cited its preference for the Heritage Report but noted that there were positive elements to the INDU Report, including the recognition of “the problematic

nature of the education sector’s copying guidelines and practices” (2019, para. 3). The International Publishers Association made a clear connection between fair dealing for education and the “resulting economic damage” (para. 3). The organization also applauded the INDU Committee’s call for negotiations between the education sector and copyright collectives (para. 4).

Access Copyright released a statement (2019) in which it supported the INDU Committee’s Recommendation 16, directing the government to facilitate the relationship between copyright collectives and the education sector but noting that “immediate action would have addressed the serious harm Canada’s writing and publishing industries have and continue to experience more effectively” (para. 3). Roanie Levy, president and CEO of Access Copyright, was quoted within the statement, noting that the Heritage and INDU Reports “concur there is a legitimate problem with the education sector’s interpretation of fair dealing” (para. 5).

Research Questions

This project set out to answer the following questions:

1. What stakeholders contributed to the Copyright Act Review?
2. What recommendations did stakeholders put forward and what justifications did they offer?
3. In what ways did the final report on the review reflect the recommendations put forward by stakeholders?

Methods

Corpus

Our corpus consisted of the briefs (N = 192) submitted to the INDU Committee in response to their call for comment on the statutory review of the Copyright Act. Briefs were accepted between April 17 and December 10, 2018, and were made available to the public on the INDU Committee’s website. We analyzed the INDU Report in addition to the briefs (INDU Committee, 2019).

Tools and Methodology

Upon retrieval of our corpus, we uploaded all documents into NVivo, a qualitative data analysis software that allowed us both to record demographic information about stakeholders and to code our corpus according to the recommendations and rationales presented. To structure our analysis we relied on an approach to coding informed by grounded theory, a qualitative research method that is highly iterative and calls for an ongoing exchange between data collection

and analysis (Glaser & Strauss, 2017; Strauss, 1987). This methodological approach allowed us to revisit our coding structure as we progressed through our corpus.

In our initial analysis we coded both the briefs and the report for the recommendations presented. We further distinguished the recommendations by dividing them into “strong” and “weak” categories, defining strong recommendations as those that could be legislated into the Copyright Act and weak recommendations as those outside the scope of the act (for example, these nodes include “Indigenous rights – recognize,” “Open access – support,” “Author incomes – improve”).

We conducted a second level of analysis in order to capture the rationales or arguments put forward in support of the proposed recommendations. These justifications are coded as subnodes to the corresponding recommendation nodes. In keeping with a grounded theory approach, we continued to refine and consolidate our coding schema as we proceeded through the corpus.

Finally, we captured demographic data about the parties who submitted briefs to the INDU Committee. These data were initially recorded in Google Sheets and later appended to the NVivo project through the use of cases, nodes that represent units of observation. For our analysis we recorded five different aspects of demographic information to help inform the critical analysis (table 1). We grouped the submitting stakeholders into 19 communities (table 2). Where a party could be categorized in more than one community we selected the dominant role or priority for that stakeholder, or where this was unclear we selected the community most represented by the content and concerns in its brief. Throughout the following results, education – postsecondary and libraries – academic have been combined as “higher education.”

Category	Definition
Position	Identifies whether stakeholder(s) reflects a user or creator approach.
Sector	Identifies whether the stakeholder(s) represents a public, for-profit, or non-profit body.
Community	Identifies the primary user or creator group the stakeholder(s) represents.
Scope	Identifies the geographical region the stakeholder(s) represents.
Perspective	Identifies whether the stakeholder(s) represents an individual or collective.

Table 1. Demographic data categories.

Community	Definition
Artificial intelligence (AI)	Artificial intelligence, machine learning, and text-mining researchers and organizations.
Archives	Archives, archivists, and their organizations.
Author/Publisher	Authors, publishers, and their organizations.
Broadcasting/ Telecommunications	Broadcasting and telecommunications companies and organizations.
Economics	Economists, economics researchers, and those expressing primarily economic interests.
Education – K-12	Individuals and organizations in K-12 education.
Education – postsecondary	Individuals, institutions, and organizations in postsecondary education.
Film/TV/Theater	Individuals and organizations in the film, television, and theater industries.
Government	Government bodies and their representatives.
Indigenous	Indigenous individuals, groups, and those primarily interested in Indigenous issues.
Internet	Individuals and organizations whose primary concern or place of business is the Internet.
Legal	Lawyers, legal scholars, and legal organizations.
Libraries – academic	Academic library workers, libraries, and their organizations.
Libraries – public	Public library workers, libraries, and their organizations. Note that provincial library associations were included here, though they often also represent academic libraries and library workers.
Museums	Museum workers, museums, and their organizations.
Music	Music creators, performers, and the music industry.
Public concern	Individuals and organizations primarily interested in broad public issues.
Retail	Individuals and organizations in the retail community.
Visual arts	Artists and organizations in the visual arts.

Table 2. Stakeholder groups that submitted briefs to the INDU Committee.



Limitations

The findings presented in this paper are based on analysis of the written briefs submitted by stakeholders and the INDU Committee's report. We have not yet analyzed the transcripts of the INDU Committee's hearings with stakeholders because these present different types of information—namely, the views of individual committee members as evidenced in their questions and comments as well as stakeholders' specific responses to those comments. Some stakeholders participated in meetings but did not submit briefs, so some stances may be missing from this current analysis. Additionally, the more than 6,000 emails received by the INDU Committee (INDU Committee, 2019, p. 1) are not publicly available.

The findings presented in this paper also do not include any of the recommendations made to or by the Heritage Committee during its supplementary study, which could add additional dimensions to these findings.

Results

The highest number of briefs were received from the higher education community (27.1%, $n = 52$) and from the author/publisher community (17.7%, $n = 34$; see figure 1).

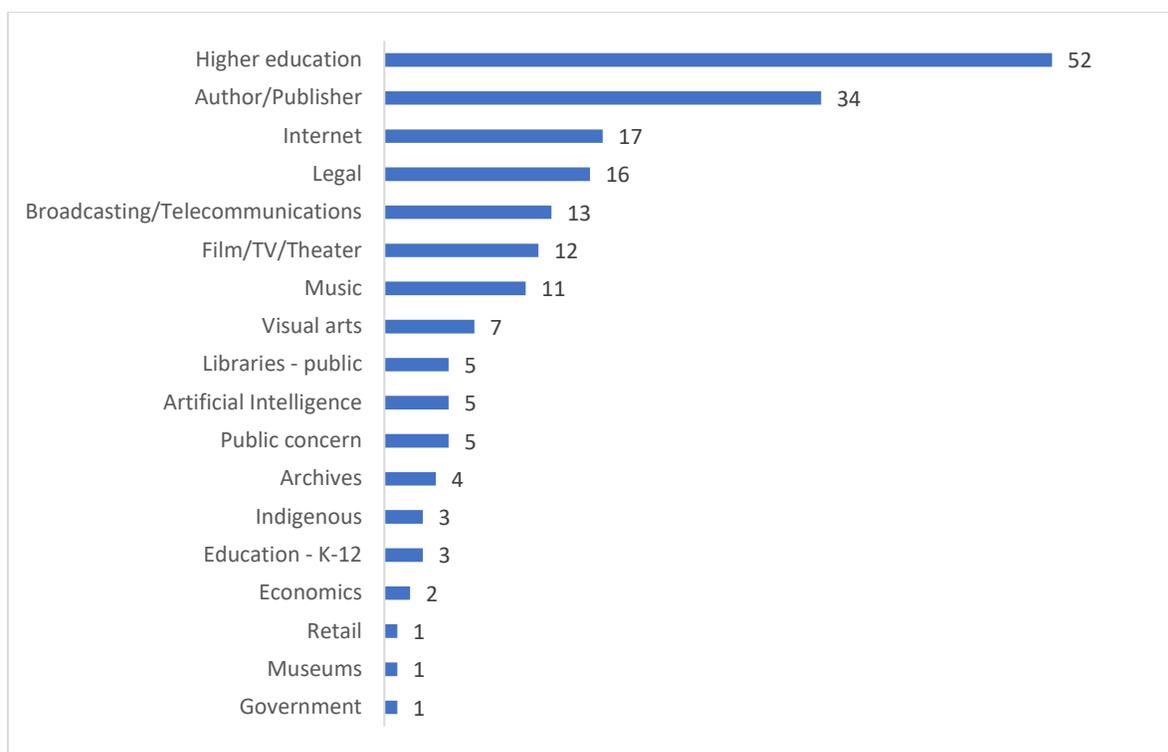


Figure 1. Briefs per stakeholder community.

Most of the submitting parties can be categorized as primarily representing a user position or a creator/rightsholder position. More than half (57.8%, $n = 111$) primarily represented users, over one-third (38.5%, $n = 74$) primarily represented creators, and a small number (3.6%, $n = 7$) cannot easily be categorized in this way, typically because they represented a neutral role between creators and users (e.g., Public Lending Right International), they played multiple roles (e.g., Google Canada), or the stakeholders themselves do not clearly represent one side or the other (e.g., law scholars). The submitting parties included national bodies (42.2%, $n = 81$), regional or provincial bodies (25.6%, $n = 49$), and international bodies (11.5%, $n = 22$), as well as individuals or groups of individuals (20.8%, $n = 40$).

Likely because the higher education community submitted many more briefs than other stakeholder groups, many of the most discussed topics in the briefs were highly relevant to education (see table 3). Fair dealing was the most discussed topic by far, addressed in more than twice as many briefs as any other topic.

Topic	Percent of Briefs	N = 192
Fair dealing	50.0%	$n = 96$
Technological protection measures (TPMs)	22.9%	$n = 44$
Term	21.9%	$n = 42$
Statutory damages	18.8%	$n = 36$
Whether contracts can override user rights	16.7%	$n = 32$
Indigenous rights	16.1%	$n = 31$
Crown copyright	13.5%	$n = 26$
Whether tariffs are mandatory	13.0%	$n = 25$
Text and data mining	10.9%	$n = 21$
Notice and notice	10.4%	$n = 20$

Table 3. Top ten most addressed topics.

Nine briefs (4.7%) did not make any explicit recommendations. In most cases, these briefs aimed to simply provide information to the INDU Committee to support its decision-making. For example, the brief submitted by Australian Copyright Council et al. (2018) “intended to provide some information about aspects of Australian copyright law that are relevant to issues under review.”

Fair Dealing

Half of all briefs submitted (50.0%, $n = 96$) address fair dealing in some way; in the following breakdown the totals add to more than $n = 96$ because some briefs made multiple recommendations about fair dealing. More than half of the briefs addressing fair dealing (57.3%, $n = 55$) recommend maintaining the current exceptions. All these briefs represented a user position (100.0%, $n = 55$), and three-quarters were submitted by the higher education community (figure 2). As explored further in the discussion section, many of these recommendations focus specifically on maintaining education as a permitted purpose of fair dealing; for example, the Dalhousie Faculty Association stated that “fair dealing for educational purposes is essential to ensuring that appropriate content is accessible by researchers and students. The key criteria for selection in a course or a scholarly study has to be usefulness and relevance, not cost, in order to ensure the highest quality instruction and research as well as academic freedom” (Dalhousie Faculty Association, 2018, p. 2; see also, e.g., Canadian Alliance of Student Associations, 2018; Council of Ministers of Education, Canada, 2018; University of Manitoba, 2018).

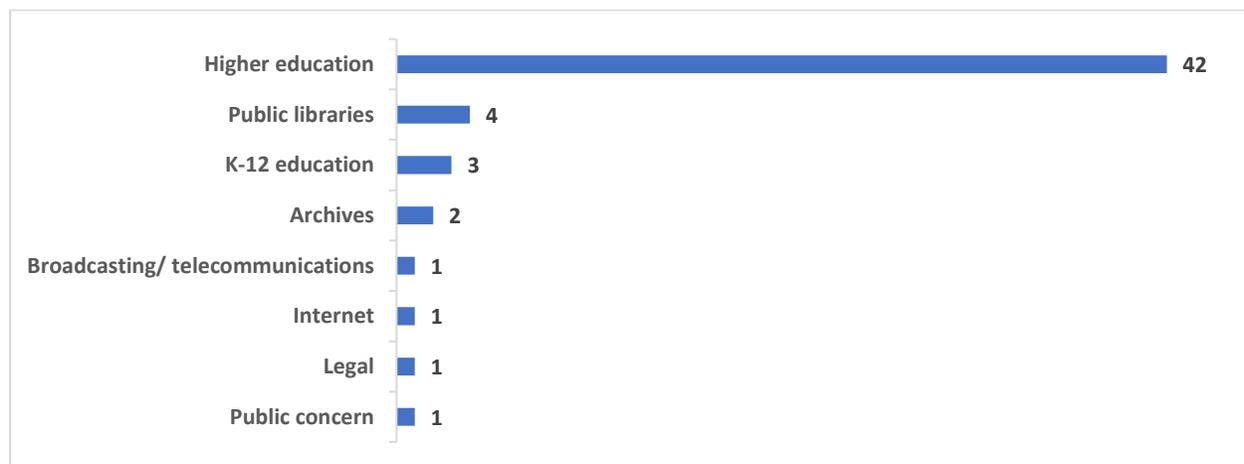


Figure 2. Briefs recommending maintaining the current fair dealing exceptions, by stakeholder community.

Over one-quarter of briefs addressing fair dealing (28.1%, $n = 27$) recommended limiting fair dealing in some way. The vast majority of these (92.6%, $n = 25$) represented a creator position, and the remaining two briefs (7.4%) represented a user position. The author/publisher community is the main stakeholder group that recommended limitations to fair dealing (figure 3).

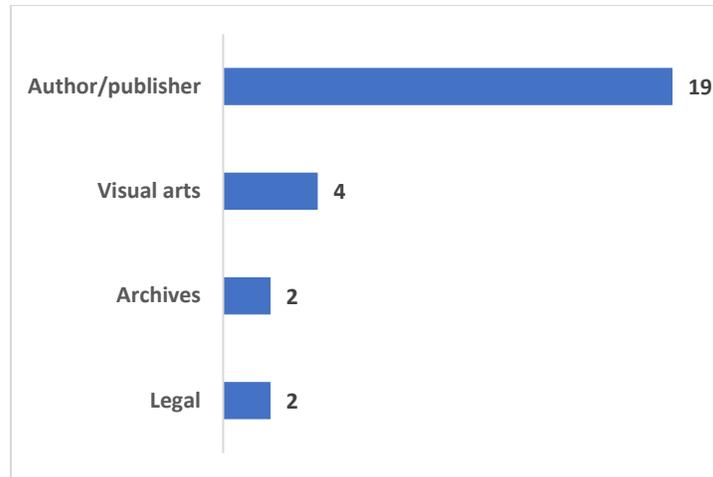


Figure 3. Briefs recommending limiting the fair dealing exceptions, by stakeholder community.

Mirroring the recommendations to maintain education as a fair dealing purpose, the majority of briefs recommending limiting fair dealing (92.6%, $n = 25$), specifically recommended removing, limiting, or clarifying the education purpose. For example, the Canadian Authors Association (2018) recommended “repealing the Educational Purposes Fair Dealing Exception” (section B3), the Partnership for the Future of Canadian Stories (2018) recommended that the government “clarify that fair dealing does not apply to educational institutions when the work is commercially available” (p. 6), and Fernwood Publishing and Roseway Publishing (2018) recommended “redefining fair dealing in the Act, or through regulation, to focus on the intent of copying that would lead to a clearer definition of short excerpt—that is, where copying, however much, is planned as part of a course of study it is not a short excerpt and not fair dealing” (pp. 4–5).

Twenty percent of briefs addressing fair dealing (20.8%, $n = 20$) recommended expanding fair dealing in some way, most commonly (75.0%, $n = 15$) recommending a move from the current exhaustive list of purposes to an illustrative list similar to that in the United States’ fair use doctrine. Other suggestions for expanding fair dealing included the following:

- adding the purpose of reconciliation (National Centre for Truth and Reconciliation, 2018; University of Manitoba, 2018);
- adding purposes of pastiche and caricature (Artists and Lawyers for the Advancement of Creativity, 2018);
- incorporating an exception for transformative art (Alberta College of Art and Design, 2018); and
- allowing for informational analysis (Element AI Inc., 2018).

Most stakeholders recommending expansions to fair dealing represented users (95.0%, $n = 19$), with one brief representing a creator position (5.0%). Briefs making these recommendations were submitted primarily by the higher education and legal communities (figure 4).

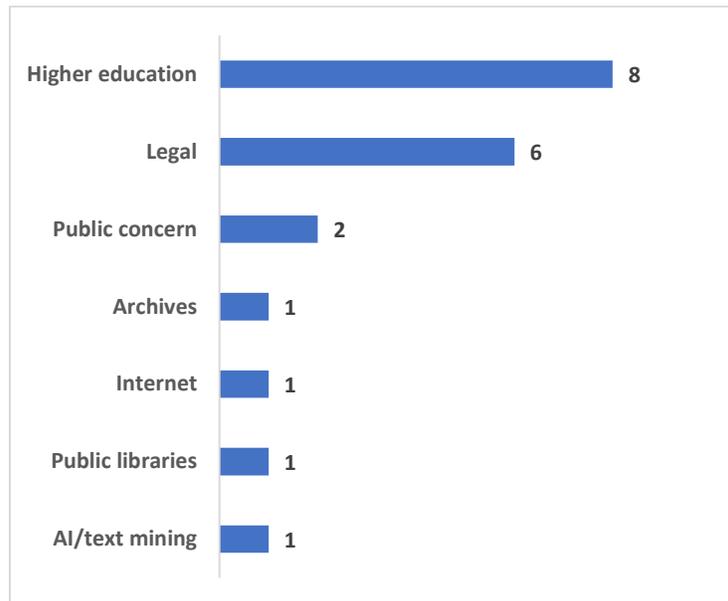


Figure 4. Briefs recommending expanding the fair dealing exceptions, by stakeholder community.

Finally, four briefs (2.1%) made additional recommendations about fair dealing that would not necessarily entail changes to the act itself; these are “weak” recommendations as described in the methods section. Dalhousie Faculty Association recommended “further clarification on the impact of a digital environment on fair dealing in the normal course of academic activities” (Dalhousie Faculty Association, 2018, p. 3). The International Authors Forum recommended that “the Committee reviews the impact on authors and the Canadian educational publishing industry of the unqualified designation of ‘education’ among the activities included within the fair dealing exceptions of the Copyright Modernization Act 2012” (International Authors Forum, 2018). And briefs from author Monica Graham, and from Fernwood Publishing and Roseway Publishing recommended consultation with stakeholders with the goal of “develop[ing] fair dealing regulations that are mutually beneficial and build on our common interests” (Fernwood Publishing & Roseway Publishing, 2018, p. 5; see also Graham, 2018); see further exploration of this recommendation in the discussion section.

Discussion

The INDU Committee made three recommendations relating to fair dealing. Recommendation 18 most directly addresses the fair dealing exception in the act and recommends making the list of fair dealing purposes illustrative rather than exhaustive.

In making this recommendation, the INDU Committee appears to favor the flexibility of a fair use–style exception consistent with the emphasis on user rights in Supreme Court of Canada cases, including *CCH* and the copyright pentalogy,⁴ rather than siding with concerns that this approach is “fraught with uncertainty” (Sookman, 2018, p. 2). In fact, the INDU Committee has gone beyond what the majority of stakeholders were requesting: as detailed above, only four higher education stakeholder briefs recommended moving to a fair use–style exception (and four made other recommendations that would expand fair dealing in some way), while 42 recommended maintaining the current fair dealing exception.

Why did most higher education stakeholders recommend maintaining the status quo rather than advocating for broader fair dealing exceptions? Numerous copyright experts from higher education have noted that after intense advocacy efforts leading up to and surrounding the CMA and decisions to opt out of Access Copyright agreements, “it was ten years’ hard work, so we rested” (McMaster University Library, 2019, P. Jones at 24:10; see also Bell et al., 2019, Part 1, A. Bell at 7:20). And while higher education “rested,” author and publisher organizations did not. They ran campaigns to keep their member communities informed and active, such as the #WhyWritersMatter social media campaign (active around 2016 and 2017; see The Writers’ Union of Canada, n.d.), Focus on Creators (active from approximately 2017 through 2020; see Access Copyright, 2017), and the ongoing I Value Canadian Stories (active since at least 2017; see I Value Canadian Stories, n.d.-a). These campaigns called on the author and publisher communities and their supporters to contact their Members of Parliament, sign petitions and open letters, and share their stories on social media. The publishing community also saw significant coverage of their concerns in the news media (see, e.g., Dundas, 2014; Williams, 2015; Taylor, 2016) and in the political arena “the federal lobbyist registry indicates that Access Copyright has emerged as one of the most active copyright lobby groups in Ottawa” (Geist, 2017, para. 4).

⁴ The copyright pentalogy was five Supreme Court of Canada cases addressing copyright that were decided on the same day in 2012: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*; and *Re: Sound v. Motion Picture Theatre Association of Canada*.

Fair dealing has clearly been the primary point of contention between higher education (and education more broadly) and the author, publisher, and rights management communities since the lead-up to the CMA. There is a significant misunderstanding here: higher education has long relied on fair dealing for the purposes of private study and research, based on the 2004 *CCH* ruling; indeed, institutions began opting out of Access Copyright agreements before education was added as a fair dealing purpose in the CMA. Surely Access Copyright has long been aware that these institutions' actions were not dependent on the education purpose (see Geist, 2018)—in fact, the 1994 model license agreement created by Universities Canada and Access Copyright included the preamble, “Whereas the parties do not agree on the scope of the said fair dealing” (Graham & Winter, 2021). However, constant campaigning by Access Copyright and organizations such as the Writers' Union of Canada have proliferated this misunderstanding so that authors and publishers have continued to focus their concerns on the education purpose: nearly all of the briefs ($n = 25$) recommending limiting fair dealing in some way specifically recommended changes to or removal of the education purpose.

However, organizations like the Canadian Association of University Teachers, Universities Canada, and Colleges and Institutes Canada were quiet on the copyright front between 2012 and 2018, only commenting on specific copyright events such as the *York v. Access Copyright* case (see, e.g., Universities Canada, 2017; Canadian Association of University Teachers, 2020) and Access Copyright tariff proceedings (see, e.g., Colleges & Institutes Canada, 2013; CARL, 2017).

Based on the recommendations and rationales provided by higher education stakeholders in the briefs, the higher education community went into this review prepared only to reactively defend the gains that came out of the CMA and not to proactively push for anything more. This stance appears to be in response to the aforementioned campaigns, which painted the education community (including K–12) extremely negatively as having “had a staggering impact on the livelihoods of creators and publishers” (I Value Canadian Stories, n.d.-b) and being the direct cause of reduced author incomes (Access Copyright, 2015). Personal stories of hardship to authors and creators, and statements about the value of Canadian culture, are difficult to argue against, and without having addressed these campaigns in the intervening years higher education entered the review at a disadvantage.

Stories of hardship to the creative community caused by education appear to have also affected the INDU Committee. While Recommendation 18 vastly opens up fair dealing, Recommendations 16 and 17 more directly address the education community and suggest that a tempering of enthusiasm about Recommendation 18 may be warranted. Recommendation 16 states that the government should consider

facilitating between education and collective licensing agencies, and Recommendation 17 states that educational fair dealing should be further reviewed within three years.

While the INDU Committee supports a broader application of fair dealing generally, it does not appear to be convinced that higher education applies fair dealing fairly. A critical reading of Recommendations 16 and 17 suggests that they may contradict Recommendation 18: while fair dealing should be expanded, it perhaps should not be as freely available to the education community as it is to others.

The INDU Committee acknowledges “evolving licensing models, ongoing court proceedings, and upcoming negotiations” and indicates that it is “wary to intervene in the conflict surrounding educational fair dealing” (INDU Committee, 2019, p. 65), but then makes Recommendation 16, which implies a fairly direct intervention in the relationship between educational institutions and Access Copyright, and Recommendation 17, which would further involve the INDU Committee in this issue. It is notable that the INDU Committee recommends that the education sector work with copyright collectives to build some consensus, rather than directly with authors and publishers; this suggests that collective licensing is seen by the INDU Committee as a likely solution to this “conflict,” which is a problematic stance to take before the Supreme Court of Canada has addressed the issue of tariffs in the *York v. Access Copyright* case. Both of these recommendations appear to subscribe to and further support the creator/rightsholder versus user tension seen throughout the review and, indeed, since at least 2012 in Canada. However, as already noted, both CARL and CFLA supported Recommendation 17, seeing the goal of “additional research, consultation, and study to gather evidence on specific aspects of a complex copyright environment” as a positive (CARL, 2019; see also CFLA, 2019).

Only two briefs (1.0%) recommended that the government get involved in some way, such as by “bring[ing] educators and independent Canadian publishers together to develop fair dealing regulations that are a [*sic*] mutually beneficial and build on our common interests” (Fernwood Publishing & Roseway Publishing, 2018, p. 5; see also Graham, 2018, p. 3). What would the facilitation proposed by the INDU Committee look like, and is there precedent for this type of involvement from the federal level in education, a provincial responsibility? These are pertinent questions, especially given the INDU Committee’s reference to ongoing court cases. What purpose could such facilitation serve before the Supreme Court of Canada rules on whether tariffs such as Access Copyright’s are mandatory, or on the fairness of York’s guidelines? And what specifically would be the goals or intended outcomes of

further “review of the implementation of educational fair dealing” (INDU Committee, 2019, p. 65)? Would that review potentially lead to new recommendations for changes to the act, for further facilitation between education and rightsholders, or something else? How would it be different from this review, which just concluded, or the next statutory review set to begin in 2022? The CFLA did at least question the INDU Committee’s recommended timeline, stating that it “believes it will take more than three years to obtain new and authoritative information” on the impact of educational fair dealing (2019, p. 2).

Conclusion

Given the breadth and variety of recommendations made in the INDU Report, it is perhaps unsurprising that both creator and user groups were able to claim a measure of victory for their communities. Interestingly, when we look specifically at the recommendations addressing fair dealing, both author/publisher groups and the higher education community interpreted them as supporting their positions. Access Copyright highlighted the report’s questioning of the educational community’s bright-line approach to fair dealing, asserting that the report acknowledges “there is a legitimate problem with the education community’s interpretation of fair dealing” (Access Copyright, 2019), while CARL appears to interpret the INDU Committee’s recommendations differently, stating it is “pleased that the Committee refrained from recommending changes to educational fair dealing, preferring to allow for the courts to decide on pertinent cases” (CARL, 2019).

An in-depth review of the INDU Report’s fair dealing recommendations and corresponding INDU Committee observations reveals ambivalence on the part of the INDU Committee regarding the application of fair dealing within the education environment. While the INDU Committee shows support for an expansive interpretation of fair dealing, it goes on to issue what we believe is best understood as a warning to educational institutions: “Considering evolving licensing models, ongoing court proceedings, and upcoming negotiations, the INDU Committee is wary to intervene in the conflict surrounding educational fair dealing by recommending amendments to the Act—for now” (INDU Committee, 2019, p. 65). With this statement, the INDU Committee makes clear that it is not against further interventions into educational fair dealing should it deem them necessary.

Since the release of the INDU Report, the government has shown some ongoing interest in copyright reform, first issuing a public call for consultation on the Canada–United States–Mexico Agreement’s commitment to extend Canada’s general copyright term of protection (Canadian Heritage, 2021) and more recently

announcing a public consultation process on a modern copyright framework for online intermediaries (Innovation, Science and Economic Development Canada, 2021). Notwithstanding the fact that the Copyright Act itself is set to undergo another statutory review beginning in 2022, there appears to be some momentum behind the government's continued interest in copyright reform and the education community should be prepared to respond both to the next review as well as to any future calls to operationalize Recommendations 16 and 17.

In preparation for these future consultations, it is imperative that the education community develop a cohesive advocacy strategy that goes beyond data and justification and engages directly with the public interest aspect of its positions and the user groups that it represents. Ultimately, educational institutions and libraries are as much a part of the Canadian cultural landscape as any other community that contributed to the review, and they do themselves a disservice by falling into a user versus creator debate, which is both a woeful oversimplification and likely to see them misrepresented as freeloading consumers. We suggest educational organizations expand their advocacy efforts beyond government consultation and consider the approaches employed by creator groups, including publishing op-eds in well-known newspapers and developing social media and marketing campaigns that speak to a broader public audience.

We also encourage the higher education community to engage in further advocacy and policy conversations with more confidence. Entering into the 2017 review, many libraries and higher education institutions were on the defensive, urging the INDU Committee to protect the additional user rights enacted in 2012. Despite most submissions from this community failing to argue for an expansion of fair dealing, the INDU Committee signaled its support for such a measure, indicating its receptiveness to expansive user rights and serving as a reminder to our community to operate more offensively in the future.

Finally, we caution against reading the INDU Report too optimistically and believe that educational institutions should continue to prepare for further debate regarding both the legitimacy of their fair dealing guidelines and the perceived harm that institutional copying has on the Canadian creative fields.

Addendum

On July 30, 2021, the Supreme Court of Canada delivered its judgement in *York v. Access Copyright (York University v. Canadian Copyright Licensing Agency [Access Copyright], 2021)*. In a unanimous decision, the court found that tariffs set by the Copyright Board of Canada are not mandatory and that users are not bound by tariffs unless they voluntarily accept their terms. Given the court's decision on the



enforceability of the tariff, it subsequently found that it would be inappropriate to weigh in on the matter of York's Fair Dealing Guidelines because Access Copyright had no standing to bring an infringement claim forward and as such there was no active dispute between the parties. Despite this, the court refused to endorse the reasoning of the lower courts when it came to their assessment of the fairness of York's guidelines. In particular, the Supreme Court disagreed with the lower courts' decision to approach their fair dealing analyses from an institutional perspective only, leaving out the perspective of individual students.

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