Richard C. Owens: Fix Canada's copyright law before it puts publishers out of business

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In Prime Minister Trudeau's mandate letter to the Ministry of Canadian Heritage, copyright policy received not a single mention. The mandate letter, which sets out the ministry's main agenda, contains extensive directives to establish programs and artists' subsidies, but none to the fundamental rights on which the arts rely.

Yet, as demonstrated by the ministerial briefing book (prepared to inform incoming ministers of active issues in their portfolios), many important copyright issues are outstanding, including implementation of treaties, Internet piracy, the 2017 review of the Copyright Act, extending the term of protection for copyright-protected works, and the efficiency of copyright collectives. Perhaps most urgent, and instructive, is another issue mentioned in the briefing book: copyright clearance by educational institutions. In this case, bad law is destroying an entire industry.

Educational institutions have been given a free ride. The law now allows them to copy almost any amount of material for their educational purposes, without compensating the publishers. The result is that, like any overgrazed commons, soon there will be fodder for no one.

How did such a state of affairs come to pass? First, the Supreme Court of Canada (SCC), in the 2012 case *Alberta v. Canadian Copyright Licensing Agency*, issued a very surprising decision, in which a teacher was determined to be dealing fairly with a publisher's book by making copies of sections of it for everyone in a class. "Fair dealing" is an exception to copyright. In this case, the court actually decided, in spite of a strong dissent and better prior judgements, that to make copies for a whole class could be said to be for "private study," a permitted exception in the fair dealing section of the Copyright Act.

> *The law allows schools to copy almost any amount of material without compensating publishers.*

Cash-strapped educational institutions at all levels were quick to seize the opportunity the Alberta decision presented to them. Shared guidelines, the Fair Dealing Guidelines, were drawn. These permit copying so extensive that Canadian educational book publishers, already serving a small market, are going out of business. According to a recent PWC study performed for Access Copyright, "since implementation of the Fair Dealing Guidelines, the educational publishing industry in Canada has been subject to a significant negative impact… Revenues from sales are experiencing an accelerated decline. These declines…will accelerate further, causing adverse structural change."

Government action has made matters worse. In the most recent amendments to the Copyright Act, "education" was added as a permitted fair dealing purpose. Imagine what extent of copying the courts will permit for "education" if copies for an entire class were permitted under the exception of "private study." Also, according to the ministerial briefing book, further negotiations are underway at the international level to expand the available scope of copying available for educational purposes.

Although the Alberta Education case is one of the most egregious examples, it is not in that case alone that the SCC has taken IP jurisprudence down a crooked path. Why is this area of law, so critical to Canadian innovation policy, ill-served by our top court? For many years after the enactment of the Charter, the SCC was busy applying it. Commercial and IP were turned aside. It is only in the last decade, a decade in which Internet copying has greatly

influenced public, and academic, views of copyright, that the court has begun finally to turn its collective mind to IP issues.

The result perhaps is twofold. First, the court came to lack both perspective and expertise in IP. Second, it finally turned its mind to IP only when new, bolder and less restrictive theories about IP were gaining popularity among the public and the academy. None the wiser, the court picked up on modern trends instead of cleaving to more established principles. More knowledgeable judges like Marshall Rothstein and Ian Binnie were not able to turn the court in spite of excellent dissenting judgements.

What conclusions to draw from this mess? The Ministry of Canadian Heritage will have its hands full with the copyright brief. Its copyright policy branch will have much to do to be ready for the 2017 review of the Copyright Act. It should act to restore the rights of educational publishers before that review, however. Also, scholars and users alike should reflect on the greater trend to "users' rights" and wider fair dealing and the lesson the Canadian educational publishing industry holds in that regard. Copyright does matter. Absent its protections there will eventually not even be any content left to steal.

*Richard Owens, a lawyer who has specialized in intellectual property and technology, is the author of the recent Macdonald-Laurier Institute commentary, "*How to really support Canadian culture: Heritage and the copyright brief.*"*