

CAUL-CBUA Copyright Webinar — “We’re Not On Our Own” 2017-2018 Copyright Developments

The copyright landscape will likely remain somewhat unpredictable through 2018, meaning there is always potential for surprises — welcome or otherwise — but here are three recent developments worth watching:

1) *Copyright Modernization Act Review*

This Act came into force in 2012 with a mandatory five-year Parliamentary review period. This review was officially announced in December, 2017. The lead Ministers on the review are Hon. Navdeep Bains, Minister of Innovation, Science and Economic Development, and Hon. Mélanie Joly, Minister of Canadian Heritage.* Details of the review — including any hearings/consultations — have not yet been announced. It is known that the federal government was lobbied heavily by the publishing industry and allied stakeholders in advance of the review, with a reported emphasis on repealing education as a fair dealing purpose.

* https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament_to_undertakereviewofthecopyrightact.html

2) Copyright Board Reform Consultations

In December, 2016 the Senate Standing Committee on Banking, Trade and Commerce — after hearing from a range of copyright stakeholders — issued a report * decrying “the glacial pace of copyright proceedings in Canada” and calling urgently for, “thorough, in-depth examination of the Copyright Board of Canada’s mandate, practices and resources.”

* https://sencanada.ca/content/sen/committee/421/BANC/reports/FINALVERSIONCopyright_e.pdf

The Senate committee anticipated this examination would be undertaken in the course of the forthcoming Copyright Act review, but the Government launched expedited consultations on the Copyright Board in August, 2017 *. This consultation invited written submissions, which are available here: <https://www.ic.gc.ca/eic/site/693.nsf/eng/00162.html>. Disappointingly, several stakeholders — including Access Copyright, the Writers Union of Canada, and the Association of Canadian Publishers — made submissions calling for mandatory (and retroactive) tariffs to be applied to Canadian educational institutions.

* The Discussion Paper for this consultation is available here: <https://www.ic.gc.ca/eic/site/693.nsf/eng/00158.html>

3) *Access Copyright v. York*

The July, 2017 Federal Court decision in this case was a great disappointment for supporters of an educative, fair dealing-based approach to education, with the judge ruling that York's Fair Dealing Guidelines were not, in fact, fair, and that Copyright Board-certified tariffs should be considered mandatory. The immediate, direct impact of this decision is limited, since it only applies to York. Furthermore, York is now taking the case to the Federal Court of Appeal, and this court's ruling will, in turn, almost certainly be appealed to the Supreme Court.

Indirectly, however, the decision may contribute to legal chill and uncertainty, and Access Copyright and other parties are already trying to leverage the ruling to their advantage, as in their submissions to the Copyright Board consultations (above). At least one publisher is also known to have directly contacted academic staff at numerous Canadian universities and collections, attempting to use the decision to sell course-pack licenses, but there are few indications of widespread changes to copyright policies in Canadian higher education at this time. Looking ahead, copyright scholars who have reviewed the Federal Court ruling in depth believe that it is flawed, and will ultimately be reversed through the forthcoming appeal(s). *

* See, for example:

<https://arielkatz.org/access-copyright-v-york-university-anatomy-predictable-avoidable-loss/>

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