

The changing landscape

of Canadian copyright
and universities

Universities Canada's
submission to the Standing
Committee on Industry,
Science and Technology's
statutory review of Canada's
Copyright Act / **June 2018**

Universities Canada welcomes the opportunity to submit this brief to the Standing Committee on Industry, Science and Technology as part of its review of the *Copyright Act*.

Universities Canada is the voice of Canadian universities at home and abroad: advocating for higher education and the power of universities to transform lives, strengthen communities and find solutions to the world's most pressing challenges. As creators, owners and users of copyright, universities bring a balanced perspective to the *Copyright Act* review.

While digital disruption is changing the context in which copyright is used and managed, legislative changes made in 2012 and seminal Supreme Court decisions have together struck a balance which must be maintained between the rights of copyright users and those of owners.



Universities' balanced perspective

Universities are unique among copyright stakeholders; our communities include creators, owners, users, sellers and more. Universities and students need access to content while academics are prolific content creators. Approximately 75,000 faculty and university teachers work on our campuses and regularly write scholarship¹, making our campuses home to the largest single group of Canadian authors. This year more than 1.7 million students will study at Canada's universities; they are the next generation of creators, cultural entrepreneurs and cultural consumers.

Most content used on campus is scholarship created by and for universities. This content spans the breadth of human knowledge – from engineering, law and medicine, to psychology, business, history and more – regardless of national borders.

Universities have a balanced perspective on copyright. We believe fair dealing is an important way to maintain equilibrium in the *Act* and facilitates educational opportunities to the benefit of students.

Copyright Modernization Act benefits students

Before the *CMA*, a university instructor wanted to illustrate a point during class using two brief clips from feature-length films. The institution's copyright manager inquired about transactional-licences: one clip was quoted at \$8 *per second*, the other at \$66 *per second* –

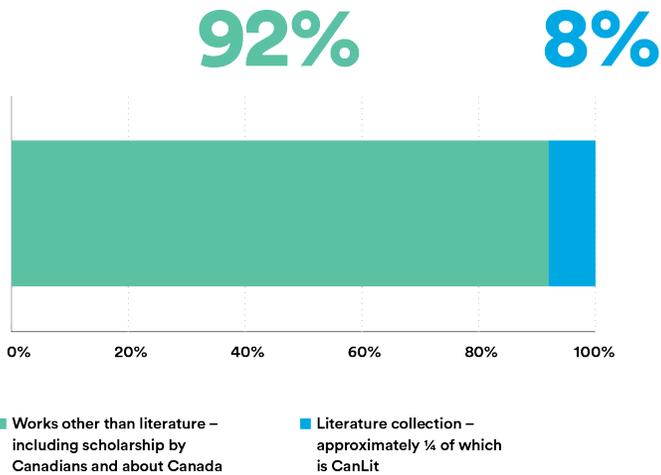
prohibitively expensive. The clips were never shown, no royalties were paid and students lost out on an educational opportunity. Today, because of fair dealing, a teacher can share short excerpts, and educational opportunities are possible with no net financial impact on the copyright owner.





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Content of a Canadian university's library in 2017



Based on an assessment of the library collection at one of Canada's largest universities with a top-rated English literature program, a renowned creative writing program and a leading library. The literature collection is among the best in Canada and large enough to support world-class literary scholars and CanLit experts.



The legal precedent for fair dealing

The Supreme Court of Canada has repeatedly recognized the importance of balancing copyright, and the role of fair dealing in achieving balance.

In *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 the Supreme Court ruled on the need for the *Act* to **balance dissemination of works and rewarding creators**:

[Paras 31-32] The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.[...] Excessive

control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement [including fair dealing].

In the *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13 decision, the Supreme Court was clear that **fair dealing is a user's right** and

[Para. 48] to maintain the proper balance between the rights of copyright owners and users' interests, [fair dealing] must not be interpreted restrictively. [...Quoting David Vaver:]

'Both owner rights and user rights should therefore be given the fair and balanced reading [...]

The Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37 decision clarified that educators providing photocopies to students is fair dealing because teachers are [Para. 23] "facilitat[ing] the students' **research and private study**"— two fair dealing purposes that have always been part of Canada's copyright laws.

These decisions and others from July 2012 transformed Canadian copyright and are the genesis of universities' understanding of their role providing content to studentsⁱⁱ and, in part, our interpretation of fair dealing.ⁱⁱⁱ

Digital disruption

The copyright marketplace is undergoing unprecedented change.

In the education sector, the blanket-licence model was introduced in the 1990s when photocopiers were transforming copying technology. Over the next 25 years, as new technologies emerged, there was a shift away from print towards digital with digital content frequently bundled with built-in reproduction licences. As new avenues for purchasing content and access to content emerged, the demand for Access Copyright’s blanket-licences declined significantly.

Digital disruption in the education space has accelerated over the last five years. Today’s students – ‘digital natives’ – demand content accessible 24/7 on personal devices. Educators are also keen to adopt digital tools that support better pedagogy and researchers appreciate how digital content is more user-friendly than print. Innovative content on today’s campuses include:

- Open access content
- Internet repositories of free-to-the-user content (e.g. YouTube);
- Provincially-funded open educational resources
- Bundling content aggregators
- Content subscription services (e.g. Cengage Unlimited)
- Content platforms, e-reserves and learning management systems
- Increasing user-generated content

When Parliament studied the CMA in 2011, no one could have predicted how disruptive digital content would become in the education space, nor that in July 2012 the Supreme Court would dramatically expand our understanding of fair dealing,

rejecting the narrow scope of fair dealing argued by copyright owners.

Despite the digital disruption and arguing that the loss of Access Copyright revenue has been devastating, Canadian publishers have seen healthy profit margins since 2012. Broadview Press and House of Anansi Press made submissions to the INDU Committee indicating the impact of declining Access Copyright royalties represents less than one per cent of their revenue.^{iv}

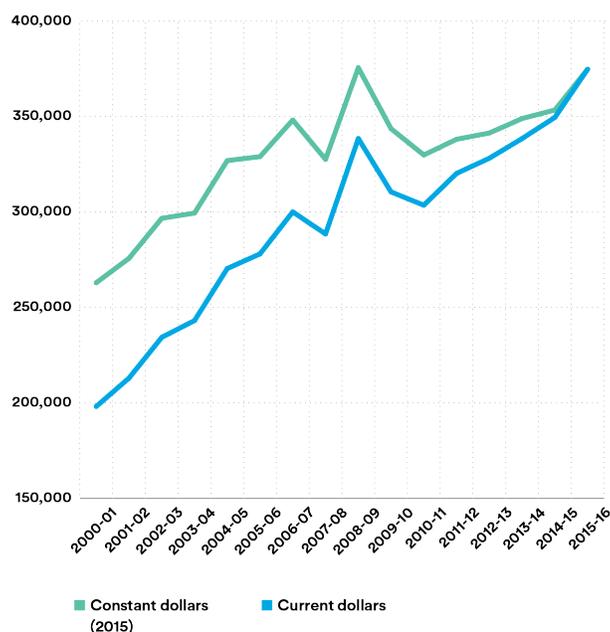
In the international scholarly publishing industry, market changes have included increasing consolidation among five publishers at the expense of universities.^v

The Internet’s ubiquity means more access to free content than ever before. Additionally, fair dealing for education is further facilitating the dissemination of works and the ideas expressed in them. But despite these phenomena, Canada’s universities are spending more than ever purchasing content: **more than one billion dollars in library content in the past three years combined.**

A changing collection

Universities are acquiring different content than in the past, increasingly shifting from purchasing print to digital content. Some institutions have adopted “digital-first” policies – only buying print when digital formats are

2 Library acquisition expenditures, 2000 - 2016

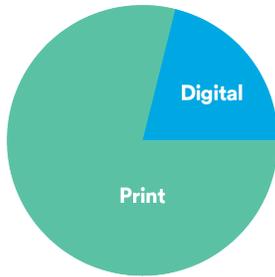


Includes printed books, electronic materials and content. Does not include staffing, operation costs, equipment etc. Source: Statistics Canada, Financial Information of Universities and Colleges Survey



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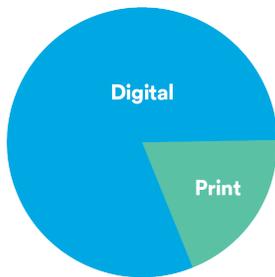
The shift towards purchasing digital content: One university's experience



2002/03

21%

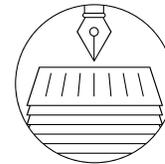
79%



2015/16

81%

19%



The reliance on print has shrunk drastically over the past 15 years from representing 79% of acquisitions in 2002 to less than 20% today.

unavailable. Some universities report as much as 95 per cent of their annual acquisitions are now digital.

The shift to digital content has tremendous implications for reproduction rights and copyright management. As a rule, **digital content purchased by university libraries includes reproduction rights.** The model licence used by the Canadian Research Knowledge Network – which negotiates \$120 million worth of licences on behalf of universities annually – includes permissions relating to reproduction rights, including posting on learning management systems, e-reserves, classroom handouts, course packs and more.^{vi} As universities increasingly purchase digital content, they are buying content with built-in reproduction licences.

It is important to note that the digital shift also has implications for the sector's reliance on fair dealing. While fair dealing remains important, licensing and open access cover most content used on campuses. For example, one mid-sized university's e-reserves system is 60 per cent licensed content, 24 per cent open access or free content and only 16 per cent posted under the fair dealing exception.

Digital content means better copyright management and compliance

In 2012, when Parliament passed the *Copyright Modernization Act*, many universities still had blanket-licences with Access Copyright. Over the past decade, there has been a shift to digital content with built-in licences,

and Access Copyright's blanket-licence became progressively redundant. As stewards of public funding – and not wanting to pay twice for the same content – universities became more and more reluctant to pay under the Access licence when permissions for reproductions were increasingly covered under other licences. As a result, some universities opted out or allowed Access licences to expire. But because universities take their responsibility to manage copyright seriously, campuses first invested in:

- alternative licences and permissions management;
- capacity to purchase “pay-per-use” transactional-licences when necessary;
- students, staff and faculty education on how to apply fair dealing and comply with copyright law;

- enhanced copyright guidelines and policies;
- increased staffing^{vii}; and
- copyright offices and consultation services.

Using digital tools, copyright managers track permissions and licences obtained for copyright reproduction. They purchase targeted transactional-licences as needed directly from publishers, copyright holders or the American Copyright Clearance Centre (which sends royalties to Access Copyright as appropriate). In contrast, in the digital context, Access Copyright's blanket-licences are not sufficiently flexible or targeted. Until very recently, the collective refused entirely to sell transactional-licences to any university that did not first purchase an expensive blanket-licence.^{viii}

Universities take copyright compliance seriously and actively promote compliance through education and sensitizing campus stakeholders to copyright responsibilities. These efforts help ensure faculty and students follow the law, reducing both intentional and unintentional infringement on campuses. Meanwhile, though universities are responsible for purchasing reproduction-licences from legal representatives of copyright owners (e.g. collectives, publishers and aggregators), there is no legal requirement for either universities or licence-sellers to notify creators when a licence is bought. Annual royalty cheques to authors do not necessarily provide disaggregated data about who bought reproduction rights to their works. This dearth of information may lead to confusion for creators, mistaking licensed reproduc-

tions for infringement. Universities welcome government plans to include copyright education for creators in its National Intellectual Property Strategy and are keen to engage with the government on this endeavor.

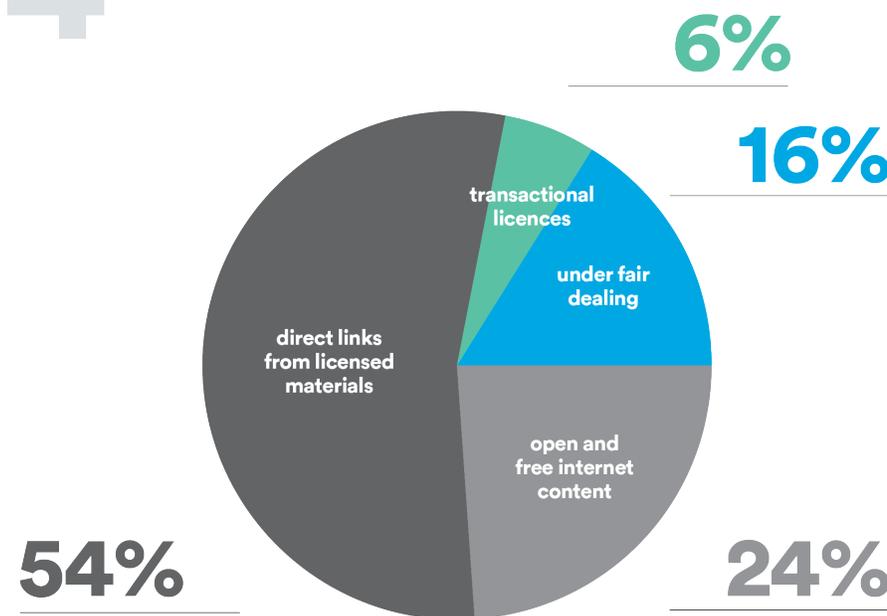
To support compliance, universities have also invested in systems, including syllabus services and e-reserves. Syllabus services enable faculty to give syllabi to the copyright office which then verifies whether materials are available in the library, purchase licences or new content where needed, and help assess that content made available through fair dealing or other exceptions in the *Copyright Act* is within the scope of such exceptions. Copyright staff organize the material and post it on the university's e-reserves for faculty and student use. These full-service programs makes it easy for faculty to get course readings organized while ensuring all content has been checked for compliance.

Furthermore, while infringement is rare and usually unintentional in the academic context, it is standard for employment contracts to require faculty to abide by Canadian law. Some faculty collective agreements include language to encourage compliance, and some institutional copyright policies outline sanctions for wanton infringement.^{ix}

Recommendation: Recognize that

1. the 2012 Supreme Court expanded the understanding of fair dealing;
2. fair dealing facilitates educational opportunities;
3. digital disruption has fundamentally changed the marketplace;
4. universities spend more on content than ever before despite widely available free online content and the implementation of fair dealing policies; and
5. the government should maintain fair dealing for education and other educational exceptions in the *Copyright Act*.

4 A mid-sized university's e-reserve system content source



Source: based on analysis by a mid-sized Canadian university's library and copyright office, 2016-2017.



Direct solutions towards sustainable creator livelihoods

Universities support a vibrant Canadian culture.

In their letter to the INDU Committee, the Minister of Innovation, Science and Economic Development and the Minister of Canadian Heritage recognized that digital disruption was likely the cause of market shifts and they cautioned:

[...] the *Copyright Act* itself might not be the most effective tool to address all of the concerns stemming from recent disruptions.^x

Fair dealing is not the problem; removing fair dealing for education is not the solution. Canada's universities support the goal of remunerating creators and respecting copyright owners' rights. We all value Canadian

stories and want them to be supported. The policy objective of improving the incomes of Canadian creators is commendable, however, a direct approach to remuneration is possible and need not be at the expense of university students' budgets.

First, the Canada Book Fund could be expanded to support more born-digital products. Its funding could also be increased to levels recommended by the Association of Canadian Publishers.^{xi}

Second, Canada's Public Lending Right program (which issues annual payments to authors based on the frequency their books appear in Canadian public libraries to compensate authors for lost royalties) should return to recognizing Canadian literature found in university libraries.^{xii} PLR programs around the

world are part of copyright laws – it is a fluke of history that Canada's is not. The copyright review is an appropriate time to consider the role of the PLR in the broader cultural ecosystem.^{xiii}

Recommendation: Improve direct supports for creators:

1. increase funding to the Canada Book Fund and expand remuneration for born-digital titles; and
2. further increase annual funding to the Public Lending Right program and extend the program to include university libraries.

For more information

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ⁱStatistics Canada, 2016 Census.

ⁱⁱThe *Alberta* decision clarified that the perspective of the end user (the student) not the teacher (or school) must always be considered when determining whether a use is fair dealing. *Alberta* also clarified that, contrary to accusations heard during the copyright review of “mass industrial school copying,” copying numbers must not be considered in the aggregate (from the teacher or school’s perspective) but from that of the individual student.

ⁱⁱⁱIn *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36, the Supreme Court held that 30-second free previews streamed by commercial online music services from songs that averaged four minutes in length (or 12.5% of the work) were “modest” amounts that constituted fair dealing.

^{iv}Broadview Press’s submission to the INDU Committee outlined how its annual revenue is \$3.5 million and the drop in Access Copyright royalties is approximately \$30,000 (0.9% of total revenue). Meanwhile, House

of Anansi Press’ submission to the INDU Committee reports annual revenue of \$7 million and the drop in its Access Copyright royalties is approximately \$16,000 (0.2% of total revenue).

^vCBC News story “Academic Publishers Reap Huge Profits While Libraries Go Broke,” June 2015.

^{vi}Note in particular clauses 3.3, 3.4, 3.5, 3.7 and 3.8 in CRKN’s model licence. Note also the language in clause 2.1 which states that “[n]othing in this License Agreement shall prevent Authorized Users and Members from carrying out acts [...] that are permitted under the *Copyright Act of Canada*” meaning that these licences do not replace or over-ride fair dealing. Other groups of Canadian universities negotiate additional licences for electronic content and include similar language, see for example the Ontario Council of University Libraries for their model licences.

^{vii}One institution reports having created an additional 10 FTE staff positions since 2012 in order to manage copyright on campus.

^{viii}This is a well-documented challenge for the university sector. Canada’s universities petitioned the Copyright Board of Canada in 2011 to require Access Copyright to sell transactional-licences without requiring first a blanket-licence but lost. As some predicted, this business practice forced universities to find alternative vendors other than Access Copyright for transactional-licences to the detriment of Access Copyright’s revenue.

^{ix}For example, Queen’s University’s faculty collective agreement has a clause which reads: “5.2 The University shall indemnify any Member for violations of copyright arising from the fulfillment of his/her academic responsibilities so long as the Member has exercised due diligence to act in accordance with the University’s copyright policy. Upon request, the University shall provide professional advice to any Member about access to, and use of, copyrighted material for academic purposes.” The University of Calgary’s Acceptable Use of Materials Protected by Copyright policy has specific language around sanctions for

infringement, “4.5 Employees and post-doctoral fellows who use material protected by copyright in violation of this policy may be subject to formal disciplinary action up to and including dismissal.”

^xLetter from the Ministers of Canadian Heritage and Innovation, Science and Economic Development to the Standing Committee of Industry, Science and Technology, December 2017.

^{xi}Association of Canadian Publishers’ pre-budget FINA submission, 2017

^{xii}At inception, the PLR included in its surveys both public and research libraries because it was felt this represented double payment. However after the establishment of Access Copyright in the university sector, the PLR withdrew from surveying university libraries. We are recommending a return to the intent and approach of the original program.

^{xiii}Canada’s Public Lending Right Program: Program Design, International Comparisons, and the Impact of Technology, March 2012, by Roy MacSkimming.