



Submission to the Standing Committee on
Canadian Heritage (CHPC) on Remuneration
Models for Artists and Creative Industries

Submitted by
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Summary of Recommendations to the Standing Committee

1. Retain education as one of the permitted fair dealing purposes in the Copyright Act.
2. Make the fair dealing purposes listed in S29 illustrative rather than exhaustive, by inserting the words “such as” in front of “research, private study, education, parody or satire”.
3. Protect copyright exceptions from contract override
4. Allow circumvention of technological protection measures for non-infringing purposes.
5. Continue to allow libraries and universities to make choices with respect to entering into licenses with collectives, or participating in a tariff, i.e. it should not be mandatory.
6. Continue to limit statutory damages for non-commercial infringements to \$5000.

Copyright Practices at the University of Guelph

Universities, like the University of Guelph, understand the need to balance the rights of creators with those of the students, instructors, and researchers making use of copyright-protected works. The majority of works used at universities are authored by those who work, teach, and conduct research at universities, and who are already paid for their scholarly output.

The University of Guelph facilitates and advocates for responsible and informed uses of copyrighted materials by:

- Complying with the Copyright Act
- Complying with the many licenses and contracts the Library negotiates with digital content publishers and vendors
- Providing expertise and guidance on copyright and author rights issues for Guelph faculty, staff, students, researchers and scholars
- Educating faculty, students and staff about fair copyright practices so that they understand both their rights and obligations as creators and users of content
- Committing staff and other resources to support copyright education and compliance

University of Guelph Expenditures on Educational Content

In 2017-18, the University of Guelph Library spent more than \$8 million dollars on resources to support its teaching and research programs. The Library purchases and subscribes to scholarly output from all over the world, including the works of Canadian publishers and authors. While physical books are still purchased, the vast majority of Canadian content acquired by university libraries is in digital form, and is subscribed to via online platforms such as the Canadian Electronic Library, which contains more than 20,000 Canadian e-books from university presses, large educational publishers and small independent publishers. Additionally, Canadian books and journals are also

acquired via large international publishing platforms, where they are either purchased outright or subscribed to via annual licenses. In all cases, the amount paid by the University in order to gain access to these works includes the right to make copies for educational purposes; no additional permission or licensing is required.

The Library also spends \$120,000 annually on transactional licenses to publishers in order to copy educational materials that are not available via digital platforms, and that exceed what can be copied under the fair dealing exception.

In both of these scenarios, funds are paid directly to the copyright owners of the content being purchased or subscribed to.

Students at the University of Guelph access course readings in a variety of ways:

- Purchase textbooks directly from the University Bookstore
- Access materials posted on electronic reserve, or in the course management system including:
 - Direct links to articles and e-books from Library subscriptions (54%)
 - Free and open Internet content (24%)
 - Content paid for via transactional licenses (6%)
 - Content made available under the Fair Dealing Policy (16%)

While publisher and creator groups are advocating for the resumption of collective licensing at universities, the data provided above demonstrates why this model no longer makes sense for universities. The collective licensing fees once paid to Access Copyright have been redirected to the vendors who license the same content on digital platforms. Collective licensing only authorizes the right to make copies of works (within certain limits), while the licenses that universities acquire for e-journal and e-book content provide access to the content *as well as* authorizing additional uses such as posting in course management systems, inclusion in course packs and distributing print copies to students. As well, universities are increasingly turning to the use of openly-licensed educational materials, which do not require permission or payment to use, such as eCampusOntario's Open Textbook Library.

Returning to collective licensing would therefore result in universities paying twice for use of the same content, once to the licensor of the digital platform, and again to Access Copyright, as well as paying for content that is already freely available. Additionally, universities would continue to need to purchase transactional licenses for the use of content not covered by the collective license, such as publications excluded from the collective's repertoire, copying of amounts greater than the limits permitted by the collective license, and for non-text formats such as audio-visual content.

Collective licensing costs universities, students, and taxpayers millions of dollars, while returning only modest amounts to publishers and authors. The University of Guelph believes that collective licensing is not the appropriate model for ensuring that Canadian

creators are compensated effectively for educational uses of their works.

Based on our history and experience, the University of Guelph also does not agree that copying educational materials at universities has caused a decline in revenue for the Canadian publishing industry. The use of fair dealing in the education sector has existed simultaneously with a thriving Canadian publishing industry in past decades and can continue to do so today.

Impact of the Canada-United States-Mexico Trade Agreement on access to Canadian content

Under the recently signed Canada-United States-Mexico Trade Agreement, the term of copyright will be extended from the current life plus 50 years to life plus 70 years. If the agreement is passed, it will mean that no new works will enter the public domain in Canada for the next 20 years. This would represent a benefit for rights holders and their beneficiaries, but a potential loss for scholars, learners, and members of the public whose access to Canadian historical and cultural content could become more difficult. Works in this 20-year window, which would have been freely available for use by educational institutions, may now require permission and payment.

It is therefore more important than ever to protect the Canadian Copyright Act exceptions intended to ensure fair access to content for purposes such as education. In the United States, the copyright term of life plus 70 years is offset by a robust fair use exception that preserves the interests of the public, including provisions for educational uses. As Canada moves to adopt U.S. style intellectual property provisions, it should also adopt the more flexible U.S. exceptions in order to ensure that Canadian students and educators are not disadvantaged when compared to their U.S. counterparts.

The University of Guelph's Recommendations

The University of Guelph asks the committee to consider the following recommendations. We believe they will ensure fair and equitable access to the content required for teaching, learning and research, while ensuring that the rights of content creators are respected and compensated appropriately.

1. Retain Education as a fair dealing purpose

One of the objectives of the 2012 Copyright Modernization Act was to “allow students and educators to make greater use of copyright material” as well as “permit businesses, educators and libraries to make greater use of copyright material in digital form.”¹

¹ Legislative Summary of Bill C-11: An Act to amend the Copyright Act. Publication Number 41-1-C11E. Available at: https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c11&Parl=41&Ses=1

Education should be included as one of the enumerated fair dealing purposes in the Act because it:

- Provides certainty for instructors, students and researchers who routinely access and use copyrighted works, as well as incorporate the works of others into their own work.
- Fosters creativity, innovation, scholarship, and access to learning materials; as well as facilitating library services such as course reserves and interlibrary loan
- Enables access to a wide range of scholarly content that students would otherwise be unlikely to discover or access

2. Adopt a more flexible fair dealing exception in which the list of allowable purposes is illustrative rather than exhaustive

Canada's Copyright Act needs to be flexible and adaptable to change. The current list of fair dealing purposes does not allow for unforeseen, unanticipated uses that would be legitimately fair – such as mass digitization projects to preserve cultural heritage works, or scholarly text and data mining research.

By including the words “such as” in front of the current list of fair dealing purposes in Section 29 of the Act, Canada's fair dealing provision would be more like the fair use provision in the U.S. Copyright Act, which leaves open the possibility of fair uses for purposes other than those enumerated. Such uses would still need to meet the Supreme Court's six factor test for fairness, ensuring that the dealing with the work was fair regardless of purpose.

3. Protect copyright exceptions from contract override

As universities primarily gain access to scholarly works via digital subscriptions, it is essential that access to and use of this content is not restricted in ways that print materials are not.

Several countries have enacted laws that prevent users' statutory rights from being overridden by contracts, including Ireland, United Kingdom, and Belgium. As university libraries spend millions of dollars in public funds on purchasing licensed content, it is critical that we ensure that exceptions and limitations that exist to protect user access and use are not undermined by unduly restrictive license terms.

4. Adjust the Copyright Act to permit the circumvention of technological protection measures (TPMs) for non-infringing purposes.

Much of the digital content purchased by universities is encumbered with technological protection measures (TPMs), which are put in place by content vendors to protect works from unauthorized use. Unfortunately, TPMs can also limit legitimate uses, such as copying permitted under fair dealing, or access to public domain works. Section 41 of the Copyright Act should be modified to allow for circumvention of TPMs for legitimate, non-infringing uses.

5. Do not impose a mandatory tariff

Proposals to make the tariff under S. 70.1 mandatory would have serious implications for many Canadian institutions, imposing potential liabilities in the millions of dollars for inadvertently making even a single unauthorized copy of a work in a collective's repertoire. Imposing a mandatory tariff would have a detrimental impact on an institution's ability to efficiently manage the public funds used to acquire educational content.

6. Retain statutory damages limit for non-commercial infringement

The current \$5000 limit on statutory damages for non-commercial infringement recognizes that such infractions are often unintentional and have a limited impact on the market for the work. Increasing the limit would only serve to unnecessarily discourage fair and legitimate uses of educational content, through fear of unreasonable penalties.

The University of Guelph

The University of Guelph is one of Canada's top comprehensive universities: both learner centred and research intensive. Across our three campuses, we have more than 30,000 undergraduate and graduate students, with 94 per cent of our graduates finding employment within two years of graduation. The University of Guelph's McLaughlin Library, through its 101 full-time staff, looks after more than 65,000 electronic journals, more than 280 electronic databases and 7 million volumes in the shared Tri-University Libraries catalogue. Our research-centered services include world-renowned archival collections in Canadian theatre, landscape architecture, rural history, and Scottish culture.