

Submission to the Standing Committee on Canadian Heritage

REMUNERATION MODELS FOR ARTISTS AND CREATIVE INDUSTRIES

SUBMITTED BY LANGARA COLLEGE

DECEMBER 14, 2018

ABOUT LANGARA

Langara College, located in south Vancouver, was established as an independent public college on April 1, 1994, after offering programs as part of Vancouver Community College for 29 years. The College is also known as snəwəyəl lələm - which means *house of teachings* in the hənqəmihəm language - a name given to us by the Musqueam People, on whose unceded traditional territory we are located. Langara provides academic, career, and continuing studies programs and courses. In recent years the College has also increased formalized support for applied research activities among its faculty.

Copyright legislation affects the way students and educators can access and use copyright-protected materials. Langara thanks the Committee for the opportunity to discuss the impact of the *Copyright Act* on teaching and learning.

INTRODUCTION

Colleges and Institutes Canada (CICan) member institutions, including Langara College, play an integral part in Canadian society, providing students with foundational academic skills and industry-ready training. Between 2014 and 2015, Canada's colleges and institutes and those they have trained added \$191.2 billion in income to the country's economy, approximately equal to 12.7% of the Gross Domestic Product.¹

The development and delivery of dynamic programs requires fair and reasonable access to learning materials, including copyright-protected works. The *Copyright Act* exists to create a balance between public good and creator rights.² To achieve this balance, the Supreme Court of Canada advises that exceptions to copyright infringement, such as fair dealing, are better understood as users' rights.³ Shifting the balance too far in favour of the copyright owner stifles creative innovation and creates practical obstacles to otherwise acceptable uses.⁴

The purpose of this brief is to: (1) explain how copyrighted content is used at Langara, and (2) provide recommendations for maintaining a balanced copyright regime that fairly compensates creators and acknowledges the importance of research, teaching, and learning.

n.b. This paper is adapted from Langara College's submission to the Standing Committee on Industry, Science and Technology in response to its statutory review of Canada's *Copyright Act*.

¹ Colleges and Institutes Canada. (n.d.). Demonstrating the value of Canada's colleges and institutes. Retrieved from <https://www.collegesinstitutes.ca/policyfocus/impact/>

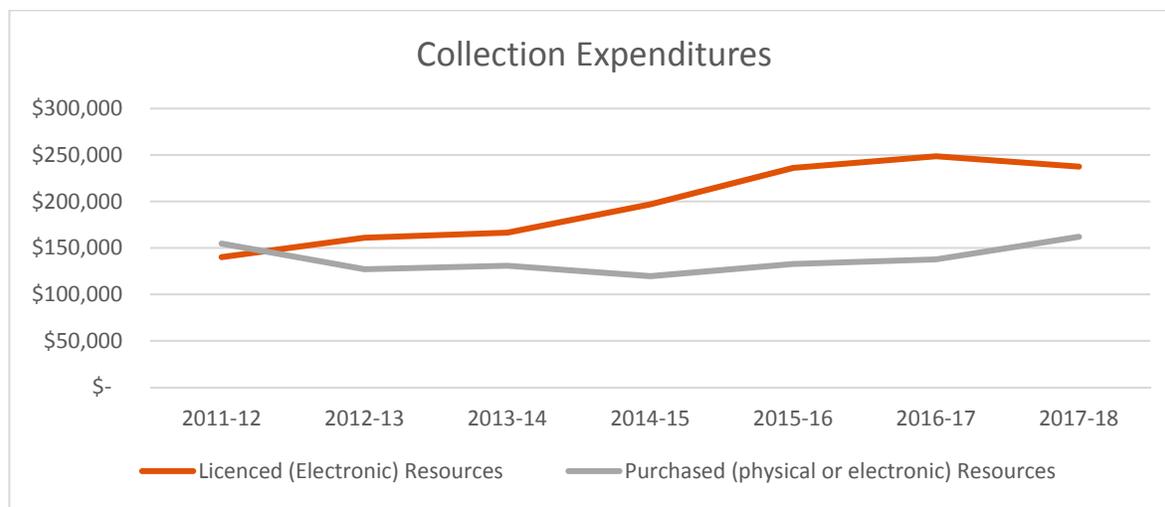
² *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 34 Supreme Court of Canada. (2002). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>. See paras. 30-31.

³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 13 Supreme Court of Canada. (2004). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do>. See para. 12.

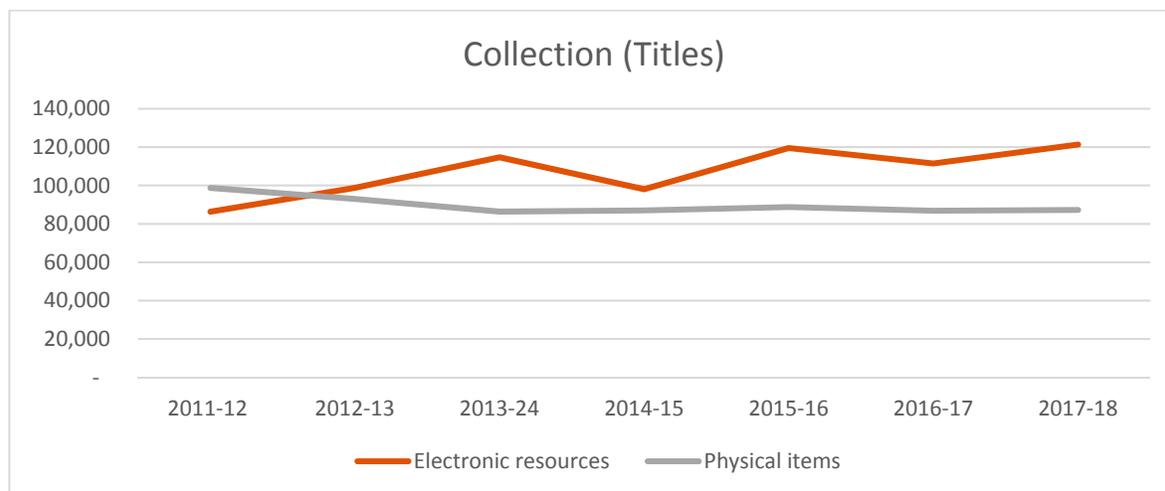
⁴ *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 34 Supreme Court of Canada. (2002). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>. See para. 32.

THE LANGARA LIBRARY COLLECTION IN CONTEXT

Contrary to what some stakeholders have suggested, educational fair dealing has not been a windfall for Canadian colleges and universities. Statistics Canada data indicates that expenditures on print and electronic acquisitions for colleges have increased by 26% since 2012.⁵ In keeping with this trend, collections spending at Langara Library increased by 34% since 2013/14, speaking to the College's commitment to providing access to legally-acquired resources and fairly remunerating publishers and authors.



As with many post-secondary libraries, Langara Library has shifted collection development activities towards digital educational materials, reaching a tipping point in 2011/12. Use of electronic materials (licensed or purchased) is governed by license agreements with content providers; while the terms of these agreements vary, most include access and reproduction rights.



⁵ Statistics Canada. Table 37-10-0029-01 Expenditures of community colleges and vocational schools (x 1,000)

Although Canadian content exists within the larger core academic electronic collections, Langara Library makes a special effort to collect materials with regional relevance to British Columbia and Canada. The Library subscribes to several databases and collections (journal, book, and media) with exclusively Canadian content. The total cost for Canadian-specific collections in 2017/18 was \$30,683. Langara also has direct subscriptions to several Canadian academic journals and magazines, spending over \$4,000 on these subscriptions in 2017/18.

Langara encourages instructors to adopt, adapt, and create open educational resources (OER). Open educational resources are teaching, learning, and research resources in the public domain or with intellectual property licenses that permit free use and repurposing by others.⁶ Langara is the second heaviest user of open textbooks among B.C. post-secondary institutions, as reported through British Columbia's Open Textbook Project. Since 2013, instructors have adopted over 15 open textbooks, saving students approximately \$521,054.⁷ In 2016, Langara formed a college-wide Open Education Advisory Committee to build awareness, cultivate in-house expertise, and support instructors using and creating OER.

Academic publishing is in the midst of a sea change. In an era where the web is omnipresent, the traditional textbook is no longer a panacea. Publisher and author groups point to educational fair dealing as the cause of falling revenues. Yet, the Supreme Court found no link between lost profits and photocopying done by educators. Rather, it identified several other factors that were likely to have contributed to the decline in sales, including increased use of the Internet and a shift towards resource-based learning.⁸

COPYRIGHT COMPLIANCE AT LANGARA

Langara has long been committed to balancing its interests as a place of learning with those of creators and publishers. The Langara Library has always helped students, staff, and faculty manage their rights and responsibilities under Canadian copyright law. The Copyright Office continues to be housed within the Library and is staffed by the Copyright Officer (a title shared by the Director of Academic Innovation and the Copyright Librarian) and a Copyright Technician. Langara's Copyright Office has developed a set of policies and procedures to monitor and guide faculty, staff, and students' use of copyrighted content.⁹ To supplement these policies, educating the College community has been a major focus over the past five years. Copyright education on campus takes place in many forms, including:

- Workshops each semester on such themes as *Copyright for Educators* and *Copyright for Creators*;
- Customized workshops for individual departments on campus;

⁶ Hewlett Foundation. (n.d.). Open educational resources. Retrieved from <https://hewlett.org/strategy/open-educational-resources/>

⁷ BCcampus OpenEd. (n.d.). Open textbook stats. Retrieved from <https://open.bccampus.ca/open-textbook-stats/>

⁸ Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 37 Supreme Court of Canada. (2012). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>. See para. 33.

⁹ Langara College. (n.d.). Policies. Retrieved from <https://langara.ca/about-langara/policies/college-policies/index.html>

- Course-embedded copyright instruction for a number of academic programs, including Professional Photography, Publishing, Web and Mobile App Design and Development, and Library & Information Technology.

To supplement these face-to-face sessions, the Copyright Office developed an interactive online tutorial in the College's Learning Management System (LMS) entitled *Copyright for Langara Instructors*. Launched in 2018, the tutorial teaches faculty how to legally use copyright-protected materials through common scenarios they encounter in their day-to-day work.

Outside of educational workshops, staff are readily available to answer questions from students, faculty, and College employees via email, telephone, and in-person consultation, responding to 112 copyright questions in 2017/18.

The Copyright Office works closely with the Langara Bookstore and Print Services to produce print coursepacks. Staff review every coursepack for copyright compliance, maintain a detailed copy log, process licensing fees, and seek permission from copyright owners on behalf of instructors whenever necessary.

Since 2010, the annual use of printed coursepacks at Langara has declined by 53.6%. Comparing fall semesters 2012 and 2018, the College now offers 33.7% more sections and produces 32.6% less print coursepacks. Instructors have stated many reasons for moving away from coursepacks, such as the increased number of licensed digital resources available through the Library, the amount of freely available resources on the Internet, and the quality and flexibility of open educational resources.

Access Copyright asserts that Canadian schools copy 360 pages per student per year, a number it acquired during its court case with York University. Access Copyright has used this number to calculate pages copied by educational institutions across Canada. However, this is simply not the case at Langara, where in 2017 print coursepacks accounted for 1.2 pages per full-time equivalent (FTE) student.

APPLICATION OF EDUCATIONAL FAIR DEALING AT LANGARA

According to the Supreme Court of Canada, fair dealing is more than an exception to infringement: It is a user's right.¹⁰ When fitting, Langara instructors use and share content under fair dealing and other educational exceptions in the *Copyright Act* in accordance with College policy and with assistance from Copyright Office staff.

To help members of the Langara community work within copyright law, Langara has adopted the fair dealing guidelines jointly developed by CICan, Universities Canada, and the Council of Ministers of Education, Canada. The College's Fair Dealing Policy and Guidelines are founded on two landmark Supreme Court rulings in 2004 and 2012, rather than the expanded definition of fair

¹⁰ Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 36 Supreme Court of Canada. (2012). Retrieved from the Supreme Court of Canada Judgements website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9996/index.do>. See para. 41.

dealing introduced by the *Copyright Modernization Act* (though the latter affirmed the former). *Alberta (Education) v. Access Copyright* (2012) confirmed that copying short excerpts is “reasonably necessary to achieve the ultimate purpose of the students’ research and private study.”¹¹

The Guidelines provide some guidance as to what constitutes a short excerpt (i.e. 10% or less of a book) where the *Copyright Act* does not, though *CCH Canadian Ltd. v. Law Society of Upper Canada* (*CCH v. LSUC*) (2004) asserts that “it may be possible to deal fairly with a whole work.”¹²

Fair dealing guidelines provide a useful starting point, but copyright law ultimately requires case-by-case evaluation. In *CCH v. LSUC*, the Supreme Court outlines six factors, or tests, to help users determine whether a use is fair.¹³ This is a more rigorous evaluation than required by the U.S. doctrine of fair use, which only uses four factors. Langara Copyright Office staff promote the conscientious application of this framework, providing support and guidance whenever needed. These six factors form the foundation of the College’s online copyright tutorial for Langara instructors.

RECOMMENDATIONS

Recommendation 1: Preserve education as a fair dealing purpose

Counter to the narrative popularized by some stakeholders, Langara College does not use fair dealing to avoid compensating writers and publishers. Indeed, many members of the Langara community are rights holders themselves. Langara recognizes this sector’s valuable cultural, artistic, and educational contributions.

Educational fair dealing is a user’s right that enhances pedagogy by facilitating access to short excerpts from copyright-protected works. Fair but nimble use of copyright-protected materials lends itself to innovative research and teaching practice. As Canadian legal scholar Michael Geist noted in a recent meeting of the Standing Committee on Industry Science and Technology, to restrict fair dealing would represent a step backwards and run counter to the experience of the past six years.¹⁴ As such, the College recommends preserving education as a fair dealing purpose under Section 29 of the *Copyright Act*.

Recommendation 2: Clarify that Copyright Board tariffs are not mandatory for users

The Supreme Court found no link between falling textbook sales and photocopying done by educators, instead attributing the decline to such factors as increased use of the Internet and a

¹¹ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 37 Supreme Court of Canada. (2012). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>. See para. 32.

¹² *CCH Canadian Ltd. v. Law Society of Upper Canada*, 13 Supreme Court of Canada. (2004). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do>. See para. 56.

¹³ *Ibid.* See para. 53. The six factors are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

¹⁴ mgeist. (2018, December 11). INDU Meeting No. 143 154158. Retrieved from <https://soundcloud.com/user-956278298/indu-meeting-no-143-154158>

move towards resource-based learning –a shift clearly illustrated by Langara Library’s spending on licensed digital content.¹⁵ Access Copyright’s business model has failed to keep pace with these changes and continues to offer educational institutions only two blanket licensing schemes.^{16 17}

Langara’s Copyright Office seeks permission from rights holders for uses not covered by commercial subscriptions, open licenses, fair dealing or other exceptions in the *Copyright Act*. When possible, the College arranges licenses through the U.S.-based Copyright Clearance Center, which offers a flexible pay-per-use service. Education has long urged Access Copyright to develop a similar service without success. Consequently, Canadian colleges and universities spend hundreds of thousands of dollars annually on transactional licenses sought elsewhere.¹⁸

In *CBC v. SODRAC* (2015) the Supreme Court confirmed that tariffs are binding for collectives such as Access Copyright but optional for users.¹⁹ Legal expert Howard Knopf offers a helpful analogy: Tariffs set the maximum price for a train ticket from Ottawa to Toronto, but travelers were always free to make the journey by plane, bus, car, or any other legal means.²⁰ In an educational setting where the destination is engaging and relevant course content, there are many legal avenues available to instructors.

As Laura J. Murray and Samuel E. Trosow assert, collective administration of copyright makes a lot of sense: “When collectives are working well, they make things easier for creators, other rights owners, and users alike.”²¹ However, collectives must acknowledge the optional nature of tariffs and provide fair and innovative licensing options that meet the needs of both creators and users. As such, the College encourages the Committee to affirm the Supreme Court’s ruling and clarify that Copyright Board tariffs are not mandatory for users.

¹⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 37 Supreme Court of Canada. (2012). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>. See para. 33.

¹⁶ Access Copyright. (n.d.). Universities & colleges. Retrieved from <https://www.accesscopyright.ca/educators/universities-colleges/>

¹⁷ Under this type of licensing scheme, colleges and universities pay a set royalty fee per full-time equivalent (FTE) student. In 2010, Access Copyright applied to the Copyright Board to increase the royalty rate per FTE from \$3.58 to \$35 for colleges and \$45 for universities, later lowering this to \$25 for colleges and \$35 for universities for 2014-2017.

¹⁸ Geist, M. (2018, November 29). Misleading on fair dealing, part 8: The Access Copyright fight against transactional licensing. Retrieved from

<http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-8-the-access-copyright-fight-against-transactional-licensing/>

¹⁹ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 57, Supreme Court of Canada (2015). Retrieved from the Supreme Court of Canada Judgments website: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15646/index.do>

²⁰ Knopf, H. (2018, November 28). My speaking notes for my presentation to the House of Commons INDU Committee for its s. 92 Statutory Review of the Copyright Act. Retrieved from

<http://excesscopyright.blogspot.com/2018/11/my-speaking-notes-for-my-presentation.html>

²¹ Murray, L.J. & Trosow, S.E. (2013). *Canadian copyright: A citizen’s guide*. Toronto, ON: Between the Lines. See pg. 89.