

**SUBMISSION PRESENTED TO THE STANDING  
COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY  
REGARDING THE REVIEW OF THE  
*COPYRIGHT ACT***

**UNIVERSITY OF WINNIPEG  
JULY 27, 2018**

## **SUBMISSION OF THE UNIVERSITY OF WINNIPEG REGARDING THE REVIEW OF THE *COPYRIGHT ACT***

The University of Winnipeg is pleased to contribute to this review. As a university, we have an intrinsic relationship with knowledge creation and dissemination. By virtue of our diverse community – comprising creators, owners, and users of copyrighted materials – we also have an engaged and balanced perspective on copyright.

Copyright encourages and rewards creativity while enabling users to access and incorporate copyrighted works to society's benefit.<sup>1</sup> The 2012 amendments to the *Act* epitomized this balance. Creators and owners were afforded expanded protections, while users benefitted from changes facilitating the fair access and use of copyrighted materials for the public good, increasingly through digital means.

We believe the 2012 amendments established a progressive system of copyright that must be maintained. In conjunction with seminal court decisions, these changes facilitate the success of Canadian students in a time of significant change and pressure in higher education. Amendments to the *Act* which would hamper the competitiveness of Canadian students through reduced access to learning materials and increased costs will negatively impact the educational sector and Canadian society as a whole.

### **PART I: INTRODUCTION TO UWINNIPEG**

#### **Commitment to excellence and accessibility**

UWinnipeg is a small to medium-sized university with approximately 10,000 students. We provide programs that are high quality and accessible. Through initiatives such as the Opportunity Fund,<sup>2</sup> we seek to remove barriers to higher education. However, reduced provincial grants and an ongoing funding disparity<sup>3</sup> have led to tough decisions, such as a 6.6% tuition increase for 2018-19 and staffing reductions in an already stressed environment. To fulfill our mission, we must make strategic choices regarding expenditures and maximize student success.

#### **History of fair copyright practice**

Our faculty, students, and staff respect copyright. Many are creators themselves.<sup>4</sup> For over a decade, we have employed specialist personnel to assist with copyright compliance. In 2012, we established a dedicated Copyright Office with two full-time positions overseeing copyright activities. After introducing a comprehensive Copyright Policy in 2016, we have a robust program featuring:

- A prohibition on copyright infringement with a range of sanctions for non-compliance
- Assistance to faculty in obtaining copyright clearances, including transactional licences
- Copyright checking software for materials posted to our learning management system ("LMS")

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<sup>1</sup> *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, 2002 SCC 34.

<sup>2</sup> The Opportunity Fund provides traditionally underrepresented students with bursaries and tuition credits.

<sup>3</sup> UWinnipeg has for decades received a smaller per-student operating grant than any other university in Manitoba.

<sup>4</sup> Our faculty and graduate students are prolific creators, having authored over 2,700 articles in peer-reviewed journals in the past 10 years alone.

- Educational presentations, handouts, posters, and webpages
- Support for faculty and students in exercising authors' rights
- Notices for faculty regarding copyright obligations
- A mechanism for review of materials posted to our LMS

## **PART II: CONTINUED INVESTMENT DURING A TIME OF CHANGE**

UWinnipeg's acquisition and use of copyrighted materials has been disrupted by changes in the academic publishing market. While our library collections budget receives modest yearly increases, diminishing choices<sup>5</sup> and rising costs<sup>6</sup> have forced us to carefully assess the value of our expenditures and cancel some subscriptions.<sup>7</sup> Nevertheless, we continue to invest in licenced content, overwhelmingly in digital format. Since 2012, our spending on digital database subscriptions has risen by 32%, now exceeding \$1.2 million per year. As we begin to move away from "big deal" subscriptions – which obligate universities to use public funds to purchase back scholarship created overwhelmingly by university faculty in the first place – we seek to invest instead in Canadian content of greater relevance to our faculty and open access.<sup>8</sup>

Another significant change towards digital learning is exemplified by increasing usage of our LMS, which allows students to experience university at a place and time that works for them. This year, over 1,600 courses have been created in our LMS, a 50% increase since 2013-14. The LMS allows for seamless distribution of licenced library content, which forms the overwhelming majority of content shared with students. Not only is this content highly accessible through any smartphone or laptop, students are not burdened with additional costs of textbooks and printed course packs.

## **PART III: FAIR DEALING AS A USER RIGHT AND A VITAL SUPPORT FOR STUDENTS**

Fair dealing is paramount among the user rights contained within the *Act* and has always been a part of copyright in Canada. Not only have successive Canadian governments recognized the criticality of fair dealing to our copyright system, so too has Canada's highest court for over 75 years affirmed the importance of limitations on the monopolies afforded to copyright holders,<sup>9</sup> and the role of fair dealing in achieving this aim.<sup>10</sup> The Supreme Court has also provided instruction on applying fair dealing in a manner which protects the interests of copyright owners, guidance to which we strictly adhere.<sup>11</sup>

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<sup>5</sup> Consolidation in academic publishing has led to a handful of international publishers dominating the market. These "Big 5" invest heavily in technology and sell large, bundled "big deal" subscriptions.

<sup>6</sup> Appendix 1: 5 Year EBSCO Journal Price Increases.

<sup>7</sup> Appendix 2: UWinnipeg Collections Budget and Cancellations.

<sup>8</sup> 45% of scholarly works published in 2015 are available open access. Juan Pablo Alperin et al., "The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles," *PeerJ* 6:e4375 (2018).

<sup>9</sup> *Vigneux v. Canadian Performing Right Society Ltd.*, [1943] SCR 348.

<sup>10</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13.

<sup>11</sup> Our Copyright Policy includes the Supreme Court's six fair dealing factors. Only after considering the factors and determining that a proposed copying action is fair may a user proceed.

Fair dealing is a right of individuals and must always be considered from the perspective of the end user. When education was included as a fair dealing purpose in 2012, this simply clarified that teachers may assist students in exercising their existing fair dealing rights. As the Supreme Court asserted,

*“[Teachers] have no ulterior or commercial motive when providing copies to students. They are there to facilitate the students’ research and private study and to enable the students to have the material they need for the purpose of studying. The teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study.”<sup>12</sup>*

At a university, it is not administration which determines the content of course syllabi. It is individual instructors, who are subject experts and select the resources which best support their students’ learning and research outcomes. While investments in licenced digital content and open access have lessened the need to rely on fair dealing, it remains crucial. For example, when an instructor wishes to provide her students with a copy of a seminal journal article, and that journal is out of print or one to which we can no longer afford to subscribe, she may reproduce her own copy under fair dealing to ensure the content reaches her students. Any amendment to the Act which would limit the ability of faculty to assist students in exercising their fair dealing rights – such as by removing “education” as a fair dealing purpose or permitting fair dealing only when a commercial licence is unavailable – must be avoided to support student accessibility and affordability.

### **Recommendation 1: Maintain fair dealing for education as currently expressed in the Act**

#### **PART IV: COPYING TARIFFS ARE VOLUNTARY LICENCES NOT MANDATORY FEES**

The purpose of tariffs under the “general” regime – such as the copying tariffs sought by Access Copyright – is to protect users from the monopolies held by copyright collectives, and not the reverse. Studies demonstrate excessive copyright restrictions encourage monopolies and market consolidation, which lessen the bargaining power of independent creators and stifle future creativity and innovation.<sup>13</sup> In considering whether tariffs certified by the Copyright Board should be binding on users, the Supreme Court determined in 2015 that “there is no legal basis on which to hold users to the terms of a licence without their assent.”<sup>14</sup> Referencing leading cases, the Court also expressed that:

*“...the statutory scheme’s focus on regulating the actions of collective organizations, and the case law’s focus on ensuring that such organizations do not devolve into ‘instruments of oppression and extortion’...would justify finding that the Board does have the power to bind collective organizations to a licence based on the user’s preferred model – transactional or blanket – on terms that the Board find fair in view of that model.”<sup>15</sup>*

Even when viewed correctly as a voluntary agreement, Access Copyright’s licence is not good value for our students. In 2012, we elected not to renew our licence with Access Copyright and ceased operating

<sup>12</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, 2012 SCC 37.

<sup>13</sup> Ruth Towse, “Why has cultural economics ignored copyright?,” *Journal of Cultural Economics* 32, 4 (2008).

<sup>14</sup> *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57.

<sup>15</sup> *Ibid.*

under the Board's interim tariff. While Access Copyright's licence may have been a model for clearing certain copyrights in an era of photocopiers and printed course packs, it is now poor value for several reasons:

- Lack of choice: Access Copyright's repertoire is limited and does not include digital works. Our students require resources from multiple academic disciplines, which obligates us to enter into myriad licensing arrangements. A single licence does not meet our needs.
- Double payment and overlap: Access Copyright does not have exclusive rights to the works it purports to hold within its repertoire, and we have many ways to clear copyright. As scholarly journal articles and books are overwhelmingly the resources used for learning and research at universities, we licence these materials directly from publishers. Where these works appear in Access Copyright's repertoire, we will already have paid for use. As such, purchasing a licence from Access Copyright would lead to many double payments.
- High cost: Even at the "reduced" rate of \$26/FTE,<sup>16</sup> a licence from Access Copyright is costlier than even our most expensive "big deal" subscription, which offers full-text, online, downloadable, and printable access.<sup>17</sup> With our increasing investment in licenced digital resources, the value and utility of Access Copyright's licence continues to decline.

**Recommendation 2: Clarify tariffs are mandatory only for those who choose to enter into licences**

**PART V: "HARMONIZATION" OF STATUTORY DAMAGES WILL DISRUPT THE ACT'S BALANCE**

Certain creator groups, such as Access Copyright, have advocated for the tariff-setting regime of the *Act* to be "harmonized" by extending statutory damages – currently reserved for the two collective societies operating under the "mandatory" regime – to all collective societies. Such an amendment to the *Act* would have a dramatic and chilling effect on universities. Currently, the *Act* caps non-commercial infringement at \$5,000, recognizing its limited impact on creators and owners. Under a "harmonized" model and assuming a "mandatory" copying tariff of \$26/FTE, a single infringing copy could result in a penalty to UWinnipeg of at least \$585,000 and up to \$1,950,000.

In the face of such draconian damages, no university would dare not possess a licence from Access Copyright. User rights such as fair dealing, as well as the expanded educational rights introduced in 2012, would be all but eradicated. "Harmonizing" statutory damages would not improve the efficiency of the Copyright Board's operations and would be a fundamental change to the *Act*. Any amendment that would exponentially increase statutory damages for non-commercial infringement must be rejected as critically damaging to Canada's balanced and fair system of copyright.

**Recommendation 3: Resist "harmonization" of statutory damages and maintain current damage limits**

**SUMMARY OF RECOMMENDATIONS**

1. Maintain fair dealing as currently expressed in the *Act*
2. Clarify tariffs are mandatory only for those who choose to enter into licences

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<sup>16</sup> At the Copyright Board in 2010, Access Copyright sought \$45/FTE.

<sup>17</sup> Appendix 3: Access Copyright Licence Compared to "Big Deal" Subscriptions.

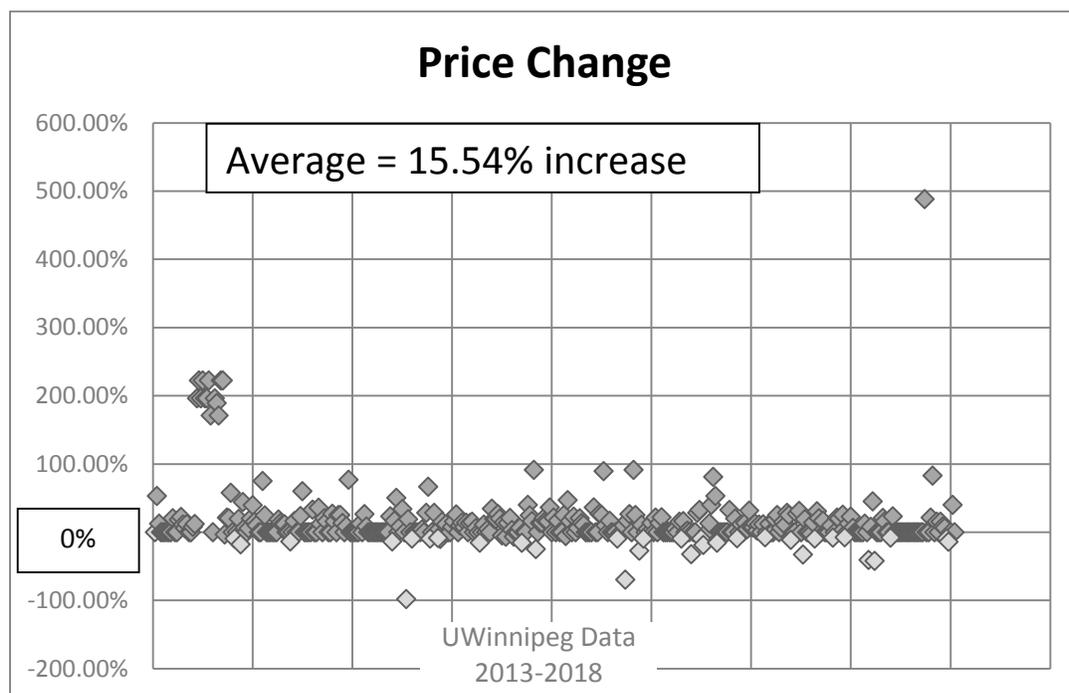
3. Resist “harmonization” of statutory damages and maintain current limits on damages

Respectfully,

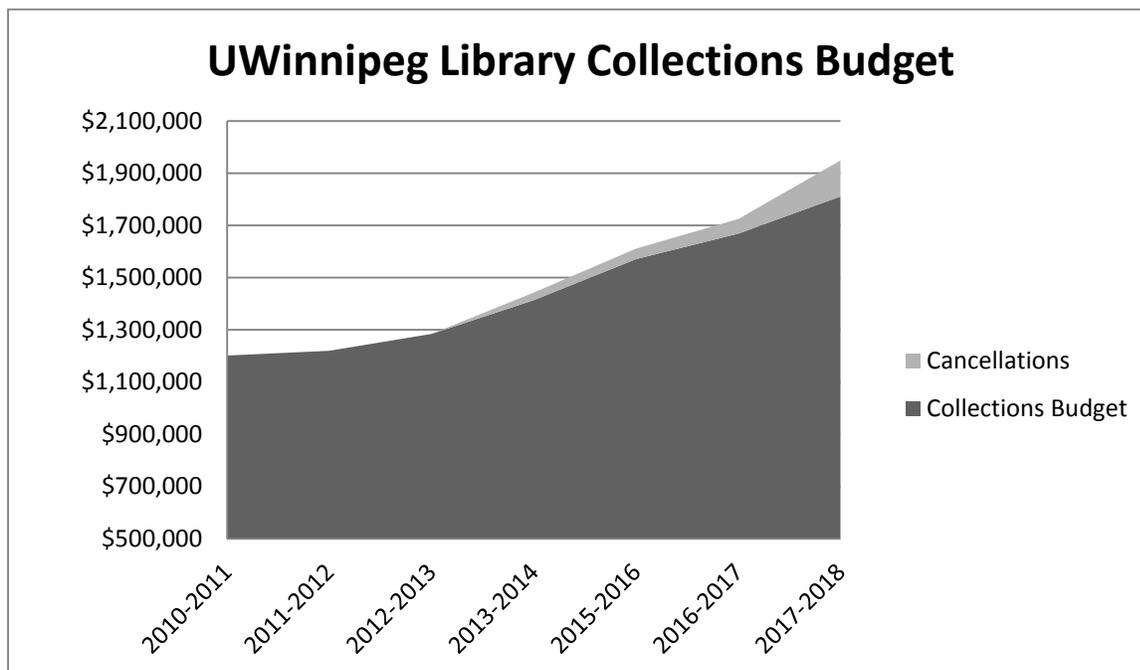
A handwritten signature in cursive script that reads "A. Trimbee".

Dr. Annette Trimbee  
President and Vice-Chancellor  
University of Winnipeg

APPENDIX 1: 5 YEAR EBSCO JOURNAL PRICE CHANGES



**APPENDIX 2: UWINNIPEG COLLECTIONS BUDGET AND CANCELLATIONS**



**APPENDIX 3: ACCESS COPYRIGHT LICENCE COMPARED TO "BIG DEAL" SUBSCRIPTIONS**

