

# **MacEwan University Submission to the Standing Committee on Industry, Science and Technology**

**Statutory Review of the Copyright Act**

**August 2018**

## Introduction

MacEwan University welcomes the opportunity to submit this brief to the INDU committee. MacEwan University, a student-focused undergraduate university with an enrolment of over 19,000 full and part-time students, is located in Edmonton, Alberta.

## Copyright in the public interest

After many years of expanding copyright scope and increasing control by copyright owners over the downstream uses of their works, the Supreme Court of Canada (SCC) made a number of landmark copyright rulings, starting in 2002, emphasizing the need for balance between the rights of copyright owners and the public interest in creativity, innovation and the wide dissemination of works.<sup>1</sup> The court re-established the central place of fair dealing as the mechanism to achieve this balance, framing it as a user right and requiring it be given a large and liberal interpretation.<sup>2</sup>

Fair dealing is a flexible provision that adapts to changing ways that copyrighted content is accessed and used. When applied robustly, fair dealing achieves the proper balance between copyright owner and user rights ensuring there is room for broad access to and engagement with works. The SCC has consistently sought to limit excessive control by copyright owners over the use of works in order to not constrain the application of fair dealing. It has stated that it is as self-defeating to overcompensate creators as to undercompensate them.<sup>3</sup> Importantly, the SCC made it clear in the 2004 *CCH v Law Society of Upper Canada (2004)* ruling that the availability of a licence does not override fair dealing.<sup>4</sup> As *CCH* demonstrates, even some commercial uses can be fair.

Parliament supported the direction of the court in the 2012 reform of the Copyright Act, expanding fair dealing and providing additional exceptions to recognize the way works are used and communicated digitally. It largely achieved the best fit for how works are used today.

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<sup>1</sup> David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed. (Toronto: Irwin Law, 2011) at 14. Discusses the public interest in IP law.

<sup>2</sup> *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13[2004] 1 SCR 339 [CCH] at para 51.

<sup>3</sup> *Théberge v Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 SCR 336 [Théberge] at para 31.

<sup>4</sup> *CCH*, supra note 1 at para 70.

## Fair dealing in education

Fair dealing and additional Copyright Act exceptions rightly support the public interest in education and research. The SCC rulings laid the foundation for the current educational fair dealing practices. The *CCH* ruling outlines the breadth of application of fair dealing, setting out factors to consider in assessing fairness. The 2012 SCC rulings confirm and amplify the direction of *CCH*, emphasizing technological neutrality and making explicit that fair dealing applies to copies made by teachers for students.<sup>5</sup>

Fair dealing benefits education by providing access to broader and varied sources of teaching and research materials. Prior to 2012, the restrictive interpretation of fair dealing created numerous barriers to access, including additional cost. As a result, instructor selected works were simply not used, benefitting no one.

The new, technologically neutral approach to fair dealing, combined with new educational exceptions, has transformed digital education. Collectively, these changes ensure the broadest access to works and remove barriers to the full utilization of current technologies.

## Fair dealing guidelines

Most Canadian educational institutions have adopted fair dealing guidelines that represent a reasonable “safe-harbour” interpretation of the guidance provided by the SCC.<sup>6</sup> The guidelines provide safeguards for copyright owners, helping ensure that both owner and user rights are respected.

The guidelines align with the approach of other countries. The United States commonly uses 10% and one chapter from a work under fair use for course distribution. After moving from a fair dealing to a fair use model, Israel developed best practice guidelines endorsing up to 20% as a reasonable amount for education.<sup>7</sup> This was confirmed by an Israeli court after a mediated outcome to a legal challenge.<sup>8</sup> Australia is in the middle of a broad copyright review. Reports by Australian government commissions recommend moving to a more flexible fair use model, emphasizing the need for greater flexibility to replace a very restrictive approach

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<sup>5</sup> *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 231

<sup>6</sup> Universities Canada. *Fair dealing policy for universities*, retrieved from <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>. Similar guidelines were recommended by CICan and the [CMEC](#).

<sup>7</sup> Amira Dotan, Niva Elkin-Koren, et al. “Fair Use for Higher Education Institutions: The Israeli Experience” (2010) *Journal of the Copyright Society of the USA*, Spr. 2010 p.23. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648408](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648408)

<sup>8</sup> *CC (Jerusalem) 3524/09 Schocken Publishing House Ltd. et al v. The Hebrew University of Jerusalem et al*, November 27, 2013.

to educational copying.<sup>9</sup> In each of these cases, flexible copyright is seen as a necessary foundation for a competitive and innovative economy.

The Copyright Board examined the educational fair dealing guidelines in the 2013-2015 K-12 tariff decision assessing the guidelines as fair.<sup>10</sup> In the same decision, the Board determined that copies of up to 2.5% from a source was an *insubstantial use* in the educational context and thus would not implicate copyright or require fair dealing to justify the use. This offers additional perspective on the appropriateness of the amounts used in the guidelines.<sup>11</sup>

### **MacEwan University pays for content**

As much as fair dealing provides essential access to supplementary materials, paid content remains the primary source of learning materials at MacEwan University. Over the last eight years, MacEwan students spent an average of \$6.75 million per year on textbooks and coursepacks from the MacEwan Bookstore. This amount does not reflect the significant amount spent on course materials from outside sources, such as Amazon.

MacEwan library expended \$2.6 million on acquisitions in 2017-2018 - a 98% increase since the 2009-2010 academic year. Digital content such as journals, eBooks, and streaming audio and video currently represents around 80% of the library collections budget. These resources are purchased with reproduction and distribution rights, commonly allowing their use as primary course materials. Growing eBook collections, including Canadian specific packages, often allow access by all students in a course. Such sources do not require additional external licensing to be used.

### **Technological protection measures**

The Technological Protection Measures (TPM) provision, introduced in the 2012 reform of the Copyright Act, disrupts the copyright balance, denying the application of user rights (Copyright Act at section 41). The general prohibition on circumventing TPMs, without consideration for whether the underlying activity is legal, undermines the intended benefits of copyright policy. The provision is more of a limit on legal uses than a

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<sup>9</sup> <http://www.pc.gov.au/inquiries/completed/intellectual-property/report> & <https://www.alrc.gov.au/publications/copyright-report-122>

<sup>10</sup> *Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire, (Elementary and Secondary Schools, 2010-2015)* (19 February 2016), Copyright Board of Canada at p 115. <https://cb-cda.gc.ca/decisions/2016/DEC-K-122010-2015-19-02-06.pdf>

<sup>11</sup> *Ibid*, at 64.

barrier to the piracy that it is intended to target. It is imperative that the government clarify that it is legal to circumvent a TPM for non-infringing purposes.

### **Access Copyright collective licence**

The entire K-12 sector and most post-secondary educational institutions have opted out of licensing arrangements with Access Copyright. The original Access Copyright negotiated licence was of declining value for most educational institutions. Expanding sources of open and free content, direct database licensing and the ease of digital transactional licensing has replaced any of the transaction-cost benefit that a blanket licence once provided.

Access Copyright has a post-secondary tariff proposal before the Copyright Board currently. The increased rate has been highlighted as an issue. However, the proposed tariff also represents an unreasonably restrictive approach that seeks to expand copyright scope and control - incompatible with the direction set by the SCC. For example, the following are defined as a “copy” that require compensation: posting a hyperlink, emailing content and displaying content, including on individual computers. The tariff also proposes extensive monitoring requirements with potential implications for privacy and academic freedom.<sup>12</sup>

### **Access Copyright tariff a blunt instrument**

An Access Copyright tariff is not the most effective way to support Canadian writers and publishers. The majority of materials that are used in universities are scholarly, not Canadian literary works. Universities Canada notes that literature represents a mere 8% of member institution library holdings, with only one quarter of that amount defined as CanLit.<sup>13</sup> This suggests that payments by post-secondary institutions to Access Copyright would in large part be directed to international publishers and foreign reproduction rights organizations. A mandatory Access Copyright tariff would amount to a foreign tax on education.

Access Copyright’s contribution to Canadian writer and publisher income is very limited. A survey conducted by the Writers’ Union of Canada indicates that Canadian writers derive only 2% of their income from Access

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<sup>12</sup> Canada Gazette *Post-Secondary Institutions 2018-2020*. Retrieved from: <http://www.gazette.gc.ca/rp-pr/p1/2017/2017-05-20/html/sup2-eng.html>

<sup>13</sup> Universities Canada. *The Changing Landscape*. Written submission to the INDU Committee, April 17, 2018 at 3.

Copyright.<sup>14</sup> Likewise, Canadian publisher submissions and testimony before the INDU committee suggest that Access Copyright disbursements are not a significant part of overall revenue.<sup>15</sup>

A recent scholarly study of Canadian poets' income showed the majority is derived from grants, with only 2% coming from Access Copyright and 5% from sales royalties. The Public Lending Right provides 9% of income.<sup>16</sup> The author of the study concludes that fair dealing in schools is more likely to benefit poets through expanded readership and potential book sales.<sup>17</sup>

### **Educational fair dealing not the cause**

The numbers above suggest that fair dealing practices in education are not the likely cause of the significant drop in income reported by some Canadian writers and publisher groups to the INDU committee. Other factors, such as digital disruption and changing purchasing patterns, affecting writers and publishing worldwide, are more likely the source. Changing the Copyright Act or restricting fair dealing are not the right tools to address a changing market.

### **Supporting Canadian writers and publishers**

MacEwan University recognizes that a changing market has impacted Canadian writers and small publishers and is a problem that requires solutions. We encourage measures to assist Canadian publishers to adapt to changes, such as support for digitization projects. We also recognize that valuable literary work with limited markets deserves direct support. We support the Universities Canada recommendation to include educational institution libraries in the Public Lending Right (PLR) program as a more effective mechanism of support than a mandatory Access Copyright licence. Administered by the Canada Council, the PLR only funds Canadian writers and publishers, and currently represents 7% of Canadian writers' income.<sup>18</sup>

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<sup>14</sup> The Writers' Union of Canada. *Devaluing Creators, Endangering Creativity*. at 5. Retrieved from: [https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity\\_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less](https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less)

<sup>15</sup> <http://www.michaelgeist.ca/2018/05/accesscopyrightroyalty/>

<sup>16</sup> Eli MacLaren. "Copyright and Poetry in Twenty-First-Century Canada" (2017) *Canadian Literature*, Spring 2017 at 20.

<sup>17</sup> *Ibid* at 25.

<sup>18</sup> The Writers' Union of Canada. *Devaluing Creators, Endangering Creativity*. At 5.

## Recommendations

In addition to the points addressed above, MacEwan University recommends the following:

1. **Retain “education” as a fair dealing purpose.**
2. **Fix the technical protection measures (TPM) provision.** Amend the Copyright Act or establish regulations to make explicit that circumvention of TPMs is legal for non-infringing purposes.
3. **Maintain choice for educational institutions to make appropriate licensing arrangements.** Do not amend the Copyright Act to require mandatory participation in a collective licence or impose unreasonable statutory penalties in the collective licensing regime.
4. **Protect user rights from contract override.** Amend the Copyright Act to clarify that fair dealing and user exceptions may not be overridden by contract.
5. **Retain the copyright term at life plus 50 years.** The current copyright term gives sufficient protection and incentive to the creation of works.
6. **Maintain notice and notice system.** Maintain the notice and notice system, but change the Act or establish regulations to disallow the inclusion of demand claims and false information in notice letters.
7. **Indigenous knowledge.** In order to ensure the protection and respectful use of traditional Indigenous knowledge, we recommend consultations with Indigenous communities and national Indigenous organizations.
8. **Reform crown copyright.** Remove copyright protection from government works made available to the public.
9. **Support text and data mining.** An explicit exception may be required to ensure that new technology research with potential commercial outcomes (such as AI) can rely on access to content.