

Brief submitted to the
House of Commons Standing Committee on Industry,
Science and Technology
on the
Statutory Review of the *Copyright Act*

Submitted by the University of Lethbridge
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Introduction

The University of Lethbridge welcomes the opportunity to contribute to the *Copyright Act* review. Founded in 1967 on traditional Blackfoot land in southern Alberta, we are a research-intensive public university with approximately 8,600 students. Liberal education principles guide our undergraduate and graduate degree programs in business, education, fine arts, health sciences, humanities, sciences, and social sciences. Our degree and research programs involve the production and use of copyrighted works.

In this brief we foreground the foundational, enduring purpose of copyright: encouraging learning and the progress of science and the arts.¹ Although the *Act* lacks an explicit purpose statement, the dual nature of its purpose is articulated in a key copyright ruling from the Supreme Court of Canada (SCC):

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.²

The term of copyright in the *Act* meets the Berne Convention minimum and is sufficient to achieve copyright's public and private purposes.³

User's Rights

The landmark SCC decision in *CCH* determined fair dealing and other infringement exceptions are user's rights that must be interpreted broadly and liberally because they are an intrinsic part of copyright.⁴ On this point, the authority relied on by the Court explains uses permitted by the *Act* are integral to realizing copyright's purpose:

Whoever does a permitted act is not just taking advantage of a limitation, exception, exemption, defence, 'loophole,' or gracious indulgence extended by the copyright owner. He is exercising a right inherent in the balance the *Copyright Act* strikes between owners and users. Both owners and users must receive the fair and balanced reading that befits remedial legislation.⁵

CCH provides a flexible six-factor analytical framework for assessing whether a dealing with a work, on the whole, is fair. With regard to the amount factor, the SCC noted the following:

¹ *Statute of Anne, 1710 (U.K.); U.S. Const., art I, § 8, cl 8.*

² *Théberge v. Galerie d'Art Du Petit Champlain Inc.*, 7 2002 SCC 34 (2002).

³ Christopher Buccafusco and Paul J. Heald, "Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension," *Berkeley Technology Law Journal* 28, no. 1 (2013).

⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (2004).

⁵ David Vaver, "Copyright." In *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Toronto, ON: Irwin Law, 2011), 215.

The amount taken may be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision.⁶

After *CCH*, many educators believed the user's right of fair dealing to be applicable to classroom copying in a manner similar to the fair use provisions in U.S. copyright law.⁷ A judicial ruling from our highest appellate court on this precise matter was unavailable, however, until July 2012.

The question of whether copying short extracts for classroom use can qualify as fair dealing was answered affirmatively by the SCC in *Alberta (Education)*.⁸ The Court reasoned that since teachers provide copies to students in order to facilitate students' purposes of research and private study, teachers cannot be said to copy for different purposes than those of their students. In the SCC's words, "instruction and research/private study are, in the school context, tautological."

Alberta (Education) clarified the scope of fair dealing in classroom settings. As this ruling considered the *Act* as it stood prior to June 2012, it is untrue to claim, as some suggest, that the 2012 amendments to the *Act* led educational institutions to modify their fair dealing policies. The pivotal consideration was the SCC's holding that teachers' copying on behalf of students can be covered by the long-standing fair dealing purposes of "research" and "private study"—user's rights that are strongly relevant for elementary, secondary, and post-secondary learners.

We therefore note that the statutory provisions we depend on for some course-related copying were in place before the *Act* was amended in 2012 to include "education" as a fair dealing purpose. Given the importance of user's rights in maintaining copyright's purposive balance between public and private interests, we recommend the following:

- retain all fair dealing purposes in the *Act*;
- protect all statutory user's rights from contractual override,⁹ and
- permit circumvention of technological protection measures when the desired use is lawful.

⁶ *CCH v. LSUC*.

⁷ [U.S. Copyright Act, 17 U.S.C. §107](#): "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

⁸ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (2012).

⁹ For example, s. 29(4B) of the fair dealing provision for research and private study in U.K. copyright law contains the following clause: "To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable." [Copyright, Designs and Patents Act 1988 \(UK\)](#).

Blanket Licensing

Most Canadian educational institutions held blanket photocopying licenses from roughly the mid-1990s to 2010, although whether fair dealing could apply to educational copying remained a strongly contested issue. For example, in that period, all model blanket licenses for universities outside of Quebec contained the following clauses:

Whereas the Institution desires to obtain the right to reproduce copyright works for any purpose within the mandate of the Institutions which reproductions would be outside the scope of fair dealing under the *Copyright Act* R.S.C. 1985 c.C-42, as amended;

And Whereas the parties do not agree on the scope of the said fair dealing.¹⁰

In addition to evolving aspects of copyright law, post-secondary institutions have faced growing doubts about the value of blanket licensing, given that the amount of content licensed directly with publishers has increased steadily. From 2009 to 2018, the proportion of the University of Lethbridge acquisitions budget spent on licensed electronic resources jumped from 48% in 2009/10 to 69% in 2017/18.

Public universities are accountable for their use of public funds to meet mission-critical needs such as content required for learning, teaching, and research. The University of Lethbridge sought to understand the permission sources we rely on most often for course-related copying. To do so we asked faculty who use our learning management system (LMS) to allow the University's Copyright Advisor to access their courses solely to assess the kinds of course materials used and probable permission sources, when needed.¹¹

Results of the LMS study were combined with permissions information for coursepacks and library reserve materials to create an overall picture of permission sources for course-related copying over a full school term. We found our collective license accounted for a mere 1.7% of all permissions needed for course-related copying. Since January 2016 we have operated outside of blanket licensing, choosing instead to acquire needed permissions directly from rights owners and through agencies like the Copyright Clearance Center.¹²

On the issue of licensing, we note that in *CCH* the SCC expressly stated the fairness of using a work does not hinge on whether a license can be purchased:

The availability of a licence is not relevant to deciding whether a dealing has been fair. . . . If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in

¹⁰ Association of Universities and Colleges of Canada - Access Copyright model license, 1994.

¹¹ Rumi Graham, "An Evidence-Informed Picture of Course-Related Copying," *College & Research Libraries* 77, no. 3 (2016), <https://doi.org/10.5860/crl.77.3.335>

¹² Copyright Clearance Center: <http://copyright.com>

a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.¹³

Copyright Education and Services

Since 2011, a copyright office has provided copyright education, guidance, and permissions assistance to University of Lethbridge faculty, students, and staff. Main sources of copyright information include the University of Lethbridge copyright website.¹⁴ The Copyright Advisor regularly offers workshops on a variety of copyright topics and presents copyright updates at academic department and faculty council meetings.

Permissions for all items copied for University of Lethbridge coursepacks or library reserve are cleared by copyright staff. Permissions clearance for LMS courses are the responsibility of faculty who are supported by copyright staff. Before the start of each term, the Copyright Advisor sends all instructors a detailed reminder about sources of copyright clearance help, which includes a dedicated fund to cover permission costs for copied course readings.

We are not alone in strengthening copyright support for our university community. A 2015 national survey on how Canadian universities have managed copyright since the 2012 changes in copyright law found the majority had shifted responsibility for copyright from central administration to specialized copyright offices.¹⁵ Copyright specialists have increased the breadth of resources aimed at helping learners, researchers, and creators understand, comply with, and use copyright effectively.

Supporting Authors and Learners

The University of Lethbridge supports just rewards for creators of original works. In some cases, however, the most effective way to do so is not necessarily through copyright or blanket licensing. Scholarly works comprise the majority of university course content, but their authors typically neither expect nor receive royalties for publishing those works. Their rewards originate outside of copyright in other forms such as peer recognition, career progression, and research grants.¹⁶

But even among authors of creative rather than scholarly works, not everyone believes just rewards are effectively obtained through copyright. For example, a study on how Canadian poets make a living found "the direct commercial benefits of ownership, as measured by the

¹³ *CCH v. LSUC*.

¹⁴ University of Lethbridge Copyright website: <http://www.uleth.ca/copyright>

¹⁵ Rumi Graham and Christina Winter, "What Happened after the 2012 Shift in Canadian Copyright Law? An Updated Survey on How Copyright Is Managed across Canadian Universities," *Evidence Based Library & Information Practice* 12, no. 3 (2017), <https://doi.org/10.18438/B8G953>

¹⁶ Aileen Fyfe et al., *Untangling Academic Publishing: A History of the Relationship between Commercial Interests, Academic Prestige and the Circulation of Research*, (St. Andrews, UK: University of St Andrews, 2017), <https://dx.doi.org/10.5281/zenodo.546100>

sales of authorized copies, are so low as to be almost negligible” and that “the poets rejected the idea that money motivates, limits or permits their writing.”¹⁷

We support the study’s suggestion to support Canadian poetry (and perhaps other forms of creative expression) in a way that compatibly combines public and private interests in a multi-faceted program where “writing and publication are supported by the state while reception is encouraged through fair dealing.” Perhaps state support can be channeled through an expansion of the Public Lending Right to include holdings of university libraries.¹⁸

Recommendations

1. Retain all exceptions to infringement, including all fair dealing purposes in s. 29 and s. 29.1.
2. Protect the freedom of educational and cultural institutions to determine the most cost-effective means of acquiring needed copyright permissions.
3. Maintain the Berne Convention’s minimum term of copyright.
4. Prohibit contractual override of exceptions to infringement.
5. Allow circumvention of technological protection measures when they prevent the exercise of user’s rights and other lawful uses.
6. Recommend to Canadian Heritage that the Public Lending Right program be expanded to include holdings of Canadian works in post-secondary libraries.

Contact Information

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¹⁷ Eli MacLaren, "Copyright and Poetry in Twenty-First-Century Canada: Poets' Incomes and Fair Dealing," *Canadian Literature*, no. 233 (2017).

¹⁸ Public Lending Right Program: <https://publiclendingright.ca/>