

UNIVERSITY OF MANITOBA

Submission to the Standing Committee on Industry, Science and Technology for the Statutory Review of the *Copyright Act*

ABOUT

The University of Manitoba is located in Winnipeg, Manitoba and is the top research-intensive post-secondary educational institution in the region. With one of the most diverse student bodies in Western Canada, hundreds of degree programs, eleven libraries and two archives, the University of Manitoba supports a campus of approximately 30,000 full-time equivalency students.

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COPYRIGHT AND EDUCATION

The impact of the 2012 inclusion of fair dealing for education in the *Copyright Act* has proven a divisive topic during this first statutory review. The issue is not whether Canadian creators should be compensated for their work; appropriate remuneration for creators is a crucial component of a vibrant creative economy. However, it is important to recognize that from the inception of statutory copyright in 1710, copyright law has sought to balance the interests of creators with the use of copyright protected works for “the encouragement of learning”.¹

The ability to use fair amounts of copyright protected works and fair compensation for creators have consistently been recognized as two objectives which need to operate harmoniously for copyright law to promote creativity, learning, and benefit society as a whole. This is sound policy which has guided the evolution of copyright law over hundreds of years.

In 2012 Parliament legislated education as a fair dealing purpose, and within months, the Supreme Court of Canada also clarified that fair dealing needed to be assessed from the perspective of the end user. If a student has a valid fair dealing purpose (research or private study), it should not be viewed “in splendid isolation”,² but rather, a third party like an instructor can produce a fair dealing copy on behalf of the student. This clarification is consistent with the manner fair dealing is applied by Canadian educational institutions today and with the historical development of copyright law and its policy objectives.

Many content creators have stated before this Committee that the harmony between copyright and the public domain was disrupted in 2012. To assess this assertion, the University of Manitoba has reviewed its own practices and industry trends since 2002.

UNIVERSITY OF MANITOBA PRACTICES – A REVIEW (2002-2018)

A. Libraries acquisitions and the digital disruption

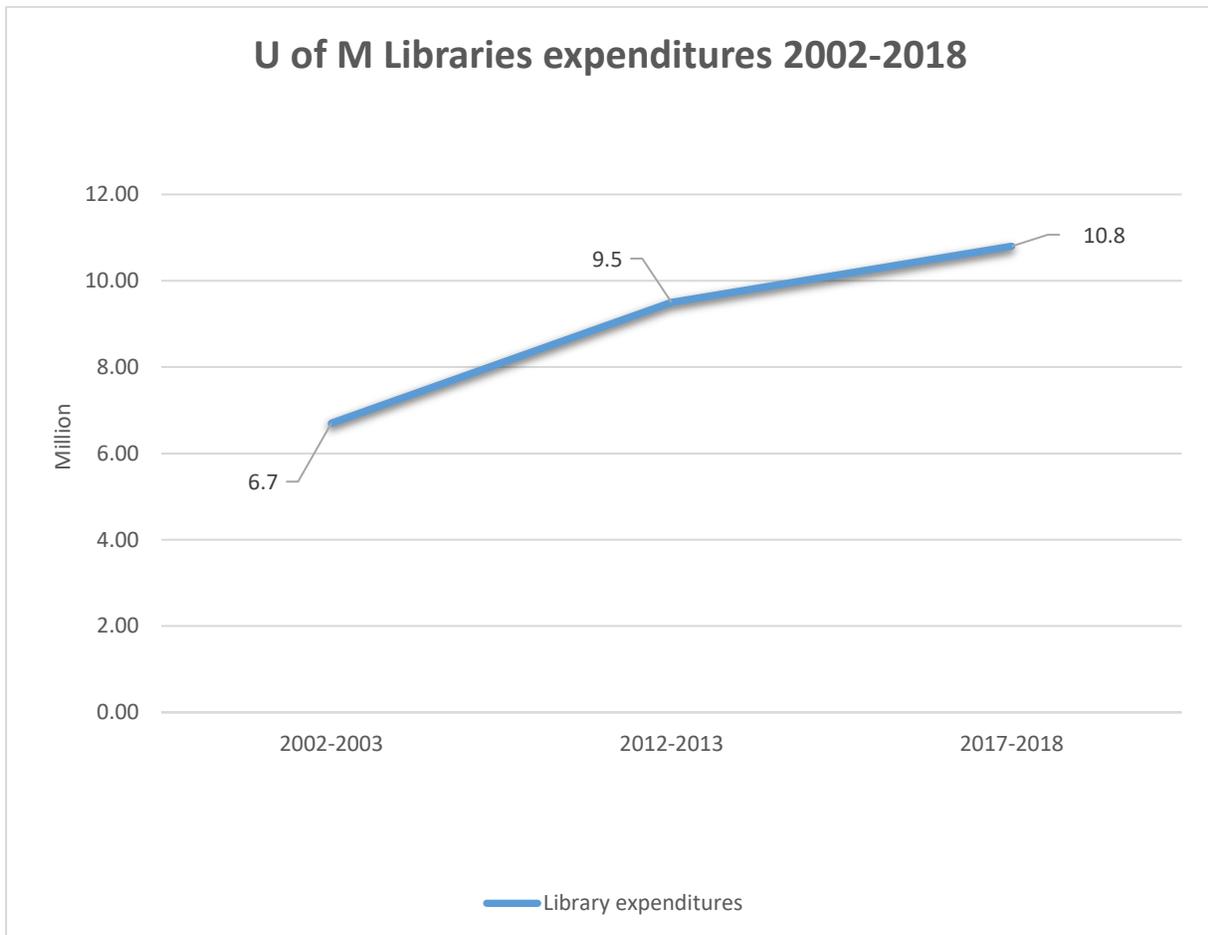
The University of Manitoba operated under the Access Copyright tariff until the end of 2015. Throughout the decade preceding the decision to opt out of the Access Copyright tariff, the digital revolution had been advancing and was having a dramatic effect on the types of resources purchased by universities. The University observed a shift in demand for library resources from print to digital. Students and faculty began to expect “24/7”, digital, on demand access to materials as the availability of e-resources increased. New models for providing access to digital materials, including patron-drive acquisition and rentals provided additional flexibility and are now in common use.

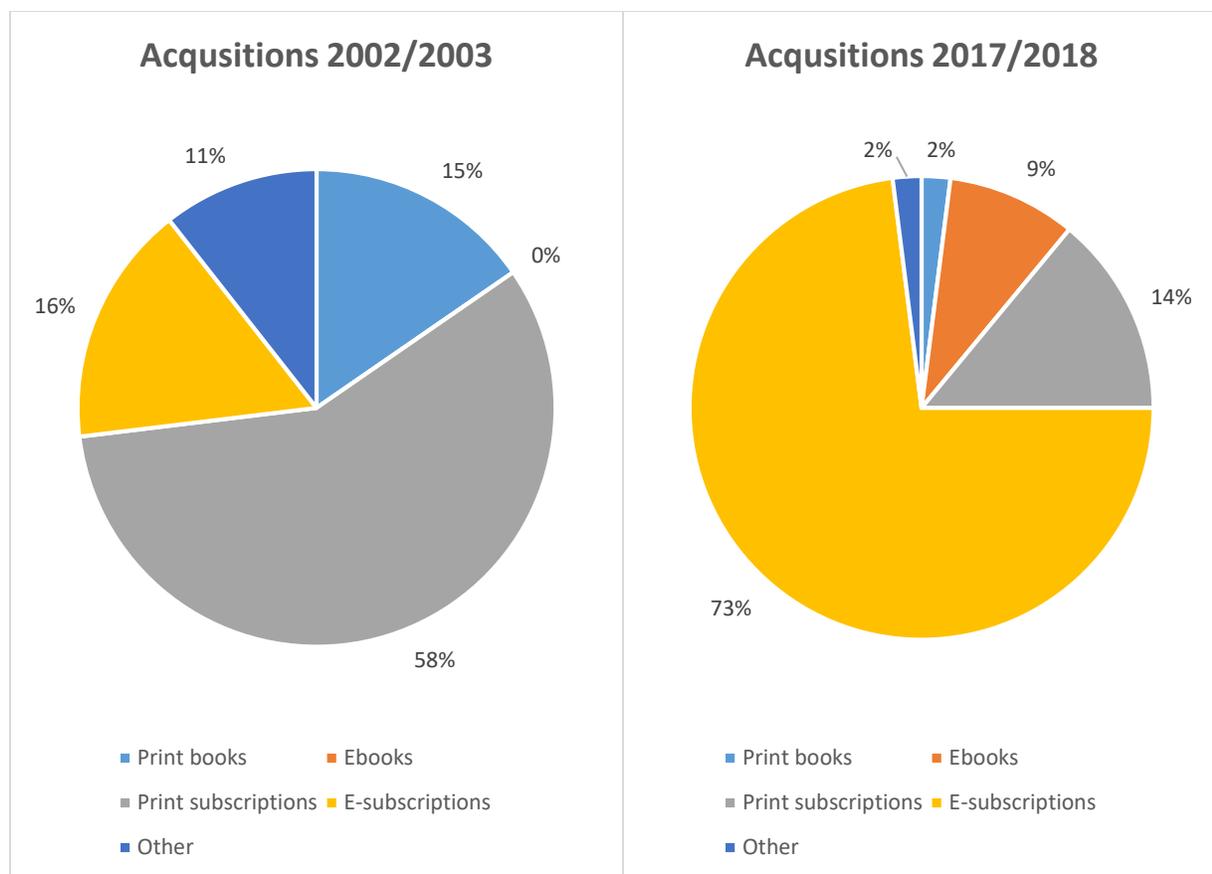
Academic e-journals are especially in demand and consume the largest portion of the University libraries’ acquisitions budget. Five international academic publishers dominate the market for this content. Subscription costs increase annually and universities, including the University of Manitoba, have limited bargaining power when negotiating e-subscription licences with major international publishers who set the fees for access to academic journal subscriptions. This being said, licenses for e-resources still provide more flexibility and better value than a blanket collective

¹ *The Statute of Anne*, 8 Anne, c. 19 (1710)

² *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, at paragraph 27.

licence because they allow the University to tailor purchases to the kind of materials University Community members want. These licences also typically include defined reproduction rights (for use in coursepacks or on a Learning Management System) which satisfy most instructional needs. The University has no knowledge of, nor control over, how Canadian content creators are compensated for licenced e-resources.





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B. Canadian acquisitions

The University of Manitoba Libraries has actively maintained acquisition programs focused on Canadian print and digital content because of its scholastic importance for Canadian studies.

The University of Manitoba is a member of the Canadian Research Knowledge Network (CRKN), which supports sustainable models for Canadian scholarly publishing. Through CRKN, the University purchases collections of e-books from the Association of Canadian University Presses. The University of Manitoba Libraries also have two long-standing approval programs for acquisitions focused on Canadian literature and Canadian studies. Calculating the precise percentage of Canadian content in the University of Manitoba Libraries is complicated by the way publisher and library data is collected, and because of the bundling of Canadian content and publications together with international publications in large electronic packages.

It is important to note that academic libraries purchase resources to support the programmes of teaching and research at their institutions. Higher education research is global in nature, and researchers require the latest ground-breaking cancer or aeronautical research or political analysis available, regardless of where it is published.

³ The “Other” category includes taxes, postage and shipping costs in addition to other non-book or journal libraries acquisitions.

C. Reassessment

After reviewing institutional content use and the libraries' licensed e-resources, the University of Manitoba determined in 2015 that it was effectively paying more than once for the same content by:

1. Buying access and reproduction rights for resources through licensing electronic resources; and
2. Paying the blanket Access Copyright tariff.

This analysis made it difficult to justify both purchasing licenses for electronic resources and continuing to opt into the Access Copyright tariff when this effectively meant that students were paying twice for permission to copy the same content.

In the same timeframe during which the Access Copyright licence has declined in relevance because of the digital disruption, copyright compliance efforts at the University were reinforced by:

- establishing a Copyright Office (2011);
- creating the UM Copyright Guidelines (2011);
- increasing copyright education and training sessions;
- providing the "Copyright Solutions" service for faculty and staff;
- reviewing course content and offering copyright assistance to instructors;
- including copyright notices in the Learning Management System (LMS);
- employing full time copyright staff;
- answering over 7000 copyright questions and presenting to over 4200 University Community members since 2011; and
- implementing a University-wide copyright policy.

The [Use of Copyright Protected Materials Policy](#) at the University of Manitoba focuses on copyright education to promote compliance, but also includes potential disciplinary sanctions for copyright infringement. At all times members of the University of Manitoba community are required to comply with copyright law under University policy and procedures.

In practice, copyright infringement that is brought to the University's attention is typically unintentional, internal (e.g., a student making copies of a professor's PowerPoint slides), and can be satisfactorily remedied through education.

D. Use of fair dealing

When fair dealing is applied at the University of Manitoba, it is truly as a complement and not as a replacement for purchased access to copyright protected materials. Approximately 35% of all coursepacks produced at the University contain only internally authored materials, and no third-party copyright protected materials. From routine reviews, it is estimated that approximately 64% of materials in the University's secure, password-protected LMS were included pursuant to the terms of the licence for an e-resource. The remainder of the content was included subject to transactional licences, Open Access or open licences (such as Creative Commons), public domain or fair dealing status.

Fair dealing materials on the University LMS are predominantly copies of born-digital works publicly available online, and not copies of materials which form part of Access Copyright's repertoire.

E. Summary

- The University saw decreasing value to the Access Copyright licence given the growing community preference for digital access to academic e-journals and e-books with defined reproduction rights;
- The University continues to make efforts to support Canadian scholarly and literary content and Canadian creators, as warranted by University programmes of research and teaching;
- Fair dealing is applied to complement, not replace, the purchase of copyright protected works to meet the educational needs of students;
- The University has created positions, procedures and policies to promote copyright compliance for the University of Manitoba community; and
- The University found it problematic to require students to pay twice for access to materials when the majority of content used on campus is accessible and reproducible under licenses for e-resources purchased by the Libraries

Authors' incomes have been declining internationally;⁴ this is not solely a Canadian issue, and fair dealing cannot be isolated as the Canadian cause of this phenomenon. Changes in the publishing industry occurred during the same period that fair dealing was refined in legislation and jurisprudence—this correlation does not equal a causation.

The University observed that following the shift to primarily digital access, reproduction rights for the same materials were being purchased twice. This trend was monitored for several years before the University ultimately made the decision to opt out of the Access Copyright tariff in 2016. Most Canadian universities came to the same realization that they were paying twice for the same rights and chose to rely on the reproduction rights they were getting directly from vendors and publishers rather than duplicating these rights and obtaining additional rights to materials they were not using through a blanket licence from Access Copyright.

The effects of the digital disruption on the Canadian publishing industry are real, but they are not a copyright issue. Shifting the impact of the digital disruption onto Canadian students would run contrary to the history of copyright law and its policy objective to further the advancement of learning. Other solutions that are equitable to both content creators and users are available.

⁴ See: Parker, Jim. (June, 2018). The public lending right and what it does. *WIPO Magazine*. Retrieved from http://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html

POLICY RECOMMENDATIONS

1. **Education as a fair dealing purpose should remain in the *Copyright Act*.** Both this purpose and its application by Canadian post-secondary institutions is consistent with the history of copyright law and the interpretation of fair dealing supported by legislative amendments and the Supreme Court of Canada. Maintaining education as a fair dealing purpose will be especially critical with the contraction of the public domain which will result from the extension of the copyright term to 70 years under the USMCA free trade agreement. The lack of works entering the public domain will result in increased costs to educational institutions and students.
2. **Statutory damages should not be harmonized.** Harmonizing statutory damages between the *mandatory* and *optional/general* collective licensing schemes would have a stifling effect on fair dealing in educational settings.

The tariff applies to every student, even when their program of study does not use materials that form part of Access Copyright's repertoire, and regardless of whether creators have been compensated for resources the student uses pursuant to the libraries' licenses for e-resources. From a policy perspective, there is no reason that students who are not using materials from Access Copyright's repertoire, or who are using licensed e-resources, should pay a blanket tariff fee that is simply no longer reflective of licensing and content delivery options available from the publishing industry today.

3. **Increase funding to the Canada Book Fund, particularly for digital publications.** By doing this the Canadian Government could emphasize that supporting the Canadian creative industry is a goal of Canadian society as a whole and not limited to the education sector. Supporting born-digital publications would also reflect the increasing use of digital content and help moderate the effects of the digital disruption.
4. **Include a broad fair dealing exemption for the purposes of reconciliation.** An exemption would remove the barrier that locating copyright owners and requesting permission to reproduce materials imposes on Canadians who want to share the documentary history of Canada's Indian Residential Schools.
5. **Prevent contracts from overriding copyright exemptions.**
6. **Permit the circumvention of TPMs for non-infringing purposes.**
7. **Reform the orphan works regime to allow easier access to and use of archival and research materials.** This will be particularly important following the USMCA copyright term extension.