



Submission to the Standing Committee on  
Industry, Science and Technology on the  
2018 Statutory Review of the Copyright Act

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Submitted by:  
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## **Summary of Recommendations to the Standing Committee**

1. Retain education as one of the permitted fair dealing purposes in the Copyright Act
2. Make the fair dealing purposes listed in S29 illustrative rather than exhaustive, by inserting the words “such as” in front of “research, private study, education, parody or satire”
3. Protect copyright exceptions from contract override
4. Allow circumvention of technological protection measures for non-infringing purposes
5. Continue to allow libraries and universities to make choices with respect to entering into licenses with collectives, or participating in a tariff, i.e. it should not be mandatory
6. Continue to limit statutory damages for non-commercial infringements to \$5000

## **A History of Copyright Practices at the University of Guelph**

For nearly four decades, the University of Guelph has properly and effectively managed copyright practices within our campus. Universities, like the U of G, understand the need to balance the rights of creators with those of the students, instructors, and researchers making use of copyright-protected works. The majority of works used at universities are authored by those who work, teach, and conduct research at universities, and who are already paid for their scholarly output.

The University of Guelph facilitates and advocates for responsible and informed uses of copyrighted materials by:

- Complying with the Copyright Act
- Complying with the many licenses and contracts the Library negotiates with digital content publishers and vendors
- Providing expertise and guidance on copyright and author rights issues for U of G faculty, staff, students, researchers, and scholars
- Educating faculty, students, and staff about fair copyright practices so that they understand both their rights and obligations as creators and users of content
- Committing staff and other resources to support copyright education and compliance

### **1980's**

The University of Guelph and a small number of other Canadian universities first implemented an institutional copyright policy in 1984, which included specific guidelines on fair dealing. The University of Guelph's policy indicated that copying from a book “may not exceed ten percent of the monograph” while copying from periodicals was limited to “one article in five from any one issue ... [no] more than 10% of the whole issue.” Fair dealing guidelines adopted by institutions in the 1980's are very similar to the Fair Dealing Policy commonly in use by universities today.

### **Mid-1990's-2010**

These years saw a dramatic shift from the acquisition of individual books and journals in print, to the large-scale acquisition of digital content on online platforms. During this period, the University of Guelph:

- Paid for a collective license with Access Copyright to authorize photocopying of print materials
- Paid transactional licenses to Access Copyright for copying that exceeded what could be copied under the terms of the blanket license
- Paid publishers and creators directly for the right to digitize and post course materials online for students
- Continued to use fair dealing to authorize copying works from works that were excluded from Access Copyright's repertoire

By 2010, the majority of the journal and book content being drawn on for course materials was included in library subscriptions to digital collections. Instead of obtaining readings as class handouts or in print course packs, students were able to access course materials primarily via direct links to online articles and book chapters.

### **2011**

Given the digital publishing and learning environment, the collective license for reproducing print materials no longer had the same value for universities. In fact, this resulted in institutions paying twice to use the same content, once to the publisher and a second time via the Access Copyright blanket license. Therefore, in January 2011, the University of Guelph and a number of other Canadian universities chose to “opt out” of the collective licensing model. With long-established copyright policies in place, and a history of obtaining transactional licenses directly from publishers and authors, the U of G chose to manage its own copyright practices, and continues to do so.

### **2012-2017**

Subsequent developments supported the University of Guelph's decision to “opt out” of the Access Copyright License, most notably the 2012 Supreme Court decision in *Alberta (Education) v. Access Copyright*<sup>1</sup> which affirmed that fair dealing for purposes such as private study and research extended to teachers making copies for their students. In its decision, the Supreme Court stated:

*“Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study... The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study.”<sup>2</sup>*

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<sup>1</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012 SCC 37](#)

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

The addition of “education” as a fair dealing purpose in the 2012 Copyright Modernization Act provided further clarity on the scope of fair dealing in an educational context. In 2012, the University adopted the *Fair Dealing Policy for Universities*, developed by Universities Canada, and based on the analysis outlined by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004 SCC 13](#).

## **2018: Current Copyright Environment**

In 2017-18, the University of Guelph Library’s Acquisitions budget was more than \$8 million dollars. The Library purchases and subscribes to scholarly output from all over the world, including substantial portions of Canadian university presses output and works by Canadian authors. The Library also spends \$100,000 annually on transactional licenses to publishers in order to copy educational materials beyond the limits outlined in the Fair Dealing Policy.

Students at the University of Guelph access course readings in a variety of ways:

- Purchase textbooks directly from the University Bookstore
- Access materials posted on electronic reserve, or in the course management system including:
  - Direct links to articles and e-books from Library subscriptions (54%)
  - Free and open Internet content (24%)
  - Content paid for via transactional licenses (6%)
  - Content made available under the Fair Dealing Policy (16%)

Based on our history and experience, the University of Guelph does not agree that copying educational materials at universities has caused a decline in revenue for the Canadian publishing industry. The use of fair dealing in the education sector has existed simultaneously with a thriving Canadian publishing industry in past decades and can continue to do so today.

## **The University of Guelph’s Recommendations**

The University of Guelph asks the committee to consider the following recommendations. We believe they will ensure fair and equitable access to the content required for teaching, learning and research, while ensuring that the rights of content creators are respected and compensated appropriately.

### **1. Retain education as a fair dealing purpose**

One of the objectives of the 2012 Copyright Modernization Act was to “allow students and educators to make greater use of copyright material” as well as “permit businesses, educators and libraries to make greater use of copyright material in digital form.”<sup>3</sup>

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<sup>3</sup> Legislative Summary of Bill C-11: An Act to amend the Copyright Act. Publication Number 41-1-C11E. Available at: [https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=c11&Parl=41&Ses=1](https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c11&Parl=41&Ses=1)

Education should be included as one of the enumerated fair dealing purposes in the Act because it:

- Provides certainty for instructors, students, and researchers who routinely access and use copyrighted works, as well as incorporate the works of others into their own work
- Fosters creativity, innovation, scholarship, and access to learning materials; as well as facilitating library services such as course reserves and interlibrary loan
- Enables access to a wide range of scholarly content that students would otherwise be unlikely to discover or access

## **2. Make the list of fair dealing purposes illustrative rather than exhaustive**

The Act needs to be flexible and adaptable to change. The current list of fair dealing purposes does not allow for unforeseen, unanticipated uses that would be legitimately fair – such as mass digitization projects to preserve cultural heritage works, or scholarly text and data mining research.

By including the words “such as” in front of the current list of fair dealing purposes in Section 29 of the Act, Canada’s fair dealing provision would be more like the fair use provision in the U.S. Copyright Act, which leaves open the possibility of fair uses for purposes other than those enumerated. Such uses would still need to meet the Supreme Court’s six factor test for fairness, ensuring that the dealing with the work was fair regardless of purpose.

## **3. Protect copyright exceptions from contract override**

As universities primarily gain access to scholarly works via digital subscriptions, it is essential that access to and use of this content is not restricted in ways that print materials are not.

Several countries have enacted laws that prevent users’ statutory rights from being overridden by contracts, including Ireland, the United Kingdom, and Belgium. As university libraries spend millions of dollars in public funds on purchasing licensed content, it is critical that we ensure that exceptions and limitations that exist to protect user access and use are not undermined by unduly restrictive license terms.

## **4. Adjust the Copyright Act to permit the circumvention of technological protection measures (TPMs) for non-infringing purposes**

Much of the digital content purchased by universities is encumbered with technological protection measures (TPMs), which are put in place by content vendors to protect works from unauthorized use. Unfortunately, TPMs can also limit legitimate uses, such as copying permitted under fair dealing, or access to public domain works. Section 41 of the Copyright Act should be modified to allow for circumvention of TPMs for legitimate, non-infringing uses.

## **5. Do not impose a mandatory tariff**

Proposals to make the tariff under S. 70.1 mandatory would have serious implications for many Canadian institutions, imposing potential liabilities in the millions of dollars for inadvertently making even a single unauthorized copy of a work in a collective's repertoire. Imposing a mandatory tariff would have a detrimental impact on an institution's ability to efficiently manage the public funds used to acquire educational content.

## **6. Retain statutory damages limit for non-commercial Infringement**

The current \$5,000 limit on statutory damages for non-commercial infringement recognizes that such infractions are often unintentional and have a limited impact on the market for the work. Increasing the limit would only serve to unnecessarily discourage fair and legitimate uses of educational content, through fear of unreasonable penalties.

## **The University of Guelph**

The University of Guelph is one of Canada's top comprehensive universities: both learner centred and research intensive. Across our three campuses, we have more than 30,000 undergraduate and graduate students, with 94 per cent of our graduates finding employment within two years of graduation. The University of Guelph's McLaughlin Library, through its 101 full-time staff, looks after more than 65,000 electronic journals, more than 280 electronic databases and 7 million volumes in the shared Tri-University Libraries catalogue. Our research-centered services include world-renowned archival collections in Canadian theatre, landscape architecture, rural history, and Scottish culture.