

Brief to the INDU Committee as Part of the Review of the *Copyright Act*

Submitted by the
Canadian Association of Research Libraries

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Introduction

For 40 years, the Canadian Association of Research Libraries (CARL) has actively participated in the evolution of Canada's copyright policy and scholarly publishing, contributing to prior reviews of the *Copyright Act*, promoting and undertaking copyright and author rights education on our campuses, and working to ensure sustainable and open scholarly publishing in Canada.

Copyright law must fairly balance the interests of copyright holders and users of copyright materials to achieve two public policy aims: to encourage creation by ensuring appropriate payment for use of works, and to safeguard public access to works through exceptions such as fair dealing and a robust public domain. The 2012 legislative changes to the *Copyright Act* (the *Act*) were a helpful step forward for users of copyrighted works, including educators, students, researchers and libraries.¹

The following recommendations include both retaining what we believe is working in the *Act* and suggestions for changes that would better serve creators, users, educators and libraries.

1. Retain Educational Fair Dealing

CARL believes that fair dealing is not at odds with the existence of a successful market for creators' works. Like the copyright laws in many other countries, the *Act* recognizes that uses of copyright-protected materials for education, research and private study are investments in the production of future scholarship and are necessary for the public good and innovation. In fact, the United States Copyright Act explicitly allows for fair use "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."² A robust fair dealing regime that permits reasonable uses for research, private study and educational purposes is critical to the continuance of a competitive and innovative Canadian copyright framework.

¹ As noted in the bill's summary, two of the main objectives of the 2012 Copyright Modernization Act were to: permit businesses, educators and libraries to make greater use of copyright material in digital form; and allow educators and students to make greater use of copyright material. Legislative Summary of Bill C-11: An Act to amend the Copyright Act. Publication Number 41-1-C11E. https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills/_ls.asp?ls=c11&Parl=41&Ses=1, accessed April 19, 2018.

² 17 U.S.C. §107. See CARL opening statement <http://www.carl-abrc.ca/wp-content/uploads/2018/05/Opening-Remarks-final-1.pdf> and graphical comparison between fair use/dealing in the US, Canada, Australia and the UK <http://www.carl-abrc.ca/wp-content/uploads/2018/07/Fair-dealing-comparison-chart.pdf>.

Educational fair dealing is not the cause of the decline in Canadian educational publishing

A recent white paper published by Campus Stores Canada demonstrates that the shift to digital materials in all aspects of the publishing industry has been highly disruptive to the print market worldwide. Factors such as increased consumer choice, different consumption patterns, and a saturated market for print materials appeared long before the word “education” was explicitly added to the *Act* in 2012.³ Oxford University Press’s 2013-14 Annual Report attributed the decision to close its school division in 2013 to “a decade-long decline in the Canadian market for educational resources during which purchases of materials have fallen by nearly 50 per cent.”⁴

CARL believes that the educational market is evolving but not evaporating. We foresee that rightsholder remuneration will continue, and may grow, with the advent of new access models like aggregation subscription services for commercial educational resources.

Responsible application of fair dealing in the post-secondary context

Universities have, with the support of their research libraries, put in place safeguards to help ensure copyright compliance at their institutions. Based upon the access policy used by the Law Society which was affirmed by the Supreme Court of Canada⁵, Canadian universities maintain fair dealing policies that place appropriate limits on the copying and use of copyrighted works, and educate their instructors, students and staff on the application of those policies. Copying that is not clearly within these established guidelines is assessed on a case-by-case basis against the six-step test set out by the Supreme Court.

Research libraries also continue to spend significant amounts on copyrighted content. For example, CARL’s member libraries spent \$345 million on information resources in 2016-17, demonstrating a clear commitment to accessing content legally and rewarding content owners. Purchased resources include both print and ebooks, journals, databases, and streaming media, and the right to make educational uses of the content is negotiated at the time of purchase. Permitted uses of content include posting in learning management systems, incorporating into print course packs, and library uses such as interlibrary loan and course reserve.” As such, universities have already paid to use this content for educational purposes, and do not owe any

³ “Copyright and the Evolving Learning Materials Market” (Campus Stores Canada) <https://www.scribd.com/document/363248925/Copyright-and-the-Evolving-Learning-Materials-Market-Campus-Stores-Canada>, accessed April 19, 2018.

⁴ “Annual Report of the Delegates of the University Press 2013/2014” (Oxford University Press), p.7, http://fdslive.oup.com/www.oup.com/pdf/OUP_AnnualReport_2014.pdf, accessed April 22, 2018.

⁵ CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <http://canlii.ca/t/1qlp0>, accessed April 22, 2018.

additional compensation. Eliminating this double payment was a significant factor in the decisions by universities to exit blanket license agreements with collectives. Subscriptions to electronic content, which include the right for students and instructors to use the material in their education and research, have resulted in a marked reduction in the usefulness of blanket licenses.

Additionally, libraries purchase content specifically for use as course materials. University libraries support electronic reserve services that enable instructors to provide course resources electronically to students, while the library clears copyright, obtains transactional licenses, and pays royalties as required. Purchased content makes up the vast majority of content made available through electronic reserve services.⁶

Fair Dealing for education is serving its intended purpose and should not be reopened

CARL believes that five years is too short a time to see the long-term impact of the 2012 changes to the Act. Institutions are actively developing the tools and processes used for copyright management, and best practices are still emerging. In addition, the courts are in the process of making evidence-based decisions on fair dealing; we need to let them do their work.

Recommendation: Continue to demonstrate support for education as an investment in innovation and in the creation of future knowledge via the inclusion of education as a fair dealing purpose.

2. Retain Current Copyright Term

In Canada, copyright generally lasts for 50 years after the death of the creator of the work. This is consistent with the Berne Convention, the international agreement that sets out the minimum standards of protection in copyright laws.⁷

⁶ For example, in their opening remarks, the University of Calgary states that only 250 out of a sample of 3200 learning items used in courses like book chapters, articles and internet resources were made available using fair dealing (<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-117/evidence>). Likewise, the University of Guelph states that in addition to textbooks, students “also access materials placed on reserve in the learning management system including 54% through direct links from licensed materials, 24% open and free Internet content, 6% via transactional licences, with the remaining 16% under fair dealing” (<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence#Int-10122492>).

⁷ World Intellectual Property Organization. 1982. Berne Convention for the Protection of Literary and Artistic Works: texts. [Geneva]: World Intellectual Property Organization, available at: http://www.wipo.int/treaties/en/text.jsp?file_id=283698, accessed April 18, 2018.

Extending term of copyright does not create additional incentives for creation of works

Most copyrighted works are commercially viable for a short period of time.⁸ In the vast majority of cases, adding an additional twenty years of copyright protection will not produce significant benefits for the rights-holders or their heirs, who have already received the financial benefits for the work. Further, published research from Industry Canada concluded that extending the term of copyright does not create additional incentives for new creativity⁹ and may carry considerable economic costs.¹⁰

The Government of Canada resisted the imposition of a longer term in CETA and the Trans-Pacific Partnership negotiations, and CARL recommends that the government retain its firm stance on the length of protection.

Recommendation: Maintain the current term of copyright.

3. Protect Copyright Exceptions from Contract Override

The majority of the hundreds of millions of dollars spent by Canadian research libraries are for licensed digital works such as electronic journals and e-books. It is essential to ensure that the public funds spent on these resources enable the same equitable access for library users as is currently possible for print material.

With print works, research libraries and library users have a variety of exceptions and limitations available to facilitate their access and use, including fair dealing; the library, archive and museum exceptions; and the educational institution exceptions. This is not necessarily the case for licensed digital works, for which the terms of use are negotiated between libraries and publishers. In fact, rights holders often use licenses “to override copyright exceptions that were created through transparent legislative

⁸ Estimates based upon a New Zealand government study indicate that a term extension could cost the Canadian economy about \$454 million a year. Howard Knopf blog, The Cost of Canadian Copyright Term Extension Capitulation in the TPP - Estimates Based Upon New Zealand Study, November 17, 2015 (<http://excesscopyright.blogspot.ca/2015/11/the-cost-of-canadian-copyright-term.html>).

⁹ “Assessing Economic Impacts of Copyright Reform on Selected users and Consumers” <https://web.archive.org/web/20160313134400/https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip01185.html>, accessed April 22, 2018.

¹⁰ Estimates based upon the New Zealand study, *Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy*, indicate that a term extension could cost the Canadian economy about \$454 million a year. Howard Knopf blog, The Cost of Canadian Copyright Term Extension Capitulation in the TPP - Estimates Based Upon New Zealand Study, November 17, 2015, (<http://excesscopyright.blogspot.ca/2015/11/the-cost-of-canadian-copyright-term.html>).

processes, at the expense of users and at the cost of the spread of knowledge, discovery and innovation.”¹¹

The Supreme Court of Canada has ruled that a consumer’s right to redeem a mortgage after five years cannot be overridden by contract.¹² The same principle should be made explicit in the *Copyright Act*.

Recommendation: Amend the *Act* to make it clear that no exception to copyright can be waived or overridden by contract.

4. Allow Text and Data Mining without Rightsholder Permission

Text and data mining (TDM) – or the automated process of identifying patterns from data extracted from large quantities of material – is an essential part of some 21st century research. As outlined in the fact-sheet released by the Association of European Research Libraries (LIBER), text and data mining “has the potential to facilitate the discovery of cures for diseases such as cancer and Parkinson’s. It has already been used to discover how existing drugs can be used to treat other conditions.”¹³ While Canadian exceptions like fair dealing may already permit TDM, and permission for TDM can be added into library purchase contracts, a TDM specific exception would provide clarity and could give Canadian researchers an advantage, driving new discoveries and innovation.

Recommendation: Amend the *Act* to allow text and data mining without permission from the copyright holder.

5. Allow the Circumvention of Technological Protection Measures for Non-Infringing Purposes

When libraries purchase digitally licensed products such as eBooks, streaming video and DVDs, these are often protected by technological protection measures (TPMs). As stated in CARL’s 2012 report, TPMs can pose a variety of practical problems for libraries. For example, they can:

¹¹ “CFLA Position Statement: Protecting Copyright Exceptions from Contract Override” (CFLA) http://cfla-fcab.ca/wp-content/uploads/2018/02/CFLA-FCAB_statement_contract_override.pdf, accessed April 22, 2018.

¹² Royal Trust v. Potash, [1986] 2 SCR 351, 1986 CanLII 34 (SCC), <http://canlii.ca/t/1ftqg>, accessed April 22, 2018.

¹³ “Text and Data Mining: The Need for Change in Europe.” (Ligue des Bibliothèques Européennes de Recherche/Association of European Research Libraries, April 25, 2013), <https://libereurope.eu/wp-content/uploads/2014/11/Liber-TDM-Factsheet-v2.pdf>, accessed April 22, 2018.

...impede criticism and review by precluding the copying and pasting of excerpts or the sharing of images with students for the purposes of education. They can also frustrate or prevent preservation efforts. Moreover, digital locks and DRM can be implemented in a way that would make library lending difficult or even eliminate libraries from the publisher's business model altogether.¹⁴

In our view, libraries and library users should be able to circumvent TPMs for any non-infringing purpose.

Recommendation: Amend the *Act* to clarify that the circumvention of TPMs is only illegal for acts that are an infringement of copyright.

6. Revisit Crown Copyright

The *Act* assigns all government works to the Crown for a period of 50 years from the calendar year of first publication. In our view, the current administration of Crown copyright is at odds with the concept of open government and the policy direction embraced by the Government of Canada as reflected in its membership in the Open Government Partnership and its multi-year open government action plans. A government that has committed to openness and transparency should make its published works available for the broadest reuse by the public that has funded their creation and keep them available over time as part of the public record.¹⁵

Recommendation: Take steps towards the waiver or elimination of Crown copyright by consistently applying an open licence regime to Crown material, or by amending the *Act* to effectively abolish Crown copyright.

7. Retain Cap on Statutory Damages for Non-Commercial Infringement

CARL believes that reasonable statutory damages for non-commercial infringement are necessary to ensure that the public can use exceptions and limitations in the *Act* without fear of being subject to massive damages that would be disproportionate to the impact of any use that is found by the Courts to be infringing. The 2012 legislative addition of a \$5000 cap on non-commercial statutory damages must be retained.

¹⁴ Colebatch, Chabriol, Josh Dickison, Mark Swartz, Diego Argáez, Mathieu Jacques, and Kathleen Shearer. "Digital Locks and Canadian Research Library Collections: Implications for Scholarship, Accessibility, and Preservation [CARL Document]," January 4, 2012. <http://www.carl-abrc.ca/doc/2012-10-04%20CARL%20Digital%20Locks%20Report.pdf>.

¹⁵ For example, in the United States, the Copyright Act (17 U.S.C. §105) explicitly provides that works of the United States Government are not protected by copyright.

Recommendation: Retain the \$5000 cap on non-commercial statutory damages

8. Do Not Impose Mandatory Tariffs

CARL is committed to opposing the concept of a “mandatory” tariff and believes that this view is supported by Supreme Court jurisprudence.¹⁶ Tariff rates must be set by the Copyright Board based on evidence of economic value for amounts that exceed both insubstantial use and fair dealing and must be reflected in collective societies’ blanket license rates. However, using a blanket license must be a matter of administrative choice for universities. In fact, for efficiency, risk mitigation, or because they find 15% or 20% to be a more practical use threshold than 10% of a work, some universities may choose to use a collective society’s blanket license approach – provided the per-student rate makes sense from a public spending perspective. As collectives are not exclusive rights-holders for literary works, universities must be free to negotiate with others who license the same content as collectives do. CARL urges that this Committee not endorse a “mandatory tariff” as part of either the Copyright Board reform or the harmonization of statutory minimum damages provisions.

Recommendation: Do not introduce a “mandatory tariff” regime for literary works as part of either the Copyright Board reform or the harmonization of statutory minimum damages provisions.

9. Refine Education and Library Exceptions

CARL libraries, as regular users of the *Act* exceptions for educational institutions and libraries, archives and museums, recommend a number of improvements to ensure these exceptions remain relevant and applicable to current practices. For example:

- 30.01 (5): remove the limitation in this exception which requires that students destroy a copy of a lesson 30 days after receiving their grade. This requirement is unrealistic, unenforceable, and renders the current exception unusable;
- 30.1: expand the management and maintenance of collection exception to enable libraries to undertake web archiving (the process of capturing open web pages, archiving them, and making the archive publicly available);
- 30.2 (2): expand this exception to enable library staff to make copies for users of content from all genres and formats, not just newspapers and periodicals. The purpose of this exception is to allow libraries “to do anything on behalf of any person that the person may do personally under section 29 or 29.1”, yet no such distinction with respect to material type exists in S.29 or 29.1.;
- 30.2 (2) (b): remove the restriction on library staff copying newspaper or non-scholarly periodicals for a user if the item is less than one year old.

¹⁶ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> paras. 101-113, accessed April 22, 2018.

- 30.5 (a): add “and long-term access” after “preservation” to clarify that the end goal of Library and Archives Canada’s preservation efforts is to ensure availability for future public use.

Recommendation: Remove unnecessary limitations and expand the scope of some of the exceptions related to both educational institutions, and libraries, archives and museums (see [detailed list](#) above).

10. Recognize Traditional Knowledge

The recognition of Indigenous and traditional knowledge within the intellectual property regime in Canada must be a priority. Libraries and archives, as repositories of Indigenous communities’ materials, recognize that this is essential as we seek to establish respectful partnerships with Indigenous individuals and communities. Canada’s work in this area must be consistent with the *UN Declaration on the Rights of Indigenous Peoples*, and recognize the need for Indigenous people “to have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.”¹⁷ However, it cannot be denied that the traditions of Canada’s Indigenous people which go back thousands of years are not necessarily compatible with Western intellectual property laws, which also have a long heritage and are subject to very precise international treaty obligations.

Recommendation: Commit to working domestically and internationally to find the appropriate means to recognize and protect traditional knowledge.

General Description of CARL

The Canadian Association of Research Libraries (CARL) represents 31 research libraries, 29 of which are academic libraries in Canada’s most research-intensive universities. More information about CARL is available here: <http://www.carl-abrc.ca/about-carl/>

¹⁷ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>, accessed 18 April 2018.

Summary of Recommendations

In summary, CARL recommends that the Government of Canada:

1. Continue to demonstrate its support for education as an investment in innovation and in the creation of future knowledge via the inclusion of education as a fair dealing purpose.
2. Maintain the current term of copyright.
3. Amend the *Act* to make it clear that no exception to copyright can be overridden by contract.
4. Amend the *Act* to allow text and data mining without permission from the copyright holder.
5. Amend the *Act* to make it clear that the circumvention of technological protection measures (TPMs) is only illegal for acts that are an infringement of copyright.
6. Take steps towards the waiver or elimination of Crown copyright by consistently applying an open licence regime to Crown material, or by amending the *Act* to effectively abolish Crown Copyright.
7. Retain the \$5000 cap on non-commercial statutory damages.
8. Do not introduce a “mandatory tariff” regime for literary works as part of either the Copyright Board reform or the harmonization of statutory minimum damages provisions.
9. Remove unnecessary limitations and expand the scope of some of the exceptions related to both educational institutions, and libraries, archives and museums (see [detailed list](#) above).
10. Commit to working domestically and internationally to find the appropriate means to recognize and protect traditional knowledge.