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September 11, 2018

To: Standing Committee on Industry, Science and Technology

Re: Statutory Review of the Copyright Act

Contact: Shely Henry, Copyright Officer

### **About the Southern Alberta Institute of Technology (SAIT)**

SAIT is a leader in action-based learning, delivering skills-oriented education in Calgary. From its founding in 1916, SAIT became Canada's first publicly funded technical institute. Today, SAIT is Alberta's third-largest post-secondary, representing more than 13,000 students and 8,700 apprentices. It is recognized as one of Canada's Top 50 Research Colleges.<sup>1</sup>

### **Introduction**

Educators, researchers and students benefit from progressive copyright laws that allow them to access and use information to further their studies, collaboration and creation. This is particularly true at polytechnics, including SAIT, that pride themselves on developing industry-ready professionals. To foster innovative business models and align with emerging industry needs, Canada's copyright laws must support creators and users in the post-secondary space.

The 2012 updates to the *Copyright Act*,<sup>2</sup> via the *Copyright Modernization Act*, reflected Parliament's efforts to make Canada's copyright laws more forward-looking and responsive to a fast-paced digital world, while recognizing "the critical role a modern copyright regime plays in Canada's digital economy."<sup>3</sup> Updates to the fair dealing provision affirmed Supreme Court of Canada judgments, recognizing the importance of a balanced copyright regime to Canadian creative innovation and culture.

In reviewing the *Copyright Act*, the Standing Committee on Industry, Science and Technology has the potential to significantly impact Canada's post-secondary institutions and the next generation of researchers, learners, educators and creators. This review must consider the financial and informational ramifications for Canadian students. Fair dealing provisions for education impact reasonable access to

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<sup>1</sup> Research Infosource Inc. *Canada's Top 50 Research Colleges* (2017), <https://researchinfosource.com/pdf/CIL2017-Top%2050%20College%20List.pdf>.

<sup>2</sup> Copyright Act (R.S.C., 1985, c. C-42). Retrieved from <http://laws-lois.justice.gc.ca/eng/acts/C-42/>.

<sup>3</sup> Government of Canada, Office of the Minister of Industry. Harper Government Delivers on Commitment to Reintroduce Copyright Modernization Act (2011), <http://www.marketwired.com/press-release/harper-government-delivers-on-commitment-to-reintroduce-copyright-modernization-act-1567021.htm>.

learning materials for over 2 million students enrolled in Canadian colleges and universities.<sup>4</sup> Respectfully, SAIT submits three recommendations for the Committee's consideration:

1. Recognize that the Act requires no changes to the scope of fair dealing.
2. Recognize that no changes are needed to the collective administration of copyright sections of the Act.
3. Remove copyright protection from government works available to the public.

### **Recommendation 1: Recognize that the Act requires no changes to the scope of fair dealing**

Education and technology have changed dramatically since Parliament expanded the fair dealing scope to include education as a purpose in the broader public interest. Post-secondary education is increasingly reliant on digital information, a trend that began long before modernization of the *Copyright Act* in 2012. Digital resources have outpaced printed textbooks as resources of choice, with colleges increasingly using open educational resources. This includes open access courses and journals, Creative Commons images and data.<sup>5</sup> Yet spending has not declined. Colleges and institutes have increased spending on learning resources for students, allocating tens of millions of dollars to library acquisitions and copyright licenses.<sup>6, 7</sup>

Instructors must be permitted to provide students with needed educational materials while ensuring that creators receive fair remuneration for their work. Canadian legislators and the courts acknowledge that fair dealing for the purposes of education, research and private study does not infringe copyright. Rather, it empowers instructors to provide relevant resources that broaden students' learning. Instructional and library staff must be free to choose the learning materials that best suit their students and learning outcomes. The Supreme Court of Canada has repeatedly reaffirmed this interpretation of the law, most recently in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*.<sup>8</sup>

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<sup>4</sup> Statistics Canada. Canadian postsecondary enrolments and graduates, 2014/2015 (2016), <https://www150.statcan.gc.ca/n1/daily-quotidien/161123/dq161123b-eng.htm>.

<sup>5</sup> Denise Amyot. In *Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology. Evidence. 42nd Parl., 1st sess. Meeting No. 103* (April 2018), <http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-103/evidence#Int-10086500>.

<sup>6</sup> Ibid.

<sup>7</sup> Statistics Canada. Table 37-10-0029-01. Expenditures of community colleges and vocational schools (x 1,000) (2018), <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710002901>.

<sup>8</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>. "It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying" (para. 23). The decision continues: "In my view, buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks ... Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study" (para. 32).

A 2018 U.S. survey found that, after tuition, buying course materials was the top source of financial stress for college students. More than 4 in 10 of students surveyed reported having skipped meals to cover the cost of learning materials.<sup>9</sup> Although no similar study of Canadian students has been done, it is fair to assume that increasing costs of post-secondary education are also a concern here.

Limitations and exceptions to copyright for educational purposes have been entrenched in international law since the signing of the Berne Convention in 1886. Article 10 of the Convention requires member countries, “to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”<sup>10</sup> Canadian copyright law has included this concept since its inception in 1921. The 2012 update that provided for education as an allowable fair dealing purpose clarified what was already permitted under Canadian case law concerning research and private study. It also aligned Canada with international fair dealing practices by affording students the same access to learning materials as their global counterparts and providing a broader flow of knowledge, ideas and innovation. Canada’s 2012 updates reflected user rights in international copyright laws. A 2009 study of copyright limitations in 57 countries in Europe, North American, Central Asia and Caucasus found that 53 countries had some exception for teaching or education and that all national laws allowed for some copying provisions beyond the teaching exemptions.<sup>11</sup> Notably, Canada maintains a more rigorous fairness evaluation, with the six-step test put forward by the Supreme Court of Canada, than most countries’ three- or four-step evaluations, based on the WIPO Copyright Treaty.

Over time, Canadian copyright laws and customs have transformed into an original creation that balances users’ and creators’ rights and supports Canadian culture by encouraging innovation and creativity. Canadian fair dealing legislation should remain as it is.

## **Recommendation 2: Recognize that no changes are needed to the collective administration of copyright sections of the Act**

SAIT respects copyright and is committed to ensuring that rights holders are fairly and appropriately compensated for the use of their copyright-protected works. This can be achieved without mandatory tariffs or licensing fees set by the Copyright Board. Leaving the applicable sections of the Act unchanged

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<sup>9</sup> Cengage. *New survey: college students consider buying course materials a top source of financial stress.* [Press release](2018), <https://news.cengage.com/corporate/new-survey-college-students-consider-buying-course-materials-a-top-source-of-financial-stress/>.

<sup>10</sup> World Intellectual Property Organization. *Berne convention for the protection of literary and artistic works (as amended on September 28, 1979)*, [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693).

<sup>11</sup> Raquel Xalabarder. *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel.* Report prepared for World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Nineteenth Session. Geneva (2009), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130393](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393).

allows Canadian case law interpretation to stand, while giving schools the freedom to choose voluntary licensing *or* a mandatory tariff system.<sup>12</sup>

It has been suggested that the 2012 updates to the Act have negatively impacted authors' and publishers' incomes and that a mandatory collective licensing regime for educational institutions would address this concern.<sup>13</sup> Statistics Canada, using figures submitted by the publishing industry in 2016, found that sales of educational titles increased 4.9 percent between 2014 and 2016, with university and college bookstores included in the largest customer category that generated \$520.1 million in Canadian sales.<sup>14, 15</sup> Colleges and universities continue to pay hundreds of millions of dollars in licensing fees; meanwhile, spending on copyright-protected learning materials has increased since 2012. At SAIT, the library's acquisition budget for print and electronic acquisitions rose 35 percent between academic years 2012/13 and 2017/18. The reliance on textbooks was waning long before the fair dealing addition to the *Copyright Act*, a decline that dates to the 1990s with the growth of the internet.<sup>16</sup>

Like many Canadian colleges, SAIT has implemented its own copyright management system, concentrating on the fair and reasonable use of copyrighted works while respecting creators' rights, all in the best interests of students. Responsibly managing copyright in this environment requires a strategic and multifaceted system:

- Formal institutional copyright policy and procedure
- Copyright support and guidance from the Copyright Officer
- Copyright training for staff and faculty
- Purchase and licensing of library resources
- Negotiation of direct permissions and transactional licences
- Use of fair dealing and exceptions for education

The issue of tariffs and mandatory collective pricing from 2011 is making its way through the Canadian court system. If a decision comes down in favour of mandatory fees, Canadian post-secondary institutions will owe hundreds of millions of dollars, impacting institutions and their students. SAIT respectfully recommends that the matter stay with the courts and legislation regarding this topic be left unchanged.

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<sup>12</sup> *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15646/index.do>. "I conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users" (para. 112).

<sup>13</sup> PwC. *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (2015), [https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf).

<sup>14</sup> Michael Geist. *Less Than 1%: Canadian Publisher Data Points to Tiny Impact of Access Copyright Royalty Decline* (2018), <http://www.michaelgeist.ca/2018/05/accesscopyrightroyalty/>.

<sup>15</sup> Statistics Canada. Book publishing industry (2016), <https://www150.statcan.gc.ca/n1/daily-quotidien/180323/dq180323c-eng.htm>.

<sup>16</sup> Ariel Katz. Canadian copyright and the mandatory tariff. (Spectre, part 2, 2015). *Intellectual Property Journal*, (1)39.

### **Recommendation 3: Remove copyright protection from government works available to the public**

In 2017, copyright librarian Amanda Wakaruk petitioned Parliament to remove Crown copyright from published government documents. SAIT adds its voice to the call to abolish Crown copyright. Canadians fund works created by government bodies, but the public often cannot freely access these materials, including federal codes, standards, regulations and building codes. Many of SAIT's students in apprenticeship, technology or other programs must pay for documents required to learn their trade and safely engage in field work. In SAIT's opinion, Crown copyright unduly prejudices these students and creates financial hardship. It is in the public interest that this information be readily available digitally.

Other countries have addressed government ownership and public use of information. In Great Britain, a 1997 discussion paper noted the futility of trying to tightly hold onto government data in a digital world: "Policing and enforcing Crown copyright in an electronic age, where government information is increasingly available on the Internet, is impractical."<sup>17</sup> Subsequently, the U.K. government created the Open Government Licence, which allows anyone to copy, publish, distribute, transmit and adapt a licensed work, and to exploit it both commercially and non-commercially with attribution. In the United States, federal government-produced documents are predominantly freely available with no copyright restrictions.

A 2002 Industry Canada report<sup>18</sup> stated that copyright reform is key to Canada's innovation strategy for the digital age, highlighting that Crown copyright, section 12 of the *Copyright Act*, was outdated and in need of change. The report recommended user-friendly licensing to allow for easy public access to government works, adding that without such change there would be calls to completely remove Crown copyright protection.<sup>19</sup> Sixteen years later, public accessibility has not improved. It is time to better serve the public interest by addressing this matter.

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<sup>17</sup> Government of the United Kingdom. White Paper: Crown Copyright in the Information Age (1998), <http://www.opsi.gov.uk/advice/crown-copyright/crown-copyright-in-the-information-age.pdf>

<sup>18</sup> Industry Canada. *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (2002, p. 15), <http://publications.gc.ca/site/eng/236796/publication.html>

<sup>19</sup> Ibid.