Submission on the Statutory Review of the *Copyright Act*

The **University of Alberta** is a Top 5 Canadian university located in Edmonton, Alberta, and home to 40,000 students in a wide variety of programs.

Universities can be crucibles for copyright issues. The faculty, staff and students of large research universities like the University of Alberta are both creators and users of copyright-protected materials. These materials are an essential and integral part of the execution of our mission. Copyright issues can be further complicated by new technology that facilitates the reproduction and distribution of copyright-protected material, and universities tend to be at the leading edge when it comes to the availability and use of such technology. For these reasons, any reforms of copyright law or revisions to the *Copyright Act* are of particular interest to, and have the potential for significant impact upon, the University of Alberta community.

Copyright is primarily a creature of statute, and as such it should be structured and implemented in a way that best serves the public interest. Copyright best serves the public interest through maintaining a balance between the interests of creators in being appropriately recognized and rewarded for their creative works and the interest of users in benefiting from and building upon those works[1].

Summary of Recommendations.

A. No changes to fair dealing;
B. Any tariff applicable to post-secondary institutions covering literary works should be expressly voluntary;
C. Circumventing TPMs for lawful purposes should not be copyright infringement;
D. Crown works published and made freely available should immediately become part of the public domain or be openly licensed;
E. Strengthen the "internet exception" for educational institutions;
F. Copying for non-consumptive text and data mining should not be copyright infringement;
G. No extension to the copyright term;
H. Implement a process through which rights-holders can elect to place material into the public domain before the copyright term has expired;
I. Staff and resource the Copyright Board in a manner that leads to more timely decisions; and
J. Separately explore the relationship of copyright to indigenous knowledge.

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[1] *Théberge v. Galerie d'Art du Petit Champlain inc.* 2002 SCC 34 at paras. 30-31 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do)

A. Fair Dealing. One issue that has gained significant attention leading up to the *Copyright Act* review is fair dealing (s.29). Essentially, fair dealing allows for the limited use of copyright-protected material without requiring permission from or compensation to the rights-holder, provided the use is for one of the listed public-interest purposes and provided the extent of that use is fair. In this way, fair dealing plays a key role in supporting the public interest by preserving the balance between creator and user rights.

The *Act*, quite appropriately, contains no guidance regarding the determination of fairness, because application of the provision is intended to be fact-specific and to apply in the broadest range of cases. Fair dealing has been part of the *Copyright Act* since 1921, and it has operated in largely the same way since that time with no "bright lines" to define fairness. For all these decades, leaving the interpretation of fairness to the common law seems to have been working as intended.

In recent years, it has been suggested that there have been some unintended adverse consequences arising from the addition, in the 2012 *Copyright Modernization Act*, of "education" as an enumerated purpose under fair dealing. Examples are cited that purport to demonstrate the adverse consequences of this addition to the *Act*, suggesting as a remedy the removal of "education" as a purpose under fair dealing. To the extent that educational institutions have altered their approaches to fair dealing since 2012, these changes originated predominantly from the Supreme Court of Canada decision in *Alberta (Education) v. Access Copyright* (2012 SCC 37[2]), which dealt specifically with teachers making copies of short excerpts of copyright-protected materials for distribution to students. That case was decided shortly before the *Copyright Modernization Act* came into force.

While post-secondary institutions like the University of Alberta use a significant amount of copyright-protected content, they also pay significant amounts directly to publishers to license their access to and use of that content. Not surprisingly, the vast majority of content that is used, and licensed, by post-secondary institutions is scholarly content produced throughout the world.

It may be reasonable for some avenue to be sought to address the financial difficulties that have befallen certain authors and creators of Canadian content in recent years. However, such content likely does not form a significant percentage of the content used under fair dealing by the University of Alberta and other post-secondary institutions.

Further constraining how post-secondary institutions make short excerpts of protected content available to students under fair dealing will not turn back the clock on the shifting realities of an evolving sector. We recommend that no changes be made to fair dealing under the *Act*.

B. Mandatory vs Voluntary Tariffs. Access Copyright has applied to the Copyright Board for a tariff that would apply to post-secondary institutions, and it argues

[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do

that the application of this tariff should be mandatory. The proposed tariff[3] is a blunt instrument that does not account for how different institutions approach the direct licensing of content—including rights to reproduce that content—nor how those institutions manage copyright internally. Those differences are important.

Quite reasonably, universities take different approaches in structuring their affairs while pursuing the common objective of compliance with copyright law. The University of Alberta spends considerable sums each year licensing directly from publishers the rights to use copyright-protected content. Our 2016-17 library collections expenditures[4] totalled over $25M. Given the range of options available for licensing rights to access and reproduce content, a mandatory tariff regime to cover literary works for post-secondary institutions that does not account for these options seems unreasonable and would certainly lead to unfair outcomes.

The annual fee for the University of Alberta under the proposed post-secondary tariff would be approximately $910,000 (35,000 FTE students at $26.00 per FTE), irrespective of how much we are already paying to publishers to license the use of such content. It seems reasonable and practical for post-secondary institutions like the University of Alberta to opt to operate outside such a tariff, using a comprehensive program of direct licensing with publishers and the responsible application of fair dealing to remain copyright compliant.

While a voluntary tariff might be a useful option for some institutions, a mandatory tariff would hamper the ability of universities to explore all available models to best serve their communities through providing lawful access to and rights to use the broadest array of copyright-protected resources. We recommend that any tariff applicable to post-secondary institutions covering literary works be expressly voluntary.

C. Technological Protection Measures. In cases where a "technological protection measure" (TPM) can be readily circumvented, the presence of that TPM offers little to dissuade a knowingly infringing use of the work. However, if it is deemed to be an infringement of copyright for a TPM to be circumvented for a lawful purpose, then the presence of a readily circumvented TPM does effectively prevent what would otherwise have been a non-infringing use of that work. This seems to be an unreasonable outcome that does not reflect the proper balance between creator and user rights. Accordingly, we recommend additional clarity be added to the *Act* to ensure that the circumvention of a TPM for an otherwise lawful purpose will not be deemed an infringement of copyright.

D. Crown Copyright. There may be valid reasons for preserving Crown Copyright in some form (s. 12). However, as soon as works created by the Crown have been published and made freely available by the Crown, it seems reasonable that those works either immediately enter the public domain or be made immediately available for use under a minimally restrictive open licence. Such clarity would allow researchers, librarians, and archivists to use and preserve these works

[3] https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2017/reprography2018-2019.pdf
[4] https://dataverse.library.ualberta.ca/dataset.xhtml?persistentId=doi:10.7939/DVN/TRSK5G

without concerns about possible infringements of Crown Copyright. We recommend such a provision be added to s.12 of the *Act*.

E. Internet Exception. Under s.30.04(1) of the Act, any material freely available on the internet can be used by educational institutions for educational and training purposes. However, rights-holders can unilaterally prohibit such use simply by including "a clearly visible notice" that prohibits it (s.30.04(4)(b)). It seems inconsistent with a balanced approach to copyright to allow rights-holders to restrict educational use of material freely available on the internet. We recommend that this limitation to the internet exception be removed from the *Act*.

F. Text and Data Mining. Digitization allows for significant research benefits through text and data mining within copyright-protected works. The University of Alberta recommends that a provision be added to the *Copyright Act* to confirm that copying of a work for non-consumptive use, such as text and data mining for research purposes, is not an infringement of copyright.

G. Copyright Term. The current term of copyright protection under s. 6 of the *Copyright Act* is generally the life of the author plus 50 years. This is the minimum copyright term consistent with the Berne Convention.

Copyright term length has a single purpose: to serve the public interest by providing an incentive for the creation of new works. The term of copyright protection in a work defines the length of the limited monopoly that the creator, or the rights-holder in cases where the creator transfers those rights, can control the use and generate economic benefit from the use of that work. Any proposed change to the copyright term should clearly indicate the extent to which such a change is expected to increase or decrease that incentive.

In general, having more works in the public domain better serves the broader public interest, therefore any undue extension to the term of copyright causes harm by limiting access to works and reducing the scope and breadth of the public domain. Despite the USMCA, we therefore recommend that there be no extension to the term of copyright protection.

H. Placing material into the Public Domain. Only a small percentage of copyright-protected materials ever have significant commercial value, and in the vast majority of those cases that value will be approaching zero long before the copyright term has expired. The Australian Bureau of Statistics estimates that: literary works provide commercial returns for between 1.4 and 5 years on average; 75% of original titles are retired after one year; and 90% of original titles are out of print after two years.[5] However, many older materials still have ongoing research and archival value which can be more readily exploited without the limitations that copyright protection provides. Therefore, we recommend a new provision be added to the *Act* to make clear how rights-holders might opt to place copyright-protected works into the public domain before the end of the

[5] https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf (at page 130).

term of copyright protection. A simple, clear and binding mechanism for doing so, perhaps similar to the Creative Commons CC0[6] designation, would be a significant step toward further augmenting the public domain.

I. Copyright Board. Given the importance of the role of the Copyright Board, and in light of some of the recent issues regarding timeliness of decisions, the Committee should consider the recommendations of the Senate Committee report[7] and take steps to ensure that the Copyright Board has sufficient staff and resources to enable it to issue more timely decisions and to properly fulfill its legislative mandate.

J. Indigenous Knowledge. The history of copyright law has focused on individual authorship and upon the "fixation" of a work as a triggering event for copyright protection. These features have proven inadequate to properly address issues related to the traditional knowledge and cultural works of indigenous peoples. The University of Alberta strongly encourages the Committee, as part of its current review, to make a commitment to separately explore this issue, with a separate consultation process, to ensure respect and protection for indigenous knowledge as part of the overall copyright regime.

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For additional information about copyright at the University of Alberta, contact copyright@ualberta.ca.

[6] https://creativecommons.org/publicdomain/zero/1.0/
[7] https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf