

**Standing Committee on Industry, Science and Technology  
Copyright Review**

**Submission by  
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## **Overview**

1. I am a law professor at the University of Ottawa where I hold the Canada Research Chair in Internet and E-commerce Law and serve as a member of the Centre for Law, Technology and Society. I focus on the intersection between law and technology with an emphasis on digital policies. I submit these comments in a personal capacity representing only my own views. In an appendix to this submission, I list many postings and articles I have written relevant to the review.

## **Educational Copying**

2. Notwithstanding the oft-heard claim that the 2012 reforms are to “blame” for current educational practices, the reality is the current situation has little to do with the inclusion of “education” as a fair dealing purpose. Access Copyright was asked in 2016 by the Copyright Board to describe the impact of the legal change. It told the Board that the legal reform did not change the effect of the law. Given Access Copyright’s position before the Copyright Board, the claims that current fair dealing practices are the result of the 2012 reforms are misleading.
3. Further, the claim of 600 million uncompensated copies – which lies at the heart of the allegations of unfair copying – is the result of outdated guesswork using decades-old data and deeply suspect assumptions. The majority of the 600 million – 380 million – involve K-12 copying data that goes back to 2005. The Copyright Board warned years ago that the survey data is so old that it may not be representative. The remaining 220 million comes from a York University study, much of which is as old as the K-12 data. Regardless of its age, however, extrapolating some old copying data from a single university to the entire country does not provide a credible estimate
4. In fact, the committee has received copious data on the state of educational copying. It is unequivocal: printed coursepacks have largely disappeared in favour of digital access. As universities and colleges shift to digital course management systems (CMS), the content used changes too. For example, an Access Copyright study at Canadian colleges found that books comprised only 35% of materials. The majority was journals and newspapers, much of which is available under open access licenses or licensed by other means.
5. Moreover, the amount of copying with CMS is far lower than with print. While Access Copyright argues there should be a one-to-one ratio – for every registered student the assumption should be that every page is accessed even for optional readings – the data tells us this is unlikely.
6. Most importantly, CMS allows for the incorporation of licensed e-books and other materials. At the University of Ottawa, there are now 1.4 million licensed e-books, many of which involve perpetual licences that require no further payment and can be used for course instruction.

7. Further, governments have invested tens of millions in open educational resources and educational institutions spends millions annually on transactional, pay-per-use licences, even where those schools have a collective licence. Indeed, committee has heard convincing evidence that expenditures by Canadian education on transactional licences collectively runs into the millions of dollars each year.<sup>1</sup>
8. The significant expenditures on transactional licences provides compelling evidence that claims educational institutions treat fair dealing as free dealing is simply false. Moreover, additional transactional licences may be needed even where a collective licence is operational and are more effective than collective licences in directly compensating creators and publishers for the use of their work.
9. What this means is that the shift away from the Access Copyright licence is not grounded in fair dealing. Rather, it reflects the adoption of licenses that provide both access and reproduction. These licences provide universities with access to the content and the ability to use it in their courses. The Access Copyright licence offers far less, granting only copying rights for materials that have already been acquired.
10. Therefore, efforts to force the Access Copyright licence on educational institutions by restricting fair dealing or by implementing statutory damages reforms should be rejected. The prospect of restricting fair dealing would represent an anti-innovation, anti-education step backward. While Canada's trading partners are debating how to support innovation and education through expanding the purposes of fair dealing or adopting fair use, Access Copyright's proposal would create one of the most restrictive systems in the world.
11. With respect to statutory damages, supporters argues that the massive escalation in potential damage awards is needed for deterrence and to promote settlement negotiations.<sup>2</sup> Yet there is nothing to deter: educational institutions are investing in licensing in record amounts. Promoting settlement negotiations amounts to little more than increasing the legal risk to students and educational institutions so that they have no other viable alternative than to pay for an unnecessary licence.

### **Site Blocking**

12. This committee has heard from several witnesses who have called for the inclusion of an explicit site blocking provision in the Copyright Act. I believe this would be a mistake.

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<sup>1</sup> For example, the University of Toronto said it paid more than \$285,000 on transactional licences in the last academic year, Ryerson University said it spends more than \$150,000 on transactional licences annually, and Concordia University, which pays the Copibec collective licence, still spends an additional \$120,000 in transactional licensing costs.

<sup>2</sup> In fact, the reason for different statutory approaches in the Copyright Act is based on including them for mandatory tariffs as a quid pro quo that requires rights holders such as SOCAN to file tariffs as a competitive safeguard. Tariffs such as those involving Access Copyright involve an optional process. This leaves it to rights holders to determine if they want to privately negotiate their rates or have the board establish a rate for the market. Since the process is optional, there are no statutory damages multipliers in effect.

First, the CRTC proceeding into site blocking earlier this year led to thousands of submissions that identified serious concerns with the practice.

13. For example, the United Nations Special Rapporteur for Freedom of Expression raised concerns regarding the implications for freedom of expression<sup>3</sup> and technical groups cited problems of overblocking. One of the best-known cases of over-blocking arose in Canada in 2005, when Telus unilaterally blocked access to a pro-union website without a court order during a labour dispute. In doing so, it simultaneously blocked access to an additional 766 websites hosted on the same computer server. The real danger is that this is not ancient history. For example, in 2013, UK ISPs blocked access to around 200 legitimate websites including Radio Times. The blocking occurred as a result of a court order targeting two file sharing websites.
14. Moreover, given that the starting principle for net neutrality is the right for users to access content and applications of their choice, blocking content is prima facie a net neutrality violation.
15. Second, even if there is support for site blocking, it already exists under the law as the Supreme Court's *Google v. Equustek* decision demonstrates. Before expanding such a provision, rights holders should first be required to tender evidence that they have attempted to use the existing law. When this committee asked whether they had tried to do so, Bell declined to directly answer. The reason was obvious: they have not.

### **Value Gap**

16. Two issues are not in dispute: the music industry is garnering record revenues from Internet streaming and subscription streaming services pay more to creators for streaming than ad-based ones.
17. The question for a copyright review is whether Canadian copyright law has anything to do with this. The answer is no. The notion of a value-gap is premised on some platforms or services taking advantage of the law to negotiate lower rates. Those rules – such as notice-and-takedown – do not exist under Canadian law.
18. In the U.S., the pressure for copyright reform in the 1990s that led to the Digital Millennium Copyright Act came from the music and movie industries, not the intermediaries (there was no Google or Facebook at the time). The resulting DMCA codified digital lock rules (anti-circumvention legislation) that U.S. officials acknowledged went far beyond those required in the WIPO Internet Treaties. It was the music and movie industries who claimed the legislation featuring legal protection for digital locks would support creators in the digital environment.

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<sup>3</sup> The UN Special Rapporteur noted “*While the enforcement of copyright law may be a legitimate aim, I am concerned that website/application blocking is almost always a disproportionate means of achieving this aim. Blocking an entire website/application will not only restrict allegedly infringing activity, but also cut off access to all legitimate content on that website or uses of that application.*”

19. The inclusion of safe harbours within the legislation was a compromise that granted rights holders unprecedented power to encourage the removal of alleged infringing content without court oversight. The notice-and-takedown system was never implemented in Canada. The DMCA-style issues, including digital lock rules and intermediary liability, were only addressed in legislation in 2012.
20. To this day, there is still no formal notice-and-takedown system in Canada. The Supreme Court of Canada ruled on ISP liability in 2004 in *SOCAN v. CAIP*, but that decision was not based on digital copyright reforms. The 2012 reforms include some safe harbours, but not before the industry and artists received the right to forward an unlimited number of notices to Internet users at no cost through the notice-and-notice rules, a new enabler provision to make it easier to target piracy websites, and the restrictive digital lock rules. In other words, there is no notice-and-takedown system to amend in Canada and calls to end safe harbours for technology companies bears little resemblance to Canadian law.
21. That helps explain why industry demands to this committee instead focus on reforms such as new taxes on iPhones. Those demands should be rejected.

### **CUSMA**

22. The copyright provisions in the Canada-US-Mexico Agreement significantly alter the copyright balance by extending the term of copyright by additional 20 years beyond our current law and the international standard found in the Berne Convention. By doing so, there is a need to recalibrate Canadian copyright law to restore the balance.
23. From a policy perspective, the longstanding Canadian decision to maintain the international standard of life plus 50 years was consistent with the evidence that term extension creates harms by leaving Canadians with an additional 20 years during which no new works will enter the public domain, with virtually no gains in terms of new creativity.
24. Within Canadian classrooms, dozens of books scheduled to enter the public domain will be shut out for decades. The prospect of using those books in new and innovative ways without the need for further licensing or royalties – as well as increasing access in open electronic form – will be lost for a generation. The agreement represents a major windfall that could run into the hundreds of millions for rights holders and that should be accounted for with any proposed reforms.

### **Pro-Innovative Reforms**

25. There are important reforms that would help advance Canada's innovation strategy. For example, greater fair dealing flexibility – adopting the “such as” approach - would make the current list of fair dealing purposes illustrative rather than exhaustive and would place Canadian innovators on a level playing field with fair use countries such as the U.S.

26. Led by the United States, several countries around the world, including Israel, South Korea, and Singapore, have established fair use provisions within their copyright laws. Fair use does not mean free use – rather, it means that there is a balance that allows certain uses of works without permission so long as the use is fair. A “such as” fair dealing reform would still maintain a full fairness analysis along with longstanding jurisprudence to minimize uncertainty.
27. In the alternative, an informational analysis exception is needed by the artificial intelligence sector. Given the absence of a clear rule to permit machine learning in Canadian copyright law (often called a text and data mining exception), our legal framework trails behind other countries that have reduced risks associated with using data sets in AI activities.
28. Canada should also establish new exceptions for our digital lock rules. Canada is at a disadvantage relative to the U.S. with some of the most restrictive rules in the world. Disadvantaged sectors include agriculture, where Canadian farmers do not have the same rights as those found in the U.S.
29. Moreover, while Canadians can freely exercise their fair dealing rights in the analog world, the 2012 reforms went far beyond the WIPO treaty requirements by creating unnecessary restrictions on fair dealing in the digital environment. This creates a “fair dealing gap”, where there is a massive disparity between user rights in the analog world and the digital world. The fair dealing gap should be addressed by establishing a long overdue fair dealing exception for the digital lock rules.
30. Given the government’s support for open government – including its recent funding of Creative Commons licenced local news and support for open source software – the committee should recommend removing the crown copyright provision from the Copyright Act.
31. The government also increase its support for open educational resources and open access publishing of scholarly research. This would be consistent with a study commissioned for the Association of Canadian Publishers on the emergence of OERs.<sup>4</sup>

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<sup>4</sup> The report noted “*The OER movement continues to grow and is becoming a cornerstone of the Canadian K–12 educational system. The proliferation of OER content is evident across the country and there are numerous initiatives that support the development, access, and distribution of content.*”

## **Appendix – Selection of My Posts and Articles on Copyright Review Issues Identified in this Brief**

### **Educational Copying and Fair Dealing**

Canadian Copyright, Fair Dealing and Education, Part One: Making Sense of the Spending, <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>

Canadian Copyright, Fair Dealing and Education, Part Two: The Declining Value of the Access Copyright Licence <http://www.michaelgeist.ca/2018/05/canadian-copyright-fair-dealing-and-education-part-two-the-declining-value-of-the-access-copyright-licence/>

Canadian Copyright, Fair Dealing and Education, Part Three: Exploring the Impact of Site Licensing at Canadian Universities <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartthree/>

Canadian Copyright, Fair Dealing and Education, Part Four: Fixing Fair Dealing for the Digital Age <http://www.michaelgeist.ca/2018/05/canadian-copyright-fair-dealing-and-education-part-four-fixing-fair-dealing-for-the-digital-age/>

Misleading on Fair Dealing, Part 1: Access Copyright's Inconsistent Claims on the Legal Effect of the 2012 Fair Dealing Reforms <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-1/>

Misleading on Fair Dealing, Part 2: Why Access Copyright's Claim of 600 Million Uncompensated Copies Doesn't Add Up <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-2-why-access-copyrights-claim-of-600-million-uncompensated-copies-doesnt-add-up/>

Misleading on Fair Dealing, Part 3: Data Shows Books Are Rapidly Declining as Part of Coursepack Materials <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-3/>

Misleading on Fair Dealing, Part 4: The Shift from Coursepacks to Digital Course Management Systems <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-4/>

Misleading on Fair Dealing, Part 5: The Multi-Million Dollar Educational Investment in E-Book Licensing <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-5-the-multi-million-dollar-educational-investment-in-e-book-licensing/>

Misleading on Fair Dealing, Part 6: Why Site Licences Offer Education More than the Access Copyright Licence <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-6/>

Misleading on Fair Dealing, Part 7: My Appearance Before the Standing Committee on Canadian Heritage <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-7/>

Misleading on Fair Dealing, Part 8: The Access Copyright Fight Against Transactional Licensing <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-8-the-access-copyright-fight-against-transactional-licensing/>

Misleading on Fair Dealing, Part 9: The Remarkable Growth of Free and Open Materials  
<http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-9/>

Misleading on Fair Dealing, Part 10: Rejecting Access Copyright's Demand to Force Its Licence on Canadian Education  
<http://www.michaelgeist.ca/2018/12/misleading-on-fair-dealing-part-10/>

Fair Dealing and the Right to Read: The Case of Blacklock's Reporter v. Canada (Attorney General)  
<http://www.michaelgeist.ca/2018/03/fair-dealing-right-read-case-blacklocks-reporter-v-canada-attorney-general/>

Fair Dealing Support for News Reporting and Public Debate: The Case of Warman and National Post v. Fournier  
<http://www.michaelgeist.ca/2018/03/fair-dealing-support-news-reporting-public-debate-case-warman-national-post-v-fournier/>

Why Fair Dealing Safeguards Freedom of Expression: The Case of the Vancouver Aquarium  
<http://www.michaelgeist.ca/2018/02/fair-dealing-safeguards-freedom-expression-case-vancouver-aquarium/>

Why Fair Dealing Benefits Creators: The Case of a Room Full of Spoons  
<http://www.michaelgeist.ca/2018/02/why-fair-dealing-benefits-creator-the-case-of-a-room-full-of-spoons/>

Access Copyright Calls for Massive Expansion of Damage Awards of Up To Ten Times Royalties  
<http://www.michaelgeist.ca/2017/10/access-copyright-calls-massive-expansion-damage-awards-ten-times-royalties/>

## **Website Blocking**

The Case Against the Bell Coalition's Website Blocking Plan, Part 1: Canada's Current Copyright Law Provides Effective Anti-Piracy Tools  
<http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-1-canadas-current-copyright-law-provides-effective-anti-piracy-tools/>

The Case Against the Bell Coalition's Website Blocking Plan, The Finale  
<http://www.michaelgeist.ca/2018/03/caseagainstsiteblockingfinale/>

UN Special Rapporteur for Freedom of Expression: Website Blocking Plan "Raises Serious Inconsistencies" With Canada's Human Rights Obligations  
<http://www.michaelgeist.ca/2018/03/un-special-rapporteur-for-freedom-of-expression-bell-coalition-website-blocking-plan-raises-serious-inconsistencies-with-canadas-human-rights-obligations/>

Coalition Featuring Google, Amazon, GoDaddy and CogecoPeer1 Warn Against Canadian Site Blocking Plan: Lost Jobs, Stifled Innovation  
<http://www.michaelgeist.ca/2018/03/coalition-featuring-google-amazon-godaddy-and-cogecopeer1-warn-against-canadian-site-blocking-plan-lost-jobs-stifled-innovation/>



No Need for New Internet Injunctions: Why Canadian Copyright Law Already Provides Rights Holders with the Legal Tools They Need <http://www.michaelgeist.ca/2018/11/no-need-for-new-internet-injunctions-why-canadian-copyright-law-already-provides-rights-holders-with-the-legal-tools-they-need/>

Why Canada is Now Home to Some of the Toughest Anti-Piracy Rules in the World...And What Should Come Next <http://www.michaelgeist.ca/2017/03/why-canada-is-now-home-to-some-of-the-toughest-anti-piracy-rules-in-the-world-and-what-should-come-next/>

Canadian DMCA in Action: Court Awards Massive Damages in First Major Anti-Circumvention Copyright Ruling <http://www.michaelgeist.ca/2017/03/canadian-dmca-in-action-court-issues-massive-damage-award-in-first-major-anti-circumvention-copyright-ruling/>

## **Value Gap**

Music Industry's Canadian Copyright Reform Goal: "End Tech Companies' Safe Harbours" <http://www.michaelgeist.ca/2017/05/music-industrys-canadian-copyright-reform-goal-end-tech-companies-safe-harbours/>

Who Needs an iPhone Tax: Canadian Music Industry Instead Calls for \$40 Million Annual Handout <http://www.michaelgeist.ca/2018/05/who-needs-an-iphone-tax-canadian-music-industry-instead-calls-for-40-million-handout/>

Music Canada Data Confirms Huge Increase in Streaming Revenues and Sharp Decline of Music Listening from Pirated Sources <http://www.michaelgeist.ca/2017/11/music-canada-data/>

SOCAN Financial Data Highlights How Internet Music Streaming is Paying Off for Creators <http://www.michaelgeist.ca/2017/11/socandata/>

Broken Record: Why the Music Industry's Secret Plan for iPhone Taxes, Internet Tracking and Content Blocking is Off-Key <http://www.michaelgeist.ca/2018/04/broken-record-why-the-music-industrys-secret-plan-for-iphone-taxes-internet-tracking-and-content-blocking-is-off-key/>

Canadian Music Industry Seeks New Fees, Content Blocking, and Right to Renegotiate Deals Despite Generating Record Digital Revenues <http://www.michaelgeist.ca/2018/04/canadian-music-industry-seeks-new-fees-content-blocking-and-right-to-renegotiate-deals-despite-generating-record-digital-revenues/>

Canada's Tough Anti-Piracy Copyright Law: Federal Court Awards Millions in Damages Against Unauthorized Streaming Site <http://www.michaelgeist.ca/2018/04/ellasinjunction/>

## **The Effect of CUSMA**

From Copyright Term to Super Bowl Commercials: Breaking Down the Digital NAFTA Deal  
<http://www.michaelgeist.ca/2018/10/from-copyright-term-to-super-bowl-commercials-breaking-down-the-digital-nafta-deal/>

USMCA sends Canada back to the drawing board on copyright law  
<https://www.theglobeandmail.com/business/commentary/article-usmca-sends-canada-back-to-the-drawing-board-on-copyright-law/>

Canadian Publisher on the Term of Copyright: Life Plus 50 Years is “Already Too Long”  
<http://www.michaelgeist.ca/2018/05/canadian-publisher-on-the-term-of-copyright-life-plus-50-years-is-already-too-long/>

Why Copyright Term Matters: Publisher Study Highlights Crucial Role of the Public Domain in Ontario Schools  
<http://www.michaelgeist.ca/2017/09/copyright-term-matters-publisher-study-highlights-crucial-role-public-domain-ontario-schools/>

The Trouble With the TPP’s Copyright Rules  
[https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/07/Trouble\\_with\\_TPPs\\_Copyright\\_Rules.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/07/Trouble_with_TPPs_Copyright_Rules.pdf)

## **Pro-Innovative Reforms**

Canadian copyright reform requires a fix to the fair dealing gap  
<https://www.hilltimes.com/2016/12/05/canadian-copyright-reform-requires-fix-fair-dealing-gap/90056>

How Trolls are Stifling Innovators, Gamers, and Netflix Junkies  
<https://www.cigionline.org/articles/how-trolls-are-stifling-innovators-gamers-and-netflix-junkies>

Want to Keep Canadian AI Thriving?: Create a Copyright Exception for Informational Analysis  
<http://www.michaelgeist.ca/2018/10/elementaicopyright/>

Why copyright law poses a barrier to Canadian AI ambitions  
<https://www.theglobeandmail.com/report-on-business/rob-commentary/why-copyright-law-poses-a-barrier-to-canadian-ai-ambitions/article35019241/>

Paywall Ruling Places Spotlight on Canada’s Digital Lock Problem  
<http://www.michaelgeist.ca/2015/11/paywall-ruling-places-spotlight-on-canadas-digital-lock-problem/>

The Trouble with the TPP, Day 2: Locking in Digital Locks  
<http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-2-locking-in-digital-locks/>

The Case for Flexibility in Implementing the WIPO Internet Treaties  
<https://www.irwinlaw.com/sites/default/files/attached/CCDA%2008%20Geist.pdf>

Canadian Government Commits \$50 Million to Creative Commons Licensed Open News Content <http://www.michaelgeist.ca/2018/11/ccnewscontent/>

Digital Trends and Initiatives in Education: The Study the Association of Canadian Publishers Tried To Bury <http://www.michaelgeist.ca/2018/04/digital-trends-and-initiativesstudy/>

Canadian Copyright, OA, and OER: Why the Open Access Road Still Leads Back to Copyright <http://www.michaelgeist.ca/2017/10/canadian-copyright-oa-oer-open-access-road-still-leads-back-copyright/>

Canada's National Digitization Plan Leaves Virtual Shelves Empty <http://www.michaelgeist.ca/2016/07/canadas-national-digitization-plan-leaves-virtual-shelves-empty/>

Government of Canada Quietly Changes Its Approach to Crown Copyright <http://www.michaelgeist.ca/2013/11/crown-copyright-change/>

Canada May Be Nearing the Open Access "Tipping Point" <http://www.michaelgeist.ca/2013/10/canada-oa-tipping-point/>

Swartz's Death Places Spotlight on More Open Access To Information <http://www.michaelgeist.ca/2013/01/swartz-death-column-post/>

Setting the Stage for the Next Decade of Open Access <http://www.michaelgeist.ca/2012/09/oa-next-stage/>

Why the Government's Commitment to "Open by Default" Must Be Bigger Than Open Data <http://www.michaelgeist.ca/2015/12/why-the-governments-commitment-to-open-by-default-must-be-bigger-than-open-data/>