



December 5, 2018

Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

To: Standing Committee on Industry, Science and Technology

We appreciate this opportunity to share our views on the effect of the *Copyright Act* on educational institutions and citizens alike. As a premier comprehensive institution in Canada, the University of Waterloo is committed to supporting inquiry through research and learning. Located in the heart of Waterloo Region, the University of Waterloo was founded by a group of industrialists who aspired to change the world through innovation and research. Today, the University enrolls more than 35,000 students across its six faculties and is home to the world's largest co-operative education system of its kind.¹

The University of Waterloo has consistently been the top comprehensive research university and has also been recognized as Canada's most innovative university for over a quarter of a century.² The University's uniquely entrepreneurial culture encourages experimentation and innovation. This culture is supported by the University mission to advance learning and knowledge through teaching, research, and scholarship, nationally and internationally, in an environment of free expression and inquiry.³

In order to achieve our mission, balanced copyright law is a necessary component for success. The University of Waterloo has demonstrated a balanced approach through its IP policy⁴ where in many cases the author is the owner of copyright in works created through research and teaching.

We urge you to use this opportunity to reinforce the foundation of the *Copyright Act* to facilitate the increase of access to information, the advancement of knowledge, and the continued technological growth of Canadian society.

¹ About Waterloo, available at <https://uwaterloo.ca/about/>

² Waterloo by the Numbers, available at <https://uwaterloo.ca/>

³ The University of Waterloo Mission Statement, available at <https://uwaterloo.ca/secretariat/governance>

⁴ Policy 73: Intellectual Property, available at <https://uwaterloo.ca/secretariat/policies-procedures-guidelines/policy-73-intellectual-property-rights>



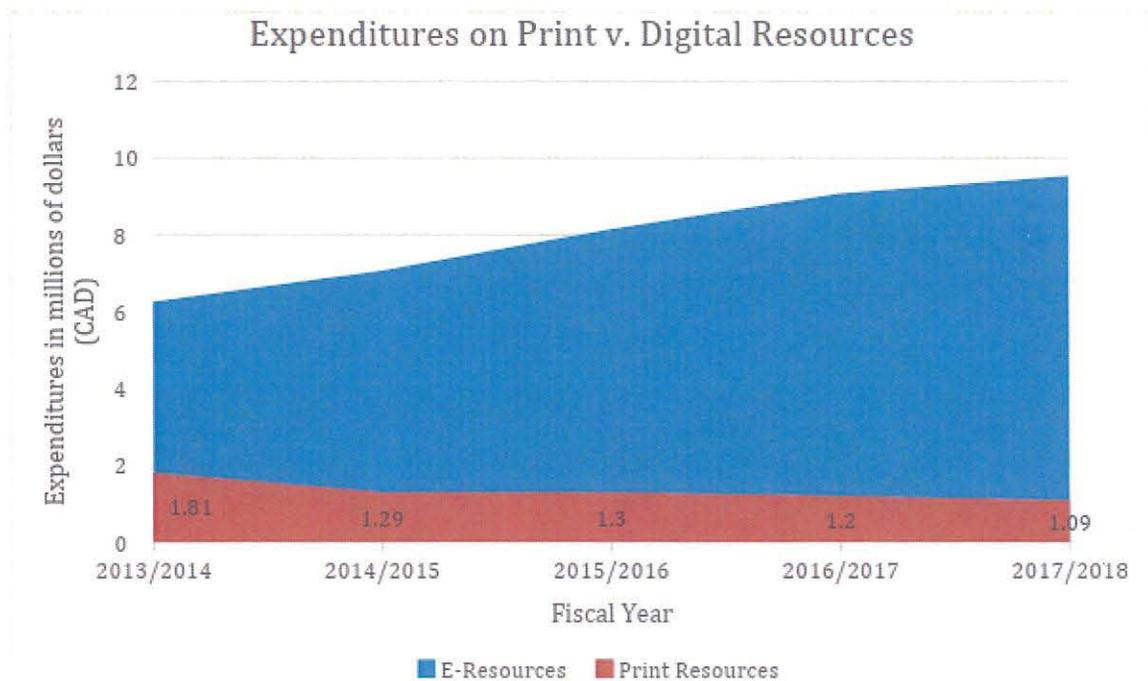
Copyright at Waterloo

The University implements a robust copyright plan in which accountabilities are shared across units that are engaged in making determinations, such as the Library, Bookstore, Centre for Extended Learning, and Media Library. These units coordinate campus copyright education and outreach, and provide copyright clearance services. Copyright clearance service expenditures in Library course reserves have increased 26% in the last five years. This is in addition to an average of \$9 million annually that the University spends on licensing digital resources in support of learning and research.

Digital Shift

At Universities across the country, there are an increasing number of options to find, consume, and share content. This has manifested as a shift to digital resources. Universities are responding to this shift, encouraged by the impact it can have on ease of use, affordability, and accessibility of content for our students, faculty, and staff.

This shift to digital resources can be clearly seen in the Library's expenditures over the last five years.



The amount spent on digital resources has steadily increased, while the amount spent on print resources has been in decline. Parallel to this digital shift, the academic publishing marketplace has

evolved to the point where a high percentage of the rights for Canadian-created scholarly content are held by large international publishers who license and/or sell it to libraries and bookstores on behalf of their students, faculty and staff. This switch to digital was one of the most important factors in opting out of the Access Copyright license in 2011; content used in the classroom was largely being licensed directly from publishers, and this raised questions about the value of that blanket licensing model.

The shift to digital content has helped instructors support student learning in more accessible and affordable ways. Instructors can curate content that is up-to-date, relevant to current themes, and available at zero cost to students. The University leverages electronic resource licenses, open access content, fair dealing, and one-time licenses to make it easier for instructors to deliver leading-edge education. Additionally, research can be easier to find and share in the digital realm, and digital methods are introducing new ways of analyzing research findings. The recommendations that follow will enable the research and teaching mission at the University of Waterloo, and focus on providing the necessary balance between creator and user rights.

Recommendations

1. Retain education as an enumerated purpose in fair dealing.

Educational fair dealing is essential to allow access to information, exchange of ideas, forward-thinking teaching and critical analysis of content. Education in fair dealing empowers instructors and researchers to engage with content in new ways, solidify ideas, and achieve the highest quality of teaching possible.

The Supreme Court of Canada in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* [Alberta] provided support for educational fair dealing.⁵ Writing for the majority, Justice Abella, stated at paragraph 23:

“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. 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. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study.”

Educational fair dealing provides instructors and researchers with the confidence needed to use copyright material in their classrooms. This inspires creativity, and provides access to learning materials

⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, 2012 SCC 37 (CanLII). <https://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html>

that would otherwise be unavailable.

The educational industry and Canadian society are only beginning to see the long-term impact of the 2012 changes to the *Copyright Act*. Strong user rights are central to a balanced *Copyright Act*, and a balanced *Act* is critical to the continuance of a competitive and innovative society. More time is needed to examine the true impacts of education in fair dealing.

2. Give copyright exceptions, such as fair dealing, protection from contract override.

As reported above, the University spent over \$9 million on licensed digital content. These license agreements can contain provisions from publishers which override the *Copyright Act* exceptions that are intended to facilitate a balance between creators and users. The *Copyright Act* is intended to uphold technological neutrality; as such, the same rights and exceptions under the *Copyright Act* should apply to both print and digital content. Allowing for contracts to override user rights creates a harmful distinction between the use of digital content and print content. The University of Waterloo encourages the committee to ensure that user rights in the *Copyright Act*, such as fair dealing, cannot be overridden by contract.

3. Maintain the cap on statutory damages for non-commercial infringement.

The cap on statutory damages for non-commercial infringement creates an environment where users are empowered to make informed decisions on the use of their rights. Removing this cap would create a power imbalance for users that would disrupt the balance intended in the *Act*. In order to balance rights effectively, users must be able to confidently engage in copyright decision making, without of fear of disproportionate repercussions. The University of Waterloo recommends that the current cap on statutory damages for non-commercial infringement be maintained.

4. Avoid the unintended consequences of restrictive copyright law.

Universities Canada said it best, "Digital innovations present boundless opportunities, helping organizations improve their effectiveness, efficiency, creativity and service delivery. Higher education is profoundly affected by these transformations and Canada's universities are actively exploring the powerful possibility of our shared digital future."⁶ In order to enable the advantages that can stem from digital innovation, it is critical that the *Copyright Act* be responsive to the changing nature of content, distribution models, and uses.

Providing an illustrative, rather than exhaustive list of purposes under fair dealing, would provide greater flexibility for users. Currently, the list of fair dealing purposes restricts uses to those enumerated. Uses such as digitization for preservation, and text and data mining, may not fall into the list of

⁶ Canadian Universities and our Digital Future: A workshop by Universities Canada. Available at: <https://www.univcan.ca/wp-content/uploads/2016/05/canadian-universities-and-our-digital-future-2015-workshop-report.pdf>

enumerated purposes, but would be likely be fair if evaluated using the six factor test.⁷ The University of Waterloo recommends that the fair dealing provision include the term “such as” to facilitate more flexible interpretation.

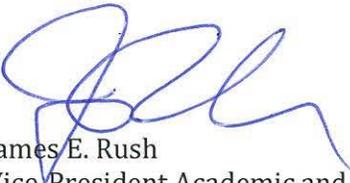
Text and Data Mining (TDM) is one example of an emerging area that could be included in fair dealing with the language “such as”. TDM is an example of a “non-expressive” use of text corporae and non-textual datasets that employs computational methods to extract meaningful patterns from large quantities of information. TDM is a crucial component of research in the digital era. Providing clarity through a specific exception would give Canadian researchers the confidence to pursue text and data mining for research purposes. For example, one research area that TDM enables is artificial intelligence. An exception for TDM would improve Canada’s ability to compete globally in the artificial intelligence industry as well as contribute substantially to advancing research in this area.

The above is one example of how balanced and flexible copyright law can facilitate emerging industries. Facilitating the growth of new areas of research, entrepreneurship, and innovation are at the core of the *Act’s* purpose, and allowing for user rights flexibility support creators in building on the successes of their predecessors.

Summary of Recommendations

1. Retain education as an enumerated purpose in fair dealing.
2. Give copyright exceptions protection from contract override.
3. Maintain the cap on statutory damages for non-commercial infringement.
4. Avoid the unintended consequences of restrictive copyright law.
 - a. Include the term “such as” in fair dealing, to facilitate flexible interpretation.

Sincerely,



James E. Rush
Vice-President Academic and Provost
University of Waterloo
200 University Ave. W.
Waterloo, ON CANADA N2L3G1

⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <http://canlii.ca/t/1glp0>