



Brief Submitted to the  
House of Commons Standing Committee on  
Industry, Science and Technology  
for the  
Statutory Review of the Canadian Copyright Act

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*December 10, 2018*

Thank you for the opportunity to submit a brief to the Standing Committee for the statutory review of the Canadian Copyright Act. Western University is a U 15 institution that currently enrolls over thirty thousand students, undergraduate and graduate, and employs nearly fifteen hundred faculty and twenty five hundred non-faculty staff. Members of our campus community are both creators and users of content and our faculty are active contributors to the Canadian publishing landscape.

Western believes that access to and reuse of copyright-protected content is critical to our educational mission and necessary to produce world-class research that will benefit our nation for generations to come. In this brief Western University offers five recommendations related to the Act and provides some additional context regarding current practices in higher education and at Western related to the management of copyright.

## **Recommendations**

### ***Recommendation 1. Retain educational fair dealing as an allowable purpose in S29 of the Act.***

Western University generally supports the existing copyright legislation and fair dealing provisions, and advocates for the retention of fair dealing for the purpose of education. The introduction of education as an allowable purpose under the fair dealing exemptions in the Copyright Modernization Act of 2012 reinforced the appropriate balance between the important rights of creators and the rights of users necessary to foster creativity, innovation, scholarship and the advancement of knowledge, while reflecting the reality of 21<sup>st</sup> century higher education pedagogy and practice and scholarly publishing.

Over the last two decades, higher education has seen the adoption of learning management systems (LMS), online teaching and learning environments, which facilitate online engagement and access to curriculum and digital content. At Western, approximately 70% of all undergraduate courses use a corresponding online form of delivery available through OWL, our LMS. Simultaneously, the publication and dissemination of scholarly information has become increasingly digital and accessible through licence, or openly on the web. Open access scholarly publications and open educational resources (OER) are increasingly being developed and integrated into the curriculum.

These shifts in the production and dissemination of scholarly information and the expectations in an online teaching and learning environment have largely changed the collections patterns in academic libraries from print to digital. The academic library acquisitions budget is now primarily directed toward site licensing of journal and e-book content. Each online aggregator or publisher has terms of use in place that define who may access the material and how it may be reused. Western Libraries continues to purchase and license published works and continues to support the writing and publishing industry and creators. These library expenditures have not been reduced by the introduction of educational fair dealing nor by the advancement of

open access publications or OER. Today, Western Libraries purchases over \$ 15 million in copyright protected content annually.

These shifts have enabled universities and colleges to integrate licensed and open scholarly and educational resources and publications into online courses and to provide online course readings services to supplement those courses with traditional delivery models. This meets student and instructor expectations for the flexibility to engage with course tools and access course content and supplementary readings online, at any time, from multiple devices. Copyright clearance is sought for the digital reproduction of materials that fall outside existing licences or subscriptions and the fair dealing educational exemption limitations.

Including education as one of the enumerated fair dealing purposes in the Act provides more certainty for students, instructors, and researchers who routinely access and use scholarly works in their education and research to expand their own knowledge and create new knowledge by building upon the scholarship of others. It is not a substitute for the sale of published works and it cannot be blamed for the declining Canadian publishing industry. The shift to digital in the publishing industry worldwide has been a highly disruptive force. Declines in educational and other commercial publishing markets are being experienced across the world due to factors such as increased consumer choice, new consumption and production models, and the implications of the social network of information.

***Recommendation 2. Tariffs sought by copyright collectives should not be mandatory.***

Western University undertakes significant effort to comply with both the spirit and the letter of the Act. Our Copyright Office supports compliance at an individual, departmental, and university wide level. The Office, under the umbrella of Western Libraries, offers copyright literacy and education programming and resources, compliance guidelines and best practices, and centralized verification and clearance services for use of copyright-protected materials at Western. Through these efforts our campus makes informed choices with respect to the most effective and appropriate use of copyright protected content.

Western provides access to copyrighted content through purchased licences and subscriptions with publishers, transactional licences for copyright clearance with content creators, publishers or collectives, and through statutory exceptions including fair dealing. These means allow for necessary access to and reuse of copyrighted materials and generally serve our teaching, learning, and research mission well. Imposing mandatory tariffs and blanket or per full time equivalent (FTE) licensing to collectives such as Access Copyright results, in large part, in paying again for use of material already paid for through licence. While tariffs might have once made practical and financial sense in a print based world, the robustness of the digital licensing market has rendered them overly expensive for the limited benefit they provide.

Overwhelmingly, the content required to support courses and programs across the disciplines at universities is not included in Access Copyright's licensed repertoire. The content that is typically reproduced as supplementary course readings is scholarly research material that

traditionally has been published in an academic journal or research monograph. These works are largely authored by academics who work, teach, and conduct research at universities and are already paid for their scholarly output. Courses studying literary works, primarily for language and literature programs, represent a proportionately low percentage of courses offered in an academic year. When works of literature are included in a syllabus, students are generally required to purchase these works because the use of a complete work falls outside the parameters for fair dealing thus these creators receive royalties through these purchases, much like textbooks.

The shifts to digital scholarship and online learning described above have corresponded with a decline in the use of printed course packs and printed course reserves services, which was at the core of the value provided by the Access Copyright license; as we increasingly purchase and deliver content digitally, the value of the license continues to decline.

Also, a blanket licence based on FTE, in essence requires payment whether or not reproduction of content actually happens for every student that makes up the total FTE count. The costs of a mandatory tariff would ultimately be included in fees and borne by Western students, many of whom gain no benefit. Given the extent of our subscription-based licensing, the growth of open access scholarly and educational publications, and the limited repertoire covered by the Access Copyright blanket licence, transaction based copyright clearance or fee-for-use permissions are a much more efficient and fair means of managing compliance for our students and educators.

Past experience has shown that the cost of the licence or tariff is subject to deeply unpredictable increases and includes substantial hidden costs to our institution. For example, in 2010, universities were paying Access Copyright a fee of approximately \$3.50 per FTE student plus a charge of \$0.10 per course pack page. In 2010, Access Copyright sought a flat licence fee in the amount of \$45 per FTE student for 2011-2013. With the Supreme Court's 2012 decision and the Copyright Modernization Act, the value of the collective licence decreased even further while Access Copyright sought a dramatic fee increase. Western University opted out of the Access Copyright license in 2013. And, while the current blanket license fee proposal is \$26, our current practices for managing copyright compliance are effective and efficient and render any tariff or mandatory licence unnecessary.

Additionally, fees do not reflect the true cost of participating under a licence agreement with these collectives. Under a tariff or agreement with Access Copyright comes extensive reporting, survey and audit obligations for a university. A sample of these provisions can be found in Access Copyright's latest tariff proceeding: <http://www.gazette.gc.ca/rp-pr/p1/2017/2017-05-20/html/sup2-eng.html>. These additional obligations result in soft costs absorbed by a university, which are not accounted for in the determination of the fee or tariff but have a material impact on the value of the licence.

***Recommendation 3. Preserve the preeminence of user rights articulated as statutory exceptions that cannot be overridden by contract.***

More and more, universities acquire content through digital packages that come with contractual terms of use, indeed, Western spends millions of dollars annually to license content for our faculty, staff, and students. For legal purposes the Act should provide clear indication that its exceptions to infringement cannot be overridden by contract, protecting the statutory rights of users.

***Recommendation 4. Make the list of delineated purposes in S29 illustrative***

Making the list of prescribed fair dealing purposes representative rather than exhaustive builds flexibility to adapt the exception for unanticipated but “fair” applications not included in the list. This could be accomplished with the addition of “such as” before “research, private study, education, parody or satire”. Such uses would still need to meet the six factor test for fairness, ensuring the dealing is fair regardless of purpose.

***Recommendation 5. For non-infringing purposes, allow the circumvention of technological protection measures (TPM).***

Circumventing TPMs for purposes that are otherwise lawful should not constitute copyright infringement in order to preserve the balance between creator and user rights. For example, by not allowing for circumvention of TPMs for people with perceptual disabilities the legislation disadvantages said users and limits our ability to meet other statutory requirements such as the *Accessibility for Ontarians with Disabilities Act*.

To conclude, Western University would like to thank the Committee for the opportunity to comment on the review of the Copyright Act. This legislation is of critical importance to the University sector, a sector that continues to support Canadian publishing, scholarship, and cultural life. Canadian universities serve our society as keepers and producers of our nation’s scholarly and cultural record, and we appreciate the chance to share our thoughts as part of this process.

Submitted on behalf of Western University by:

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