

CAUT Brief to the Standing Committee on Heritage

Remuneration models for artists & creative industries

December 2018

Introduction

The Canadian Association of University Teachers (CAUT) is pleased to have this opportunity to present a brief to the Standing Committee on Heritage on the issue of remuneration models for artists and creative industries.

CAUT is a labour organization representing 72,000 professors and librarians at 123 colleges and universities across Canada. Our members write tens of thousands of articles, books and other works every year, making CAUT Canada's largest creator group and a strong proponent of authors' rights.

Expenditures on content

Canada's public colleges and universities pay for electricity, water, cleaning supplies and a host of other products and services. Contrary to popular mythology, our sector also spends hundreds of millions of dollars per year buying copyrighted content for research and education purposes, over a billion dollars in the last three years.¹ The source of this money is students, their parents, and Canadian taxpayers. The vast bulk of this expenditure is on specialized academic works. Much of this content is developed at public expense at colleges, universities and research institutes, given for free to private publishers, and then purchased back from them at great cost.

Fair dealing & exceptions

While the hundreds of millions of dollars spent annually on content covers most of the materials necessary to complete the tasks of creating and sharing knowledge, our sector also makes careful and lawful² use of a series of critically important user rights and exceptions within the framework established by the Parliament of Canada and the Supreme Court of Canada.

The Supreme Court of Canada has affirmed the importance of these rights and the necessity that they be interpreted generously:

"the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act [...]. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it

*must not be interpreted restrictively. As Professor Vaver, [has written]: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'*³

The vast majority of the material reproduced at colleges and universities under these rights and exceptions are social science, natural science and other technical and theoretical works created within the academic community. CAUT members value the works created by Canadian literary authors, but it cannot be overstated that such content is only a very small part of the materials used on our campuses.

Context - the crisis in scholarly communications

As the Heritage Committee considers the role of the public post-secondary education sector in creator remuneration, it is important that it be aware that the international system that creates, evaluates, disseminates, and archives scholarly works is in crisis. The manner in which the crisis is resolved will have a profound effect on how human society creates and shares knowledge, with cost consequences running into the billions of dollars.

At the core of the crisis is the increasing concentration of academic journal ownership in the hands of a small group of highly profitable private sector corporations—none of which are Canadian owned. This has resulted in exorbitant price increases far outpacing the rate of inflation, placing the fruits of academic labour beyond the reach of all but the wealthiest of the world's populations.^{4,5,6} This crisis has also encompassed the textbook industry, where price increases have also far exceeded inflation, with negative impacts on students and their families, particularly those from middle to low income backgrounds.^{7,8}

In response, librarians and professors have worked to develop new ways to create and share knowledge. They have been at the forefront of the open access (OA) and open education resource (OER) movements, in which the journal articles and text books they write are made freely available on-line, rather than being given to and then purchased back from private industry. Support for open access is the official policy of the Canadian government.⁹ Meanwhile, recognizing the public benefit

of open education resource textbooks, several provinces (including British Columbia, Ontario and Quebec) have invested or are in the process of investing in developing platforms and commissioning educational content from creators, playing a role akin to public not-for-profit publishers.

Internationally, OA and OER are gaining momentum. UNESCO has officially endorsed OER.¹⁰ In Europe, Plan S has been launched, an open access initiative by Science Europe (a coalition of government science agencies from 24 European countries). The plan requires researchers who benefit from state-funding to publish their work in subscription free open repositories or in journals that are available to all by 2020. Private publishers have indicated the plan may result in the end of journal subscriptions, an annual market worth hundreds of millions of dollars.¹¹

Given the crisis in scholarly communications and the emerging solutions, it is important for the Standing Committee on Canadian Heritage to understand:

- Private sector publishers of academic materials have priced their products at the limit or beyond the ability of public sector institutions and their students to pay.
- Instead of remaining captured by an unfair marketplace, the public sector has developed new open access and open education resource methodologies of providing material for free to users while maintaining high standards for the quality of the content and equivalent levels of remuneration to creators.
- These new content development and dissemination models are increasingly supported by federal and provincial governments, and governments internationally.
- If successful, the open access and open education resources movements will usher in a new era of open learning and research. It will also end the transfer of hundreds of millions of dollars annually from the public sector to the private for-profit education publishing industry which is overwhelmingly dominated by large multi-national companies like Pearson, Elsevier and Scholastic.¹²

Canadian stories

CAUT is aware that many independent authors link their remuneration situation to a supposed change in behavior of the post-secondary education sector since the *Copyright Act* reforms in 2012. This is a finger pointing in the wrong direction.

First, literary authors are struggling worldwide, not just in Canada. This phenomenon has been the subject of intense study. The factors behind loss of income have been identified as changes in reading habits and the decline of worker/author bargaining power in relationship to publishers.¹³ With author incomes collapsing since 2012 in jurisdictions that have not undergone copyright reform, Canada's 2012 changes to the *Copyright Act* cannot be the problem.

Second, notwithstanding the hundreds of millions of dollars spent annually by public colleges and universities on content, there is a misperception by independent authors as to the nature of these copyright expenditures. As Nick Mount, professor of Canadian literature at the University of Toronto, writes in his submission to the Standing Committee on Heritage:

*"the amount of material by living Canadian authors taught at Canadian universities is very small: some would say distressingly so, but that's another argument. The vast majority of assigned texts at Canadian universities are by foreign authors, mostly dead ones (the humanities), or living academics (textbooks in the sciences and social science). Even in English departments, the amount of works by living Canadian writers is just a small fraction of the works we teach."*¹⁴

As explained by the Dalhousie Faculty Association at Dalhousie University in its submission to the Standing Committee on Industry, Science and Technology:

*"Small presses and Canadian writers are typically assigned for only a handful of courses in Canadian universities that could not have any measurable impact on Canadian publishing. At Dalhousie, there are only two courses on contemporary Canadian literature next year [2019], with a total maximum enrolment of about 80 students; there are three courses on Canadian History that might include some post-1950 material, with a total maximum enrolment of about 210 students. For context, there are about 14,000 students at Dalhousie taking up to 10 courses per year."*¹⁵

The pattern is similar at universities across Canada.¹⁶ Simply put, meaningful declines in the incomes of Canadian literary authors cannot be attributed to college and university fair dealing, other user exceptions, or alleged infringement, because the percentage of this material utilized for educational purposes in the post-secondary sector is minuscule, and the portion subject to fair dealing and other exceptions is even tinier.

In fact, fair dealing has an important role to play in helping students become the next generation of audience members for Canadian literature. As Eli MacLaren, professor of Canadian literature at McGill University, explained during his testimony to the Standing Committee on Industry, Science and Technology for its statutory review of the *Copyright Act*:

*"Forty-eight poets responded to our survey. Their annual income earned as a writer, on average, was about \$13,000, or 18% of their total household income. It came from the following sources, listed in order of importance. Over two-thirds of what they earned came from government grants. Second most important were writer-in-residence programs, followed by public readings, editing and jury work, public lending rights, and finally, royalties on book sales, payments from magazines, and payments from copyright collectives. On average, the percentage of the poet's household income coming from commercial sources governed by copyright was around 2%. My conclusion is that poets today do not derive much income from the free market. Meanwhile, fair dealing provisions for education help us teach their poetry."*¹⁷

MacLaren's research conclusion is that "poets and teachers of poetry are not enemies. We are partners in maintaining the culture of poetry in this country" and fair dealing has an important and supportive role to play in developing the next generation of readers and audience members for Canadian poetry.

Remuneration solutions

Restricting user rights is no way to genuinely support independent Canadian authors and other creators, but would have a significant negative impact on scholarly communications and the exchange of knowledge. Direct expenditures on cultural subsidies are necessary, as are new public policy approaches to reverse the decline in worker/creator bargaining power in relation to private industry.¹⁸

To restrict user rights to address challenges with artist remuneration is to confuse correlation with causation. It will not solve the challenges facing artists, and it risks compromising quality of education, research, access to knowledge and the development of future audiences for Canadian literature.

Just as curtailing fair dealing will have no measureable impact on the income of independent authors, coercing colleges and universities back into a licensing arrangement with Access Copyright through the threat of extortionary statutory damages would similarly provide no benefit. Alternate licensing expenditures such as the Canadian Research Knowledge Network¹⁹ cover most of Access Copyright's purported repertoire used at Canada's universities, and the growing availability of transactional (one-off) licensing, and free open access and open education resource material places the monetary value of the Access Copyright license at or close to zero.²⁰ Notwithstanding the current value of the license, Access Copyright has never handed out more than a pittance to the vast majority of Canadian authors, the cause of periodic uprisings within its membership^{21,22} and a clear example of how copyright-based solutions do not address creator poverty.

Do no damage

As indicated above, our sector makes careful and lawful use of a series of critically important user rights and exceptions within the framework established by the Parliament of Canada and the Supreme Court of Canada. Disrupting the way professors teach, students learn, researchers discover new knowledge, and librarians share works will provide no benefit to authors and will damage Canada's public education and research sectors.

Forcing colleges and universities back into destructive relationships with private sector publishers will cause even more harm. Corporate concentration had placed a stranglehold on access to the knowledge our members create. Colleges and universities are now pushing back. At stake in your deliberations is the question of whether the knowledge created by colleges and universities is the common heritage of all Canadians or a privatized commodity. Any recommendations by the Heritage Committee that tip the balance further away from the public interest will do grievous harm.

All of which is respectfully submitted.

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1. Financial Information of Universities and Colleges Survey, Statistics Canada, (2015-2016).
 2. The Copyright Board of Canada found that 98% of the photocopying being considered in the entire K-12 sector was absolutely compliant with fair dealing. There is no reason to believe similarly high rates of compliance would not be found in the post-secondary education sector. <http://www.cbc.ca/decisions/2016/DEC-K-122010-2015-19-02-06.pdf>
 3. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.
 4. Principles and Strategies for the Reform of Scholarly Communication, Association of College & Research Libraries (ACRL), June 24, 2003.
 5. Larivière, Vincent, Stefanie Haustein, and Philippe Mongeon. The Oligopoly of Academic Publishers in the Digital Era, PLOS ONE, 10 June 2015.
 6. "Academic publishers reap huge profits as libraries go broke" CBC, 15 June 2018.
 7. Senack, Ethan. Fixing the Broken Textbooks Market: How Students Respond to High Textbook Costs and Demand Alternatives, The Student Public Interest Research Groups, January 2014.
 8. Jhangiani, Rajiv and Surita Jhangiani."Unrelenting increases in the price of college textbooks have prompted the development and adoption of open textbooks, educational resources that are openly licensed and available to students free of cost." Investigating the Perceptions, Use, and Impact of Open Textbooks: A Survey of Post-Secondary Students in British Columbia, International Review of Research in Open and Distributed Learning Vol.18, No. 4, 2017.
 9. Tri-Agency Open Access Policy on Publications, Government of Canada. 21 December 2016.
 10. UNESCO's Paris 2012 declaration endorses OERs as one way of improving education around the world and supporting the basic human right to education in both developing and wealth industrialized countries. See here: <https://en.unesco.org/themes/building-knowledge-societies/oer>.
 11. Radical open-access plan could spell end to journal subscriptions, Nature, 04 September 2018
 12. Note that "Education publishers dwarf trade presses [and..] are also much bigger than other media companies that attract much more attention. Pearson is far bigger than AOL or The New York Times Company (and much more profitable)." See <https://www.wired.com/2012/01/why-education-publishing-is-big-business/>.
 13. Literature in the 21st Century: Understanding Models of Support for Literary Fiction. See graph "Fiction General Value" on page 11, Arts Council England. 15 December 2017.
 14. Nick Mount's submission to the Standing Committee on Canadian Heritage: <http://www.ourcommons.ca/Content/Committee/421/CHPC/Brief/BR10254166/br-external/MountNick-e.pdf>
 15. Written brief of the Dalhousie Faculty Association submitted to the Standing Committee on Industry, Science and Technology for its statutory review of the *Copyright Act*, page 1 <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9973654/br-external/DalhousieFacultyAssociation-e.pdf>.
 16. Written brief of Universities Canada submitted to the Standing Committee on Industry, Science and Technology for its statutory review of the *Copyright Act*, page 3 <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10002433/br-external/UniversitiesCanada-e.pdf>.
 17. Transcripts from the Standing Committee on Industry, Science and Technology's meeting in Montreal on May 8, 2018. <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-109/evidence>.
 18. Bryan Adams to MPs: Give artists more control over their work <https://www.cbc.ca/news/politics/bryan-adams-copyright-act-heritage-committee-1.4828097>.
 19. The Canadian Research Knowledge Network (CRKN), a partnership of 75 Canadian universities representing 1.2 million researchers and students, has entered into thousands of agreements with publishers to offer access to their members. Last year, CRKN spent over \$100 million in licensing fees for electronic content.
 20. The Copyright Board of Canada has been delaying for several years a decision on the value of Access' tariff in the university sector. At the moment, Access Copyright claims its services are worth \$26 per student. There are compelling reasons to believe this is a gross exaggeration of the value. For example, the Copyright Board of Canada recently decided that Access Copyright's tariff for use of its repertoire by all provincial and territorial governments, except Quebec, was only worth 49.71 cents per employee, per year, for the 2010-2014 period. Access Copyright had been seeking \$8.45 per employee. Using the same magnitude of exaggeration, though Access says its post-secondary tariff is worth \$26 per student, the license may actually only be worth \$1.53 per student.
 21. Friedland, Martin L. "The principal impetus for the study was concern expressed by a number of creator organizations in 2005 that the present distribution system is unfair to creators and unduly favours publishers". Report to Access Copyright on Distribution of Royalties. 15 February 2007.
 22. In June 2011, the League of Canadian Poets passed a motion at its Annual General Meeting in support of a motion that had recently been passed at the Writers' Union of Canada's AGM which read "Recognizing that [...] creators receive an inadequate share of the revenues of Access Copyright and are unable to control how the copyright income raised in their name is managed and recognizing that key differences in the copyright interests of publishers and creators will always prevent Access Copyright from fully and effectively representing creators' copyright interests, moved that one solution is an operational separation of creators' and publishers' interests in collective licensing, for instance, the British model of a creator-run distribution collective [...]" <http://creatorsac.blogspot.com/2011/06/league-of-canadian-poets-votes-on.html>. Monday, 13 June 2011. Accessed on December 14, 2018 through the Internet Archive at <https://web.archive.org/web/20110708032348/http://creatorsac.blogspot.com/>