

CAUT Submission to the Standing Committee on Industry, Science and Technology

Statutory Review of the *Copyright Act*

July 2018

Introduction

The Canadian Association of University Teachers (CAUT) represents 70,000 professors, librarians, and professional staff at 122 colleges and universities across Canada.

With our members writing tens of thousands of articles, books and other works every year, CAUT is one of the country's largest creator groups – and we understand the importance of authors' rights. As a labour organization we have sought to protect these rights and rights to income and employment security more generally, through collective bargaining.

Our members are also teachers, researchers, and librarians, whose success depends on making information available to others. In these capacities, they have developed and implemented new ways to create and share knowledge – with each other, with students, and with the public at large.

The crisis in scholarly communication

In the post-secondary education sector, the defining copyright context over the last two decades has been a crisis in scholarly communication – the system through which research and other scholarly writings are created, evaluated for quality, disseminated to the scholarly community, and preserved for future use.

With respect to academic journals, this crisis has been defined by the concentration of publishing power in the hands of an increasingly small group of highly profitable private sector corporations. This has resulted in exorbitant price increases far outpacing the rate of inflation, and in the development of corporate policies requiring copyright transfer from authors to the publishers.^{1,2}

This crisis has gone beyond journals to include textbooks, where again price increases have exceeded inflation. Rising costs means many students no longer have affordable access to learning materials.^{3,4}

Response of our community — improving access to knowledge

In response to the crisis in scholarly communication, CAUT members have developed new ways to create and share knowledge. Universities and colleges continue to license material, however from a greater diversity of sources. Educational institutions have re-evaluated their licensing practices, replacing inefficient, duplicative arrangements with higher value propositions.⁵

The post-secondary education sector spent over one billion dollars on content in the last three years alone.⁶

Librarians and professors have also been at the forefront of the Open Access and Open Education Resource movements, in which the journal articles and text books they write and distribute are made freely available online. Support for Open Access is the official policy of the federal government⁷ and Open Education Resources textbooks have received substantial support from the governments of British Columbia, Alberta, and Ontario. The education sector has also been deeply involved in copyright reform, advocating before Parliament and in the courts for copyright law that serves all stakeholders – creators, owners, and the general public – equally.

In 2012, after years of litigation culminating at the Supreme Court, and after the most extensive round of open Parliamentary consultations in the history of Canadian copyright law, the public interest positions of the education sector on copyright were largely affirmed by the Court and by Parliament. In particular, the judicial and legislative recognition of educational fair dealing has provided a small but vital component of the education sector's response to the crisis in scholarly communication.

The publishers' reaction to changing times

As the education sector has struggled to reassert control over the work it creates, at the same time as significant changes in the marketplace have occurred, some publishers have responded with a campaign to limit user rights in the education sector, ignoring the real causes of change in scholarly publishing.

Publishers have alleged that a pattern of economic hardship for creators commenced in 2012 as a direct result of fair dealing. Evidence does not support this proposition. First, in other jurisdictions where there has been no increase in fair dealing rights, many authors are facing similar economic challenges – and are placing no blame on the education sector or copyright. For example, a study done in England looked at changing technology, a historic shift in the markets for cultural and entertainment goods, and rapidly evolving consumer preferences on models of support for literary fiction and noted a sharp drop also around the turn of the last decade.⁸

Second, publishers' own data undermines the claim of their financial difficulties, calling into question whether there is a problem for them, let alone one connected to fair dealing.⁹ Third, some components of the publishing industry remain enormously profitable, further undermining the narrative of fair dealing's dire impact.¹⁰ Fourth, private publishers will see some sales diminish as a result of governments moving ahead in support of Open Access and Open Education Resources, support that has increased since 2012.¹¹

Finally, random anecdotes about infringement have been turned into a moral panic about a supposed epidemic of copyright violations by educators. In actuality, evidence indicates that copyright is taken very seriously in the education sector, with compliance being the rule rather than the exception. For example where widespread infringement was alleged in the K-12 sector, the Copyright Review Board concluded that 98% of material was lawfully accessed.¹²

In short, where difficulties do exist in particular sub-sectors of publishing, they stem from structural changes in the industry and the rise of alternative ways of creating, licensing and sharing works, not from fair dealing. A restriction in fair dealing will not make any meaningful difference in the economic situation of individual Canadian writers.

Instead, the way forward is to strengthen the hand of independent writers in their negotiations with publishers,^{13,14} and boldly champion Canadian literature by generously supporting it.

Recommendations

CAUT's motivation with respect to copyright policy is to ensure a just legal framework that facilitates the education sector's response to the crisis in scholarly communication discussed above. The following steps will assist in this endeavor:

1. Maintain fair dealing

Fair dealing is the right to copy works without permission or payment in a limited set of carefully prescribed circumstances. The recognition of fair dealing for educational purposes by the Supreme Court and by Parliament has been a great benefit to Canada. While it accounts for only a small amount of copying, it does allow teachers, librarians, writers, and the wider public to quickly and efficiently access materials for their own use and for each other for purposes of education, research, and creativity more generally, without causing any demonstrable harm.

2. Maintain the present copyright term

The general term of copyright in Canada is life of the author plus 50 years, after which the work enters the public domain – the place where the common heritage of humanity is available for all to share. Governments around the world are under pressure to increase this limit – by giant corporations such as Disney who have mined the public domain for their own benefit, but now seek to deny that opportunity to new creators. As extending the term limit does nothing more than expand corporate profits at the expense of the rest of society, and would have no positive impact on compensation for individual creators, this pressure must be resisted.

3. Address digital locks

Many content owners attach digital locks to their works to prevent illegal copying. The *Copyright Act* currently prohibits circumvention of these locks for any reason, including the exercise of fundamental rights such as fair dealing, accessing works in the public domain, archival preservation, security research, and library lending. There is no rational justification for this overbroad prohibition, as it prevents activities for which content owners could not reasonably expect compensation, but have enormous social utility (such as archival preservation). To ensure Canadians can fully enjoy

the legitimate exercise of their statutory rights, the *Copyright Act* should be amended to allow the circumvention of digital locks in cases where the circumvention is carried out for non-infringing purposes.

4. Address Crown copyright

The *Copyright Act* establishes 50 year state ownership in works the federal government prepares or publishes. Interpretations of existing Crown copyright terms of use are inconsistent and confusing, inhibiting public access to government works and leading to the delay or cancellation of library projects meant to preserve and disseminate archival material. Given that access to government information, and the ability to distribute and encourage its re-use, is of fundamental importance to a democratic society – and that the public has already paid for works produced by the government – Crown copyright should be scaled back with a view to its eventual elimination from most government documents.

5. Indigenous knowledge

CAUT has heard firsthand from Indigenous communities the damage caused by the appropriation of their cultural heritage – and the *Copyright Act's* facilitation of this process. Indigenous elders and scholars are working to address this issue, as are dedicated experts within the public service of Canada. We encourage the Committee to support these efforts, and ensure that the *Copyright Act* recognizes Indigenous control over their traditional and living knowledge.

Conclusion

CAUT urges the Committee to affirm the *Copyright Act* as legislation for all Canadians, by continuing its support of the post-secondary education sector. Fair dealing, as a limited right to allow students, teachers, and researchers to access and build upon literary and artistic works, together with a combination of Open Access journals, Open Education Resources, and hundreds of millions of dollars spent annually to license content, provides the best possible learning and research environment.

The five-year Parliamentary Review of the *Act* is an opportunity to reaffirm the balance struck in 2012 and to make further improvements: to address concerns of Indigenous communities, to allow circumvention of

digital locks for non-infringing purposes and to limit the use of Crown copyright.

1. [Principles and Strategies for the Reform of Scholarly Communication](#), Association of College & Research Libraries (ACRL)
2. Larivière, Vincent, Stefanie Haustein, and Philippe Mongeon. [The Oligopoly of Academic Publishers in the Digital Era](#), PLOS, 10 June 2015.
3. 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.
4. 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).
5. For example, 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. [Annual Report 2016-17](#).
6. [Financial Information of Universities and Colleges Survey \(FIC\)](#), Statistics Canada, 13 July 2017.
7. Government of Canada. [Tri-Agency Open Access Policy on Publications](#), 21 December 2016.
8. Arts Council England. [Literature in the 21st Century: Understanding Models of Support for Literary Fiction](#). See graph "Fiction General Value" on page 11, 15 December 2017.
9. Geist, Michael. [Less than 1%: Canadian Publisher Data Points to Tiny Impact of Access Copyright Royalty Decline](#). 1 May 2018.
10. ["Academic publishers reap huge profits as libraries go broke"](#). CBC, 15 June 2018.
11. BC Gov News. [Approximately 86,000 students in B.C. have saved as much as \\$9 million since the open textbook project was launched](#). 5 June 2018.
12. Copyright Board of Canada. [Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21](#). 19 February 2015.
13. 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](#), C.C., Q.C. 15 February 2007.
14. The League of Canadian Poets supports the Writers' Union of Canada motion on creator copyright "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 ... BIRT the League of Canadian Poets supports this motion and will send a representative to the joint signatory committee investigating creator copyright". <http://creatorsac.blogspot.com/2011/06/league-of-canadian-poets-votes-on.html>. Monday, 13 June 2011.