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# **Creative economies in transition: Maintaining balance at a time of digital disruption**

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Universities Canada's submission  
to the Standing Committee on  
Canadian Heritage's Study on  
Remuneration Models for Artists  
and Creative Industries  
**December 2018**



## Executive summary

Universities Canada welcomes the opportunity to contribute to the Standing Committee on Canadian Heritage's study on remuneration models for artists and creative industries. Our member institutions play a central role in the development and support of Canada's cultural ecosystem, helping to mobilize people and ideas to strengthen and expand our creative economy. As creators, owners and users of copyrighted material, universities have witnessed first-hand the impacts of digital transformation and fair dealing on campuses across the country.

Methods for sourcing and accessing university course materials have fundamentally changed in response to technological advancements and the changing needs of today's students and researchers. And while Canadian universities are spending more than ever purchasing library content – more than one billion dollars in the past three years – digital acquisitions are steadily outpacing hard-copy material purchases by university libraries.

Digital course materials and learning platforms facilitate flexible, innovative and affordable learning, teaching and research – strengthening Canada's public education system and enhancing our global reputation for higher education, research and innovation.

The shift towards digital materials has also significantly impacted the copyright landscape at Canadian universities, changing remuneration models for works used on campus. Licensing royalties from blanket licences offered by copyright collectives, which historically may have been a greater source of income for creators, have become less reliable and significant in recent years.

While copyright collectives have suggested that fair dealing for education and a lack of copyright compliance by universities are to blame for the declining value of their blanket licences, there is widespread evidence that print materials – whether in original or photocopied form – are simply being used less frequently on university campuses.

Access to digital materials, which typically include reproduction rights purchased along with such access, has increased. However, the legal right to fair dealing remains vital to Canadian students' learning and to ensuring a wide variety of quality educational resources remain available and affordable.

The *Copyright Act* is not the most effective tool for supporting an industry struggling to adapt to marketplace changes, and limiting fair dealing for education is not the solution. The remuneration challenges faced by creators predate the introduction of fair dealing for education. Providing direct support for creators and creative industries to adapt to the digital shift is the best way to future-proof Canada's creative industries.



## Recommendation summary

Universities support a vibrant Canadian culture and encourage the federal government to examine policy and program levers that would *directly mitigate the impacts of digital transformation on the creative economy while ensuring quality higher education*.

- 1. Maintain fair dealing for education and other educational exceptions in the Copyright Act.** Fair dealing is a legal right that facilitates educational opportunities. Even with the implementation of fair dealing policies, universities are spending more on content than ever before.
- 2. Maintain the optional status of blanket licences for educational institutions.** An open market allows universities to choose how they acquire learning materials, including through exercising their right to fair dealing. This not only ensures Canadian students and researchers have the best information available but also ensures responsible spending of public funds.
- 3. Do not introduce draconian penalties for copyright infringement, including the expansion of statutory damages remedies that could be claimed against educational institutions.** Coercive penalties for copyright infringement will force the educational sector into blanket licensing agreements that no longer meet their needs at the expense of Canadian students and taxpayers.
- 4. Help creators and creative industries adapt to the digital shift through programs that provide direct financial support to current and emerging creators, and to organizations that help creators get their work to the marketplace.**

Only direct investment in the creative economy will effectively support creators as they transition to a digital creative marketplace.

## A balanced approach to copyright

Facilitating access to the latest and highest quality academic knowledge strengthens Canada's cultural ecosystem and the vital contributions Canadian students and researchers make to it. In an age of global disruption marked by fundamental changes to the way information is consumed and disseminated, fair dealing for education remains an important means to support the flow of ideas.

As creators, owners and users of copyright, universities bring a balanced perspective to the *Copyright Act* review, including on aspects of the *Act* that impact emerging and established artists and creative industries.

### Universities are cultural hubs

Universities are hubs for curiosity, creativity and innovation. They are building Canada's creative capacity through campus-based theaters, galleries and workshops serving entire communities; developing our next generation of cultural leaders; supporting ground-breaking research projects; and running community outreach programs. Campuses employ approximately 75,000 faculty and university teachers who publish academic literature,<sup>i</sup> making universities home to the largest single group of Canadian authors.

### Fair dealing is a right

Changes to the *Copyright Act* made in 2012 followed nearly a decade of Supreme Court decisions that emphasized the importance of fair dealing. The current legislative approach, which reflects the Supreme Court's recognition of fair dealing as a user's right, has created an equilibrium between the rights of copyright owners and those of users. This equilibrium facilitates educational opportunities benefiting students and helping ensure that university studies remain accessible and affordable.

These decisions (sidebar at right) and others from July 2012 transformed Canadian copyright. They are the genesis of universities' understanding of their role providing content to students<sup>ii</sup> and, in part, the university sector's interpretation of fair dealing.<sup>iii</sup>

## Recommendation 1.

**Maintain the legal right to fair dealing for education and other educational exceptions in the *Copyright Act*.** Fair dealing remains an important means to meet the educational needs of students across the country as a complement to material accessed through diverse licensing mechanisms.



## The legal precedent for fair dealing for education

In *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 the Supreme Court ruled on the need for the *Act* to **balance dissemination of works and rewarding creators**:

[Paras 31-32] "The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.[...] Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement [including fair dealing]."

In the *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13 decision, the Supreme Court was clear that **fair dealing is a user's right** and...

[Para. 48] "to maintain the proper balance between the rights of copyright owners and users' interests, [fair dealing] must not be interpreted restrictively. [...Quoting David Vaver:] 'Both owner rights and user rights should therefore be given the fair and balanced reading [...]"

The *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 decision clarified that educators providing photocopies to students is fair dealing because teachers are [Para. 23] "facilitat[ing] the students' **research and private study**"—two fair dealing purposes that have always been part of Canada's copyright laws.

## Digital transformation on campus

As the demand for digital resources has increased, the sector has adjusted its use of fair dealing. Almost gone are the days of students waiting for a library book placed on reserve or in line for printed course packs comprised of photocopies of articles and book chapters. Born in a digital age, Millennials and Generation Z expect to be able to access course content 24/7, across multiple platforms. On today's campuses, textbooks can be rented rather than owned for short-term access to course materials or students can pay a fee to access learning materials online for a single semester.

Canada is not alone in its shift toward digital learning material. Libraries at institutions around the world are seeking out the best ways to serve the changing scholarly habits of their communities while using their financial resources and physical spaces effectively.<sup>iv</sup>

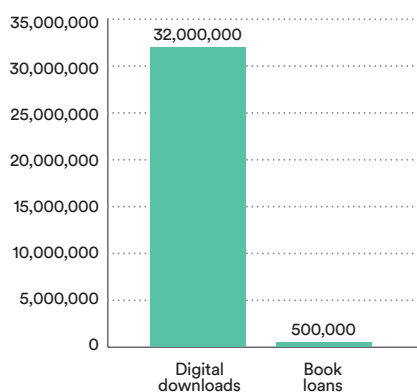
To meet evolving student expectations, today's campuses have innovative content access options including:

- **Content platforms, e-reserves and learning management systems** – Instructors can use these online platforms to link students with course material that has already been licensed by the university library, comes from an open access source or is available through the fair dealing exception.
- **Bundling content aggregators** – Universities can take advantage of licences through content aggregators that provide direct access to bundles of academic journals.
- **Content subscription services** – Services from certain educational publishers offer both students and institutions the option to subscribe to a library of digital content. This offers users a lower price and wider range of content, with access for only as long as needed.
- **Open access content** – Resources like the Directory of Open Access Journals provide access to high-quality, peer-reviewed journals. These materials are often published under Creative Commons licences that allow users the right to share with attribution for non-commercial purposes. Open access to the latest data is already the norm for advancing cutting-edge research in many disciplines, including physics, medicine and computer science.
- **Provincially funded open educational resources (OERs)** – Some provinces fund OERs like textbooks, documents and other materials that are openly available for public use. OERs generate custom Canadian content and benefit remote learners. In B.C., more than 96,000 students and 40 institutions are using OERs, which are estimated to have saved students in the province roughly \$9 million since 2012.<sup>vi</sup>



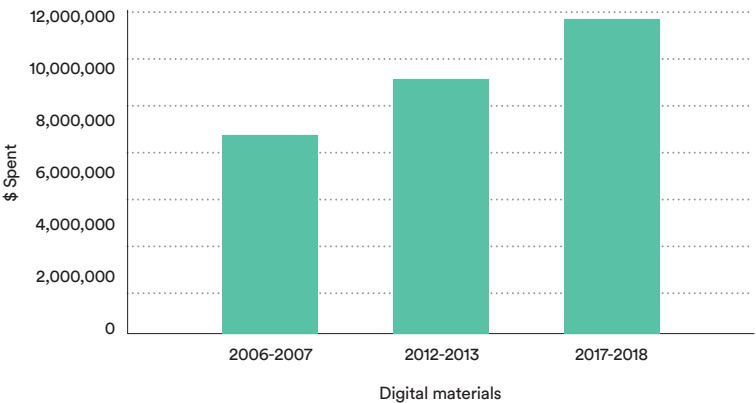
**At the Concordia University Library, digital content was downloaded 32 million times, while book loans fell to 500,000 in 2016-2017.<sup>v</sup>**

Library materials circulation at Concordia University 2016-2017



As Canada’s universities adapt to shifting student demands, they are spending more than ever purchasing content: more than one billion dollars in library content in the past three years combined. Still, universities are acquiring different content than in the past, increasingly shifting from purchasing print to digital content. A growing number of institutions are adopting “digital-first” policies – only buying print when digital formats are unavailable. Some universities report as much as 95 per cent of their annual acquisitions are now digital.<sup>vii</sup>

Over 11 years, spending on digital materials at the University of Calgary increased by 58 per cent<sup>viii</sup> – University of Calgary Library Acquisitions

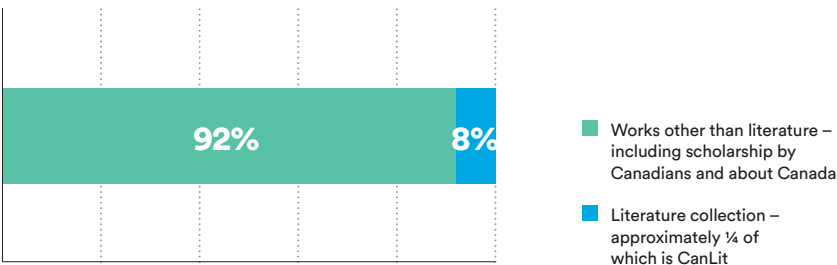


Digital access to worldwide scholarship

The innovative content access methods now commonplace on Canadian campuses are important for students and researchers needing to access to the latest developments from around the world. Digital licensing of scholarship helps Canadian universities and research talent remain competitive in the global marketplace.

Canadian literature – including novels, short stories and poetry – makes up only a small fraction of university collections, with the majority of university library collections consisting of scholarly works from international publishing groups. Therefore, limiting fair dealing for education would not be an effective tool to support remuneration for Canadian literary creators.

The University of British Columbia Library’s collection is overwhelmingly scholarly.<sup>ix</sup>





### A changing copyright marketplace

The shift to digital content has tremendous implications for reproduction rights and copyright management. When the blanket licence model was introduced in the 1990s as a tool for managing copyright in the education sector, photocopiers were still transforming reproduction technology. And in 2012, when Parliament passed the *Copyright Modernization Act*, many universities still had blanket licences with Access Copyright.

However, as new digital avenues for purchasing and accessing content have emerged, the demand for blanket licences has declined, with many universities opting out of or allowing Access Copyright licences to expire.

Today, digital content purchased by university libraries is frequently bundled with built-in multi-user access and reproduction rights. Using new digital tools, copyright managers can easily track the permissions granted through these site licences – which are often perpetual – providing copyright holders with a higher fee upfront, rather than receiving smaller royalty fees over time.<sup>x</sup>

For example, the model licence used by the Canadian Research Knowledge Network – which negotiates \$120 million worth of licences on behalf of universities annually – includes reproduction permissions for posting on learning management systems, e-reserves, classroom handouts, course packs and more.<sup>xi xii</sup> Institutions also purchase targeted transactional licences directly from publishers, copyright holders or the American Copyright Clearance Centre, which sends royalties to Access Copyright, as appropriate.

In contrast, Access Copyright’s blanket licences explicitly exclude many digital works and cover more limited reproduction permissions. Until very recently, the contents of the collective’s repertoire was not disclosed to licence holders, and it refused to sell transactional licences to any university that did not first purchase an expensive blanket licence.<sup>xiii</sup>

As stewards of public funding, universities have become reluctant to pay for blanket reprographic licences offered by collectives like Access Copyright, given that reproduction rights are increasingly covered under other licence models:

*“Due to changes in the marketplace, institutions were caught in an untenable and unreasonable position of paying for content three times:*

- *First, when buying the physical book, journal or periodical;*
- *Then paying the required per-FTE rate to copy a part of it, if desired; and*
- *Finally, to meet student and faculty demand, paying a third time for a digital subscription to the same book, journal or periodical.”<sup>xiv</sup>*



### Copyright management and compliance in the digital era

New options available in copyright management do not change the fact that universities value copyrighted material and are committed to copyright compliance. Adapting to the changing needs of their campus communities, institutions have invested in numerous measures to manage copyright efficiently and cost-effectively, streamlining compliance processes for faculty and facilitating access to copyrighted materials for students. These include:

- alternative licences and permissions management;
- creating capacity to purchase “pay-per-use” transactional-licences when necessary;
- students, staff and faculty education on how to apply fair dealing and comply with copyright law;
- enhanced copyright guidelines and policies;
- increased staffing; and
- copyright offices and consultation services.

Among the numerous measures universities use to facilitate compliance are syllabus services. Faculty submit syllabi for review by copyright staff, who then verify whether the required course materials are already available in the library, purchase licences or new content as needed, and help assess whether content can be made available through fair dealing or other exceptions in the *Copyright Act*.

Many institutions have also introduced e-reserve systems enabling copyright staff to review the material assigned by faculty as course readings to ensure it complies with copyright rules and upload it to a learning management system for convenient online access by students.

While copyright infringement is rare and usually unintentional in the academic context, it is standard for employment contracts to require faculty to abide by Canadian law. Some faculty collective agreements include language to encourage compliance, and some institutional copyright policies outline sanctions for wanton infringement.<sup>xv</sup>

Combined, these digital licensing options and the right to fair dealing give universities a robust set of tools to manage copyright compliance on campus.

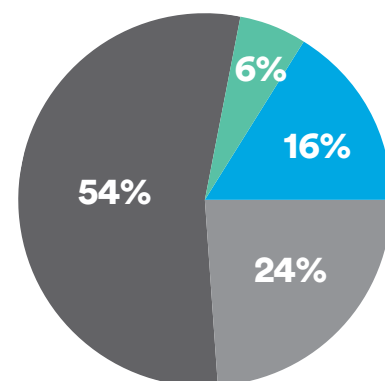
### Creator remuneration and fair dealing

While digital transformation is changing knowledge generation and consumption on Canadian campuses, fair dealing remains important to universities and students, ensuring access to a large variety of quality resources, as illustrated in the sidebar.

Copyright collectives like Access Copyright are concerned that the use of fair dealing by universities is to blame for the declining value of its blanket licences. However, widespread evidence suggests that print materials – whether in original or photocopied form – are simply being used less frequently on university campuses.

For example, nearly 70 per cent of The University of British Columbia library’s print collection has not been taken off a bookshelf – let alone signed out – since 2004.<sup>xvii</sup> The same library reports that digital acquisitions have grown from 21 per cent of overall purchases in 2002 to 82 per cent in 2017.<sup>xviii</sup> Over only 15 years, the acquisition patterns of one of Canada’s largest university libraries were completely reversed.

The University of Guelph’s e-reserve system sources its material largely from licensed materials and open access content, but fair dealing still provides 16 per cent of materials.<sup>xvi</sup>



transactional licences  
under fair dealing  
open and free Internet content  
direct links from licensed materials



Moreover, blanket licensing arrangements – including those designed for digital materials – are an indirect and inefficient tool for creator compensation. The system is virtually always predicated on the use of third-party organizations like rights management collectives and publishers to first collect user fees from educational institutions, then distribute shares back to creators in the form of royalties. These intermediary bodies naturally retain a portion of the funds for themselves, as payment for their services.

Through transactional licensing with publishers and vendors, and comprehensive copyright compliance procedures, universities have found more efficient and cost-effective ways to manage public funds and equip students with the resources they need to thrive in the workforce – including as emerging creative professionals.

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## Recommendation 2.

**Universities Canada strongly recommends that blanket licences remain optional.** The imposition of a mandatory approach to copyright licensing would force institutions to make multiple payments for the same materials, effectively mandating the misuse of taxpayer dollars and compromising the quality of learning materials available to Canadian students. Mandatory blanket licences also limit the legal right to fair dealing and would essentially deny educational institutions the ability to choose whether copyrighted materials are used under fair dealing or other exceptions in the *Copyright Act* or through other means, such as transactional licences.

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### Fair dealing and statutory damages

Statutory damages would have a chilling effect on universities' ability to exercise their options for complying with copyright law – including restricting the right to fair dealing by creating significant mandatory minimum penalties for even the most nominal cases of copyright infringement.

The magnitude of potential statutory damages awards – easily in the multi-million-dollar range if applied to Access Copyright's licensing scheme – would effectively coerce risk-adverse, publicly-funded universities into purchasing blanket licences, despite considerable overlap between these licences and those already being purchased through digital acquisitions. Further, given the potential for lucrative penalties, statutory damages could incentivize litigation: costs that would ultimately be borne by taxpayers or by students. It could also inadvertently accelerate the shift towards 100 per cent digital campuses, as universities seek to economize institutional resources by eliminating duplicate payments for the same content.

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## Recommendation 3.

**Universities Canada recommends against expanding the availability of statutory damages remedies that could be claimed against educational institutions.**





### Adapting to the new cultural marketplace

There is no doubt that digital transformation is changing consumer patterns and remuneration models for Canada's creators and creative industries. Supporting adaption by the creative industries to the digital shift is an important policy objective.

The good news is that the various innovations in the educational sector discussed above present opportunities for creators of educational content to thrive in the new creative economy. Publishers and creators' groups are innovating and adapting. But to do so quickly and efficiently, creator groups need direct support.

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### Recommendation 4.

**To help creators and creative industries adapt to the digital shift, Universities Canada recommends the Committee consider investments programs that provide direct financial support to current and emerging creators, and to organizations that help creators get their work to the marketplace.** Bolstering support for established, emerging and Indigenous artists as they adapt to technological change will ensure a vibrant and more inclusive cultural marketplace for the future.

Direct support for industry organizations, non-profit and Indigenous groups that bring creators' work to the marketplace will also play an important role in the research and development of sustainable and viable compensation models in the new digital economy. Technological disruption has exposed inefficiencies in the current regime but has also presented new opportunities for innovation.

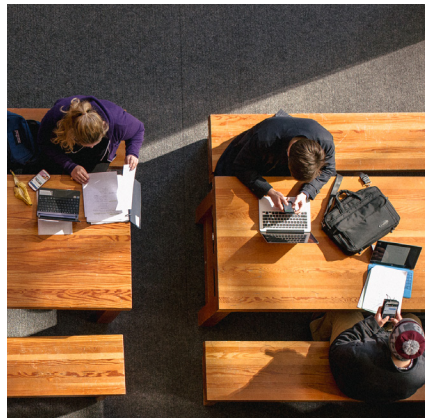
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### Protecting and reinvigorating Canada's cultural ecosystem

A vibrant and innovative cultural ecosystem in Canada – encompassing education, research, innovation and creation – requires the exchange and movement of the newest ideas, publications and knowledge. Canada's future prosperity and the success of our creative industries depends on it.

The legislative changes of 2012 and seminal Supreme Court decisions have struck a balance between the rights of copyright users and those of owners that must be maintained. Efforts to limit the definition of fair dealing, to impose mandatory collective licensing or to expand the availability of statutory damages remedies would have an immediate and negative impact on the education experience of the more than one million students at Canada's universities.

There is a valuable and legitimate role for the federal government to play in mitigating the impacts of disruption on the creative economy. Committee members are encouraged to consider policies and programs that would directly assist individual creators as well as organizations that help creators get their work to the marketplace during this time of adaptation.



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<sup>i</sup> Statistics Canada, 2016 *Census*

<sup>ii</sup> The Alberta decision clarified that the perspective of the end user (the student) not the teacher (or school) must always be considered when determining whether a use is fair dealing. Alberta also clarified that, contrary to accusations heard during the copyright review of “mass industrial school copying,” copying numbers must not be considered in the aggregate (from the teacher or school’s perspective) but from that of the individual student.

<sup>iii</sup> In *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36, the Supreme Court held that 30-second free previews streamed by commercial online music services from songs that averaged four minutes in length (or 12.5 per cent of the work) were “modest” amounts that constituted fair dealing.

<sup>iv</sup> Elsevier, *Moving from print to electronic in academic libraries - a timely consideration*, June 20, 2017. <https://www.elsevier.com/librarians/article-news/moving-from-print-to-electronic-in-academic-libraries>.

<sup>v</sup> Concordia University, McGill University, Université de Montréal and Université de Sherbrooke, *Brief Presented to the*

*Standing Committee on Industry, Science and Technology as part of the Review of the Copyright Act*, June 5, 2018, page 5. <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9990271/br-external/UniversiteConcordia9849693-e.pdf>.

<sup>vi</sup> B.C. Campus, *Open Textbook Stats*, 2012-2018. <https://open.bccampus.ca/open-textbook-stats/>.

<sup>vii</sup> Concordia, McGill, Université de Montréal and Université de Sherbrooke, *Brief Presented to the Standing Committee on Industry, Science and Technology*, page 5.

<sup>viii</sup> Data courtesy of University of Calgary copyright office, 2018.

<sup>ix</sup> UBC Library, *Supplementary Data: Responses to INDU Committee Questions and Requests for Data*, 2018.

<sup>x</sup> Michael Geist, *Misleading on Fair Dealing Part 5*, November 23, 2018. <http://www.michaelgeist.ca/2018/11/misleading-on-fair-dealing-part-5-the-multi-million-dollar-educational-investment-in-e-book-licensing/>.

<sup>xi</sup> Canadian Research Knowledge Network, *Annual Report 2017-2018*, page 4. <https://www.crkn-rcdr.ca/sites/crkn/files/2018-10/CRKN%20Annual%20Report%202017-2018%20EN%20Final.pdf>.

<sup>xii</sup> Note in particular clauses 3.3, 3.4, 3.5,

3.7 and 3.8 in CRKN’s model licence.

Note also the language in clause 2.1 which states that “[n]othing in this License Agreement shall prevent Authorized Users and Members from carrying out acts [...] that are permitted under the Copyright Act of Canada” meaning that these licences do not replace or override fair dealing. Other groups of Canadian universities negotiate additional licences for electronic content and include similar language, see for example the Ontario Council of University Libraries for their model licences.

<sup>xiii</sup> This is a well-documented challenge for the university sector. Canada’s universities petitioned the Copyright Board of Canada in 2011 to require Access Copyright to sell transactional licences without requiring first a blanket licence but lost. As some predicted, this business practice forced universities to find alternative vendors other than Access Copyright for transactional licences, to the detriment of Access Copyright’s revenue.

<sup>xiv</sup> UBC Library, *Supplementary Data*, page 3.

<sup>xv</sup> For example, Queen’s University’s faculty collective agreement has a clause which reads: “5.2 The University shall

indemnify any Member for violations of copyright arising from the fulfillment of his/her academic responsibilities so long as the Member has exercised due diligence to act in accordance with the University’s copyright policy. Upon request, the University shall provide professional advice to any Member about access to, and use of, copyrighted material for academic purposes.” The University of Calgary’s Acceptable Use of Materials Protected by Copyright policy has specific language around sanctions for infringement, “4.5 Employees and postdoctoral fellows who use material protected by copyright in violation of this policy may be subject to formal disciplinary action up to and including dismissal.”

<sup>xvi</sup> University of Guelph, *Submission to the Standing Committee on Industry, Science and Technology on the 2018 Statutory Review of the Copyright Act*, June 27, 2018, page 4. <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10002772/br-external/UniversityOfGuelph-e.pdf>.

<sup>xvii</sup> UBC Library, *Supplementary Data*, page 2.

<sup>xviii</sup> *Ibid.*, page 4.