



Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

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BY EMAIL: justin.trudeau@parl.gc.ca

July 6, 2018

The Right Honourable Justin Trudeau
Prime Minister of Canada
Office of the Prime Minister
80 Wellington Street
Ottawa, Ontario
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Dear Prime Minister,

The Canadian Association of University Teachers (CAUT) represents 70,000 professors, librarians, and professional staff at 122 colleges and universities across Canada. We are writing to express our opposition to proposals to expand the statutory damage regime in Canadian copyright law. An expansion of the regime to collectives would undermine the exceptions and user rights that provide balance in the *Copyright Act*, do little to enhance enforcement, and instead compel educational institutions to purchase otherwise unnecessary licenses.

One of the important reforms in the *2012 Copyright Modernization Act* was the elimination of excessive mandatory penalties (statutory damages) for non-commercial copyright infringement. With over a million students, teachers, researchers, and librarians exchanging content every day, this reform has allowed the education sector to utilize the various exceptions and user rights in the *Act* without fear of financial devastation for minor and inadvertent acts of infringement.

Access to these exceptions and rights has been particularly important given the ongoing crisis in scholarly communication facing the post-secondary education sector. 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, leading to price increases far higher than the rate of inflation for both academic journals and textbooks. This has resulted in cost-related denial of access to learning material to students, and undermined research and innovation more generally.

To address the scholarly communication crisis, the education community has responded with:

- the Open Access and Open Education Resource movements, in which the journal articles and text books that professors and librarians write and distribute are made freely available online;
- utilization of various education exceptions and user rights in the *Act* to maintain the flow of knowledge, and;
- the rejection of the inefficient, duplicative Access Copyright license and its replacement with higher value propositions.

Direct licensing arrangements with publishers such as the one negotiated by the Canadian Research Knowledge Network have superseded the Access Copyright license. With statutory damages for non-commercial infringement now assessed in the thousand dollar range (rather than in the hundreds of thousands) Access Copyright's fees also have no value as a protection payment against inadvertent infringement claims.

Re-introducing extraordinary statutory damages through the Copyright Board will essentially coerce educational institutions back into the Access Copyright license, undermining exceptions and user rights in the process.

As noted in a review of statutory damage regimes in the United States, the impact can be an imbalance of power towards plaintiffs, and, for defendants, a "chilling effect on their legal and, in many cases, socially beneficial, activity".¹

This imbalance is particularly evident in some classes of copyright cases. Instead of serving as a means to expand access to the courts for plaintiffs with modest damages, the *Copyright Act's* statutory damages provisions can give plaintiffs enormous powers of coercion and even chill expression. Ironically, plaintiffs in some circumstances are not the individual litigants—such as graphic designers, recording artists, or small businesses—Congress intended to help. Instead, some are large corporations using the threat of statutory damages for business leverage or copyright trolls who file abusive lawsuits to coerce settlements.²

Compliance with any legislation is a challenge, and one that the post-secondary education sector has taken great measures to meet. Since 2012 changes, the post-secondary education sector has significantly increased its capacity to manage copyright – with guidelines, more staffing, and outreach efforts to improve compliance.

Given that an Access Copyright license has no free-standing value, and Access Copyright itself is not a successful remuneration model for the majority of Canadian authors, the proposal to reintroduce a statutory damage regime for collectives into Canadian copyright law through the Copyright Board must be rejected.

We would welcome an opportunity to discuss our recommendations in regards to Copyright Board reform and the review of the *Copyright Act*.

Yours sincerely,



David Robinson
Executive Director

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1. Stewart, Geoffrey. (2011). *Emerging Issues in Statutory Damages*. Jones Day: Washington, D.C.

2. Ibid.