



# Brief for Standing Committee on Canadian Heritage (CHPC)

## Introduction

The Canadian Federation of Library Associations (CFLA-FCAB) and the Canadian Association of Research Libraries (CARL) welcome the opportunity to contribute to the Standing Committee on Canadian Heritage (CHPC) study on remuneration models for artists and creative industries.

Our brief discusses the context and perspective of Canada's research and academic libraries and large public libraries.

## Contextual Information

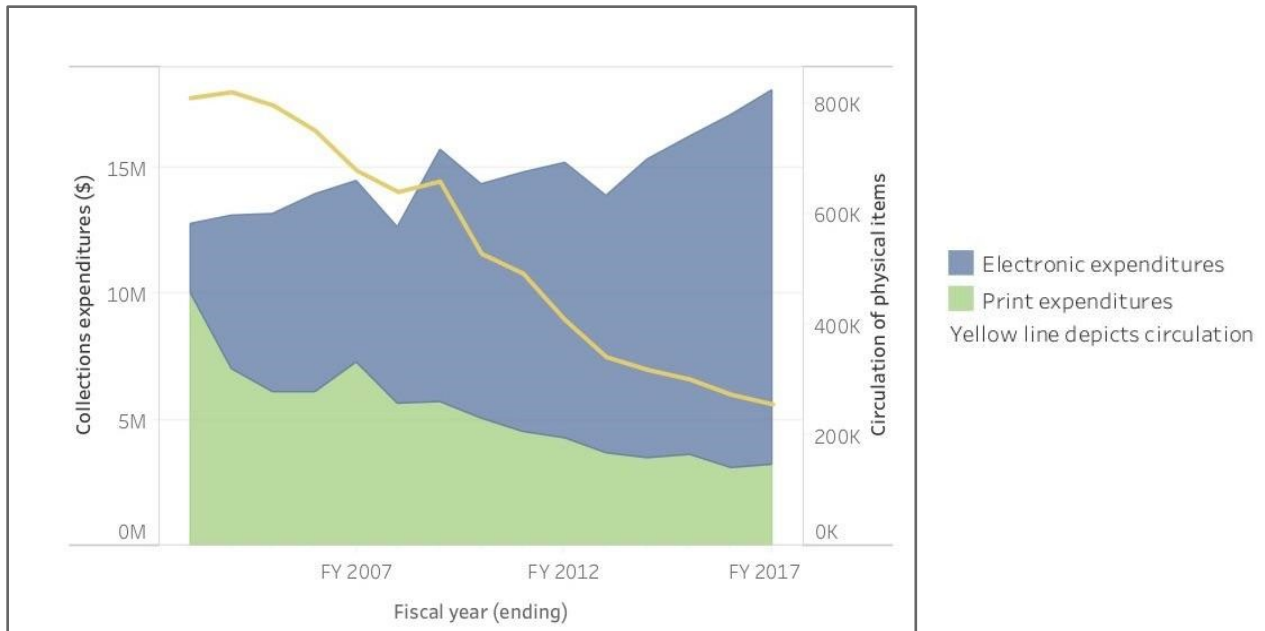
Canadian library organizations such as CFLA-FCAB and CARL are advocates for and champions of creators of copyrighted works, supporting fair and reasonable compensation for authors. Libraries and library users benefit from a strong Canadian arts and cultural production sector. Canadian libraries support creators in a myriad of ways, as outlined below, and also highly value broad and equitable access to information for all Canadians.

As part of the *Copyright Act* Review process, this past July, CARL provided a document titled [A Guide to Canadian Research Libraries' Spending on Content](#) to the Standing Committee on Industry, Science and Technology (INDU). This document was written to help the INDU committee understand how universities purchase and license content and how Canadian rights holders are remunerated through this system. CFLA-FCAB and CARL would like to highlight three main points from this document, with additional information from CFLA-FCAB, that relates to the support and remuneration for creators. These three points illustrate the library involvement in the digital environment through our own experience with shifting business models and new opportunities for information dissemination.

### The Shift from Print to Electronic Collections

**Our first point** is that there has been a significant shift from print to primarily electronic collections in research libraries. For example (as illustrated in the figure below), the University of British Columbia (UBC) has experienced a reduction in print expenditures and a dramatic drop in physical item circulation since 2008. During the

same time period, expenditures on electronic materials have increased and now make up the vast majority of purchases. The types of electronic content purchased are diverse; academic libraries are now spending funds on content other than books and journals, including, for example, datasets, software subscriptions, and streamed audiovisual content. This is a response to the changing needs of Canadian communities operating in a digital educational environment.



Graph Title: Trends in electronic and print collection expenditures at UBC from 2007-2017

This trend is also reflected in the electronic reserves services (eReserves) offered through libraries. When opting to use eReserves, an instructor submits a list of materials to be included as course readings to the library and library staff verify the copyright status of each item, including, if the content is available electronically through the library, is open access, or can be made available using the fair dealing exception. If copyright permission is required, library staff may secure a one-time transactional license for use in a course. Alternatively, if the content is available to be purchased or subscribed to, the material will often be added to the library collection, which is more efficient as it allows the entire community to make use of it on an ongoing basis. The instructor’s readings are then made available to the students in the class via the learning management system.

Purchased electronic content makes up the majority of the items made available through eReserves services at universities across the country.<sup>1</sup> These items include ebooks, journals, databases, and streaming media. Educational uses of this content are negotiated at the time of purchase. Permitted uses can include: posting in learning management systems, incorporating into print course packs, and library uses such as interlibrary loan and eReserves. As such, universities have already paid to use this content for educational purposes, and do not owe any additional compensation. In the past, many universities paid twice for uses, once at the point of purchase and again through a blanket license from a copyright collective. Subscriptions to electronic content, which include student and instructor use of the material in their education and research, have resulted in a marked reduction in the usefulness of blanket licenses.

Canada's urban public libraries are also experiencing this shift and now spend 20-30% of their materials budgets on digital content. This content includes ebooks and downloadable audiobooks; digital newspapers and magazines; and streaming film, music, and learning resources. Public libraries generally acquire this content through licenses on an annual basis. In the digital environment, public libraries rarely have the opportunity to purchase on a permanent basis and ensure future access to Canadian content. Public libraries pay for digital content by use or by the size of the service population of the public library. This payment is made through intermediaries, and the share that authors receive from library use is not publicly available as it is determined by contracts between authors and publishers.

The push to produce books in digital formats (both ebooks and audiobooks) is largely attributed to market demand as well as the ability to produce works in accessible formats.<sup>2</sup> While this increased availability is a positive step forward for accessibility, Canadian audiobook titles in libraries are unfortunately very limited due to the fact that the majority of Canadian publishers distribute their audiobooks solely through Audible, a service that is unavailable to libraries.<sup>3</sup> In a 2017 interview with the Toronto Star, Audible CEO Don Katz stated that audiobooks in their inventory, including new Canadian productions, would only be available to

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<sup>1</sup> For example, in their opening remarks to the INDU committee as part of the Statutory Review of the Copyright Act, the University of Guelph stated that in 2017-2018, 54% of the course readings accessed through their Learning Management System were direct links to library licensed materials, 24% were open and free Internet content, 6% were made available using transactional licences, and the remaining 16% were made available using fair dealing." (<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence#Int-10122492>).

<sup>2</sup> BookNet Canada, The State of Digital Publishing in Canada 2017. Page 7. [https://issuu.com/booknetcanada/docs/bnc-research\\_state-of-digital-2017/](https://issuu.com/booknetcanada/docs/bnc-research_state-of-digital-2017/)

<sup>3</sup> 70 percent of publishers who participate in the BookNet Canada annual survey reported using Audible as their audiobook retailer in 2017. For more information, see page 19 of The State of Digital Publishing in Canada 2017: [https://issuu.com/booknetcanada/docs/bnc-research\\_state-of-digital-2017/](https://issuu.com/booknetcanada/docs/bnc-research_state-of-digital-2017/)

subscribers and would not be sold to libraries.<sup>4</sup> This trend in the publishing industry has the potential for grave impact on Canadian authors, because libraries play a significant role in both book and author discovery and sales. This role was demonstrated in a recent study titled the *Community Reading Event Impact Report*.<sup>5</sup> The study reported on the effects of a two-week ebook promotion campaign at local libraries and assessed the popularity of the book for the following weeks. Retail sales reported an increase of 818% in ebook sales for this title and 212% in print sales. Many Canadian authors may not be aware of this trend and the impact that it can have on sales.

### **Libraries are Purchasing Canadian Works**

**Our second point** is that Canadian libraries are purchasing Canadian works. While it can be difficult to quantify exactly how much Canadian scholarly content is purchased by libraries, as this is often embedded in international journals, or journal packages, Canadian research libraries purchase Canadian content whenever available in packages that are suited to the academic community.

In recent years, Canadian academic libraries have supported Canadian content through targeted Canadian licenses through the Canadian Research Knowledge Network (CRKN) including:

- Érudit Scholarly Journals & Cultural Magazines
- Historical Newspapers: The Globe & Mail Archives (via ProQuest)
- Early Canadiana Online; Canadiana Online; and Canadiana Heritage Project (via the former Canadiana.org)
- Canadian Science Publishing Journals
- Association of Canadian University Publishers (ACUP) Ebooks

In his [May 24, 2018 blog post](#), Professor Michael Geist profiled a notable Canadian source for eBooks, the Canadian Electronic Library's DesLibris database, to which a number of university libraries subscribe. Sixty-seven CRKN member libraries purchased a portion of the Canadian Publishers Collection (a subset of DesLibris offerings) back in 2008, and many continue an ongoing subscription to newer content, or purchase individual titles as needed.

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<sup>4</sup> Why public libraries can't buy some of Canada's top audiobooks. Toronto Star, July 6, 2018. <https://www.thestar.com/entertainment/books/2018/07/06/why-the-toronto-public-library-cant-buy-some-of-canadas-top-audiobooks.html>

<sup>5</sup> Panorama Project. November 2018. <https://static1.squarespace.com/static/5ae8ec5f70e8024a05804e7a/t/5c00229e6d2a73e6ae5478a5/1543512743044/Community+Reading+Event+Impact+Report+v1.pdf>

It is important to note that Canadian literary works make up a small portion of the works purchased by academic institutions and used within university-level courses.<sup>6</sup>

Large urban public libraries also strongly support Canadian content. For example, more than 80% of the material published in Canada is purchased by Vancouver Public Library.

### **Libraries Support Scholarly Publishing**

**Our third point** is that universities and their libraries play a crucial role in supporting Canadian scholarly publishing. As mentioned by Universities Canada in their submission to the INDU Committee’s statutory review of Canada’s *Copyright Act*, “Approximately 75,000 faculty and university teachers work on our campuses and regularly write scholarship, making our campuses home to the largest single group of Canadian authors.”<sup>7</sup> In addition, several institutions support university presses either financially, in kind, or both.

Research libraries devote considerable resources to programs and positions that strengthen researchers’ ability to write and publish their research findings. Numerous libraries have built and support institutional repositories, which are online spaces to gather, make publicly available, and preserve their institutions’ research output. Many research libraries maintain online journal platforms that publish or host and publish journals based at their institutions.<sup>8</sup> Canadian universities and colleges, via their libraries and centres for teaching and learning, are also increasingly supporting the creation, adaptation and adoption of open textbooks and other open educational resources. Finally, Canadian libraries offer considerable financial support to scholarly communication infrastructure providers, such as the [Public Knowledge Project](#) (PKP), a made-in-Canada open source solution for hosting scholarly online content, and [Érudit](#), a consortium of three Canadian universities that provides a high-quality scholarly journal publishing platform and associated services. Érudit is the largest disseminator of French-language resources in North America.

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<sup>6</sup> Nick Mount, a professor of Canadian literature at the University of Toronto, outlines his own practice in assigning course readings in a brief to the INDU committee: <https://www.ourcommons.ca/Content/Committee/421/CHPC/Brief/BR10254166/br-external/MountNick-e.pdf>

<sup>7</sup> Universities Canada’s submission to the Standing Committee on Industry, Science and Technology’s statutory review of Canada’s Copyright Act. June 2018. <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10002433/br-external/UniversitiesCanada-e.pdf>

<sup>8</sup> An overview of the publishing programs supported by many Canadian and international research libraries is available here: <https://librarypublishing.org/directory-year/directory-2019/>

Canada's public libraries support authors as they conduct research, offer quiet space to write, and provide technology for those who need it. They offer programs that support aspiring authors to learn about writing and publishing. Public libraries promote new authors and local content, encourage literacy for all ages, and celebrate Canada's heritage.

It is in the context of this digital environment, with its shifting business models and new opportunities for dissemination, that CFLA-FCAB and CARL provide the following recommendations to the CHPC.

## Recommendations

### Allow Creators to Benefit from Rights Reversion

At his September 18, 2018 appearance before CHPC, Bryan Adams made a compelling case for copyright reversion. His first point was that:

*25 years is plenty of time for copyright to be exploited by an assignee. The second point was that an author or composer can see a further potential financial benefit of their work in their lifetime, and reinvest in new creation. It won't happen by having reversion. It's an incentive. This is the single and probably the most efficient subsidy to Canadian creators at no additional costs to the taxpayers at all.*<sup>9</sup>

Copyrighted works have a very limited period of commercial viability. In a report released in 2016 titled *Intellectual Property Arrangements*, the Australian Productivity Commission (APC) provides statistics that demonstrate that the "vast majority of works do not make commercial returns from copyright beyond their first couple of years on the market."<sup>10</sup> Citing the Australian Bureau of Statistics, the APC states that "literary works provide returns for between 1.4 and 5 years on average. Three quarters of original titles are retired after one year and by 2 years, 90 percent of originals are out-of-print."<sup>11</sup> Following this, it makes sense that authors should gain control over their works within their lifetime, so they can re-use or re-market that work.

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<sup>9</sup> Bryan Adams. Appearance before the Standing Committee on Canadian Heritage. 42nd Parliament, 1st Session, Meeting 118, Sept. 18, 2018.

<https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-118/evidence>

<sup>10</sup> Australian Government, Productivity Commission. *Intellectual Property Arrangements*, Productivity Commission Inquiry Report, 78. September 23, 2016, page 129.

<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

<sup>11</sup> *Ibid.* page 130.

Both the CFLA-FCAB and the CARL briefs to the INDU Committee recommended that copyright exceptions be protected from contract override.<sup>12</sup> In a similar vein, it should be made clear that any new rights reversion clause cannot be waived or overridden by contract.

Canadian libraries recognize the complexity of negotiating contracts with publishers. As stated above, research libraries are invested in supporting Canadian scholarly publishing and help creators negotiate fair publishing agreements. CARL also maintains an “information for authors” webpage, which includes the SPARC Canadian Authors Addendum, a legal instrument that enables authors to secure a more balanced agreement by retaining select rights, such as the rights to reproduce, reuse, and publicly present the articles they publish for non-commercial purposes.<sup>13</sup> As an advocate for author rights, CARL would therefore support rights reversion that occurs automatically 25 years after copyright assignment.

**Recommendation:** That the Government of Canada change Section 14(1) of the *Copyright Act* so that rights automatically revert back to an author or composer 25 years after assignment. It should be clear that any new rights reversion clause cannot be waived or overridden by contract.<sup>14</sup>

### **Increase Direct Forms of Funding for Canadian Creators**

The library community realizes grants to authors are among the most direct ways to support Canadian creators. CFLA-FCAB and CARL support the expansion of granting programs like those offered by the Canada Council to enhance the cultural sector and facilitate the creation of new Canadian content.

One major source of direct funding for Canadian authors is the Public Lending Right (PLR) program.<sup>15</sup> The expansion of the PLR to cover the ebooks and audiobooks held in public libraries, as well as the recent increase in funding for this program, is serving creators well. In his appearance before the CHPC on Tuesday, November 27, Howard Knopf suggested that the Government of Canada invest more money in the PLR. The

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<sup>12</sup> Australian Government, Productivity Commission. Intellectual Property Arrangements, Productivity Commission Inquiry Report, 78. September 23, 2016, page 129-130. <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

<sup>13</sup> Canadian Association of Research Libraries. Information For Authors. <http://www.carl-abrc.ca/advancing-research/scholarly-communication/info-for-authors/>

<sup>14</sup> The [Authors Alliance](https://www.authorsalliance.org/wp-content/uploads/2018/12/20181210_AuAll_CA_Review_Termination.pdf) submitted a brief to the INDU committee with explicit recommendations supporting reversionary rights in Canada. More information: [https://www.authorsalliance.org/wp-content/uploads/2018/12/20181210\\_AuAll\\_CA\\_Review\\_Termination.pdf](https://www.authorsalliance.org/wp-content/uploads/2018/12/20181210_AuAll_CA_Review_Termination.pdf)

<sup>15</sup> The PLR is program which rewards authors whose works are held in public libraries. More information about the Canadian PLR: <https://publiclendingright.ca/>

Government should consider investing more in this program to encourage further creation and dissemination of Canadian works.

The Canadian Urban Libraries Council (CULC-CBUC), a member association of CFLA-FCAB, provided a number of other ideas for direct funding in their brief to the INDU Committee. As stated by the CULC-CBUC:

Canada's government programs that offer operating grants to independent Canadian publishers, such as the Canada Book Fund, and support for industry associations are critical to ensuring the continuity of the Canadian voice.

Canadian research on literacy and reading for pleasure and life-long learning would help organizations that work in these areas, including libraries and publishers, to promote books and reading. Understanding how the use of books is changing would ensure that books are not lost as new forms of learning and entertainment emerge.

The Canadian government could provide further support by helping authors and publishers understand and value the stories and ideas that most Canadians choose to read and pay for. The highest sales of fiction in Canada are in genres such as thrillers and romance, yet these areas are not encouraged by Canada's federal grant programs.

Publicly available research encourages the writing and publishing of more of the content that Canadians want to read would increase the financial well-being of Canada's authors and publishers, and cause Canadians and Canadian libraries to choose Canadian content more often over international works.<sup>16</sup>

**Recommendation:** That the Government of Canada both expand existing and explore new programs that provide direct financial support to creators and authors.

### **Return Balance to the *Copyright Act***

At his November 27, 2018 appearance before CHPC, Jeremy DeBeer – a law professor at the University of Ottawa – recommended that the committee recognize the upset in balance created by the CUSMA. Canada must offset the CUSMA's harms,

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<sup>16</sup> CALC-CUBC. Brief to the Standing Committee on Industry, Science and Trade (INDU) as Part of the Review of the Copyright Act. Sept. 21, 2018. <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10040853/br-external/CanadianUrbanLibrariesCouncil-e.pdf>



like the copyright term extension, through counterbalancing domestic reforms like enacting flexible fair use in Canada.<sup>17</sup>

Similar to copyright laws in many other countries, Canada's *Copyright Act* recognizes that uses of copyright-protected materials for education, research and private study are investments in the production of future scholarship and are necessary for the public good and innovation. For example, the *United States Copyright Act* explicitly allows for fair use "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."<sup>18</sup> As we stated in our opening remarks to the INDU Committee, "In the interest of maximum flexibility and future proofing, we think Canada could look to add the words "such as" to the fair dealing purposes given in Section 29 of our *Act*."<sup>19</sup>

Authors and creators will clearly benefit from a fair use style exception. The Author's Alliance outlines the importance of fair use from an author's perspective here:

Authors often incorporate existing materials in their works. A historian may excerpt a soldier's letters to a loved one; an art critic may reproduce a telling detail in a painting; a fiction writer may incorporate quotes from a popular song.<sup>20</sup>

The re-use of existing works in new works, as described in these examples, can only occur when an author or creator has permission from a copyright holder or when he/she is using an exception or limitation to copyright like fair dealing or fair use. Adding "such as" to the fair dealing purposes would provide creators with more flexibility in the use of fair dealing while still upholding the six fairness factors articulated in *CCH v. Law Society of Upper Canada*.<sup>21</sup>

In addition, any further copyright limitations not required by the CUSMA, including making the educational use of fair dealing only apply to non-commercial works, harmonizing statutory damages to all collectives, removing the \$5000 cap on statutory damages for non-commercial copyright infringement or imposing a

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<sup>17</sup> As summarized by Jeremy Debeer on twitter:

<https://twitter.com/jdebeer/status/1067466581884563456>

<sup>18</sup> 17 U.S.C. §107. See the CARL graphical comparison between fair use/dealing in the US, Canada, Australia and the UK for more information. <http://www.carl-abrc.ca/wp-content/uploads/2018/07/Fair-dealing-comparison-chart.pdf>

<sup>19</sup> Canadian Association of Research Libraries. Opening Remarks to the Standing Committee on Industry, Science and Trade (INDU). April 23rd, 2018. <http://www.carl-abrc.ca/wp-content/uploads/2018/05/Opening-Remarks-final.pdf>

<sup>20</sup> Author's Alliance. Fair Use. <https://www.authorsalliance.org/resources/fair-use/>

<sup>21</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <<http://canlii.ca/t/1gIp0>>, retrieved on 2018-12-13.

mandatory tariff regime for literary works will only serve to further erode this balance.

**Recommendation:** That the government of Canada add “such as” to the fair dealing purposes given in Section 29 of the Copyright Act.

### **About CFLA-FCAB and CARL**

CFLA-FCAB - As the national voice of Canada’s library associations, CFLA-FCAB’s purpose is to advance library excellence in Canada, champion library values and the value of libraries and influence national and international public policy impacting libraries and their communities.

CARL - As a representative of Canada’s twenty-nine largest university libraries and two federal institutions, CARL is committed to providing broad and equal access to information to researchers from across the country and around the world. For 40 years, CARL has actively participated in the evolution of Canada’s copyright policy and scholarly publishing, contributing to reviews of the *Copyright Act*, promoting and undertaking copyright and author rights education on our campuses, and working to ensure sustainable and open scholarly publishing in Canada.

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