Introduction

On Wednesday July 12, 2017, the Federal Court of Canada released the decision in *The Canadian Copyright Licensing Agency (“Access Copyright”) v. York University*\(^1\) case. This case, which was an overwhelming victory for Access Copyright and a loss for York, was also a loss for all individuals advocating for stronger user rights in Canada, particularly for those working in the educational sector.

Previous to the release of that crucial court decision, Canadian educational institutions were managing copyright in an environment that had undergone “copyright reforms that were among the most user-friendly
in the world, emphasizing user rights and featuring an expansion of
fair dealing, a host of new consumer exceptions, innovative new tech-
nology-focused exceptions, limitations on liability for non-commercial
infringement, and notable safeguards for user privacy in internet service
provider liability rules.” Working in conjunction with a Supreme Court
that had also demonstrated clear support for the rights of users in copy-
right law, these reforms had radically transformed the way that Canadian
English-speaking educational institutions manage copyright. In the wake
of the Access Copyright v. York case, however, the copyright law landscape
has changed dramatically—especially for such educational institutions.

The first half of this chapter provides a synopsis of the major legislative,
jurisprudential, and policy changes that have had an impact on higher
education in Canada over the past ten years, with a focus on how these
changes have transformed the way that copyright is managed in higher
education. The second half focuses on the role that libraries have played
in this management, as Canadian universities and colleges have frequent-
ly turned to their libraries for help with navigating—and managing—
this new copyright landscape. Finally, the chapter concludes with a few
thoughts about the future of copyright management in higher education
in Canada as institutions determine paths forward in the aftermath of the
Access Copyright v. York case.

Section 1: A Brief History of Copyright and
Higher Education in Canada

The fair dealing exception to Canadian Copyright law is the central
concept that has defined the relationship between copyright and higher
education over the past fifteen years. In Canada, fair dealing permits the
copying and use of copyrighted materials without permission as long as
a two-part test is passed. Fair dealing can be thought of as the Canadian
equivalent of fair use, although there are significant differences between
the two exceptions.

While fair dealing has been part of Canadian copyright law since 1921, it
was “not considered more than a fairly long-shot defense to allegations of
infringements” before 2002. One example is the Michelin & Cie v. CAW
decision in 1997, which held that the use of copyrighted material (in
this case the Michelin Man) in a leaflet for a union drive was infringing, rejecting the fair dealing and freedom of expression arguments advanced by the union.\(^4\)

For quite some time, there was a significant disconnect between the theory of fair dealing and the practice of the doctrine, so for much of its history, Canadian fair dealing existed as an unused vestigial presence in the Copyright Act. In the absence of fair dealing in practice, the void was largely filled by copyright collective societies. Canada has at least thirty-four such collective societies.\(^5\) Some, like Re:Sound\(^6\) and SOCAN,\(^7\) deal with the public performance rights for copyrighted musical works. Others, like Access Copyright, deal with published works. While the collectives were not, strictly speaking, statutorily created, they nevertheless operate under guidelines set out in Section 70.1 of the Copyright Act.\(^8\) The collectives operate in multiple ways. They can grant transactional licenses for limited uses, but their primary dealings pertain to the granting of blanket licenses through tariffs. The latter is how most educational institutions dealt with the issue of copying on campus prior to the advent of strengthened fair dealing, with Copibec handling permissions for Quebec and Access Copyright handling permissions for the rest of Canada. The tariffs would be set by the Canadian Copyright Board calculated based on a per-student basis, and then the fee would be determined based upon an institution’s full-time equivalent (FTE) student numbers. Additional per-page fees would be charged for material reproduced for printed course packs.

Canadian courts began to shift toward strong user rights starting in 2002 with the \textit{Théberge v. Galerie d’Art du Petit Champlain}\(^9\) Supreme Court decision followed by the \textit{CCH v. Law Society of Upper Canada}\(^10\) Supreme Court decision in 2013. The \textit{Théberge} case revolved around whether transferring artwork from posters to canvas constituted copyright infringement. The court found that these relocations were not copies but rather modifications as the ink was directly lifted and transferred. The court also stated that there needs to be a balance between the rights of users and creators to benefit the public interest.\(^11\)

The 2004 Supreme Court \textit{CCH v. Law Society of Upper Canada} case is the most important fair dealing decision in Canada. It is difficult to overemphasize the impact \textit{CCH v. Law Society} had on the way educational
institutions in Canada use copyrighted works. That case, in which a group of publishers objected to the interlibrary loan and photocopy services offered to the members and patrons of the Great Library managed by the Law Society of Upper Canada, truly established fair dealing as a user’s right in Canada. The language of the court was also important, explicitly stating that user’s rights like fair dealing should be interpreted in a “large and liberal” way—a specific phrase that has provided room for much of the subsequent growth of fair dealing—as “large and liberal” has been taken to mean that any ambiguity should be weighted in favor of user’s rights.

The CCH case also set forth the six-factor fair dealing test which remains the basis for a fair dealing analysis today. As mentioned above, fair dealing is a two-part test. First, the dealing must fall under one of the purposes enumerated in the statute (research, private study, education, parody, satire, criticism or review, and news reporting). If this test is met, then the following six factors can be analyzed, including

1. the purpose of the use of the copyrighted work;
2. the character of the dealing;
3. the amount of the work taken;
4. the availability of alternatives;
5. the nature of the work; and
6. the effect of the dealing on the work.

This case set out the criteria needed for Canadian institutions to transition from a sector dependent on collective licensing for the vast majority of the copies made for educational purposes in higher education to one that could rely on fair dealing for much of the copying on campus.

Since CCH was a library case, it would be easy to assume that the facts in that case would translate well to the use of copyrighted materials in both libraries and in educational institutions. However, this shift was so momentous that it took educational institutions almost a decade to adopt a balanced approach to the law in their policies and procedures.

Until 2010, higher education continued to license with Access Copyright for campus copies of educational materials. During this period, Access
Copyright offered a blanket license that allowed institutions to make limited print copies of works for a variety of uses, including using copies as classroom handouts or providing copies of works to other institutions through an interlibrary loan service. The cost of the license varied over the years with the final years of the agreement costing $3.38 per FTE student from 2007 to 2010. This license did not cover digital copying, so institutions at this point either purchased transactional licenses for any digital copies used or disregarded copyright law and allowed faculty to provide digital copies to students without digital copying guidelines. It is important to note that fair dealing was not always totally ignored, as some institutions had fair dealing guidelines. For example, Guelph University had guidelines that allowed for one copy of under 10 percent of a work to be copied in print under fair dealing. These guidelines did not allow digital copying, as Guelph purchased individual licenses for any digital copies used for educational purposes.

The lack of coverage available under the blanket license for digital copies was a huge (and ever-growing) gap for Access Copyright’s licensing efforts, and they moved to fill this gap by offering new and much more expensive licensing options to cover this new form of copying, which was quickly becoming the default format for providing course readings to students. Access Copyright had to find a way to include digital copying in their license offerings, so they submitted a tariff application in 2010 for 2011 to 2013 to the Copyright Board of Canada to cover both print and digital educational copying in higher education in Canada.

Access Copyright was familiar with the tariff process at this point, having one successful tariff approved for public elementary, middle, and high schools across all provinces in Canada except for Quebec. This tariff, which would go on to be challenged at the Supreme Court level, set a rate of $5.16 per FTE student for the period of 2005 to 2009. According to Howard Knopf in a blog post on Monday, July 27, 2009, this amount “essentially divides the amount sought by Access Copyright and the amount proposed by the Educators of $2.43 per FTE more or less down the middle…. With almost 4 million FTEs, and an increase of almost $3 per FTE over the previous negotiated rate” and retroactive payments due for the entire length of the tariff (the tariff was approved in 2009), Access Copyright was poised for a significant financial windfall from this sector.
The proposed post-secondary tariff that Access Copyright submitted to the board in 2010 was very controversial, as it upped the fee to $45 per FTE student at the university level and $35 for other educational institutions, including community colleges. This represented a “more than 1300% increase over the current basic charge,” essentially for the ability to make digital copies of works in Access Copyright’s repertoire. The cost of the tariff was just one of the many controversies surrounding the proposal, as the proposal included problematic auditing procedures and terms that could easily be seen as overreaching. For example, the definition of “copy” in the proposal included both copies made by “displaying a copy” and “posting a link or hyperlink.” These two methods are both generally considered to be non-compensable under Canadian copyright law.

The Copyright Board is slow-moving and there was no chance the board would certify a tariff before the beginning of 2011. This was a problem as the previous copying agreements between Access Copyright and post-secondary institutions were set to expire at the end of 2010. The board, therefore, had to move quickly to certify an “interim tariff” that would cover the time between January 2011 and the certification. This interim tariff had very similar terms to the original negotiated license for the post-secondary sector. It was assumed that all post-secondary institutions would pay the interim tariff for the short term, paying the difference in cost when the final tariff was approved retroactively.

The certification of the interim tariff was unexpected and occurred directly before the holiday break on December 2010. As this was the first time the post-secondary sector had experienced the tariff process for this type of copying, a quick decision had to be made. Many institutions chose to sign the interim tariff and continue to pay fees to Access Copyright, while others chose to rely primarily on transactional licenses for making copies of course readings and to stop paying blanket fees completely. Some institutions did use fair dealing to make copies of copyrighted works for educational use, but there was no standard approach or policy being used across the higher education sector.

As the year went on and universities expanded their copyright-related educational support and services, more and more universities decided to exit the interim tariff and operate in a blanket license free environment. During this time, the educational sector, including public junior, inter-
mediate and senior schools, community colleges and universities, banded together and created a standard approach for using the fair dealing exception to “communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work”\textsuperscript{20} to students for educational purposes. This policy, which was almost universally adopted in some form by all Canadian institutions, defined a short excerpt as up to 10 percent of a copyright-protected work or one chapter from a book, whichever is greater.\textsuperscript{21} These guidelines were officially released on October 9, 2012.

While these guidelines were being developed, two Canadian universities—the University of Toronto and Western University—chose to band together to sign a blanket license with Access Copyright. This license cost $27.50 per FTE student, much lower than the $45 that Access Copyright proposed in their tariff application but high nevertheless. This license also included similarly problematic definitions and terms to those identified in the tariff proposal.\textsuperscript{22} Using this agreement as a model, the university sector then negotiated a model license with similar terms to the University of Toronto and Western agreement. Universities then had to decide either to adopt the model license with Access Copyright or to stay out of the licensing agreement and to manage copyright compliance themselves. This decision had to be made quickly while the sector was waiting on both a significant update to Canadian copyright law and the release of five major Supreme Court decisions pertaining to copyright law. In the end, about half of the public universities in Canada ended up signing the model license.\textsuperscript{23}

The Canadian government had been trying to update the Copyright Act for some time, with Bill C-32, the Copyright Modernization Act, having been tabled in parliament on June 6, 2010. The text of the proposed legislation included the addition of education as a fair dealing exception.\textsuperscript{24} As it was, the bill died when an election was called in March of 2011. However, the minority Conservative government won a majority in May and the bill was revived early in the new parliamentary session on September 29, 2011.\textsuperscript{25} It is with this context in mind that it is easy to see why Access Copyright was eager to sign up post-secondary institutions to a tariff before the proposed changes in the legislation came to pass. Conversely, it also helps to understand why post-secondary institutions were guardedly confident about wading into the heretofore uncharted territory of fair dealing.
Although institutions were confident that the CCH case provided adequate cover under which to move to a fair dealing model, there was still enough ambiguity in the Copyright Act fair dealing exceptions to give pause. While “research and private study” as an exception could probably be reasonably inferred to include education, there was still enough ambiguity to cause uneasiness. However, with the passage of the long-overdue Copyright Modernization Act (SC 2012, c. 20) in 2012, there were suddenly far greater grounds for the widespread use of fair dealing. As with previous versions of the Copyright Modernization Act, the amendments to the Copyright Act explicitly included “education” as a permitted fair dealing exception. The act received Royal Assent on June 29, 2012, and, while this alone would have made 2012 a momentous year for fair dealing in higher education, just a few weeks later there was another significant landmark.

On July 12, 2012, the so-called “copyright pentalogy” was released by the Supreme Court. The pentalogy was a cluster of five major decisions pertaining to copyright that were all released on the same day. Each case had its own merits, but for fair dealing in education, there were two particularly notable decisions: Society of Composers, Authors, and Music Publishers of Canada (SOCAN) v. Bell Canada and Alberta (Education) v. Access Copyright.

SOCAN reiterated the findings and six-point test from CCH and re-affirmed the “large and liberal interpretation” that is to be afforded to “research” as a means of fair dealing. The main takeaway from the case was that it clarified and arguably expanded the understanding of what constitutes fair dealing and how it should be assessed.

Alberta (Education) dealt with the photocopying of copyrighted excerpts by teachers for distribution to their students. The lower courts found that copying works for instructional purposes were not synonymous with the “research and private study” as outlined as a fair dealing purpose the act. However, the Supreme Court found that the “teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study,” meaning that fair dealing would apply to copying in an instructional context. The court also noted that fair dealing had to be assessed each time a copy was made, and could not be assessed as an aggregate of all copies. This issue would reappear in the York case in 2017.
Universities operated with a print blanket license with Access Copyright. The cost of this license was $3.38 per FTE and $0.10 per page or printed sheet included in a printed course-pack. Negotiations between Access Copyright and Universities to set a price for digital copying were ongoing.

Access Copyright gave up on negotiating with Universities, instead filing a tariff with the Copyright Board of Canada. The cost for this tariff was $45 per FTE. An "interim tariff" was proposed by Access and certified to cover the period before the tariff was approved. The interim tariff maintained the pre-2010 rates for copying, and did not cover digital copying.

Some Universities (e.g. Guelph) did not sign the interim tariff, while others, including Queen’s, signed and agreed to the terms. Universities had to decide what to do very quickly, as the interim tariff was not approved by the board until the week before the Holiday.

Others (e.g. Queen’s, York) operated under the tariff until the summer of 2011.

The Association of Universities and Colleges in Canada (AUCC) released a model fair dealing policy to help universities apply fair dealing to copying on campus. Fair Dealing is an exception to copyright law that allows users to make copies of short excerpts of copyrighted works without permission.

The University of Toronto and Western University negotiated a blanket license with Access Copyright to cover digital copying. This license was for a two year term and cost $27.50 per FTE.

AUCC (now Universities Canada) used this as a model to enter into negotiations with Access Copyright. They released a "model license" that was similar in to the U of T/Western license. Universities once again had to choose to license with Access Copyright or to manage copyright independently, relying on fair dealing and transactional licenses instead of a blanket license.

Many Universities including Queen’s, UBC, Guelph, Waterloo, York, Carleton, Calgary once again decided to operate outside of a license with Access Copyright. Bill C-11 (the Copyright Modernization Act) was passed, and five major Copyright Supreme Court decisions were released. Both Bill C-11 and these decisions expanded the scope of user rights in Canada and were generally favourable for educational institutions.

Access Copyright launches a lawsuit against York University. This lawsuit asserted that tariffs and mandatory and challenged the interpretation of fair dealing set out in the York (AUCC) fair dealing policy.

University of Toronto and Western decide not to renew their licenses with Access Copyright.

Most universities that agreed to sign the AUCC/Access Copyright model license decide not to renew as well. At this point, almost all Universities in Canada were operating without a license with Access Copyright.

Access Copyright v. York University decision is released. York publically announces intention to appeal and to seek a stay.

Figure 20.1. Timeline of fair dealing and higher education in Canada, 2011–2017. Author: Mark Swartz

Taken together, the Copyright Modernization Act, SOCAN, and (Alberta) Education provided the impetus for institutions to move forward with confidence that they had the legal underpinnings to adopt fair dealing in a robust way. Since 2012, Canadian educational institutions have banded
together to adopt a standard approach to the use of the fair dealing exception, the most important and flexible user right in Canadian copyright law.

The outcome of these cases, along with the statutory changes brought about by the Copyright Modernization Act and the standard approach to fair dealing adopted by most institutions, created an atmosphere in Canadian higher education that favored exercising user rights instead of purchasing blanket licenses from collectives. Over the next few years, most universities and colleges exited their blanket agreements with Access Copyright at the first possible opportunity, starting with the University of Toronto and Western University in 2014 and continuing with most other Canadian public universities at the end of 2015.

On April 8, 2013, Access Copyright launched a lawsuit against York University. This lawsuit challenged both York’s approach to fair dealing and their position that the interim tariff was not mandatory and enforceable against York. This case, which was also bifurcated (or divided) on York’s request on the “basis that documentary and oral discovery would be too burdensome,” took until July 12, 2017, for a decision to be released. This decision “delivered a complete victory for the copyright collective, rejecting York University’s fair dealing approach and concluding that an interim tariff is mandatory and enforceable against the university.” York is appealing the decision to the Federal Court of Appeal, so this case is far from over, as it will almost certainly eventually be appealed to the Supreme Court of Canada.

As of late 2017, Canadians sit in a time of significant uncertainty for higher education. The 2011–2013 tariff is still outstanding, meaning that after 2013, when the interim tariff expired, there were no approved tariffs for higher education in Canada. Access Copyright would go on to submit two more tariffs over the next seven years—all similar in scope but with reduced costs for educational institutions. The decisions on these tariffs are all outstanding as well, so the nation currently sits with over seven years of outstanding tariffs (and the retroactive costs that are associated with these tariffs if the York case is upheld). In addition, both the mandate of the Copyright Board and the Copyright Act will be under review over the coming year, and Copibec (the Access Copyright equivalent in Quebec) is pursuing a class-action lawsuit against Université Laval in Quebec. Combined with the York case, these disruptions are likely to impact policies and practices in higher education for years to come.
Section 2: Role of Librarians in Copyright Education and Compliance

When the Access Copyright Interim Tariff decision was released by the Copyright Board of Canada in 2010, most Canadian universities and colleges did not have a position solely dedicated to copyright matters and/or copyright education on their respective campuses. Tony Horava’s 2010 study identified only four such positions across the country. Since then, as Patterson’s 2016 qualitative study has shown, most institutions in Canada have hired at least one copyright specialist. While some positions are located within the general counsel’s office (such as at York University), many more positions are located in the library with titles such as copyright librarian. If a non-librarian was hired to look after copyright compliance strategies and education, these positions, often named the copyright officer or manager, were generally located in the library or in a separate office attached to the library.

Graham and Winter’s 2017 comparative follow-up to Horava’s study also found that these positions have tended to be, with some notable exceptions, created within the library and that responsibility for copyright matters had shifted from central administrative offices and resources to units within the library. Within libraries themselves, while Horava’s study found that copyright responsibility tended to be located in the portfolio of the chief or university librarian, Graham and Winter’s follow-up confirmed a shift of this responsibility into specialized roles and units within libraries. While both studies found that the scope of these new positions varies according to institutional size or setup and the existence of previous expertise or services, taken together, these studies suggest that after 2010, Canadian universities have been navigating copyright in a similar manner and that this shared approach has created the need for and, in turn, been shaped by a new cohort of specialist librarians.

Lesley Ellen Harris, in her 2015 article, “Lawyer or Librarian? Who Will Answer Your Copyright Question?,” explains that the role of library copyright specialist has grown to encompass a novel package of responsibilities encompassing a range of copyright-related legal issues, leading to “blurred lines of responsibility” between the traditionally demarcated roles of lawyers and librarians. According to Harris, librarian responsi-
bilities have grown to range from answering copyright-related reference questions about course materials, photocopying, and scanning to including management over more complex systems and services, such as those for centralized e-reserves or digitization programs.

In many cases, copyright specialist roles may also include support for other institutional needs that are copyright-related or copyright-adjacent, such as e-resource license advising or negotiation, or the provision of advice regarding publication contracts to faculty authors. Harris places these services on the spectrum between what had been a pre-existing role for librarians, such as “frontline” ad-hoc copyright question answering as needed, to the post-Access Copyright license copyright portfolio. This portfolio includes not only ad-hoc services but also responsibility for conducting copyright education and information literacy campaigns, assisting with or overseeing the management of compliance with institutional fair dealing guidelines, policies, or advisories and playing a direct role in risk mitigation.

The notion of librarians as the primary advisors to create policies balancing user and creator rights did not emerge out of nowhere. In fact, conceiving of the library's role in this way stems directly from the fact that a library played the starring role in *CCH Canadian Ltd v. Law Society of Upper Canada*. Key to the findings of the court in that case was its analysis of what the court called the Great Library’s “Access Policy,” the document through which the materials in the library’s collection were photocopied and made available upon request via the library’s photocopying service (The Law Society of Upper Canada had called this document the “Access to the Law Policy”).

At the Great Library, a reference librarian was directly responsible for administering the policy and for making decisions as to whether a prospective use of the library’s collection conformed with its provisions or not. In its analysis of the six fair dealing factors that the ruling set out, the court repeatedly mentioned the key oversight role the reference librarian at the Great Library played in assuring that the restrictions on copying laid out in the policy were followed. The court also emphasized the librarian’s ability to deny particular requests if they did not follow the policy.

In her article “The Librarians’ Role in the Interpretation of Copyright Law: Acting in the Public Interest,” Victoria Owen points out how in the
unanimous *CCH* decision, the Supreme Court noted the special status that libraries and librarians hold within the Copyright Act itself, most especially in the case of section 30.2(1). This section, which states that “it is not an infringement of copyright for a library, archive, or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1 [the fair dealing exception],” confers on the libraries a role as intermediaries at the core of the balance within the copyright system. If Canada’s copyright system is a public policy instrument meant to foster the creation and dissemination of works, then libraries and librarians are, by statutory design and by their starring role in *CCH*, instrumental actors within that public policy framework.

**Actually Using Exceptions**

The Supreme Court’s 2004 *CCH* decision held that fair dealing was applicable in the context of copying in libraries and that its purposes should be given a large and liberal interpretation. In response, as a 2012 article by Robert Thiessen details, Canadian libraries began relying on or considering fair dealing as a factor in the delivery of services most similar to the facts in the *CCH* case, such as inter-library loan and internal document delivery.\(^{37}\) However, the growth of the copyright librarian as a role and the concurrent increased level of comfort with the role of librarians in implementing fair dealing as a user’s right in Canadian higher education did not begin until further statutory and jurisprudential clarifications in the Canadian copyright system took place.

The six- to over ten-year lag period between what was clearly a strengthened and balanced fair dealing doctrine set forth in *CCH* and the beginning of fair dealing’s widespread institutionalization can be understood practically as well as theoretically. Emily Hudson’s forthcoming (and eagerly anticipated) monograph will contain a close examination of what internal factors contributed to the delayed response by Canadian institutions to the strong signal sent by the Supreme Court in *CCH* that fair dealing was, among other things, “always available.”\(^{38}\)

Lisa Di Valentino’s dissertation, “Laying the Foundation for Copyright Policy and Practice in Canadian Universities,” argues that a shift in the
way institutions considered the value of copyright had to occur before a more intentionally balanced approach could be implemented. Di Valentin-no defines this shift as a move away from the economic weighing of risk and markets toward a more purposive approach, which would consider these factors alongside others, such as the broad benefits of the encouragement of the “maximal use of copyrighted works in teaching, learning and research.”

Another lens through which to answer this question is to consider copyright and intellectual property law as parts of a broader “scholarly information infrastructure” and to view the post-\textit{CCH} inertia on the part of Canadian universities as a facet of a larger and slower process of change. To expect a sudden shift into the widespread application of balanced fair dealing would be unrealistic given that there were other factors aside from copyright law itself that could shape or affect what was possible. This “infrastructure,” in Christine Borgmann’s sense, is not just the brick and mortar of classrooms or the fiber optic lines of the internet connecting them, but the laws, business models, general industry-wide practices, shared definitions, and values that govern and are governed by what occurs in these spaces. As Borgmann writes, the internet had quickly become the “channel of first resort for a growing array of activities” in higher education, including the provision of access to bundles of licensed content for teaching and research. The legal issues implicated in such a large transformation in infrastructure are complex and consequential. Faced with such large changes, a single Canadian institution might be hesitant to take a more balanced approach to copyright on its own. Without a communally developed understanding of the implications of the Supreme Court’s copyright decisions, one institution’s decision to apply fair dealing in new areas might seem too risky.

Another factor in the higher education reconsideration of collective licensing and the adoption of a fair dealing approach was the increasing perception that a collective license was no longer quite as necessary as it once had been. At great expense, academic libraries have responded to the demand for electronic access to scholarly and educational resources by buying and licensing with greater frequency. For example, University of Toronto in the mid-2000s made the decision to start acquiring an electronic copy of a book, if one was available, as they had conducted a study that it better served their community. The value of collective licensing
is challenged by the acquisition of digital licenses that allow for material to be used in teaching and for research either by using library licenses or licenses that include copyright exceptions in their language.

Libraries, and by extension the university and college communities that use them, are now part of a marketplace in which a growing portion of material is made available for direct purchase by libraries in digital format. By 2010, libraries were already enabling the “copying” and sharing of licensed electronic information on campuses, activities allowed by licenses signed directly with publishers and their representatives, bypassing the need for collective licensing for a substantial portion of scholarly material being used in the higher education community, precluding often even the need to apply fair dealing. For example, in 2010–2011, while print collection acquisitions remained flat in the Canadian Association of Research Libraries (CARL) members, the number of e-books acquired rose 21 percent and the acquisition spending on e-serials rose 30 percent. This library collection development activity often overlapped significantly with works that a copyright collective might claim as part of its repertoire. A continuing trend in the rise of electronic resource use among users is also noted in more recent CARL statistical reports, and this use is being measured.

Many Canadian academic libraries have worked hard to add a layer of transparency and discoverability to the license terms of their electronic resources so that students, faculty, and instructors can increasingly understand how a resource can be used in various institutional contexts. This was greatly aided by the development of an open source tool called Mondo License Grinder database by the University of British Columbia launched in 2010. This tool can make discoverable the licensing terms of a resource at the database, collection, journal, and record level. It is especially useful as it gives clear information on how material can be used as it has a detailed License Terms of Use table. For example, it gives information describing if a resource can be used in a course management system (CMS), in e-reserves, in a course pack, as a link, or via interlibrary loan (ILL). It has been widely adopted in Ontario in the university sector as the OUR-OCUL Usage Rights Database. One discovery that came from the process of populating the database was that the vast majority of electronic licenses academic libraries acquire allow licensees to provide direct persistent links to the licensed resource, precluding the need
for copyright collective licensing for the use of the resource in teaching or even the need for a fair dealing interpretation. Usage rights databases and discoverability tools making usage rights transparent are not as widespread as they could be throughout Canada. Graham and Winter found that one-third of the respondents to a survey felt that they did not have a good grasp of the licensing terms of their resources when they were conducting permissions analyses for course readings.\textsuperscript{47,48} In terms of protecting copyright exceptions within library licenses, higher education consortial licensing organizations, such as the Canadian Research Knowledge Network and Ontario Consortium and University Libraries, have both adopted model licenses asking vendors to agree to recognize Canada’s Copyright Act and its fair dealing exceptions.\textsuperscript{49} Lisa Di Valentino even questions whether contracts like library licenses themselves have the power to constrain statutory rights like fair dealing.\textsuperscript{50}

Copyright librarians are uniquely positioned to understand that the maximization of library licenses is one way to reduce the amount of material that could be seen as compensable to Access Copyright. One of the major developments across Canada directly influenced by the uncertain copyright landscape was the increasing reliance at many academic libraries on the use of an e-reserve service that provided copyright checking and permission services for the institution. E-reserve services leverage the use of library-purchased electronic resources by providing students with direct links to these materials and providing direct links to material freely available on the internet. By engaging in e-reserve services, libraries make most required readings available to students without even relying on fair dealing. Fair dealing is also applied to readings that qualify, however, and when licenses are required to post material they are obtained. A study of compiled e-reserve readings processed across three institutions from September 2013 to April 2014 found on average that 76.3 percent of the readings available to students were made up of library-licensed works, freely available internet material, open access works, public domain materials, and faculty and government documents.\textsuperscript{51} The copyright survey of various institutions undertaken by Graham and Winters in 2015 reported that 58.3 percent of the readings made available in e-reserves were made available through library licenses.\textsuperscript{52}

E-reserves is just one of the safeguards institutions use to manage copyright risk. Other safeguards include focused copyright education, such as
mandatory copyright education for new hires. Some institutions may even decide to renew a license with Access Copyright while waiting for the appeal process to be completed for the *York v. Access Copyright* case. Perhaps even further copyright reform is desirable. For example, the adoption of the fair use doctrine instead of fair dealing in Israel’s new Copyright Act in 2007 has proved so far to be an effective way to support user’s rights for education in that country.\(^5\) In 2017–2018, the Copyright Act in Canada is undergoing a review, but it is unlikely that further liberalization of the Act with occur at this time, and there is strong opposition from publishing and creator industries against some of the 2012 modernizations.

As the appeal process in the *York v. Access Copyright* case is just beginning at the lower level of the Federal Court of Appeal—with a further appeal to the Supreme Court of Canada almost inevitable—there are still a number of years left before final clarity is achieved. While it is foolhardy to bank on any definitive outcome from the courts, Michael Geist, for one, feels that the analysis in the *York v. Access Copyright* decision is flawed:

The case is likely to be appealed as the trial judge’s analysis of fair dealing is inconsistent with Supreme Court of Canada jurisprudence. The Supreme Court’s emphasis on copyright balance, user’s rights, and a large and liberal interpretation to fair dealing, are largely missing from the ruling. In its place, the trial judge injects claims of boosting enrolment as York’s purpose of copying, cites aggregate copying for the amount of the dealing, and relies on “likely” impact for the effect of the copying on the work. None of these positions reflect Canadian copyright law as articulated in the leading decisions.\(^5\)

In the meantime, the advances in fair dealing from the previous decade-and-a-half are, in most cases, still being utilized pending the outcome of the appeal process and the 2017–2018 review of the Copyright Act. That fair dealing has been entrenched in higher educational library practices is undeniable, and at this point, the remaining question is what the final contours will look like. Copyright librarians and library associations are continuing to take an active role in educating, lobbying, implementing change, and ensuring that the legacy of fair dealing will continue in Canadian academic institutions for years to come.
Endnotes

11. Théberge, paras. 30–32.
12. CCH, para 51.
13. For clarity, these are the purposes in the current version of the act, which added education following the Copyright Modernization Act in 2012.
14. CCH, paras. 53–60.
15. The cost for years prior to 2007 is available on page 10 of the “Interim Statement Of Royalties To Be Collected By The Canadian Copyright Licensing Agency” (Access Copyright).
23. Ariel Katz, a professor at the University of Toronto law school, kept track of the institutions that decided to sign the model license in a blog post that he titled the “Fair Dealing’s Halls of F/Sh/ame,” https://arielkatz.org/fair-dealings-halls-of-fshame/.


35. Harris, “Lawyer or Librarian?,” 37.

36. CCH, para 61.


38. CCH Canadian Ltd. v. Law Society of Upper Canada, para 49.


41. Borgman, Scholarship in the Digital Age, 1.


47. This may be also because only 34% of respondents came from Ontario where use of the OCUL Usage Rights (OUR) database is more common. The OUR database is integrated with the library catalogue to show the ways in which materials may be used, allowing users to ascertain this information at a glance.


54. Geist, “Ignoring the Supreme Court.”

Bibliography


Bill C-32, An Act to amend the Copyright Act, 3rd Sess, 40th Parl, 2010 (First reading).


Swartz, Mark, Ann Ludbrook, and Heather Martin. “Blurred Lines: How Electronic Reserves Services are Breaking Down the Barriers Between Content and the Classroom.” Accessed November 11, 2017. https://qspace.library.queensu.ca/han-


