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Laying the Foundation for Copyright Policy and Practice in Canadian Universities

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Library & Information Science

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Abstract

Due to significant changes in the Canadian copyright system, universities are seeking new ways to address the use of copyrighted works within their institutions. While the law provides quite a bit of leeway for use of copyrighted materials for educational and research purposes, the response by Canadian universities¹ and related associations has not been to fully embrace their legal rights – rather, they have taken an approach that places emphasis on risk avoidance rather than maximizing use of materials, unlike their American counterparts. In the U.S., where educational fair use is arguably less flexible in application than fair dealing, there is a higher level of copyright advocacy among professional associations, and several sets of best practices have been created to guide the application of copyright to educational use of materials.

Canada is lagging behind the U.S. in this respect, placing Canadian universities at a relative disadvantage. The goal of this study is to lay the foundation for the development of policies and guidelines in the use of copyrighted works, and the provision of copyright literacy education in universities. The research will be undertaken from a critical perspective, with the goal of promoting fair dealing and other exceptions as user rights within the institution, and a reduction in risk aversion.

The methodology employed is both qualitative and quantitative and includes legal analysis, content analysis of policies and guidelines, and collection of survey data.

Keywords

copyright, universities, policy, literacy, higher education, fair dealing, fair use, intellectual property law, comparative law

¹ This dissertation will focus on the activities of universities rather than colleges, for two reasons. The first reason is for space and time purposes, and the second is that universities and colleges in Canada have somewhat different missions that influence their use of copyrighted works.

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1 Introduction and organization

1.1 Problem statement

Literally, “copyright” means the right to copy: the exclusive right to publish, distribute, and use a work. The *Copyright Act* defines it as the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, including [producing a translation, adapting a book for a performance or movie, etc.] and to authorize any such acts. Copyright is a legal right: a form of intellectual property. It applies to expressions (works) such as text, art, or music, but not to the ideas behind those expressions. It is a legal system by which the creation of intellectual and artistic works is promoted by incentive, and the use of works is encouraged, for the betterment of society.

The rights granted to copyright owners are limited – both by length (copyright expires 50 years after the death of the author), and by scope (exceptions to copyright infringement which allow certain uses of works without payment or permission).

In the past 12 years, Canadian copyright law has changed significantly due to important court decisions and major legislative amendments. While the potential for copyright infringement (both deliberate and inadvertent) has grown with the rise of network computing and the Internet, it is crucial that the lawmakers (Parliament) and interpreters (courts) do not attempt to over-regulate the legitimate, and particularly educational, uses of copyrighted materials that ultimately benefit society. For the most part, over-regulation has been avoided in the law itself.

The first major event that heralded a marked transformation in Canadian copyright law was the Supreme Court's 2004 decision in *CCH Canadian Limited v Law Society of*

*Upper Canada*¹ (*CCH*). In this case, the court characterized copyright exceptions as user rights, integral to the *Copyright Act*.² The Great Library of the Law Society had been making and delivering copies of excerpts of legal materials (both primary and secondary) to Ontario lawyers upon request. This service was subject to the library's Access to the Law Policy, which stated that copies would be made only for the purposes of research, review, private study, criticism, or for use in court proceedings, and that discretion would be used as to the amount of copying. *CCH Canadian*, along with other legal publishers, brought action against the Law Society for copyright infringement. The Law Society claimed that the copies were fair dealing and hence not infringing on the publishers' copyrights. The Supreme Court agreed, noting that the copies were being made for the purpose of "research", even if on a commercial basis, and that copies made within the scope of the library's Access to the Law Policy were fair, taking into account a number of considerations such as the amount being copied, alternatives to the copying, and the effect of the copying on the market for the original work. Significantly, the court held that fair dealing and other exceptions to copyright "must not be interpreted restrictively."³

¹ 2004 SCC 13, [2004] 1 S.C.R. 339, online: CanLII <<http://canlii.ca/t/1glp0>>.

² Prior to this decision, exceptions, particularly fair dealing, had been interpreted narrowly. For example, in *Michelin v. CAW* ([1997] 2 F.C.R. 306 (F.C.)), online: CanLII <<http://canlii.ca/t/4g4v>>) (*Michelin*), the Federal Court decided that the Union's use of the "Michelin Man" character on protest pamphlets was not fair dealing, because parody was not an enumerated purpose and could not be considered a form of criticism, as purposes are to be read literally and restrictively.

³ *Supra*, note 1 at para. 48.

Eight years later (2012) the Supreme Court considered the application of fair dealing in the educational environment, and reiterated its prior reasoning that user rights are to be given an expansive scope. That same year, Parliament added “education” as a permitted fair dealing purpose in *Copyright Act*, and added further provisions that are relevant in academia such as the user-generated content exception and the right to use copyrighted content in lessons.

Essentially, these changes in copyright law meant that universities could rely on fair dealing for many of its activities, if an infringement suit were to be brought by a copyright owner. As a corollary, reliance on existing blanket licences with collective copyright societies such as Access Copyright could be reduced.⁴ (A collective copyright society is an organization that represents copyright owners, entering into licences with users on their behalf, and collecting and distributing royalties.) Universities that previously relied on negotiated licences with Access Copyright were faced with a decision: to continue to work under a blanket licence, or to handle copyright issues in-house (by relying on copyright exceptions, existing publishers’ licences, transactional licences, and open access materials).

Universities, for their part, have a governmental mandate and a mission to foster the development and spread of knowledge. Yet Canadian universities and library and educational associations have not yet taken full advantage of this broad conception of

⁴ Access Copyright <<http://accesscopyright.ca/>> is a collective that represents copyright owners throughout Canada except for Quebec. The collective negotiates copyright licences and collects royalty payments on behalf of owners. Until the end of 2010, Canadian universities had licences to reproduce certain amounts of works the owners of which are represented by Access Copyright.

user rights (particularly fair dealing), as compared to their U.S counterparts. While the American fair use provision was being debated in the U.S. House of Representatives in the mid-1970s, representatives of publishers and educational administrators negotiated what would become the Classroom Guidelines. Guidelines also emerged from other negotiations, such as the Proposal for Educational Fair Use Guidelines for Distance Learning, and the Proposal for Fair Use Guidelines for Educational Multimedia (Crews, 2001). Since then, best practices for fair use have been developed in various sectors of the American educational community.

There are several reasons for this discrepancy, one of which is the relative recency of the Canadian developments. A second reason is the pervasiveness of collective societies in Canada. Until 2010, all Canadian universities outside Quebec had blanket licences with the collective society Access Copyright that covered copying now generally considered to be covered by the fair dealing exception to infringement in the Canadian *Copyright Act*.⁵ It has only been very recently that Canadian universities have trended towards managing copyright without blanket licences (see Chapter 5 for a detailed discussion of the trend).

However, Canadian universities retain a certain amount of risk aversion that is not warranted by the law. Because of this aversion, schools have not fully taken advantage of fair dealing, and so instructors, students, and researchers are not encouraged (and in some

⁵ Fair dealing in Commonwealth countries, like fair use in the United States, is a flexible exception to copyright infringement that is codified in the legislation. The primary difference between fair dealing and fair use is that fair dealing applies to a closed list of possible purposes (including research and education), whereas the U.S. provision for fair use is open-ended and the listed purposes are merely examples.

cases not allowed) to make the full use of copyrighted materials to which they are entitled. Therefore, a review of policies and practices is needed, along with recommendations for the creation of copyright policies and copyright literacy education that universities can adapt to their particular situations.

1.2 Justification

Such a study is needed, firstly, to address the long-term implications of university copyright policies and practices, in that their content may affect how courts interpret copyright in the future, particularly fair dealing. In its *CCH* decision the Supreme Court stated that “[it] may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”⁶

There are also immediate practical implications of the research presented in these chapters. In 2013, Access Copyright brought legal action in federal court against York University, who no longer had a blanket licence with the collective. The action is based in part on what Access Copyright claims are deficiencies in York’s fair dealing policy, specifically that it is “arbitrary and purely mathematical” and does not suffice to prevent impermissible copying by York faculty members.⁷

⁶ *Supra* note 1 at para. 55.

⁷ *The Canadian Copyright Agency (“Access Copyright”) v. York University* (8 April 2013) Federal Court File No. T-578-13 (Statement of Claim at para. 23), online: Scribd <<http://www.scribd.com/doc/134926954/AC-v-York-Statment-of-Claim-T-578-13-Doc1>>. (*Access Copyright v. York*)

Communication of policies and practices to librarians, faculty, staff, and students (ideally as part of general copyright literacy program) is equally as important as the existence of the policies and practices (Horava, 2008, 2010). Communication is especially crucial in terms of fair dealing, which is intended to be flexible; however, this flexibility can be perceived as complicated and ultimately frustrating by those who would prefer to follow a step-by-step protocol (Crews, 2001).

Furthermore, the existence of a comprehensible fair dealing policy or set of guidelines provides an element of legal defence in a copyright infringement suit, as per the Supreme Court in *CCH* (2004, para. 63).⁸

There is a need, then, for a comprehensive analysis of the current policies and practices with which Canadian universities address copyright use, as well as the development of policies and practices that place users at the forefront. The policies and practices may be slightly different based on factors such as the size of the university and resources available, but they should all reflect the underlying educational mission and mandate of the public university, and maximizing access to resources in order to achieve them.⁹

Universities are continuing to evolve in their approaches to copyright management and

⁸ *CCH*, *supra* note 1.

⁹ “Western creates, disseminates and applies knowledge for the benefit of society through excellence in teaching, research and scholarship.” (“Our mission”
<http://president.uwo.ca/strategic_planning/index.html>)

“Western’s mandate... is to provide the highest quality learning environment to help students, staff, and faculty achieve their full potential which, in turn, will drive Ontario’s competitiveness and prosperity and Ontario’s contribution to our global society.” (“Strategic mandate agreement”
<<http://www.tcu.gov.on.ca/pepg/publications/vision/WesternAgreement.pdf>>)

scholarly communications. In addition, the *Copyright Act* will be under review in 2017, and copyright owners and their representatives have begun to communicate their dissatisfaction with what they consider to be overly-broad interpretations of fair dealing on the part of universities that they claim threaten to put Canadian publishers out of business (for example Hunt, 2016; Owens, 2016; Taylor, 2016) Consequently, time is of the essence for the creation of guidelines and best practices, as well as strong advocacy efforts in favour of users' rights, particularly in the educational context.

1.3 Theoretical framework

This research is approached from a critical perspective as applied to the subject of copyright practices. In addition to the goal of contributing to the pool of knowledge in this subject, there is a larger societal goal. This goal is to reduce schools' reliance on private contracts and promote awareness of users' rights as research and pedagogical necessities, and to reverse the trend of basing copyright compliance on the avoidance of liability, which prevents users from taking full advantage of their rights. To that end, the research is directed towards determining how best to promote fair dealing and other exceptions to infringement in the current copyright scheme, as well as the consideration of alternatives to traditional copyright (such as open access and Creative Commons licenced works), in universities in a way that is cost- and time-efficient, and does not place an undue burden on users.

This project requires challenging assumptions about copyright and its purpose, and the best way to achieve this purpose. In the literature the two main theories in this regard can

be called the equitable and the market-based theories of copyright.¹⁰ (See Chapter 2 for a fuller discussion of the theoretical framework.)

The market-based theory of copyright, which centres on economic analysis rather than equitable considerations, is a central concept in the “information society” theory. The information society theory is an attempt to characterize the latter 20th and early 21st century as being a new kind of society where the creation, dissemination, and use of information take on a fundamental importance in politics and the economy. According to this theory, information is a *thing* and can affect social and political relations without the interference of human agency. Because it is a thing, information is also capable of being privatized into a marketable commodity. The purpose of copyright, in this market-based view, is to correct for the “market failures” that are inevitable when access to and use of information are not artificially limited – the market failure being that nobody will pay for something they can get for free, and without payment the creation of new information will be unprofitable. Under this theory, exceptions to copyright exist only insofar as attempting to control such uses would cost more than simply letting them occur (which would lead to market failure). When other options exist to correct this market failure, such as contracts or technological protection measures, legal exceptions are no longer necessary (see, e.g., Gordon, 1982), although she has softened her approach somewhat in recent years (Gordon, 2002)).

¹⁰ Note that these two views are not totally mutually exclusive; equitable approaches to copyright management may also make economic sense in a given context, while “positive externalities” (benefits to third parties) can be taken into account in a market-based analysis (although the main focus is still the quantitative economic effects). My description is meant to be illustrative and not comprehensive.

By contrast, the equitable theory of copyright considers information to be a public good, and that meaningful access to copyrighted works is integral to the creation of new works and to the goal of societal progress. Exceptions to infringement are not responses to market failures – they are *per se* elemental parts of the copyright regime. As such, it does not matter to the availability of exceptions whether it becomes easier or more cost-effective to control access to and use of copyrighted materials; exceptions exist because without them, new information could not easily be created and shared.

The two theories of copyright can be illustrated in this way:

Market-based	Equitable
Information is a commodity.	Information is a public good.
Copyright law exists to provide an environment for market activity.	Copyright law exists to ensure both a reward (or incentive) for the creation of intellectual and creative works, and meaningful access to and use of these works.
Property in information is analogous to property in physical goods (private property); copyright owners have an absolute right to control use of their works by others.	Property in information is similar in some ways to property in physical goods, but there are important differences; copyright owners have a limited (in time and in substance) right to control use of their works by others.
The ideal way to achieve copyright's objectives is to allow the market to set the conditions by which works are accessed and used. Private ordering (such as contracts and technological protection measures) is optimal.	The ideal way to achieve copyright's objectives is to enshrine in law the ability to freely access and use works in certain ways, to educate and to create new works. Private ordering is inadequate.
Exceptions such as fair dealing are responses to market failure, and when the market is able to correct this failure, the exception is not needed.	Exceptions such as fair dealing are necessary elements in achieving the public interest objective of a robust body of creative and intellectual works.

Table 1: Comparison of the market-based and equitable theories of copyright.

Since the mandate of a university is to create and spread knowledge, there is a particular responsibility on the part of the institution to resist as much as possible this commercialization of information. How a university operationalizes owners' and users' rights will influence the content of its policy and educational strategies. If copyright is seen through a primarily market-based lens, the policy will emphasize the importance of owners' rights and interpret exceptions narrowly. Policy content will be motivated in large part by the desire to avoid the risk of costly lawsuits by copyright owners, rather than the need to provide an environment to use materials effectively in pedagogy and research. On the other hand, if copyright is seen through an equitable lens, policies will emphasize the importance of the availability of information to the development of knowledge, and encourage the use of copyrighted resources while still respecting the rights of owners.

Among educational administrators in Canada there is still very much a culture of risk aversion. In 2016, 85 percent of the largest Canadian universities outside Quebec have adopted or adapted the a model fair dealing policy that limits the allowable amount “up to” 10% of the work (or one book chapter, or one journal article),¹¹ which is inconsistent with the flexible and context-sensitive nature of the exception. In addition, more than half of these universities' policies or web sites claim that licence agreement terms can

¹¹ See Appendix A.

override exceptions in copyright law, a claim that is not supported by Canadian legislation or jurisprudence.¹²

The ultimate goal of this dissertation, then, is not merely to present facts related to copyright management policy and practice in universities. The intent, rather, is to reject the idea of a “neutral” approach to copyright and to provide information that can assist universities in basing their policies and practices on equitable views of copyright, in keeping with their mandate and mission to provide high quality learning opportunities for the benefit of society.

1.4 Objectives

The objectives of this study are:

- to analyze the current state of the law in Canadian copyright in light of its underlying policies and goals, and to compare it to U.S. copyright law;
- to identify and critically review the current practices of Canadian universities in relation to copyright including policies and guidelines, awareness and education initiatives, and the delegation of responsibility for their development and application;
- to identify the reasons that Canadian universities appear to be lagging behind their U.S. counterparts in optimizing users’ rights;

¹² See Chapter 4.

- in order to recommend ways in which Canadian universities can delegate responsibility for copyright, and develop policies and educational initiatives in a way that optimizes users' rights.

1.5 Research questions

The following research questions are posed:

- What is the current state of the law in Canadian copyright (and as it compares to U.S. copyright law) and what are the policies underlying the legislation and judicial decisions, in particular fair dealing/use and the interaction of contract and copyright exceptions? This question will be approached via legal analysis.
- What are the current practices of Canadian universities in relation to copyright including policies and guidelines, awareness and education initiatives, and the delegation of responsibility for their development and application? What are the basic assumptions that guide the development of these practices (i.e. how is copyright operationalized), and do they reflect the mandate and mission of university education? Policy content analysis will be the method used.
- Why do Canadian universities appear to be lagging behind their U.S. counterparts in optimizing users' rights for their instructors, students, and researchers?
Answers will be suggested based on an analysis of decisions and actions taken by individual universities, associations of universities, and professional associations for educators and librarians.

- What do teaching faculty know about copyright in general and about copyright policies at their own institutions?
- How can Canadian universities delegate responsibility for copyright, and craft policies and educational initiatives in a way that optimizes users' rights? The answer to this question will flow from the previous four, and from a critical examination of assumptions underlying copyright policy and its relationship to educational policy.

1.6 Thesis

The thesis of the study is that the copyright management policies and guidelines of Canadian universities, in general, do not reflect the intent nor the state of law as developed by Parliament and the courts. Specifically, the policies are based heavily on a market-based rather than equitable theory of copyright, are overly conservative and risk averse, and do not encourage maximal use of copyrighted works in teaching, learning and research. The result is an incomplete approach to pedagogy, an inhibition of creativity and innovation, and the potential to negatively affect the future development of copyright law in the educational context.

A set of consistent copyright policies and educational initiatives is required to support the ability of universities to educate members of society and promote intellectual inquiry.

These policies and initiatives must be user-focused and based on a critical assessment of the mission and mandate of universities and of the objectives of copyright law.

1.7 Methodology and organizational plan

This dissertation takes a multidisciplinary approach. Within the critical theoretical framework outlined above, research was undertaken using a mixed methodology (qualitative and quantitative). Specifically, the primary methods used are legal analysis, content analysis, and surveys.¹³

In Chapter 2, the theoretical framework underlying the dissertation is discussed in more detail. (This framework will also unfold as it is revisited in other chapters.) This framework is normative, rather than descriptive; it suggests that universities have an obligation to examine the assumptions behind copyright laws and policies. Universities must eschew a market-based, “information society” approach to copyright issues that treats information as a commodity, and the copyright owners as those with power over it. Instead, universities must favour a equitable approach that makes explicit the power differentials in publishing and use of information. All of the analyses in this dissertation, including the quantitative research in Chapter 6, is filtered through this critical lens.

In Chapter 3, a comprehensive comparative legal analysis of Canadian and American fair dealing/use law and its application is used to investigate whether Canadian copyright law is meant to reflect solely a market-based approach, or whether the market for information must be tempered by legislation. This inquiry will include legislation, court decisions

¹³ The methodologies employed in chapters 5 and 6 are discussed in more detail in sections 5.4 and 6.4, respectively.

(particularly of the Supreme Courts of each country), legislative debates and committee discussions, and secondary sources (books, book chapters, law review articles).

An issue that has not yet been addressed in Canadian courts is whether the terms of a subscription or licence contract can override the user rights found in copyright law. As more information is delivered in universities by electronic database subscription, it is important to determine whether exceptions to copyright infringement can be lost in subscription contracts. In Chapter 4, a legal analysis of licensing agreements and their relation to copyright law is undertaken. In particular, the chapter examines whether restrictive terms in private contracts may legally override the copyright exceptions provided by Parliament and the courts. It is argued that it is not clear in Canadian law whether users' rights can be abrogated by contractual agreement, but it is very likely that they cannot.

Chapter 5 consists of a content analysis of university copyright policies and guidelines, and the copyright information that is available on their web pages. These documents will be analyzed in light of the conclusions of the previous sections. Specifically, it will be noted whether the documents address the following aspects of copyright: the character of copyright (i.e. that the law represents a balance between the rights of owners and the rights of users); the main Supreme Court cases on the doctrine of fair dealing and the details of the decisions; the most current amendments to the *Copyright Act*; the issue of technological protection measures; and how conflicts between copyright law and contract law (licences) should be resolved. It will also be noted whether the web sites list an institutional contact to which faculty can address questions about copyright.

Although the primary means of gathering and interpreting information will be qualitative, some of the research will comprise descriptive quantitative analysis, specifically a survey questionnaire. When developing a copyright compliance strategy for an institution, there is a need to take into account the baseline understanding and assumptions of those who are expected to abide by the institutional policy. It is also important to consider their perceptions and opinions of how copyright issues affect their work so as to develop an effective awareness and educational strategy. A useful instrument to collect such data is a questionnaire. To this purpose, teaching faculty across Canada were invited to complete a survey that asks faculty various closed- and open-ended questions to determine what they know about copyright initiatives in their institutions, what they think about these initiatives and about copyright in general, and how they would proceed in various copyright-related scenarios. The results of this study are presented and discussed in Chapter 6.

In Chapter 7, recommendations are made for developing user-centred copyright policies and educational programs that will ensure that the institution can encourage maximal use of copyrighted works in teaching, learning, and research, while still reducing legal risk and maintaining the balance between the rights of users and creators that copyright policy should strive to maintain in a democratic society. In addition, avenues for future research are explored.

2 Context: Canadian copyright and the information society

The first part of this chapter will be an outline of the law of copyright in Canada, and the events that have led to the need for universities to take on a more active role in encouraging and managing the use of copyrighted works for educational purposes.

The second part of this chapter will expand upon the theoretical framework introduced in the previous chapter, and discuss its relationship to Canadian copyright law and policy making. It will discuss the relationship between information society discourse and the dominant copyright regime. First, the “information society”, and its claims and assumptions, will be described. Following this will be a discussion of the information society and copyright policy in general, and then a more specific discussion of information society discourse in the creation and interpretation of copyright policies in law. The next section will address institutional policies and the roles of libraries and library research. Finally, I briefly touch on the notion of identifying the assumptions behind information society discourse and making them explicit, and what effect this might have on discussions of copyright policy.

2.1 Copyright in Canada

Copyright in Canada is governed by the *Copyright Act*,¹ as well as the judicial interpretations of the Act. Copyright is defined in the Act as (among other things) the exclusive right to “produce or reproduce the work or any substantial part thereof in any

¹ R.S.C. 1985, c. C-42, online: CanLII <<http://canlii.ca/t/52hd7>>.

material form whatever,” and includes exclusive rights to communicate or perform the work.² Since 1997 the Act has permitted the creation of copyright collective societies to administer certain rights of participating copyright owners. Copyright owners may authorize a collective society to administrate on their behalf, for example by negotiating and entering into licensing agreements and collecting remuneration. Licences may be transactional (or pay-per-use), in which a payment is made for each use of a work, or blanket (also known as comprehensive), in which an annual fee is paid for ongoing permission to use works in the collective’s repertoire.³ Collective societies may also apply to the Copyright Board to certify a tariff, which is a remuneration scheme similar to a licensing agreement but not negotiated between parties.⁴

Users of copyrighted material also have rights under copyright law, by which they are permitted to copy, communicate, perform, integrate, or otherwise deal with a work without permission or payment; these rights are also known as exceptions to infringement. In the educational context, the *Copyright Act* includes specific exceptions for schools⁵ and libraries.⁶ Educational institutions and the individuals within them can also take advantage of the fair dealing exception,⁷ which is broader in scope than the

² *Ibid.*, s. 3.

³ *Ibid.*, s. 70.1.

⁴ *Ibid.*, s. 70.12.

⁵ *Ibid.*, ss. 29.4-30.04.

⁶ *Ibid.*, ss. 30.1-30.21.

⁷ *Ibid.*, ss. 29-29.2.

specific educational exceptions; whether a given dealing is “fair” is determined by an analysis considering several factors, set out by the Supreme Court in its 2004 case *CCH*. The *CCH* test evaluates the fairness of a dealing using a framework that includes six factors, considered holistically:⁸

1. The purpose of the dealing: A given dealing is more likely to be fair if its purpose is one of those enumerated in ss. 29-29.2 of the *Copyright Act*.
2. The character of the dealing: A dealing is more likely to be fair if it is not widely distributed. Here the Court notes that customs and practices in the industry may be relevant to determining whether the character of the dealing is fair.
3. The amount of the dealing: It is relevant here to consider the amount of the work being dealt with (quantity), the excerpt’s importance in relation to the entire work (quality), and the purpose for which it is being used. A dealing is more likely to be fair if it is no more than necessary to achieve the purpose.
4. Alternatives to the dealing: It is relevant to consider whether there is a non-copyrighted equivalent of the work that could be used instead, or whether the purpose could be reasonably achieved without the dealing.
5. The nature of the work: A dealing is more likely to be fair if the work has already been published.

⁸ *CCH*, *supra* note 1 at paras. 54-59.

6. The effect of the dealing on the work: A dealing is more likely to be fair if it does not compete with the market for the original work.

Access Copyright is a collective that represents copyright owners throughout Canada except for Quebec. The collective negotiates copyright licences and collects royalty payments on behalf of owners. Until the end of 2010, Canadian universities had blanket licences to reproduce certain amounts of works in Access Copyright's repertoire.

Those agreements were set to expire at the end of 2010; meanwhile universities were unable to reach further agreements on blanket licensing terms with Access Copyright, partly due to the fairly large increase in proposed fees to cover digital copying, and concerns that the licence terms overlap with other licences with individual publishers or database providers, resulting in double payment for use of certain materials (Lorinc, 2010). In June 2010, Access Copyright applied to the Copyright Board to institute a tariff that aimed to, among other things, incorporate royalty payments by post-secondary institutions for digital use of works in its repertoire, such as scanning, uploading, and posting hyperlinks.⁹ The proposed tariff would increase the copyright fee paid by students from \$3.38 per year to \$45.00, and eliminate the 10¢ per page course pack payment. The Copyright Board approved an interim tariff that would apply until it could hear arguments and objections regarding the main tariff.¹⁰ Universities that previously

⁹ *Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013* (12 June 2010), online: Copyright Board <<http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/2009-06-11-1.pdf>>.

¹⁰ *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013* (23 December 2010), online: Copyright Board <http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/interim_tariff.pdf>.

relied on negotiated licences with Access Copyright were faced with a decision: whether to rely on the interim tariff or to opt out and sever ties with the collective organization altogether.¹¹

In 2012, two events had direct impacts on how universities would come to manage copyright compliance among faculty, staff, and students in their institutions. First, the Supreme Court decided five copyright-related cases (known as the Copyright Pentalogy); in one of them, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*¹² (*Alberta*), the court held that the copying of excerpts of copyrighted works by elementary and secondary school teachers, and the distribution of these copies to students in the class, were fair dealing. The Court reasoned, drawing on its previous decision in *CCH*, that copying for class instruction falls under the purpose of “research and private study” as enumerated in the legislation. As a result of the decision in *Alberta*, the Copyright Board proceeded to rule in its tariff decision that a certain set of reproductions made for instructional use in schools fall under the category of fair dealing and thus are not subject to royalties (Katz, 2012a). The point that “research and private study” should be interpreted from the point of view of the end user was also made in

¹¹ It was uncertain for a time whether tariffs set by the Copyright Board were mandatory upon universities. A 2015 case in the Supreme Court confirmed that “licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline.” (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at para. 113, [2015] 3 S.C.R. 615, online: CanLII <<http://canlii.ca/t/gm8b0>>.) See Knopf (2016a) for a discussion of this case in relation to Access Copyright’s suit against York University.

¹² 2012 SCC 37, [2012] 2 SCR 345, online: CanLII <<http://canlii.ca/t/fs0v5>>.

*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*¹³ (*Bell*), another Pentalogy decision. In this case, the Court ruled that 30-second previews of songs are used by consumers for research purposes, and can be considered fair dealing.¹⁴

The second event was the enactment of a number of amendments to the *Copyright Act*. One amendment was the addition of “education” to the list of allowable purposes of fair dealing.¹⁵ Exceptions for educational institutions were modified to address digital uses of copyrighted works¹⁶ and participation in classes over the Internet.¹⁷ Another amendment was the reduction of maximum statutory damages that may be awarded for non-commercial infringement.¹⁸

Between 2012 and 2013, following these two events, a number of universities entered into new agreements with Access Copyright, while several opted to proceed without a blanket licence and manage copyright compliance in-house by relying on a combination of publishers’ licences, public domain works, open access works, and institutional copyright policies addressing fair dealing and educational exceptions (Geist, 2013). Those Canadian universities that continued to operate under the Access Copyright licences were required in mid-2015 to decide whether they will continue this partnership.

¹³ 2012 SCC 36, [2012] 2 SCR 326, online: CanLII <<http://canlii.ca/t/fs0vf>>.

¹⁴ *Ibid.* at para. 30.

¹⁵ *Copyright Act*, *supra* note 1, s. 29.

¹⁶ *Ibid.*, ss. 30.02, 30.04.

¹⁷ *Ibid.*, s. 30.01.

¹⁸ *Ibid.*, s. 38.1.

As of mid-2016, the vast majority of the larger universities have declined to enter into a blanket licensing agreement (see Chapter 5).

However, there remains a risk of litigation due to unintentional copyright infringement by faculty who may be unacquainted with the finer points of copyright law. In April 2013, Access Copyright filed suit against York University,¹⁹ alleging that faculty members have copied protected works outside of the scope of user exceptions in the *Copyright Act*, and were thus subject to the interim tariff set by the Copyright Board.²⁰

It is from these facts this dissertation takes its starting point.

2.2 Information society

The dissertation is theoretically framed by the notion of the information society and its relevance to the law of copyright and to the work of the post-secondary educational institution. This section introduces the argument that a market-based theory of copyright represents an inappropriate approach to information and knowledge exchange in the university setting. This argument will be revisited throughout the following chapters.

2.2.1 Claims and assumptions of the information society

The “information society” theory is an attempt to characterize the latter 20th and early 21st century as being a new kind of society where the creation, dissemination, and use of

¹⁹ *Access Copyright v. York*, *supra* note 7.

²⁰ This case is ongoing at the time of writing.

information take on a fundamental importance in politics and the economy. Not only is there more information, but economic and political relations have changed because of it.

This theory grew out of Daniel Bell's theory of the "post-industrial society". For Bell, the transition to a post-industrial society was driven by the relationship between theoretical knowledge and technological application. Knowledge, then, as opposed to machinery, was becoming the main wealth-producing resource, replacing labour and capital (Dyer-Witford, 1999, pp. 17–18, 19). Society would be organized around knowledge as a means of social control and would eventually be free of the economic crisis and class conflict that characterized the industrial era, with no need for a proletariat revolution (p. 18).

Webster describes and critiques five conceptions of the information society. The first is based on technological innovation and diffusion, which Webster calls the "technoeconomic paradigm" (2006, p. 445). The second focuses more on information itself rather than technology, and is based on the increase and preponderance of occupations in the area of information work (especially with respect to theoretical knowledge) (p. 446). It is most associated with Daniel Bell. The third, associated with Fritz Machlup, is based on the economic value of information and points to the rising proportion of information-based sectors in the U.S.'s gross national product (p. 447). The fourth has an emphasis on information networks and the alteration of space/time relations (p. 448). The fifth points to the increase in social information such as television, movies, and advertisements (p. 448). Despite the differing focus, all of these conceptions rely on some kind of quantitative assessment to argue that there is a qualitatively different form of social organization (p. 444).

While the details vary, the important consideration is the wider paradigms that underlie these theories. Trosow (2004) discusses the Burrell and Morgan framework of social science theory and the four paradigms that arise from it. Of these, the dominant paradigm in social science, and in library and information science, is “functionalist” – i.e. positivist (we are value-neutral observers of an objective reality), determinist (particularly with respect to technology), and presumes a unity of science (Trosow, 2001). As Harris (1986) points out, library research has generally been uncritical in approach (p. 212). An alternative paradigm lies on the other end of the continuum. The “radical humanist” paradigm takes as its assumptions that reality is constructed through the perceptions of the participants and that these participants have free will, and focuses on radical change (for example, conflict and power differentials) rather than cohesiveness (Trosow, 2004, p. 428). The construction of reality in turn is influenced by radical change, in the sense that that “the activities of those at the top of the stratified hierarchy both organize and set limits on what persons in lower positions can understand about themselves and the world around them.” (Trosow, 2001, p. 376) These limits are based on force and law; as Braman points out, “Copyright also affects the social construction of reality by determining who has control over whether particular content enters public discourse, and if it does, the conditions under which it does so.” (2006, n.p.) However, the limits are based also on “ideological persuasion and self-imposed subordination.” (Raber, 2010, p. 150)

The various information society conceptions described above generally flow from the functionalist paradigm. In the functionalist paradigm, information is reified; it seen as a *thing* that exists in reality outside of human perception of it. The functionalist paradigm is

determinist, taking as fundamental that certain events, such as technological diffusion, are inevitable. Information, being a thing in and of itself, is then capable of affecting social and political relations without the interference of human agency. The information society theory has been critiqued on both of these bases. The reification of information leads to the primary use of quantitative (for example, economic) measures to explain systemic change (Webster, 2006, p. 449). It also leads to the omission or devaluing of factors that cannot be reduced to quantitative representations. Each of these critiques will be discussed in more detail below.

By contrast, in the radical humanist paradigm (or information *for* society), information is a *process* that has the potential to change the knowledge structure of persons. Viewing information as a process keeps the focus not on the quantifiable end product, but on its development, including the raw materials and the intellectual labour that go into its creation. This holistic approach accounts for such factors as power relations (e.g. between capitalist and knowledge worker), and how the hegemony operates to portray itself as ideology-free (Trosow, 2004, p. 456).

If we apply these two paradigms to the study of information and knowledge, we can see that there are fundamental differences in how information will be perceived. This perception, in turn, will influence copyright policy in government, industry, and individual institutions.

Because information is a thing in the information society view, divorced from social relationships (Schiller, 2007, p. 18), it can be propertized and commodified (Trosow, 2004, p. 458). Indeed, that is a basis for the theory of the information society and the

market-based view of copyright. Although Bell claims that knowledge is different from property (Dyer-Witheford, 1999, p. 19), in order for knowledge to be a wealth-producing resource it must be propertized in some way.

2.2.2 The information society and copyright policy

The discourse of the information society is related to the construction of dominant copyright regimes in several related ways. The first and most obvious relates to the propertization and commodification of information.

Information itself is non-rival good, meaning it can be used by more than one person at once. It is non-excludable, meaning that it is not possible to prevent a non-payer from having access to it. In this way it is considered a public good. Historically, much information was, by necessity, confined to a physical container. This introduced a natural rivalry and excludability in that the container itself could be treated as a private good.

Trosow argues that information always has a use-value; i.e., its consumption meets some kind of demand (Trosow, 2003, p. 231). It does not, however, have an internal exchange-value (how different use-values exchange for each other), since it does not have an inherent exclusion mechanism. If it is confined to a physical container, however, there is an exclusion mechanism, which creates an exchange-value. Trosow makes this point to distinguish between information container as a commodity, and information as a commodity (p. 233). There is no “natural” reason that information must be treated as a commodity (in fact, “naturally”, information tends to be free). In information society theory, however, it is treated as a commodity. This is the basis for many criticisms of the theory, disputing its claims that the proliferation of information has led to a new type of

socio-economic relationship. Instead, say the critics, the commodification of information is simply an extension of the creation of private property rights as is necessary for capitalist social relations (May, 2006, p. 34; McNally, 2014, p. 297). The “natural rights” always seem to benefit the bourgeoisie (May, 2006, p. 36).

Furthermore, if it is claimed that information can be propertized and commodified, and that this is an acceptable basis for information policy, the question becomes *who* is the owner of the information? Contemporary Canadian copyright policy deems the creator to be the copyright owner by default,²¹ and grants exclusive rights on this basis. Owners are granted the exclusive right not only to copy the work, but also to create derivatives of it.²² However, this policy does not reflect how culture and knowledge are in fact created.

Many scholars point out that creation is not an isolated event; it refers to and derives from the knowledge and culture that preceded it (Leval, 1990, p. 1109). For example, Patry (2011) states that “culture is behavior, creatively duplicated” (p. 94). Drahos and Braithwaite (2002) point out that innovators are still borrowers (p. 2). According to Hettinger (1989) “invention, writing, and thought in general do not operate in a vacuum” (p. 38). Drassinower (2005) defines an author as one who is “constantly engaged in a dialogue with that world in general, and indeed with other works that populate the world.” (p. 466) Aufderheide and Jaszi (2011) claim that the idea of authors as individual geniuses is a fairly new concept (p. 21). The idea that innovation is a *thing* rather than a

²¹ *Supra* note 1, s. 13(1). However, if the work was created under the terms of employment, the employer is the copyright owner by default (*Copyright Act, supra* note 1, s. 13(3)).

²² *Ibid.*, s. 3(1).

process that occurs through human agency can be found in information society theory, particularly that of Daniel Bell (McNally, 2014, pp. 298–299). Schiller (2007) asserts that Bell and other “postindustrialists” tried to remove information analytically from consciousness and the lived experience, which takes place in an existing culture among other individuals (p. 20). Information, being reified, is separated from its societal roots, and the importance of raw materials to creation is devalued (Boyle, 1997, p. 98). From this point of view, then, primacy is placed on the rights of the creator rather than the rights of the society that supplied the ingredients. What was common property now becomes private property.

Another consequence of the removal of human agency (beyond the actions of the original creator) from discussions of knowledge and information is that certain assumptions are perceived as “common sense” (McNally, 2014, p. 291). Bell’s post-industrial society was to be characterized by the “rational progress” of knowledge (Dyer-Witford, 1999, p. 19). The copyright industry tries to invest unauthorized private copying with normative significance (Cohen, 2005, p. 351), while at the same time claiming that their own perspective is obvious and common sense and others are irrational (Bollier, 2003, p. 20). Of course there is a strategy at play; as Cohen points out, “Policy proposals do best when they are linked to a ‘strong’ paradigm that makes institutions seem natural, rather than ‘social contrived arrangements.’” (2005, p. 175) Those who want to retain control will justify the system on a “rational/legal” basis (Raber, 2010, p. 150), and use terms like “natural rights”, implying that others’ rights are merely secondary and political (May, 2006, p. 50), and putting the onus on the other to show that these rights are *not* natural (Patry, 2011, p. 129). This tactic has the effect of thwarting discussion of the nature of

property rights (Drahos & Braithwaite, 2002, p. 23). Interestingly, it hasn't always been spoken of that way – only in 18th century England did printers and publishers of the Stationers Company start using the language of natural rights; previously, the justification was related to offending civility and custom (Johns, 1998, pp. 221–222). Natural rights discourse also relates back to the notion of the author as an individual genius who must have exclusive control over what he has created.

The information society view attempts to explain the alleged change in social relations in a positivist manner through quantitative measurements (pieces of information communicated, new technological innovations, gross domestic product, etc.). However, a quantitative approach should only be used where it is appropriate (M. H. Harris, 1986, p. 217). One of the main criticisms of most of the “information society” claims is that taking a purely quantitative survey of informational occupations or GDP overlooks qualitative differences in the variables, and, just as importantly, it overlooks the researchers’ own subjective perceptions of the proper categorization of the variables (Webster, 2006, p. 450).

Specifically with regards to copyright, some concerns cannot properly be expressed in the language of neo-classical economics (Boyle, 1997, p. 115). Copyright policy that is based on purely economic considerations will miss any factor that cannot be reduced to numerical terms. It is difficult to measure the value of a work to society outside of monetary considerations (Breyer, 1970, p. 285 note 19). Losses from limiting access (e.g. loss of use-value) cannot easily be quantified like financial gains can (e.g. exchange-value) (Nair, 2010, pp. 90–91; Trosow, 2003, p. 229). The benefits of the commons cannot be “economized” (Bollier, 2003, p. 18). Vaidhyathan (2004) states that there is

an “unquantifiable”, yet “discernible and essential” value in the public library and the information commons (p. 124). Even information itself can be operationalized in different ways, depending on the starting point – for example, the engineering or economist's view of information admits quantitative measurement, while those who stress the importance of the semantic aspect of information cannot measure in this way (Webster, 2006, pp. 451–452). Braman (2006) describes one definition of information as a constitutive force in society, and characterizes as a “weakness”²³ that this type of definition is difficult to operationalize because its effects are often qualitative rather than quantitative. Knowledge itself is created and disseminated by an abstract, difficult to quantify process (Bollier, 2003, p. 139), and neoclassical economics cannot measure “culture” (Patry, 2011, p. 126).

This distinction puts promoters of the information commons at a disadvantage where policy makers are wedded to an information society view. Without numbers representing these aspects of copyright, perception can be skewed. Those in the copyright industry can point to dollar amounts representing their alleged losses, and put numbers on “piracy” (Drahos & Braithwaite, 2002, p. 93), and dominate the conversation about copyright.

The information society theory encourages a view of copyright as a matter of economic efficiency. Again, this is seen as the “natural order of things” (Drahos & Braithwaite, 2002, p. 219), and those who promote this view do not bother to explain themselves (Cohen, 1998, p. 492). Copyright in this view exists only to ensure that the market for

²³ An unfortunate choice of words; perhaps she could have called it a “challenge”.

information goods will flourish (May, 2006, p. 35). Information society theorists also attribute the creation of knowledge value in the market to something other than the exploitation of human labour – the reification of information is accompanied by the reification of intellectual labour as a means of adding exchange value (Trosow, 2003, pp. 235–236). When knowledge and information are commodified, they are subject to commodity fetishism, whereby the commodities themselves, rather than people, are the subjects of relationships, and can be governed by the market (Radin, 1996, p. 81). By removing human labour and power relationships from the equation, information society theorists can claim that there is a new type of society, where power is collapsed. But in fact, “the imperatives of profit, power and control seem as predominant now as they have ever been in the history of capitalist industrialism.” (Webster, 2006, p. 456)

2.2.3 Legislative policy

An information society theorist would view copyright law as necessary only to the extent that it allows for the propertization (and thus commodification) of information so that it can be exchanged on the market. Similarly, exceptions to copyright are necessary only when they apply to uses that cannot otherwise be efficiently monetized. These claims reflect the market-based view of copyright.

The first copyright law itself cannot, of course, be said to be “based” on the information society theory. However, the economic assumptions it was based on were very similar. The development of commercial printing and publishing in Europe occurred in the context of information control, in this case, “prepublication censorship” (Drahos & Braithwaite, 2002, p. 30; Hesse, 2002, p. 29). The state would only allow the common

people to know certain things. Almost as soon as commercial printing started in England in the 16th century, the government instituted a licensing regime (the *Licensing of the Press Act 1662*)²⁴ to ensure that the technology would only be used for approved ends (Johns, 1998, pp. 189, 230). This licensing regime was accompanied by a monopoly of the Stationers' Company (a group of printers, binders, and booksellers). The monopoly was based primarily not on the law, but on civility and conduct. The expense and time required to print materials were also factors that contributed to the monopoly. When a manuscript was acquired by a printer and licenced by the Crown, its title and the name of the printer were entered into the register. (It is interesting to note that the author's name was rarely added to the entry [p. 216]. In fact, it was not necessary to have the author's consent to publish [p. 228].) The Stationers' Company was also the arbitrator of printing disputes, and only after being heard there could the dispute go further into the legal system. The only statutory protection for printers was the *Licensing of the Press Act*. When the *Licensing of the Press Act* lapsed, the statutory protection went with it. It was at this point the Stationers' Guild began to promote the idea of natural property rights (p. 246).

The British *Statute of Anne*,²⁵ enacted in 1709, was the first copyright law proper. Its long title was "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."

²⁴ 14 Car. II. c. 33, online: BHO <<http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435>>.

²⁵ 8 Ann. c. 21, online: The History of Copyright <<http://www.copyrighthistory.com/anne.html>>.

“Intellectual property, an invention of the eighteenth century, thus burst into the world claiming to be real property in its purest form.”²⁶ (Hesse, 2002, p. 33) The monopoly was limited to publishing and printing of the books, and did not address derivative works or uses by individuals (Lessig, 2004, p. 87). The statute was enacted for economic purposes, to incentivize the writing and publishing of works, but left a great deal of room for use. So, although information and knowledge were propertized and commodified to some extent, others were free to adapt or translate the work and further add to culture.

Even the first American copyright law in 1790²⁷ was very limited in scope. It only covered maps, charts, and books, and afforded only the exclusive right to publish, but not the exclusive right to create derivative works (Lessig, 2004, p. 136).

As time went on, however, it became more efficient for individuals to make copies, thus freeing information from its container. The scope of copyright was expanded in order to preserve the artificial scarcity and retain the exchange value that is necessary for this economic model (i.e. correct the “market failure” of free access to information (Trosow, 2003, p. 228)). Lessig (2004) attributes this primarily to the lobbying efforts of the copyright industry (such as Disney) to extend their ownership of culture whenever a new type of technology arises. He describes this as an atrophy of democracy (p. 41). From an information society perspective, however, such developments are inevitable. If

²⁶ Schiller (2007), however, challenges this periodization and suggests that the onset of the propertization of culture occurred earlier, starting in the 15th century in England, with drama and theatre rather than literary works such as novels (p. 34).

²⁷ *Copyright Act of 1790*, 1 Statutes at Large, 124, online: Wikisource <https://en.wikisource.org/wiki/Copyright_Act_of_1790>.

information and knowledge are now the main wealth-generating resources, it is economically sensible to encourage their commodification and provide more rights to those who are most likely to make money that way. This applies particularly to materials in the public domain, such as fairy tales (from which the Disney Corporation has made a lot of money). From an information society perspective, the public domain does not have value in itself except to the extent that it can be mined in order to create marketable goods. As Boyle (1997) puts it: “The structure of our property rights discourse tends to undervalue the public domain, by failing to make actors and society as a whole internalize the losses caused by the extension and exercise of intellectual property rights.” (p. 111)

In terms of contemporary policy making, how the issue is identified is political because it determines the participants, the rhetorical frames, and definitions and methods used. For example, copyright can be seen as an economic issue, or alternatively as an issue of our ability to communicate (Braman, 2006). A government that adheres to the notion of the information society (or aspects of it) will draft legislation that reflects this notion. They will base the legislation on ideas about economics and technological determinism. Dyer-Witford (1999) notes that proponents of the information society did not just predict the future, they prescribed it; governments used the approach of the information society to justify acts such as academic-business partnerships and the privatization of telecommunications (p. 22).

In regards to copyright, the U.S. federal government white paper on Intellectual Property and the National Information Infrastructure (Working Group on Intellectual Property Rights, 1995) fully embraced the economic approach and referred to fair use as a “tax” on

copyright owners (Aufderheide & Jaszi, 2011, p. 43) and a “subsidy” for universities (Boyle, 1997, p. 106). There is no reason that the discussion could not have started from the opposite point of view, taking rights of users and consumers as the baseline (Boyle, 1997, pp. 105–106).

Information society assumptions have shown up quite a bit in discussions about technological protection measures. The white paper referred to above eventually influenced the passage of the *Digital Millennium Copyright Act* in the U.S.,²⁸ which criminalizes the circumvention of technological protection measures controlling access to a work (whether that work is still under copyright or in the public domain). Similarly, in Canada, the Conservative government’s insistence on restrictive digital locks provisions was framed by comparison to the sale of physical goods and a focus on remunerating “creators” and allowing them to profit as much as possible (Carrie, 2012; Del Mastro, 2012). Information is seen as just another type of commodity, and so owners should have the right to protect access to their information as they protect access to pieces of clothing. The technology exists, so copyright owners should be able to use it. This justification for complete control presumes that the technology has arisen on its own, rather than being specifically created in order to protect capital (McNally, 2014, p. 299). Lessig (1999) makes a similar point, although not in the context of the information society specifically, when he states that code (or architecture) is not found, and not neutral, but made by us (p. 6).

²⁸ 112 Stat. 2860 (1998), online: Congress <<https://www.congress.gov/bill/105th-congress/house-bill/2281>>.

The irony here is that Bell spoke of an “information explosion” (Dyer-Witthford, 1999, p. 21) but copyright (especially technological protection measures) is being used more and more to restrict access to information, based on the assumptions of the information society. If the development of new digital technologies is the prime herald of the information revolution (p. 23), then one would think that these technologies would be used to disseminate knowledge more widely. In fact, the opposite is the case – a document co-authored by information revolution theorists including Alvin Toffler, called “Cyberspace and the American Dream: A Magna Carta for the Knowledge Age” specifically recommended strong intellectual property rights to protect private ownership of information (Dyer-Witthford, 1999, pp. 34–35). Technology allows copyright owners to have control over content that they did not have in the age of the printed book (Lessig, 1999, p. 128), and, since the law does not permit one to offer a means of circumventing these digital locks, publishers do not have an incentive to fine-tune or remove them (Reichman, Dinwoodie, & Samuelson, 2007, p. 1023). Furthermore, digital locks may limit access to works in the public domain, so they may be perpetual, unlike copyright itself. As Dyer-Witthford (1999) says, “Digitization yields, not postcapitalism, but new investment possibilities, more efficient management techniques, better marketing opportunities – faster, swifter, more efficient commodification.” (p. 30)

The claim of information society theorists that the exchange and manipulation of information will be the primary generator of wealth (Dyer-Witthford, 1999, p. 24) thus seems inconsistent with the idea of information being meaningfully available to all.

2.2.4 Judicial interpretation

Copyright policy does not end with statute, however. The courts must interpret the provisions and apply them to specific situations. The interpretations themselves may be influenced by theoretical discourse beyond the statute. Take, for example, the discussions of fair dealing and fair use. How the courts interpret the scope of these exceptions may be related to how copyright is characterized and what the frame of reference is. If the purpose of copyright law is to ensure profit to the copyright owner on the basis of her “natural rights” over commodified information, then exceptions would be interpreted narrowly. Craig (2005) states that the claim that fair dealing should be constructed narrowly comes from the “normative presupposition of the copyright system: namely, that the author should have exclusive control over the use of her work.” (p. 449) The “Magna Carta for the Knowledge Age” mentioned above would certainly call for a restricted view of exceptions to copyright.

However, in Canada, the Supreme Court has called exceptions “users' rights” and copyright a “balance” between the rights of the owner and the public interest in access to information. It could be said that they have taken an equitable, user-centric approach to the fair dealing analysis; the frame of reference is the end user (D'Agostino, 2008, p. 324; Trosow, 2013, p. 224). The Supreme Court has, to some extent, rejected the information society ideal of stronger intellectual property rights.

The difference between U.S. and Canadian courts' analysis of fair use and fair dealing (respectively) is telling, specifically in regards to the effect of an available licence.²⁹ The importance of market harm potential in U.S. courts been said to be the single most important element of fair use.³⁰ Even in cases where market harm is not considered the most important factor (possibly because the defendant was a non-profit educational institution), where a licence for the use is available, it tends to make the use less fair, because it represents an additional market for the copyright owner.³¹ Again, the background theory here is that where it is economically feasible to treat information as a commodity (to pay for its use), the copyright owner should be paid.

By contrast, the Canadian Supreme Court's view of licences is that they have no effect on whether a given dealing was fair. The Court has said that the availability of a licence is not relevant to the fair dealing analysis; if it were, it would allow the owner to extend the scope of his monopoly in a way that upsets the balance between owners' rights and users' rights.³² This interpretation of the statute is an acknowledgment that there are other factors to consider besides income to the copyright owners. Such an interpretation is inconsistent with a market-based, information society view of copyright.

²⁹ A more detailed comparison of Canadian fair dealing and American fair use can be found in Chapter 3.

³⁰ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 at 567, 105 S.Ct. 2218 (1985), online: Google Scholar <http://scholar.google.com/scholar_case?case=12801604581154452950>. (*Harper*)

³¹ *Cambridge University Press v. Becker*, 863 F.Supp 2d 1190 at 1210, 1237 (N.D. Ga. 2012), online: Google Scholar <https://scholar.google.ca/scholar_case?case=18306741473986959577>. (*Cambridge* 2012)

³² *CCH*, *supra* note 1 at para. 70.

In U.S. decisions the fair use analysis begins with a determination of “prima facie infringement” (i.e., the plaintiff is in fact the owner of the copyright, and the defendant made a copy). This implies that that the starting point is assuming infringement.³³ The Canadian Supreme Court acknowledges that procedurally, fair dealing and other exceptions are defences, but substantially they are rights. This difference is not merely semantic; how exceptions are characterized has implications within and outside the legal system. First, the outcome of infringement cases might not be the same. Courts (at least in the U.S.) are less sensitive to free flow of information arguments when the context is perceived to be private/property rather than public/censorship as the baseline (Boyle, 1997, p. 98).

The court’s perception of copyright and fair dealing can affect how it decides cases of contract conflicting with user rights.³⁴ If the perception is that copyright law is a set of default rules that can be contracted out of where it is more economically efficient – i.e. the information society view as described above – the court will enforce “agreements” such as shrink wrap licences even where the terms restrict use of public domain material or exceptions (Elkin-Koren, 1997, p. 98). This can lead to the common use of such licences. On the other hand, if copyright is seen as a purposeful arrangement that balances rights and duties – not merely from a “neutral” economic perspective but from a

³³ However, Leval (1990), a former U.S. judge, warns that that fair use should not be considered a “bizarre, occasionally tolerated departure” from the copyright monopoly – it is necessary to the overall design of the copyright regime (p. 1105).

³⁴ The issue of contracting out of user rights such as fair dealing is addressed in Chapter 4.

normative perspective that acknowledges the (non-quantitative) benefits to society of access to information – then contracts should not be allowed to disrupt this.

Second, due to the relationship between dialectic and society (McNally, 2014, p. 295), the characterization of fair dealing and other exceptions will have an effect on its actual use – if exceptions are excuses, risk-averse individuals and institutions will be less inclined to take advantage of them for fear of overstepping the bounds (Demers, 2006; Gibson, 2007, p. 14 calls this the “permissions culture paradigm”). In general, putting the burden of proof on the fair user chills fair use (Snow, 2010, p. 1782).³⁵ The availability of fair use does not only depend on the outcome of a particular case, but on the perception of copyright by users and by those who are responsible for setting policies.

2.2.5 Institutional policies and library science research

Finally, information society discourse influences policy outside of the law. Copyright policies and guidelines in post-secondary institutions take various forms.³⁶ Some follow the Supreme Court’s lead and encourage users to view their fair dealing rights in a broad and expansive manner. Others focus on the rights of the owner and characterize fair dealing as merely an exception that should not often be relied upon. The perspective that is taken in crafting policies has consequences outside of the particular institution; in Canadian law, industry practice may be taken into consideration in a fair dealing analysis,

³⁵ Lessig (2004) takes this a step further and claims that fair use (at least in the U.S.) is simply the “right to hire a lawyer to defend your right to create.” (p. 187)

³⁶ For an analysis of current Canadian university copyright policies, see Chapter 5.

and a suite of narrowly-crafted policies may restrict the scope of the right (Scassa, 2004, p. 94). Gibson (2007) notes that practices that avoid taking advantage of certain uses that may be fair, and instead seek out a licence, can lead the courts to decide that such a use “properly fall[s] within the rights-holder’s control.” (p. 884) He calls this phenomenon “doctrinal feedback” (p. 885) (transformation in the law from the bottom up), and it is similar to the idea that information society discourse and social practice have a tendency to reinforce each other.

Likewise, some policies claim, without the support of the law, that restrictive licensing agreements for electronic resources take precedence over fair dealing. This approach is especially dangerous because Canadian law has not yet determined whether the terms of a contract can trump users’ rights. Industry practice that assumes that it does can lead the court to interpret it in that manner.

Pyati (2007) discusses the role of academic libraries with regards to the increasing commodification of information. He argues that the commodification of knowledge inherent in the information society view has led to a “scholarly publication crisis” that is threatening academic libraries’ fundamental mission of facilitating access to information. However, libraries have the opportunity to respond with support of electronic publishing, specifically open access journals and repositories, as they are “uniquely or strongly positioned to uphold principles of cost-effective or low-barrier access.” (Lougee, 2007, p. 323) By taking a more active role in the publication process, academic libraries can halt (or at least avoid taking part in) the transformation of knowledge into a capitalized commodity (Pyati, 2007).

Willinsky (2006) also suggests the possibility of cooperation between scholarly associations and academic library organizations, whereby libraries would use their technical infrastructure to host the scholarly associations' journals and provide preservation and indexing support (pp. 64-65).

Research that supports policy making in institutions such as libraries is also important to consider. Which view the researcher takes – information society or information for society – will influence what questions she asks, how she asks them, how she seeks the answers, and how she interprets the answers. Information society theorists posit a situation where the growth of information and technology has led to a diffusion of power relations, different from that of one hundred years ago.

In much the same way, library and information science researchers, for the most part, commit to a pluralist world view (where all stakeholders are equally positioned), a positivist epistemology, and an objective reality (M. H. Harris, 1986, p. 212). There is little research on the distribution of power, since it is assumed to be more or less equal (p. 217). Quantitative measurement and reductionist approaches are undertaken in order to explain, predict, and control (p. 217). Even when a qualitative approach is taken, the aim is still to be “objective”. Content analysis, for example, is often referred to via Ole Holsti’s definition as “the application of scientific methods to documentary evidence”; it is expected to be systematic and objective (cited in Marshall, 2002, p. 241), or value neutral (Trosow, 2001, p. 361). Many studies that employ content analysis to investigate library policies do not look critically at the content, only describing what is there. This approach serves to “limit the range of questions that can be investigated and has rigidly defined the characteristics of relevant answers.” (M. H. Harris, 1986, pp. 221–222).

For example, Meyer (2009) took a descriptive approach to content analysis of the copyright policies of education journal publishers (p. 15). She does not make any mention of power imbalances between the publishers and the individual authors, merely suggesting that “if faculty members are concerned about the rights to their own articles, they have several options [including open access publishing]” but if the current norms of the institution do not support open access publishing, then faculty should not risk promotion or tenure opportunities (p. 16).

McGuigan (2004) takes a nearly critical approach. He addresses the oligopoly of publishers and price inelasticity due to non-substitutability, but stops short of identifying it as a power differential.

Mangrum and Pozzebon (2012) do not explicitly state that they are taking a critical approach in their study of electronic material collections policies, but they do worry about the lack of advocacy within the library profession with regards to restrictive licensing agreement (p. 109). Their theoretical background was critical in that they were looking in part at whether collection development policies addressed licensing agreements. Only about half of the policies did so, but not in any significant way, and this was a cause for concern for the authors (p. 113).

Eschenfelder (2008), on the other hand, took an explicit critical information studies approach (CIS) to examining use restrictions in digital materials interfaces at an academic library. “CIS seeks to reveal the structures and practices that channel flows of information and cultural elements, and the processes by which legal outcomes unfold.” (p. 206) She is concerned that the library community has accepted many “soft use”

restrictions (including technological protection measures) and that this can be thought of as implicit consent. Librarians, therefore, should advocate for removal of all use restrictions, or encourage vendors to offer restriction-free products (p. 219).

2.2.6 Identifying assumptions

The importance of identifying assumptions inherent in information society discourse is that it allows us to “unmask” the reification of information and who is driving it (May, 2006, p. 45).

A second reason we must identify the assumptions is that there is a dialectical relationship between language and society. As policy makers borrow from the discourse of the information society, it further naturalizes and entrenches the information society (McNally, 2014, p. 300). For this reason, we have to reorient the narrative from the market (information society) to the commons (information for society) (Bollier, 2003, p. 19); “we need to reclaim the conversation about copyright as something that belongs to all of us.” (Aufderheide & Jaszi, 2011, p. 7)

The “unmasking” of information society discourse and its assumptions leads to a rethinking of the current copyright regime itself. Some authors have called for a more radical change to copyright law (or perhaps some sort of law that is meant to serve the same ultimate purpose as copyright law, to encourage creation and authorship). Trosow (2003) suggests (taking as his basis the radical change paradigm) that law should protect intellectual labour rather than property, because it is the intellectual labour that gives the work its use value (p. 236). Exchange value attaches only because of artificial scarcity. In a world where technology has the potential to erase the need for artificial scarcity

(because anyone can publish and anyone can access information), the focus must be not on the information as a *thing* separate from the society in which it was created (as with an information society view), but on the *processes* within society that allow authors to create new culture (including their labour). Incentives would still be important, but need not take the form of a monopoly, or even be economic.

Lessig (2004), while not addressing the information society perspective explicitly, suggests that “the Internet should at least force us to rethink the conditions under which the law of copyright automatically applies, because it is clear that the current reach of copyright was never contemplated, much less chosen, by the legislators who enacted copyright law.” (p. 148) Rather than information being seen as a generator of wealth in all cases, the focus would be on its relationship to culture.

2.2.7 Conclusion

In this chapter I have attempted to show that the discourse of information society can be implicated in the construction and maintenance of copyright regimes. The assumptions underlying information society theory have been taken as common sense and incorporated into policy (legislative, judicial, and institutional) to a certain degree. When these assumptions are revealed as value-laden, it becomes more obvious how they are able to influence policy making in the intellectual property sphere. This influence is especially concerning in relation to university copyright management policy. If a university’s mission is to create and disseminate knowledge for the benefit of society, particular attention must be paid to the process of information and knowledge creation, including the raw materials and labour that go into it, as opposed to information as a

“thing”, strictly the property of the one who created it (or who currently owns the copyright).

3 Canadian fair dealing and U.S. fair use

3.1 Introduction

This chapter presents an overview of the Canadian copyright landscape as it exists in 2016, particularly with regards to fair dealing in the educational context. While traditionally U.S. fair use has been thought of as broader in scope than Canadian fair dealing, I claim that in 2016 this is no longer the case, and that the current state of the fair dealing doctrine is now as broad in scope, and more flexible, than fair use where educational uses are concerned.

3.2 Background

In contrast with the open-ended American doctrine of fair use, fair dealing was traditionally thought to be rigid due its circumscribed list of permissible purposes.¹ A given dealing must first fall into one of the enumerated purposes (first stage) before the six factor test can be considered (second stage). Prior to 2012, the purposes were limited to research, private study, criticism, review, and news reporting. It was unclear whether common educational practices such as multiple copies for classroom use (which is an explicitly permitted purpose under American fair use) would pass the first stage of the fair dealing analysis. Educational administrators, then, were cautious in allowing this type of copying to take place in colleges and universities without the safety net of a blanket agreement with copyright owners (Trosow, 2010, p. 546).

¹ However, Katz (2013a) argues that such a view does not reflect the intent of Parliament in enacting the original fair dealing provision, that it was meant to be broadly interpreted.

The effect of the Copyright Pentalogy and legislative amendments has essentially been to broaden the scope of fair dealing, to include education, parody, and satire. In this chapter I argue that in fact Canadian fair dealing, as the doctrine currently stands, is now more flexible and pro-user than U.S. fair use, at least with respect to the education and library sectors, in that a potential defendant has less of a burden to overcome in a fair dealing analysis than in a fair use analysis.

Section 3.2 contains a brief and general overview of copyright in Canada and the United States. Section 3.3 contains an overview of fair dealing and fair use. Section 3.4 contains a comparison of the legislation and jurisprudence specifically with respect to fair dealing and fair use, using the fairness factors as a guide. Specifically, this section will examine differences with respect to the fairness factors in general, transformativity, amount and substantiality, market harm and licences, and institutional practice and policy.

3.3 The law of fair dealing and fair use

The purpose of copyright is explicitly addressed in the *Constitution of the United States*: Congress is empowered “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²

² art. I, § 1, cl. 8, online: Wikisource
<https://en.wikisource.org/wiki/Constitution_of_the_United_States_of_America>.

In the Canadian *Constitution Act, 1867*, the federal Parliament is authorized to make laws related to copyright, but there is no specific indication of the objective of these laws.³

While the *Copyright Act* itself does not include any discussion of its purpose, the preamble of Bill C-11 (which amended the Act to include education as a fair dealing purpose) describes the *Copyright Act* as “an important marketplace framework law and cultural policy instrument” that “supports creativity and innovation”.⁴ The purpose of Canadian copyright law has also been reiterated and clarified in a series of Supreme Court rulings.

Gervais (2005) argued that the Canadian copyright laws have a “dual economic purpose” of rewarding copyright owners while not impeding dissemination and access (p. 356).

This dual purpose is fulfilled by a careful balancing of the interests of copyright owners and users. The Supreme Court in *Théberge v. Galerie d'Art du Petit Champlain Inc.* (*Théberge*) stated that “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.”⁵ In this case, the Court was not engaging in a fair dealing analysis, but rather addressing the proprietary rights of those who had purchased a copy of the work. Nonetheless, the Court asserted that copyright owners’ rights were not to be given

³ (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91, online: Government of Canada <<http://laws-lois.justice.gc.ca/eng/Const/page-1.html>>.

⁴ *An Act to amend the Copyright Act*, 1st Sess., 41st Parl., 2011 (assented to 29 June 2012), S.C. 2012, c. 20, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5144516&File=4>>.

⁵ 2002 SCC 34, [2002] 2 S.C.R. at para. 31, online: CanLII <<http://canlii.ca/t/51tn>>.

an overly-expansive reading lest the balance be tilted too far in one direction. This characterization has been said to be similar to the American policy foundation of encouraging innovation (Howell, 2003, p. 169).

Then in *CCH* the Court took the analysis a step further: not only does the user (and by extension, the public) have an *interest* to be considered in copyright law, she has a *right* to deal with a copyrighted work in certain ways, and not only because she may own a physical copy of the work. This right – represented by fair dealing and other exceptions – is an “integral part” of the *Copyright Act*.⁶ As such, limitations on owners’ exclusive rights “must not be interpreted restrictively.”⁷ *Alberta*⁸ and *Bell*⁹ provided further support to this characterization, declaring that the purpose of the dealing must be looked at from the perspective of the end user who is taking advantage of her right.

American copyright has also been characterized as having a balancing effect. The House of Representatives report addressing the proposed fair use provision in 1976 stated that “it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.” (U.S. House Judiciary Committee, 1976) While fair use has been described as a “right” in scholarly and popular commentary (e.g., see Aufderheide & Jaszi, 2011; Bartow, 1998; Gerhardt & Wessel, 2010; Leval, 1990;

⁶ *CCH*, *supra* note 1 at para. 48.

⁷ *Ibid.*

⁸ *Supra* note 12 at para. 22.

⁹ *Supra* note 13 at para. 34.

Masnack, 2015), it is not generally characterized that way in U.S. courts, even in cases where a use is found to be fair. For example, the Eleventh Circuit, in deciding the appeal of *Cambridge 2012*, said that their task was to determine whether the use under consideration “should be *excused* under the doctrine of fair use.”¹⁰ (emphasis added) Elsewhere in the decision the court called fair use an “implied licence” and a “transaction cost”.¹¹

The representation of fair dealing and other exceptions as users’ rights by the Supreme Court is not mere rhetoric. Evidence of its effect can be found elsewhere in Canadian copyright law and jurisprudence, demonstrating that Canadian fair dealing post-Pentalogy is in many ways more flexible than American fair use.

3.4 Comparison of fair dealing and fair use

3.4.1 Fairness purposes

Traditionally, fair use was considered to be more expansive in scope than fair dealing, primarily because the U.S. *Copyright Act* does not limit the purposes to which a fair use can be put (“purposes such as”),¹² while the Canadian *Copyright Act* provides a closed list of fair dealing purposes.¹³ Prior to *CCH* in 2004, therefore, the purposes were

¹⁰ *Cambridge University Press v. Patton*, 769 F.3d 1232 at 1238 (11th Cir. 2014), online: Google Scholar <https://scholar.google.ca/scholar_case?case=12627493296032837499>. (Cambridge 2014)

¹¹ *Ibid.* at 1257.

¹² 17 U.S.C. § 107, online: Copyright Office <<http://www.copyright.gov/title17/>>.

¹³ *Supra* note 1, s. 29.

generally interpreted restrictively. For example, in *Michelin*, a 1996 decision, the Federal Court decided that the Union's use of the "Michelin Man" (Bibendum) character on protest pamphlets was not fair dealing, because parody was not an enumerated purpose, and it could not be considered a form of criticism, as purposes are to be read literally and restrictively.¹⁴

The ratio of *CCH*, on the other hand, established the principle that the purposes in the first part of the fair dealing test (whether the dealing is for an enumerated purpose) were to be given a "large and liberal interpretation" in keeping with the notion of users' rights.¹⁵ Some commentators have noted the apparent convergence of the scope of fair use and fair dealing purposes immediately subsequent to the *CCH* decision (D'Agostino, 2008; Gervais, 2004).

The Court in *Alberta* reiterated the idea of a large and liberal interpretation when it concluded that the research or private study purpose was broad enough to encompass copies of excerpts made for students on the initiative of the teacher, because it is the student who is the end user, thus it is the student's purpose that is under consideration: "The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study."¹⁶ Likewise, in *Bell*, the Court said "In mandating a generous interpretation of the fair dealing purposes, including 'research', the Court in

¹⁴ *Supra* note 2 at para. 70.

¹⁵ *Supra* note 1 at para. 51.

¹⁶ *Supra* note 12 at para. 23.

CCH created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.”¹⁷

In response to the federal government’s public copyright consultation process in 2009, a number of submitters recommended that the fair dealing provision be made more flexible by the addition of “such as” to the list of fair dealing purposes, much like American fair use.¹⁸ While Parliament did not make this particular change, it did add “education, parody or satire” to the list of enumerated purposes.

After the Copyright Pentalogy decisions were issued, and the statutory amendments in force, Michael Geist wrote that “The Court’s fair dealing analysis, when coupled with Bill C-11’s statutory reforms, may have effectively turned the Canadian fair dealing clause into a fair use provision.” (2013, p. 159) A dealing for the purpose of education will inevitably pass the first part of the fair dealing test, just as it would be considered an acceptable purpose in fair use. Of course, the dealing must still be adjudged to be “fair” as per the several factors, and it is this subject that is addressed in the following sections.

3.4.2 Fairness factors

Unlike the four American fair use factors, which were codified in the *Copyright Act* in 1976, Canada’s six fair dealing factors are still common law. They were first set out by

¹⁷ *Supra* note 13 at para. 27.

¹⁸ These submitters included the Canadian Alliance of Student Associations, the Canadian Association of University Teachers, Jeremy de Beer, Howard Knopf, and Samuel Trosow (2009).

Linden J.A. in the *CCH* Federal Court of Appeal decision (2002, paras. 150-160),¹⁹ and given support and further elucidation by the Supreme Court.²⁰

Despite that the two sets of factors differ in number, they can be mapped onto each other fairly easily:

Fair dealing	Fair use
1. The purpose of the dealing.	1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.
2. The character of the dealing.	
3. The amount of the dealing.	3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. Alternatives to the dealing.	No fair use equivalent, but parts of factor 4 have some relevance as to alternatives (specifically, the availability of a licence).
5. The nature of the work.	2. The nature of the copyrighted work.
6. Effect of the dealing on the work.	4. The effect of the use upon the potential market for or value of the copyrighted work.

Table 2: Mapping of fair dealing factors to fair use factors.

¹⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, [2002] 4 F.C.R. 213 at paras. 150-160, online: CanLII <<http://canlii.ca/t/4j5c>>.

²⁰ *CCH*, *supra* note 1 at paras. 53-60.

All four fair use factors must be taken into consideration, according to the text of § 107 of the U.S. *Copyright Act* (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered *shall* include...” [emphasis added]), but other, non-enumerated factors may be looked at in addition. By contrast, the Federal Court of Appeal in *CCH* stated that the six named fair dealing factors “are *usually* among the non-exhaustive list of considerations.”²¹ (emphasis added) Likewise, the Supreme Court in *CCH* stated that not all of the factors will need to be considered in every case, and that they are more of an “analytical framework” than a strict requirement.²²

There has been criticism of the Canadian approach. Vaver (2011) has said that leaving the consideration of factors up to the courts makes the concept of fair dealing “inherently amorphous” (p. 236), implying that if the factors were enumerated in the statute the process would be clearer. However, the same amorphousness plagues fair use as well; in *Cambridge 2012* the District Court called the statutory factors a “very fluid framework for resolving fair use issues”, and that the process is a “value-laden review” that is undertaken “in light of the purposes of copyright”.²³ The Appeals Court found that the District Court (despite the latter’s comments) treated the four factors “mechanistically” rather than holistically, and that this was an error that justified overturning the decision and remanding.²⁴ Similarly, Crews (2001) has argued that rigid fair use guidelines for use

²¹ *Supra* note 19 at para. 150.

²² *Supra* note 1 at para. 53.

²³ *Supra* note 31 at 1210.

²⁴ *Supra* note 10 at 1283.

in schools are contrary to the intent of Congress in enacting the fair use provision (p. 665).

On the other hand, D’Agostino (2008) asserted that the Canadian approach is more flexible and ultimately pro-user than the American approach, in that certain factors such as market effect tend to weight against a defendant in a fair use analysis, but are not mandatory to consider in a fair dealing analysis (p. 346).²⁵ The tension between “bright-line” certainty and flexibility remains one of the main concerns in policy making (both governmental and institutional), and is a factor in Access Copyright’s suit against York University.

Whether or not the particular structural approach to the fairness factors differs significantly between the two jurisdictions, the judicial interpretation of the factors can be shown to reflect a more pro-user tendency in Canadian fair dealing than in American fair use, as will be shown in the sections that follow.

3.4.3 Transformativity

Transformativity – the extent to which the use or dealing alters the nature of the original work or its utility – is an element of the first fair use factor (the purpose and character of the use), and to a certain extent the fourth (the effect of the use on the potential market).

It is also sometimes known as a “productive use”, in that it produces something beyond

²⁵ Since the Copyright Pentalogy, she has changed her opinion somewhat, arguing that the more “arithmetical” and “absolutist” approach by the Supreme Court to considering the six factors in *Alberta and Bell* is not consistent with the “large and liberal” approach championed by the Court in *CCH* (D’Agostino, 2013, p. 190).

or in addition to the original work itself, rather than simply being a straight copy. It has been said that transformativity is the most important element of the first factor (Leval, 1990, p. 1111), or indeed of the entire fair use analysis (Aufderheide & Jaszi, 2011, p. 82ff).

At the very least, where a use is deemed to be more transformative or productive, the remaining factors become less important (Nimmer & Nimmer, 1998, s. 13.05[A][1][b]). Even where the use is non-transformative, this fact renders the other factors (except for market effect) less significant.²⁶ In *American Geophysical Union v. Texaco Inc. (Texaco)*, the Second Circuit related the notion of transformativity to the “value” of the copy, or more accurately, the value of the user’s contribution to the advancement of arts and sciences in making the copy. The creation of an untransformed (or straight) copy does not make any such contribution – according to the Court – and so is less likely to be considered fair use.²⁷

A notable exception to this trend is *Sony Corporation of America v. Universal City Studios, Inc. (Sony)*, the so-called Betamax case in 1984, where the Supreme Court cautioned against trying to draw a bright line between “productive” and “non-productive”

²⁶ *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 at para. 32 (6th Cir. 1996), online: Cornell LII <http://www.law.cornell.edu/copyright/cases/99_F3d_1381.htm>. (*Princeton*)

²⁷ 60 F.3d 913 at 923 (2d Cir. 1994), online: Cornell LII <http://www.law.cornell.edu/copyright/cases/60_F3d_913.htm>. In his dissent, Justice Jacobs argues that copying articles for use in the course of research does generate additional value in that it is part of a “transformative process of scientific research.” (p. 933)

uses. The court instead placed the focus on the economic effect of the copying (the fourth factor).²⁸

Moreover, the Appeals Court in *Cambridge* 2014 stated that an educational use of a work, even where it is a verbatim copy and not transformative, is more likely to be fair when the use itself is non-profit, that is, when there is no commercial or “measurable, indirect benefit” to the user.²⁹ However, the court did add that “the threat of market substitution is significant” when there is no transformativity, even when the use is made by a non-profit educational institution.³⁰

The level of importance of transformativity (whether for commercial or non-commercial purposes) in Canada is arguably lower than it is in the United States, if one considers that it is rarely brought up in fair dealing cases. In *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.* (2011), the British Columbia Supreme Court called transformativity an “American concept”³¹ and said that “Canadian courts have not recognized ‘transformative use’ as a characteristic of fair dealing.”³² In *Bell* the Supreme Court likewise did not accept the plaintiff’s reliance on the American view of transformativity in its argument that the offering of song previews was unfair, even

²⁸ 464 U.S. 417 at 455 fn 40, 104 S. Ct. 774 (1984), online: Cornell LII <http://www.law.cornell.edu/copyright/cases/464_US_417.htm>.

²⁹ *Supra* note 10 at 1266.

³⁰ *Ibid.* at 1267.

³¹ 2011 BCSC 1196 at para. 54, online: CanLII <<http://canlii.ca/t/fn00h>>.

³² *Ibid.* at para. 234.

though a for-profit company was making the previews available.³³ The courts have not yet dealt with a case where the level of transformativity of a new work has led to a finding a fair dealing, so it is currently unclear how much of an influence (if any) transformativity would have on the analysis.

Some transformative uses in Canada may also fall under the specific “non-commercial user-generated content” (or UGC) exception added to the *Copyright Act* in 2012, which allows for the incorporation of an existing work in the creation of a new one, subject to certain requirements.³⁴ Arguably, a certain element of transformativity would inherently be required in order to rely on the UGC exception. While fair dealing is always available,³⁵ it can be argued that the existence of a separate exception for inherently transformative works is an indication that non- or less transformative works would be more likely in Canada than in the U.S. to be considered fair, at least in non-commercial contexts such as education and library services.

This reduced emphasis on transformativity in Canada may also be a reflection of the conceptualization of fair dealing as a user’s right rather than a narrowly-construed justification, in that the user is not necessarily required to “do” anything to the work (or as the court in *Texaco* might put it, “generate value”) in order to be entitled to deal with it. This is especially relevant for educational uses, which are, in many cases, verbatim

³³ *Supra* note 13 at para. 23.

³⁴ *Supra* note 1, s. 29.21.

³⁵ *CCH*, *supra* note 1 at para. 49.

copies of excerpts (for class handouts, supplemental readings, or course packs) rather than immediately transformative.

3.4.4 Amount and substantiality

As noted in the previous section, the level of transformativity in U.S. fair use (being part of the character of the use) and the amount of the work used can be placed in relation to one another. In *Authors Guild, Inc. v. HathiTrust (HathiTrust)*³⁶ and *Authors Guild v. Google, Inc. (Google)*,³⁷ entire works were copied, but the character of the use was highly transformative, and the use was deemed to be fair by the Appeals Courts. This notion was confirmed in *Cambridge 2014*.³⁸ In *Texaco*, journal articles were considered to be separate works with individual copyrights, which weighed against fairness. (Again, in *Sony*, entire works in the form of television programs were copied, but the Court lent more significance to the lack of economic harm to the copyright owners.)

In Canada, there is a relationship between the amount of the dealing and the purpose of the dealing. For example, where the purpose is research or private study (or, presumably, education), it may be fair to copy an entire academic article, whereas a dealing for the

³⁶ 755 F.3d 87 (2d Cir. 2014), online: Google Scholar
<https://scholar.google.ca/scholar_case?case=4571528653505160061>.

³⁷ 804 F.3d 202 (2d Cir. 2015), *cert. denied*, No. 15-849, U.S. Sup. (2016), online: Google Scholar
<https://scholar.google.com/scholar_case?case=2220742578695593916>.

³⁸ *Supra* note 10 at 1274.

purpose of criticism or review would be more likely to be fair if only a small part of the work is duplicated.³⁹

However, there is little guidance as to what proportion of a work is fair under what purpose. In *CCH*, the copying at issue was for research purposes and was generally of law review articles, parts of monographs, and annotated cases and legislation. However, because the Great Library's copying policy was considered fair,⁴⁰ the Court determined that there was no need to examine each individual instance of copying via the six factors.⁴¹

In *Bell*, the Supreme Court agreed with the Copyright Board's characterization of a 30-second preview as a "modest dealing" when compared with a four minute song.

Neither the Supreme Court decision in *Alberta*, the Federal Court of Appeal Decision, nor the Copyright Board's tariff reasons (on which the case was based) stated the actual proportions of the textbooks that were copied (i.e. the length of the excerpts). The Copyright Board merely noted that the teachers copied "relatively short excerpts" from the works.⁴²

³⁹ *CCH*, *supra* note 1 at para. 56.

⁴⁰ The Great Library's policy indicated that requests for more than five percent of a secondary source, or more than two articles from a volume, may be refused at the discretion of a reference librarian.

⁴¹ The role of an internal policy is discussed further in Section 3.3.6, *infra*.

⁴² *Access Copyright Elementary and Secondary School Tariff, 2005-2009* (27 June 2009) at para. 104, online: Copyright Board <<http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2009/20090626-b.pdf>>.

Besides the transformativity consideration, both fair dealing and fair use appear to be in agreement on the notion that fairness is more likely when the quantity or proportion of the work copied is no more than is necessary for the particular purpose. However, there is a variance in interpretations of the significance of an excerpt's *quality* or importance to the work. Canadian courts have so far not considered qualitative issues directly in fair dealing analysis. In *CCH*, it was acknowledged that both quantity and quality of the dealing in relation to the whole work are considerations in fair dealing, but a quality analysis was not applied to the particular copying in question. In *Bell*, the Supreme Court pointed out that the sound quality of the previews were lower than that of the purchased songs, but did not address whether or not the previews represented the "heart" of the songs.

By contrast, several U.S. fair use cases have addressed the quality of the portion copied, and in some cases have found that a use was not fair in part because of this consideration. In the 1985 decision *Harper & Row*, the Supreme Court said the qualitative value of the copied extracts could be presumed because a substantial portion of the infringing work was taken verbatim.⁴³ The District Court took a similar view in the 1991 case *Basic Books, Inc. v. Kinko's Graphics Co. (Basic Books)*, concluding that the fact that the

⁴³ *Supra* note 30 at 565.

professors used them was evidence that they were critical parts of the work.⁴⁴ The Sixth Circuit in *Princeton* reiterated this idea.⁴⁵

While only five out of 48 uses at issue in *Cambridge 2012* were found to be unfair, in one of those findings the third factor (amount of the use) weighed heavily in the plaintiff's favour – not only because the total extract was not “decidedly small”, but also because it represented “the heart of the work.”⁴⁶ The Appeals Court agreed that the quality of the excerpt used should be taken into consideration.⁴⁷

The reasoning above in *Harper & Row*, *Basic Books*, and *Princeton* is particularly worrisome from a user's perspective. If the reproduction of an extract of a work leads to the presumption that the copied part is critical to the work (because the copier chose to reproduce it) and thus weighs against the defendant in fairness factor three, then essentially any reproduction is unfair to some degree from the outset.⁴⁸

⁴⁴ 758 F.Supp. 1522 at 1533 (S.D.N.Y. 1991), online: Boston College <http://www.bc.edu/bc_org/avp/cas/comm/free_speech/basicbooks.html>.

⁴⁵ *Supra* note 26 at para. 40.

⁴⁶ *Supra* note 31 at 1359. The excerpts in this instance were two chapters of a book that the District Court judge felt were most representative of the thesis of the work and thus had “greater value in relation to the book as a whole.”

⁴⁷ *Cambridge 2014*, *supra* note 10 at 1275.

⁴⁸ In *Nimmer on Copyright*, the circularity of this reasoning is pointed out (1998, s. 13.05[A][3]).

3.4.5 Market harm and licences

In *Harper & Row*, the court stated that the market effect factor is the “single most important element of fair use.”⁴⁹ This notion was repeated in *Basic Books*,⁵⁰ and in *Princeton* the court characterized it as “first among equals.”⁵¹ Note, however, that in these three cases the copying was done on a commercial basis. In *Cambridge 2012* where the copying was done in the context of non-profit education, the Court seemed to reject the idea that market effect is most important: “It is hornbook law that there is no across the board rule for what weight should be given to each factor or how the factors should be applied”,⁵² and the Appeals Court agreed that the importance of the fourth factor will vary depending on the strength of the other factors.⁵³ The Second Circuit in *Google* characterized the fourth factor as being of “great importance” and “weighty”.⁵⁴

The U.S. fair use analysis includes a “market harm test”, where, for a non-commercial use, the copyright owner need only show that if there use were widespread, it would substantially and adversely affect the market or potential market (Nimmer & Nimmer,

⁴⁹ *Supra* note 30 at 567.

⁵⁰ *Supra* note 44 at 1534.

⁵¹ *Supra* note 26 at para. 17.

⁵² *Supra* note 31 at 1210.

⁵³ *Cambridge 2014*, *supra* note 10 at 1275.

⁵⁴ *Supra* note 37 at 223, 224.

1998, s. 13.05[A][4]).⁵⁵ This test was considered in *Sony*,⁵⁶ *Harper & Row*,⁵⁷ *Basic Books*,⁵⁸ *Campbell v. Acuff-Rose Music, Inc. (Campbell)*,⁵⁹ *Texaco*,⁶⁰ *Princeton* (in which the Court strongly endorsed the test, stating that “there is no circularity in saying, as we do say, that the potential for destruction of this market by widespread circumvention of the plaintiffs’ permission fee system is enough, under the Harper & Row test, ‘to negate fair use.’”),⁶¹ and *Cambridge*.⁶²

There is yet no Canadian equivalent of the market harm test, and it is doubtful that Canadian courts would endorse it. In both *Alberta*⁶³ and *Bell*⁶⁴ the Supreme Court dismissed the argument that aggregate use would make the dealing unfair: “Since fair dealing is a ‘user’s’ right, the ‘amount of the dealing’ factor should be assessed based on the individual use, not the amount of dealing in the aggregate.” Although this statement is

⁵⁵ A similar test was discussed in *Folsom v. Marsh*, an 1841 appeal decision: “But if the defendants may take three hundred and nineteen letters, included in the plaintiffs’ copyright, and exclusively belonging to them, there is no reason why another bookseller may not take [another] five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs’ copyright be totally destroyed.” (9 F.Cas. 342 (C.C.D. Mass. 1841) at 349).

⁵⁶ *Supra* note 28 at 451.

⁵⁷ *Supra* note 30 at 568.

⁵⁸ *Supra* note 44 at 1534.

⁵⁹ 510 U.S. 569 at 590, 114 S. Ct. 1164 (1994), online: Cornell LII <<http://www.law.cornell.edu/supct/html/92-1292.ZS.html>>.

⁶⁰ *Supra* note 27 at 928.

⁶¹ *Supra* note 26 at para. 28.

⁶² *Cambridge* 2012, *supra* note 31 at 1236; *Cambridge* 2014, *supra* note 10 at 1276-1278.

⁶³ *Supra* note 12 at para. 29.

⁶⁴ *Supra* note 13 at para. 41.

made in the context of the third factor (amount of the dealing) rather than the sixth (market effect), the same reasoning could be applied in response to an argument that widespread use might cause substantial market harm. If fair dealing is the right of the user, and not simply a privilege or benefit to the public in general, it should not matter how many individual users take advantage of it. A right does not become less of a right when many people reap its benefits.

A second significant difference between the Canadian and American approaches to the market effect factor is the relevance of a permission licensing scheme (although in a fair dealing analysis, this consideration falls under factor four, alternatives to the dealing). In short, the availability of a licence is relevant to a fair use analysis, but is not relevant to a fair dealing analysis.⁶⁵

The primary licensor for text reproduction in the U.S. is the Copyright Clearance Center. In Canada, Copibec and Access Copyright are rights administration collectives that offer licences to users within Quebec, and in the rest of Canada, respectively. These licences may be transactional (one-time payment for a particular use of a work), or blanket/repertoire (yearly payment for ongoing limited use of a collection of works). Licences may also be offered directly by publishers. Licences represent an additional market for copyright owners: even if a book is out of print (and thus there is no sales market), licensing ensures that copyright owners can continue to earn money from reproduction of parts of the work. (Note that organizations such as the Copyright

⁶⁵ *CCH*, *supra* note 1 at para. 70.

Clearance Center and Access Copyright do not provide the work itself – payment is merely for permission to use a work to which a user already has access.)

For the purposes of a fair use analysis, the U.S. courts have taken the availability of a reasonable licence as an indication that the use is less fair, particularly for “non-transformative” works. In *Sony* the Court said that had the studios developed a market whereby users of video cassette recorders could pay a licence to copy television programs, that market would be taken into account.⁶⁶ Likewise, in *Texaco* the Court said that since the development of licensing schemes for photocopying journal articles, it is now appropriate to consider the publishers’ loss of this revenue in evaluating the market effect factor,⁶⁷ and perhaps even the purpose factor, to the extent that copying articles without permission may have been “reasonable and customary” before the existence of photocopy licensing arrangements.⁶⁸ In the *Cambridge* 2012 decision, the District Court agreed with *Texaco* that the existence of an easily accessible, convenient, and reasonably priced, should be considered in a fair use determination.⁶⁹ It went so far as to suggest that “[t]he only practical way to deal with factor four in advance likely is to assume that it strongly favors the plaintiff-publisher (if licenced digital excerpts are available).”⁷⁰ In other words, where a licence is available, the presumption is that the fourth factor would

⁶⁶ *Supra* note 28 at 446 note 28.

⁶⁷ *Supra* note 27 at 931.

⁶⁸ *Ibid.* at 924.

⁶⁹ *Supra* note 31 at 1237.

⁷⁰ *Ibid.* at 1363.

be decided in favour of the copyright owner, unless the defendant can show that there would *not* be a substantial loss of licensing revenue. In *Cambridge* 2014, the Appeals Court upheld this analysis,⁷¹ while elsewhere characterizing the fair use doctrine as “a means by which a court may ascertain the appropriate balance in a given case if the market actors cannot do so on their own.”⁷²

In other cases, however, the mere existence of a licence does not automatically turn the fourth factor against the user. If the licence is unlikely to be granted (for example, in a parody situation such as *Campbell*), or if the cost would be astronomical (see *HathiTrust*), it would not be seen as less fair to use the work, because the copyright owner would not have earned revenue in the first place.⁷³

In Canada, the availability of licence, even at reasonable terms, is not considered at all.

The Supreme Court in *CCH* said:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over

⁷¹ *Supra* note 10 at 1278-1279.

⁷² *Ibid.* at 1238.

⁷³ Note also that in *Campbell* and *HathiTrust* the use was considered to be transformative.

the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.⁷⁴

Justice Merritt expresses a similar concern in his dissent in *Princeton*: “It is also wrong to measure the amount of economic harm to the publishers by loss of a presumed licence fee – a criterion that assumes that the publishers have the right to collect such fees in all cases where the user copies any portion of published works.”⁷⁵ While copyright owners certainly do have a right to collect licence fees for certain uses of their work, when there are free uses explicitly permitted in the legislation, there must be limits on what kinds of uses they may seek payment for. Otherwise, the doctrines of fair dealing and fair use would be weakened based solely on the decision of copyright owners to offer licences for any and all extracts. If the doctrines arose primarily because it was too difficult to extract payment for all uses of the work, then a convenient licensing scheme would tend to negate its significance. However, fair dealing and fair use exist as a counterbalance to exclusive rights in order to encourage cultural and scholarly progress.

Copyright owners may, of course, offer licences for any possible use of the work, no matter the amount. The Copyright Clearance Center acknowledges that their fees are “net of fair use”, meaning that they do not take the exception into account.⁷⁶ This means that they will offer a licence for a use that could otherwise clearly be fair, or charge a per-page fee that does not subtract the portion that would be fair use. They will even calculate

⁷⁴ *Supra* note 1 at para. 70.

⁷⁵ *Supra* note 26 at para. 85.

⁷⁶ *Cambridge* 2012, *supra* note 31 at 1215.

and accept payment for minuscule extracts. For example, the cost for permission to photocopy a single page (or 0.08 percent) of the textbook *Sage Handbook of Qualitative Research* (3rd ed.) for distribution to one student is US\$3.64 (not including sales tax).

Similarly, Access Copyright's web site includes a pricing schedule for transactional licences. The minimum charge is CD\$5.00 plus applicable sales tax, so permission to copy a one page of a book in Access Copyright's repertoire, for use by one student, would cost CD\$5.65 in Ontario.⁷⁷ (However, unlike the Copyright Clearance Center, Access Copyright does not offer transactional licences to post-secondary institutions that do not already have a blanket agreement with the collective.)

It is interesting to note, then, that a fair use analysis will consider potential market harm should unlicensed use become a widespread practice, but does not take into account the revenues earned from licences for uses that may clearly be fair and thus do not require payment at all. In a fair dealing analysis, on the other hand, neither "widespread use" nor licence availability are considered. This difference mirrors the ideological distinction between a market-based view of copyright, in which private ordering such as licences are seen as the ideal method of achieve the goals of copyright law; and the equitable view, in which legal copyright exceptions are important to copyright *per se* and not merely "placeholders" until a sufficiently effective private ordering scheme can be created.

⁷⁷ Such a use may not even rise to the level of "substantiality" that would invoke the copyright owner's exclusive rights as per s. 3(1) of the Canadian *Copyright Act* (*supra* note 1), or rise above *de minimis* copying such that a fair use analysis would be necessary (*Cambridge* 2012, *supra* note 31 at 1229).

3.4.6 Institutional practice and internal policy

The market harm test in fair use looks at the possibility of a use becoming widespread, and whether this would lead to substantial harm to the market for the work or for permissions. On the flip side, the existing practices within a given sector (such as the post-secondary educational sector, or the commercial copy shop industry) may be taken into consideration.

The Supreme Court indicated in *CCH* that industry practice may be relevant in assessing the fairness of the character of the dealing. If a defendant's dealing was far beyond what is actually the norm in the industry, the dealing may be less fair (D'Agostino, 2008, p. 320).⁷⁸ (Presumably, if the defendant's dealing comports with custom it would not weigh against her.)

In *Basic Books* and *Princeton*, the courts considered the "Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals"⁷⁹ (Classroom Guidelines) – a set of non-binding, general rules negotiated in 1976 by representatives of publishers and educators, meant to represent a sort of industry standard or safe harbour – as an additional factor outside of the statutory four. Both found that the copying in question was far outside the parameters of the agreement. (Just how much weight the Classroom Guidelines were given is not clear, since the four-factor assessment already pointed in favour of the copyright owners [Crews, 2001, pp. 661–

⁷⁸ *CCH*, *supra* note 1 at para. 55.

⁷⁹ The guidelines were published in HR Report No. 94-1476 (U.S. House Judiciary Committee, 1976).

663].) In *Cambridge* 2012, the District Court criticized the Classroom Guidelines as being overly-restrictive for teaching purposes and did not take them into account.⁸⁰

Industry practice may be determined in part by examining the policies followed by various institutions. The abovementioned Classroom Guidelines have been explicitly adopted by some American universities as policy, while other schools point to them as merely illustrative. The courts have considered the guidelines on several occasions (although not at the Supreme Court level) as a representation of industry norms, whether or not the defendant institution has appropriated them.

In *Cambridge* 2012, the defendants relied in part on their up-to-date copyright policy and fair use checklist in the first instance.⁸¹ The District Court in its first decision did not consider these documents in its analysis of the four factors (or in any of the additional factors). Instead, the policy was addressed only inasmuch as it was said to have caused infringements because it did not limit copying to “decidedly small excerpts” or provide guidance on determining likely market effect.⁸² The defendants also submitted evidence describing the copyright policies of other universities as compared to its own (to show that other policies are more “liberal”), but the Court did not give any weight to the evidence because without explicit judicial guidance regarding the extent of fair use in non-profit educational settings, the schools (including Georgia State University, the

⁸⁰ *Supra* note 31 at 1234.

⁸¹ These documents can be found at the University System of Georgia web site: <http://www.usg.edu/copyright>.

⁸² *Cambridge* 2012, *supra* note 31 at 1363.

school involved) were merely “guessing”.⁸³ The Appeals Court similarly dismissed the notion of considering the university’s “broader practices” (presumably, as represented by a fair dealing policy), stating that without a case-by-case analysis, “the District Court would have no principled method of determining whether a nebulous cloud of infringements purportedly caused by GSU’s ‘ongoing practices’ should be excused by the defense of fair use.”⁸⁴

In a fair dealing analysis, the defendant’s internal policies may be considered in lieu of showing that each individual dealing was fair, which was one of the bases of the Canadian Supreme Court’s decision in *CCH*: “This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner, or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices.”⁸⁵

Reasonable policies, therefore, carry more weight in favour of the user in fair dealing than they do in fair use, another crucial difference between the two exceptions.

⁸³ *Ibid.* at 1232.

⁸⁴ *Cambridge* 2014, *supra* note 10 at 1259. Interestingly, it was the plaintiff publishers who argued that the court should consider the “broader context” of copying rather than each instance individually.

⁸⁵ *Supra* note 1 at para. 63.

3.4.7 Summary

The burden of proof in a claim of fair dealing or fair use is on the defendant, as it is an affirmative defence.⁸⁶ However, this burden is lessened in fair dealing as compared to fair use, especially in educational and library contexts, if one considers the arguments in the preceding sections.

In Canada, the level of transformativity of the dealing has not been given great significance. The defendant does not have to show that she has “added value” to the excerpt by incorporating it directly into a new work or using it directly for a new purpose. There is no requirement that the excerpt be smaller in proportion to the whole work in a “non-transformative use” (i.e. straight reproduction) as compared to a transformative use.

Similarly, there is no presumption in fair dealing that the qualitative value of the excerpt is significant simply because the user has chosen to copy it. The defendant, therefore, need not worry about rebutting such a presumption.

There seems to be more support in Canadian fair dealing jurisprudence that the onus to demonstrate negative market effect, in a practical sense, lies with the plaintiff. In *CCH*, while the Supreme Court acknowledged that the burden, procedurally speaking, is on the defendant, it also noted that the defendant did not have access to the plaintiff’s financial information. The Court suggested that if there was evidence of such an effect, “it would

⁸⁶ *CCH*, *supra* note 1 at para. 48; *Texaco*, *supra* note 27 at 918.

have been in the publishers' interest to tender it at trial."⁸⁷ In *Alberta*, the Court interpreted this to mean that negative market effect due to the defendant's dealing with the works had not been demonstrated: "In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated."⁸⁸ (emphasis original)

So, it appears that where there is no evidence tendered by either side in regards to market effect, the sixth fair dealing factor may simply not be taken into account (Vaver, 2011, p. 243).

In the U.S., it is not entirely clear whose burden it is to demonstrate negative market effect or lack thereof. In some U.S. cases, such as the 1973 *William & Wilkins Company v. United States (Williams & Wilkins)*, the burden seemed to be on the plaintiff,⁸⁹ while in *Sony*⁹⁰ and *Princeton*,⁹¹ the Supreme Court said that if the intended use is for commercial gain, the likelihood of negative market effect would be a rebuttable presumption, and if the use is non-commercial, the likelihood would have to be demonstrated by the plaintiff. In *Texaco*, demonstrating market effect (or lack thereof) could be a burden of the plaintiff

⁸⁷ *CCH*, *supra* note 1 at para. 72.

⁸⁸ *Alberta*, *supra* note 12 at para. 35. See also Geist, 2013a, p. 176.

⁸⁹ 487 F. 2d 1345 at 1359 (C.C. 1973), online: Stanford <<http://fairuse.stanford.edu/case/c487f2d1345/>>. Note, however, that this case was decided before the codification of the fair use provision.

⁹⁰ *Supra* note 28 at 451.

⁹¹ *Supra* note 26 at para. 18.

or the defendant; whoever has the evidence can sway the factor in their favour.⁹² In *Cambridge 2012*, which dealt with a non-commercial, educational use, the burden was on the defendant to show insubstantial market effect, and if there is a licence available, a substantial market effect is assumed.⁹³

Even if the burden were strictly on the plaintiff, he may discharge it via the so-called market harm test, by showing on a preponderance of the evidence that widespread use of the sort at issue would lead to significant loss of revenues or likely revenues. There is yet no such test in a Canadian fair dealing analysis.

The availability of a licence, although not dispositive of fair use, tends to orient the fourth factor (in an American fair use analysis) towards unfairness. The defendant may be able to negate this presumption by demonstrating that the cost of the licence is unreasonable, that the licensing process is unduly complicated or inconvenient, or that the plaintiff has already refused permission: “[D]efendant’s witnesses did not produce evidence which would explain why they could not seek and pay for permission to create these anthologies.”⁹⁴ Such an effort is unnecessary for a defendant claiming fair dealing, since licences are not a relevant consideration in a fair dealing analysis.

Perhaps the most significant development in the law of fair dealing from the point of view of educational institutions and libraries is the court’s expansion of the role of

⁹² *Supra* note 27 at 928.

⁹³ *Supra* note 31 at 73, 75.

⁹⁴ *Basic Books*, *supra* note 44 at 1535.

internal policies. The Canadian Supreme Court has said that an institution does not have to show that each and every dealing made under its roof is fair; it suffices that the usual practice (which can be adduced by reference to an internal policy) can be considered instead. This means that if a university or library develops and makes available a reasonable and appropriate copyright policy, it is not necessary to gather evidence demonstrating that all copies are fair (D'Agostino, 2008, p. 325).

The differences in burden between fair dealing and fair use are not arbitrary; they reflect a fundamental variance in the overall conception of the purpose of the provisions. As the Court in *CCH* put it: “Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.”⁹⁵ Lessening the burden on the user ensures that fair dealing is given a broad and liberal interpretation, maintaining the balance that copyright represents: “[B]y framing the defence narrowly, it invites a more restrictive approach to interpretation.” (Scassa, 2004, p. 94)⁹⁶ If copyright is taken from a market-based view, then insofar as a restrictive approach to exceptions to exclusive rights is necessary (where the market is thought to do a better job to achieve copyright’s objective), a defendant’s burden of establishing fair use is correspondingly expanded.

⁹⁵ *Supra* note 1 at para. 48.

⁹⁶ See also Snow (2010): “The burden affects judicial conception of fair use, and that conception affects the substantive outcome of decisions” in that uncertainty or ambiguity tends to favour the plaintiff (p. 1812).

3.5 Conclusion

Copyright is not, and never has been, about giving complete control over the use of works to the author or copyright owner, or payment for every use (Nair, 2010, p. 91). It has always been a balance of some kind, whether between owners' rights and the public interest, or between owners' rights and users' rights. Creative output is all to some degree derivative of what has come before (Drassinower, 2005; Leval, 1990, p. 1109). The author is also a user, and the user may take parts of an author's work in order to create a new work, either directly or indirectly. The focus is not just on the exchange value of the work; the user is not merely a consumer transferring money to the copyright owner within the "information marketplace". Canadian courts recognize that the user is a substantive and necessary part of the process, and therefore an integral part of copyright, hence fair dealing and other exceptions are given a broad scope. In practical terms, this means that the burden of proof on the defendant is significantly reduced, particularly in the non-profit academic and library sector, as compared to American fair use: the defendant does not have to show that she has transformed the original work; she does not have to rebut a presumption of qualitative value in the chosen excerpt; she does not have to argue that dealing of the sort at issue will not cause significant reduction in the plaintiff's revenues; the availability of a licence does not weigh against her; and she may rely on an institutional policy as proof that the dealings are fair. Canadian universities would be wise, then, to craft institutional policies that reflect copyright law in this regard.

4 Contract and copyright law

4.1 Introduction

The previous chapter argued that Canadian fair dealing in the educational and library environment can be considered more “pro-user” than U.S. fair use in that the fair dealing defendant has a lesser burden to overcome. However, the point could be moot if copyright owners (or intermediaries such as database providers) were able to bury works behind contracts that would override copyright exceptions. Some universities have claimed in their policies or on their web pages that contract terms override fair dealing, for example those that have adopted the Fair Dealing Policy Application Guidelines drawn up by the Association of Universities and Colleges of Canada (now Universities Canada).¹

In this chapter it is claimed that it is not a settled issue in Canadian law that copyright exceptions provided in the Canadian *Copyright Act* can be trumped by contractual agreement, and that a strong argument can be made that they cannot. The issue is framed with a discussion of the increasing use of digital materials in academic libraries, and the potential conflict between subscription agreements and the *Copyright Act*. The chapter then addresses three approaches (jurisdictional, purposive, and statutory right) that can be taken to determine whether contractual terms are preempted by statutory provisions, and

¹ Throughout this chapter, the term “licence” may be used to mean “licensing agreement”. This is a common use, even in court decisions. However, a licence is not in itself a contract, as there does not necessarily have to be consideration (an exchange of something of value) granted on the part of the licensee (the user) (see Katz, 2015, p. 199; Newman, 2012, p. 1104). A licence may be granted as part of a contract, and it is in this sense that the term is used in this chapter.

conclude that, in Canada, copyright exceptions are statutory rights that cannot be removed by contract. Finally, there is a brief discussion of technological protection measures and the argument is made that their recent inclusion in the *Copyright Act* does not necessarily indicate legislative support for private ordering. It is not in the best interests of universities to make concessions in regards to the status of copyright exceptions in the face of purported contractual limitations.

4.2 Digital subscriptions: Framing the issue

Over the past two decades, academic libraries in Canada have increasingly acquired materials such as journals and monographs in electronic format. Correspondingly, access to these electronic materials is not via ownership of a tangible commodity, as it has been in the past. Instead, libraries enter into subscription contracts that allow for access to electronic works in exchange for an annual payment.

From 2002 to 2009, electronic journal expenditures of members of the Association of Research Libraries (which includes some Canadian academic libraries) tripled, while total library materials expenditures went up by a factor of 1.3. Spending on electronic journals more than doubled from 25 percent of total materials expenditures to 56 percent (Kyrillidou & Morris, 2011). Between 2009 and 2010, members of the Ontario Council of University Libraries spent \$63 million on their physical items collection (both monographs and serials) and \$60.5 million on their electronic collection. The libraries had subscriptions to about 80,000 print serial titles, and about 847,000 electronic titles (Brundin & Schrader, 2012). The Association of College and Research Libraries reports that in 2015, Canadian member institutions owned 16,652,223 print serial titles, and had access to 86,504,498 electronic serial titles (“ACRL trends & statistics survey,” 2015).

The reasons for the move to electronic materials are varied: conservation of shelf space, user preference, lack of choice where a journal is only offered digitally, or a print subscription is not offered without a corresponding electronic subscription (Miller, 2007, p. 183). Electronic journal subscriptions can be more cost efficient, taking into account such factors as the cost of the subscription, the time and effort to process physical materials, storage costs of physical materials (on- or off-site), and the number of times a particular title is accessed (Cooper, 2006; Odlyzko, 2013). Despite the cost advantages, libraries and university administrators continue to struggle with other implications of the increasing move to digital resources. “Academic libraries are in a new, electronic environment where the delineation of access to scholarly materials is not universally shared and must be carved out afresh.” (Copyright Committee Task Group on E-Books, 2008, p. 2)

Physical containers of information (as opposed to the information itself) bear limitations in certain respects that restrict how they can be used: they are rivalrous, in that only one person can use them at one time; there is a certain amount of inherent excludability, in that a user must be in the same physical location as the good; and copying a larger portion of the information (such as a chapter or article) from the good generally takes more effort and expense than copying a small portion (such as a page). When information was housed primarily in physical containers, these limitations likely restrained a great deal of copying, simply because it was difficult or inefficient for a user to go to the trouble.

However, such impediments are reduced, if not eliminated, in the case of digital works available in a networked environment, where many users can access the information at

the same time from any location with Internet access, and make identical copies of any proportion of the work with a mouse click. This state of events is similar to that which spurred the development of copyright law – the easier it is for users to make copies, the more artificial scarcity (and thus exchange value) needs to be preserved in order to ensure maximal profits.²

From a purely law and economics (or market-based) perspective, the relative ease of copying electronic materials presents a difficulty for copyright owners: what is to stop a subscriber from making a digital copy that could then be used by anyone, making further subscriptions unnecessary, destroying the exchange value of the information, and leading to market failure? Copyright legislation limits copying to a certain extent, but exceptions to copyright infringement such as fair dealing provide users with an opportunity to use and share information in ways that can potentially disrupt a publisher's business model. In response, copyright owners have turned to private ordering in the form of contract law and technological protection measures as a means of controlling access to and use of electronic materials.

Journal and database subscription agreements will often contain provisions that restrict the amount that one can copy from the work, or the purpose to which the copy may be put. For example, the institutional licence agreement for those subscribing to MIT Press journals includes the following provision: "Without limitation, an Authorized User may not... make multiple copies in either digital or paper form; or store any electronic file of

² See Chapter 2.

such material on any intranet or other centrally accessible network or server, including but not limited to for ‘coursepack’ or ‘e-reserve’ purposes.”³ *The Chronicle of Higher Education*’s web page user agreement states that “You may not... create course books or educational materials using any of the Site content.”⁴ The *Harvard Business Review* is adamant in its restrictions:

Except for these options, we prohibit the posting of cases, articles, or chapters on “e-reserve” course pages for student access, as well as in “electronic coursepacks” that link to our digitized content and content postings on course management systems such as WebCT or Blackboard. Such unauthorized postings are equivalent to distributing our copyrighted content to students without permission, which infringes that copyright. This is so even if the content is being used for the first time and is password-protected, accessible only to students in the course, and taken down at the end of the course.⁵

There may also be a technological limitation on, for example, how many pages can be printed from an electronic textbook. These contractual or technical limitations, however, can conflict with the public domain status of the particular work, or with the exceptions provided for in copyright legislation and interpreted by the courts.

The Supreme Court of Canada, in its decision for *Théberge*, recognized that an effective copyright law is a balance between the ability of the author or copyright owner to earn a reward for his or her creative efforts, and the interest of the public in having the

³ “MIT institutional licence agreement” <http://www.mitpressjournals.org/page/inst_license_agreement>

⁴ “Permissions” <<http://chronicle.com/page/permissions/619#restrictionsOnUse>>

⁵ “Permissions” <<https://hbr.org/permissions>>

opportunity to freely use the work in a meaningful way: “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.”⁶

Furthermore, the Court has repeatedly characterized fair dealing and other exceptions to copyright infringement as “users’ rights” rather than mere defences or loopholes. In 2004, the Court explained that these users’ rights were essential to the copyright regime:

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.... The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right.⁷

In 2012 the Court reiterated these statements in two fair dealing cases, and stressed that the right belongs to the end user.⁸ That fair dealing is a right of the user, rather than a privilege, is significant (Vaver, 2013), and will be further discussed in the next section.

However, despite the Supreme Court’s clear pronouncements, some educational institutions and associations take the view that contractual limitations always trump copyright exceptions, and claim as much in their copyright policies and reports. In 2008 the Canadian Association of Research Libraries issued a report stating that “if a library and a publisher agree in a contract that fair dealing will not apply to activities that are

⁶ *Supra* note 5 at para. 31.

⁷ *CCH*, *supra* note 1 at para. 48.

⁸ *Alberta*, *supra* note 12 at para. 22; *Bell*, *supra* note 13 at para. 34.

specified in the contract, then the contract's provisions prevail regardless of what the *Copyright Act* provides." (Copyright Committee Task Group on E-Books, 2008, p. 9) The Association of Universities and Colleges of Canada (AUCC; now Universities Canada) claims in its fair dealing application guidelines that restrictions on use in a digital licence take precedence over fair dealing (Association of Universities and Colleges of Canada, 2013, p. 2), and many universities have adopted these guidelines or have otherwise incorporated this assertion into their fair dealing policies or copyright web sites.⁹

University administrators understandably fear that failing to abide by the terms of the contract will result in loss of access to the materials, a lawsuit for breach of contract, or both. However, in taking the explicit view that the user rights enjoyed by faculty and students can be preempted by licence agreement terms, universities prevent the full educational use of copyrighted materials. More importantly, by embedding this concession into industry policy and practice, educational institutions may influence how fair dealing is interpreted by future courts.

This is by no means a settled issue in Canadian law, and it may be argued that the courts would take quite a different view.

4.3 Contracts and the *Copyright Act*

In the United States, the relationship between contract law and copyright law has been addressed in a number of court cases and several academic articles (e.g. Elkin-Koren,

⁹ See Chapter 5 for an empirical content analysis of Canadian university copyright policies.

1997, 2001; Hardy, 1995). Yet even U.S. copyright law “lacks a coherent rule for contract preemption that harmonizes the individual interest in freedom of contract and the societal interest in federal copyright policy.” (Bohannon, 2007, p. 648) From the jurisprudence and literature, however, three main approaches to the issue are apparent and may provide some guidance in a Canadian analysis: the jurisdictional approach, the purposive analysis approach, and the statutory rights approach.

4.3.1 Jurisdictional approach

In both Canada and the U.S., copyright is in the jurisdiction of the federal legislature, and copyrights cannot be created by provincial, state, or administrative bodies, or by the common law. The U.S. Constitution grants Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁰ In Canada, the *Constitution Act, 1867* empowers Parliament to make laws related to copyright.¹¹

The U.S. *Copyright Act* explicitly provides that there are no copyrights beyond what is granted in § 106:

- (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by

¹⁰ *Supra* note 2, cl.8.

¹¹ *Supra* note 3, s. 91.

sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.¹²

The court can declare “any such right or equivalent right” to be invalid based on jurisdiction. In order for such a “right” to be preempted by the federal statute, it must be the same type of right, without any “extra element” that makes it qualitatively different (Olson, 2006, pp. 94–95). For example, in *Vault Corp. v. Quaid Software Ltd.*, the Fifth Circuit Court of Appeal held that certain provisions of a Louisiana state law prohibiting the copying of software for any purpose were preempted by the U.S. *Copyright Act* because they granted greater protection to copyright owners (i.e. prohibiting decompiling of software, which is explicitly allowed in the federal statute).¹³

Per § 106, copyright owners have the “exclusive rights to do and to authorize any of the following...” but these rights are “subject to sections 107 through 122” (i.e. exceptions to exclusive rights, including fair use, the practice of which is not copyright infringement). So, by the plain text of § 301, it appears that a contractual provision purporting to restrict reliance on copyright exceptions would be invalid, as § 106 rights themselves are limited by the exceptions. In other words, if the copyright owner’s exclusive rights granted by legislation do not extend into the realm of activities covered by the exceptions, a contract restricting the exceptions will, by the same token, extend the copyright owner’s rights, or

¹² *Supra* note 12, § 301.

¹³ 847 F.2d 255 (5th Cir. 1988), online: Harvard <<https://cyber.law.harvard.edu/ilaw/Contract/vault.htm>>, cited in Olson, 2006, p. 100.

create new ones. However, U.S. courts will sometimes rule that contractual claims are *qualitatively* different from copyright claims, in that there is a promise involved – that is, the other party to the contract promises to not use the works in a certain way, and this promise is the extra element that avoids preemption (Olson, 2006, p. 95). In *ProCD, Inc. v. Zeidenberg (ProCD)* (a much-discussed and criticized decision addressing shrink-wrap contracts), the Seventh Circuit Court of Appeal ruled that a breach of contract claim is not preempted by the federal statute because the agreement only binds the parties, whereas the federal statute (and state statutes) binds “the world”, so the rights granted are not strictly equivalent.¹⁴ Judge Easterbrook in *ProCD* took an economic (market-based) approach, essentially treating the situation as a failure in information transparency that could have been remedied by the ability of the buyer to return the product and buy something else, despite the fact that the licence contract was not negotiated (de Werra, 2003, p. 258).

However, Judge Easterbrook did not go so far as to say that *no* contracts can be preempted by the statute (de Werra, 2003, pp. 259–260; Olson, 2006, p. 106), although in some subsequent cases the courts have interpreted it that way (Olson, 2006, p. 110). In other cases, courts have ruled that rights granted by contract are not qualitatively different from those granted in the federal statute and are therefore preempted (Olson, 2006, p. 95). The nature of the U.S. court system has likely contributed to the inconsistency, as appeals courts in one circuit are not bound by decisions in other circuits.

¹⁴ 86 F.3d 1447 (7th Cir. 1996), online: Cornell <https://www.law.cornell.edu/copyright/cases/86_F3d_1447.htm>, cited in Olson, 2006, p. 95.

The Canadian *Copyright Act* contains a provision similar to the U.S.'s § 301:

No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.¹⁵

The two provisions are not strictly equivalent: while § 301 limits copyright (and equivalent rights) to those granted by the *Copyright Act*, the Canadian section allows for the possibility that the federal legislature might enact additional laws that grant copyrights-like rights. However, neither permits the creation of copyrights or copyright-like rights by provincial or state legislatures, or administrative regulators.

The exclusive rights of a copyright owner are set out in s. 3(1) of the *Copyright Act*:

“‘copyright’, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...”¹⁶ Section 27 defines copyright infringement: “It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” However, certain uses of the work are plainly not infringements of copyright, despite that they are undertaken without the permission of, or compensation to, the copyright owner.¹⁷ These exceptions include fair dealing,¹⁸

¹⁵ *Supra* note 1, s. 89.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, s. 29.

reproduction of a work for a test or examination at an educational institution,¹⁹ and retransmission of a signal by a licenced retransmitter, subject to certain conditions.²⁰ So, a copyright owner does not, by the plain text of the *Copyright Act*, have the right to prevent reliance on these exceptions.

Note that while s. 81 addresses breaches of trust and breaches of confidence, it does not mention breach of contract. On the other hand, there are some provisions in the *Copyright Act* that permit some kinds of contracts and limit others. A copyright owner may assign or licence rights²¹ but assignments of copyright or licences must be signed by the owner or agent, otherwise they are not valid.²² Reversionary interest in a copyright devolves to author's estate 25 years after author's death despite any agreement to the contrary.²³ Moral rights cannot be assigned, so any contract or term purporting to assign moral rights would be void.²⁴ Certain assignments of copyrights or licences will be adjudged void if they are not registered with the Registrar of Copyrights.²⁵ Some of these provisions create rights (for example, the exclusive right to assign one's existing rights), and some explicitly disallow the creation of rights, or at least their transfer (for example, moral

¹⁹ *Ibid.*, s. 29.4(2).

²⁰ *Ibid.*, s. 31(2).

²¹ *Ibid.*, s. 3.

²² *Ibid.*, s. 13(4).

²³ *Ibid.*, s. 14(1).

²⁴ *Ibid.*, s. 14.1(2).

²⁵ *Ibid.*, s. 57(3).

rights). None of them explicitly allow or disallow the transfer or waiver of users' rights by contract. While "it is not difficult to make a finding that a contract is either expressly or impliedly prohibited by statute", one should only do so if the implication is clear.²⁶ Like much of the law regarding copyright exceptions, it is necessary to look at the courts' interpretation of the statute.

In the 2012 decision *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 (CRTC Reference)*, the Supreme Court addressed whether the Canadian Radio-television Telecommunications Commission (CRTC) could promulgate regulations that would seem to conflict with the provisions of the *Copyright Act*.²⁷ The CRTC is a regulatory body established by the *Broadcasting Act* and empowered to issue licences to broadcasters and broadcast distribution undertakings (BDUs). The CRTC sought to introduce a regime whereby private broadcasters could negotiate with BDUs for compensation for the retransmission of their signals. The regime would also allow broadcasters to prohibit retransmission if negotiations are not fruitful.²⁸ The majority of the Court noted that such a regime would directly conflict with the *Copyright Act*.²⁹ Section 21 of the Act grants certain exclusive rights to broadcasters to authorize retransmission of signals by other broadcasters, while s. 31(2) provides for an

²⁶ *Still v. Minister of National Revenue* (1987), [1998] 1 F.C.R. 549, online: CanLII <<http://canlii.ca/t/4mw9>>. (*Still*)

²⁷ 2012 SCC 68, online: CanLII <<http://canlii.ca/t/fv76k>>.

²⁸ *Ibid.* at para. 1.

²⁹ *Ibid.* at para. 11.

exception to broadcasters' rights in that a BDU – which is not a “broadcaster” within the meaning of the *Copyright Act*³⁰ – may, under certain conditions, simultaneously retransmit local signals without authorization or payment of royalties. As noted above, the exception means that broadcasters do not have the right to prevent such retransmission or seek compensation for it. The Supreme Court said that were the CRTC to impose its regime, it would be creating a new right in conflict with s. 89:

Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition.... The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21.³¹

The dissent, on the other hand, maintained that there is no conflict, because the CRTC has jurisdiction under the *Broadcasting Act* to regulate the conditions under which it will grant a licence.³² The regime does not create new copyrights, but it imposes conditions on licensing.³³ One could perhaps consider this interpretation of the facts as akin to the “extra element” analysis in U.S. copyright law. The majority did not agree, however, calling the proposed regime “functionally equivalent” to an amendment of s. 21 granting additional rights to broadcasters.³⁴

³⁰ *Ibid.* at para. 50.

³¹ *Ibid.* at para. 81.

³² *Ibid.* at para 123.

³³ *Ibid.* at para. 120.

³⁴ *Ibid.* at para. 82.

While ultimately the *CRTC Reference* decision prevents an *administrative body* from imposing conditions granting rights that are functionally equivalent to copyright, and an argument may be made that it would prevent such an imposition by way of a mass-market end-user agreement (Chapdelaine, 2013, p. 40), it does not directly rule that two parties cannot otherwise *voluntarily* contract to waive the ability to exploit copyright exceptions. However, the *ratio* can easily be applied to such an agreement. In order for the Court to decide whether or not the CRTC has the jurisdiction to enable broadcasters to negotiate with BDUs for compensation for retransmission of signal, it must be the case that broadcasters were not already entitled to do so. In fact, the regime under consideration would not *force* broadcasters and BDUs to negotiate, it would merely allow private local television stations to *choose* to negotiate.³⁵ In other words, it would create the environment for a contract where none existed before.

There is an important difference to consider, however, when applying this *ratio* to a situation where an academic library freely enters into a licensing agreement for access to electronic materials. Whereas the *CRTC Reference* case involved negotiations of the conditions under which a BDU may retransmit a signal, subscription agreements address copyright exceptions as conditions under which access to the electronic material is permitted. That is, the waiver of exceptions could be thought of as a form of consideration, in addition to monetary payment, in exchange for access to the works. In this way, it can be argued that the contract does not create a new right that is functionally

³⁵ *Ibid.* at para. 1.

equivalent to those found in the *Copyright Act*, it is merely an agreement to not take advantage of copyright exceptions for the duration of the contract.

Whether or not this type of voluntary agreement is permissible under the *Copyright Act* requires further analysis, including contemplation of the purpose of copyright legislation.³⁶

4.3.2 Purposive analysis approach

A freely-negotiated contract may not necessarily confer new rights that are equivalent to copyright; as Judge Easterbrook noted in *ProCD*, copyrights (and other rights conferred by legislation) are rights against the world, while contract terms bind only those who choose to be party to them (de Werra, 2003, p. 269). If an individual does not want her fair dealing entitlements curtailed, she is free to walk away from the contract or return the product. The “invisible hand” of the free market, where producers offer their goods for a certain price (monetary or otherwise), and consumers spend what they choose, will guide the market until it reaches a point where everybody benefits.

However, information, being in its natural state non-excludable and non-rivalrous, does not easily lend itself to guidance by this invisible hand. Because it can be “consumed” by more than one person simultaneously, and is not lessened with each use, producers will not necessarily make any money from its creation. Copyright law creates artificial

³⁶ “According to [*Cope v Rowlands* (1836), 150 E.R. 707], a finding that a contract is impliedly prohibited requires an examination as to the purpose or object underscoring the legislation.” (*Still, supra* note 26)

exclusion and rivalry in works of information and creativity, encouraging their creation by ensuring some kind of reward for the creator.

In Anglo-American countries such as Canada and the U.S., copyright law is utilitarian – its ultimate purpose is to promote progress in arts and science for the benefit of society as a whole. This purpose is directly addressed in the U.S. *Constitution*. Congress is given a constitutional mandate to “promote the progress of science and the useful arts” by imposing an artificial monopoly on creative works; the monopoly is limited in order to encourage meaningful use of the works by that will further contribute to progress. The Supremacy Clause of the *Constitution* provides that the articles therein and federal statutes are the “supreme law of the land” and take precedence over state laws.³⁷

Constitutional preemption doctrine has been argued to apply to contracts as well as state laws, and has been used by courts in striking down contractual provisions that disrupt the balance (between the interests of the creator and the interests of the public)³⁸ created by Congress in enacting copyright law (de Werra, 2003, pp. 270–271). But it is still not clear in the law whether a purposive approach leads to the preemption of all contract terms that conflict with copyright law, or only those of standard form, non-negotiated agreements (de Werra, 2003, p. 271).

³⁷ *Supra* note 2, art. VI.

³⁸ The House of Representatives report addressing the proposed fair use provision in 1976 stated that “it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.” (U.S. House Judiciary Committee, 1976)

Canada's equivalent to the Supremacy Clause is found in s. 52(1) of the *Constitution Act, 1982*: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."³⁹ However, the Canadian constitutional documents do not specify a purpose for the enactment of copyright laws.

Canadian copyright law is considered by Canadian courts to be, as in the U.S., a balance. Copyright law is itself a recognition that some form of governmental regulation is necessary to encourage creation *and* use of information and knowledge "goods". This regulation is backed by policy objectives. In *Théberge*, the Supreme Court said that copyright is a "balance".⁴⁰

The Court in *CCH* cited *Théberge* and added that copyright exceptions such as fair dealing must not be interpreted restrictively, so as to avoid tilting the balance too far in favour of the copyright owner.⁴¹ This idea was repeated in *Bell*.⁴² Indeed, the Governor General, in his Speech from the Throne in 2011, announced the government's intention to amend and modernize copyright law in a way that "balances the needs of creators and users." (Johnston, 2011) The Court in the *CRTC Reference* also noted the importance of the objective behind copyright law:

³⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, online: Government of Canada <<http://laws.justice.gc.ca/eng/Const/index.html>>.

⁴⁰ *Supra* note 5 at para. 31.

⁴¹ *Supra* note 1 at para. 48.

⁴² *Supra* note 13 at para. 11.

[A]lthough the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works.⁴³

The value for signal regime would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*.⁴⁴

Given the insistence that copyright exists to provide *limited* rights to creators and owners, it would be unusual if not counterproductive to allow copyright owners to defeat its purpose by extending those rights as a condition to access the work.

4.3.3 Statutory right approach and privity of contract

However, if the preceding sections are inconclusive as to whether two parties can or cannot come to a voluntary agreement that would, as a form of consideration, limit certain uses of a work that are otherwise permitted by the *Copyright Act*, it is still necessary to consider the notion of statutory rights in contract.

Freedom of contract is the principle whereby individuals may enter into agreements without governmental restriction; more specifically, they can alter their legal relationships towards one another, creating rights and duties, or transferring existing rights, for example. However, freedom of contract is not absolute – there are certain

⁴³ *Supra* note 27 at para. 70.

⁴⁴ *Ibid.* at para. 76.

situations where one cannot enter into particular agreements. One cannot contract to commit an illegal act, for example. One can try, but such an agreement is unenforceable in the courts. Furthermore, certain statutes provide that an individual cannot contract to waive a particular right granted to him by the statute. The *Employment Standards Act* of Ontario does not allow employees to waive by contract the employment standards that have been enacted to protect him: “Subject to subsection (2), no employer or agent of an employer and no employee and agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.”⁴⁵ Similarly, the *Ontario New Home Warranties Plan Act* states that every vendor warrants to the owner that the home is free of defects, etc., and that these warranties apply despite any agreement to the contrary.⁴⁶

It is not necessary that the text of statute itself explicitly disallow such contracts; the courts may interpret a limitation based on the statute’s purpose. In *Royal Trust v. Potash (Royal Trust)* the Supreme Court considered whether the federal *Interest Act* permitted a mortgagor (Potash) to waive his entitlement to prepay his mortgage.⁴⁷ Section 10(1) of the *Interest Act* provides that if a non-corporate mortgagor pays a mortgage in full, plus three months further interest, after five years, the mortgagee may not charge further interest. The statute does not use the word “right” to describe this section, but the Court

⁴⁵ S.O. 2000, c. 41, s. 5(1), online: CanLII <<http://canlii.ca/t/30f>>.

⁴⁶ R.S.O. 1990, c. O.31, ss. 13(1), 13(6), online: CanLII <<http://canlii.ca/t/21c>>.

⁴⁷ [1986] 2 S.C.R. 35, online: CanLII <<http://canlii.ca/t/1ftqp>>.

characterized it as such.⁴⁸ Furthermore, the statute does not explicitly prevent the mortgagor from entering into agreements that waive this right. In this case, Potash renewed his mortgage twice whereby he was permitted only to prepay a maximum of 10 percent of the principal per year. Eight years after the execution of the original mortgage, Potash attempted to pay the entirety of the loan as per s. 10(1) of the *Interest Act*. The court of first instance held that Potash had contracted out of his right and therefore could not have the mortgage discharged.⁴⁹ The Appeals Court reversed, ruling that one could not contract out of a right that is designed to protect the public, and if it were possible to waive the right of prepayment it would render the protection ineffectual, to the detriment of the public.⁵⁰ The Appeals Court discussed general propositions of waiver of statutory rights, citing *Halsbury's Laws of Canada*: "Individuals for whose benefit statutory duties have been imposed may waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest."⁵¹

The Supreme Court considered Royal Trust's argument that a statute must expressly prohibit waiving or contracting out of the protections of s. 10(1) and did not find it compelling. Instead, the Supreme Court agreed with Potash, and with the Appeals Court, that "s. 10(1) was enacted in the public interest and that the long standing rule against

⁴⁸ *Ibid.* at para. 1.

⁴⁹ *Ibid.* at para. 9.

⁵⁰ *Ibid.* at para. 49.

⁵¹ *Ibid.* at para. 33.

contracting out or waiver should apply to it.”⁵² However, ultimately it did not agree that the renewals in this case represented an attempt to contract out of the statutory right; instead, Potash chose not to exercise the right at this time.⁵³

It has been noted that the Supreme Court has, on various occasions, described copyright exceptions as “users’ rights”. It is important at this point to consider the word “right” and whether it is being used broadly (as a synonym for “interest” or “advantage”) or narrowly (as in a “claim”) – in other words, whether copyright exceptions can be considered “statutory rights” that cannot be overridden by contract. It should first be noted that the term “statutory right” as applied to copyright exceptions was used in the *CRTC Reference*. Abella and Cromwell J.J., in their dissent, acknowledged that BDUs have a statutory right to retransmit signals under s. 31(2), but that this right was intended by Parliament to be predicated on the conditions placed on retransmission licences by the CRTC pursuant to the *Broadcasting Act*.⁵⁴

W.N. Hohfeld’s influential analysis of fundamental legal concepts is often invoked in a discussion of rights. Hohfeld grouped jural relations into pairs of opposites, and pairs of correlatives. For example, a “right” (narrowly construed) correlates with a “duty” – where one person has a right, another (or all others) have a corresponding duty to do or not do something. A right *in personam* corresponds to a duty owed by particular person,

⁵² *Ibid.* at para. 40.

⁵³ *Ibid.* at para. 41.

⁵⁴ *Supra* note 27 at para. 117.

whereas a right *in rem* corresponds to a duty owed by all persons or a class of persons (Hohfeld, 1917, p. 719). Rights can also be positive or negative, and corresponding with a duty to do something, or to not do something, respectively (p. 719). Hohfeld provides an example of a negative right *in rem*: “A’s right that B shall not manufacture a certain article as to which A has a so-called patent.” (p. 719) Exclusive rights granted by copyright law would also fall into this categorization.

Rights are further contrasted with “privileges”, which correspond to “no right”. A privilege differs from a right in that there is no duty upon anyone else to do something or not do something, but there is also no right in others to make a claim against the individual. A privilege is “permission to do an act that would normally be a breach of a duty.” (Hogan, 2007)

Are copyright exceptions rights or privileges according to the above analysis? It has been argued that American fair use is only a privilege, while copyrights are rights. Fair use does not compel anyone else to do or not do something with respect to the object of the right, which in this case, is the particular use of copyrighted works. It is clear that a copyright owner has a right *in rem* in the use of her works, and users have a corresponding duty to refrain from using them without permission or compensation. This right is supported in the Canadian *Copyright Act* by statutory remedies that will legally require the user to compensate for the infringing use, pay other damages, or refrain from using the work.⁵⁵ However, this right is limited by exceptions to infringement, such as

⁵⁵ *Supra* note 1, s. 34(1).

fair dealing. Within the scope of copyright exceptions, the copyright owner does *not* have a right. The user, on the other hand is statutorily entitled to make certain uses of a work; by the plain text of the statute, the user has a privilege. If this entitlement were merely a privilege, the copyright owner would, correspondingly, have no right to prevent the use or seek remedy for it. If user rights are “rights” by the Hohfeldian conception, there would be a duty on the copyright owner to not interfere.⁵⁶

It is sometimes argued that there no right without a specific remedy. In the context of equity, this means that the breach of a right must lead to some sort of relief. An alternative, definitional, interpretation is that the very existence of a right depends on the availability of relief (Hartline, 2013). That is, a “right” must be accompanied by a means of enforcement or other remedy, otherwise it is merely a “privilege” or “freedom”. In *Black’s Law Dictionary*, a right is defined, inter alia, as “A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong.” (2009, s.v. “right”) Examples of such remedies are found in the *Copyright Act*, whereby an owner or author may seek various sorts of relief for infringement of copyright.⁵⁷ The provision protecting mortgagors in the *Interest Act* is supported by a remedy found in s. 103(1)(c) of *The Real Property Act* of Manitoba – the aggrieved individual may apply to the court for an order compelling the mortgagee to discharge the loan.⁵⁸

⁵⁶ The duty may also be on others, if it is a right *in rem*.

⁵⁷ *Ibid.*, ss. 34-40.

⁵⁸ C.C.S.M., c. R30, online: CanLII <<http://canlii.ca/t/8gm8>>.

Even where there is no statutory remedy provided for those who would like to enforce their rights, they are not completely devoid of options; a plaintiff may seek declaratory relief from the court, in order to clarify the respective rights of the parties (Sarna, 2007, p. 1). There must be a real, not hypothetical, issue to be considered, and a plaintiff with sufficient interest (p. 2). There need not be any actual wrong or even threat of one; it is enough that there is an uncertainty with respect to legal relations that has the potential to endanger a plaintiff's interests (Borchard, 1941, p. 28).

Although a declaratory judgment does not in itself lead to an award of monetary damages or an injunction, or coercion of performance or non-performance on the part of the other party, it is a *res judicata* (i.e., legally binding) and will settle any subsequent action by the other party relating to the particular set of facts (Sarna, 2007, p. 31, citing *Canadian Warehousing Association v. The Queen* (1968), [1969] S.C.R. 176). A suit for declaratory relief may be impractical for many situations, but matters of practicality (i.e. whether such relief will in fact be sought) are not dispositive to the analysis of whether a freedom is a right.⁵⁹

There is precedent for declaratory relief with respect to fair dealing in Canada. In *CCH*, the Supreme Court granted a declaration that the Law Society does not infringe copyright when the Great Library makes photocopies of materials in accordance with its Access

⁵⁹ “A right is no less a right merely because all the steps necessary to be taken to ensure its enforcement have not yet been taken.” (*Re Falconbridge Nickel Mines Ltd v Ontario (Minister of Revenue)*, [1981] 32 O.R. (2d) 240, 121 D.L.R. (3d) 403 (Ont. C.A.) at para. 32, online: CanLII <<http://canlii.ca/t/g1j31>>, cited in *Esso Resources Canada Ltd v. R.* (1988), 22 F.T.R. 110 (F.T.C.D.) at para. 17.)

Policy.⁶⁰ This relief would not be necessary were fair dealing simply a defence to copyright infringement, or a privilege; the Court had already determined that the particular copies under consideration were in fact fair dealing. The order allowing the appeal could have ended there. However, the Court went further and issued to the Law Society a form of positive relief in the form of a declaratory judgment that any copying made within the scope of the library's policy is not an infringement of copyright. This act is in keeping with the Court's characterization of fair dealing as a right that imposes a corresponding duty on the copyright owner to refrain from interfering with its exercise.

The above analysis suggests that copyright exceptions are statutory rights that cannot be waived by contract. Although exceptions are not referred to as "rights" in the statute itself, they are implicated as such in the *CRTC Reference*; furthermore, this is not a necessary condition of a statutory right. There is no statutory obligation upon the copyright owner to facilitate the exercise of an exception, nor to refrain from taking action against it, but a user may apply to the court for a legally binding declaration.

In the Supreme Court decision *Robertson v. Thomson Corp.*, Lebel and Fish J.J. said that "parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*."⁶¹ It would seem, then, that statutory rights in copyright can be waived or transferred if one chooses. However, s. 3 of the *Copyright Act* expressly

⁶⁰ *Supra* note 1 at para. 90.

⁶¹ 2006 SCC 43, 274 D.L.R. (4th) 138 at para. 58, online: CanLII <<http://canlii.ca/t/1pqw1>>.

permits a copyright owner to assign or licence exclusive rights, so that the material can be published.⁶² There is no such provision with regards to user rights.

Another important factor in the analysis of the relationship between contract law and copyright is that exceptions – although, like the exclusive rights of owners, are intended ultimately to benefit the public in general – are the right of the user. In a fair dealing analysis, for example, it is the ultimate user’s perspective that is taken into account when determining the purpose of the dealing.⁶³

D.R. Jones notes that “‘negotiated’ agreements supposedly allow the parties to arrive at the terms they bargained for. Yet these agreements do not affect only the two parties. They affect anyone who wants to borrow the work if there is a limitation on lending, and thus they affect a broader public interest.” (Jones, 2013, p. 443) While she was speaking here in terms of access to electronic books rather than use of them (such as copying), the point stands that the legal party to the contract – the party who negotiated and accepted the provisions – is not always the end user of the work. This is especially true in libraries, where materials are collected and maintained on behalf of patrons, who have not signed, and may not be aware of, subscription agreements.

In academic libraries, there are two primary classes of users: staff (including faculty), and students. Employment contracts will sometimes specify that the employee has a duty to adhere to all policies emanating from the employer, or it may be an implied term of the

⁶² *Supra* note 1.

⁶³ *CCH*, *supra* note 1 at para. 64; *Alberta*, *supra* note 12 at para. 22; *Bell*, *supra* note 13 at para. 34.

contract. Such policies may include a copyright policy indicating that certain uses of copyrighted material, although permitted by the *Copyright Act*, are barred by publishers' licence agreements.⁶⁴

The relationship between a university and its students is said to be one of *sui generis* contract; the student becomes a party to the contract by accepting the offer of admission, registering for courses, and paying tuition.⁶⁵ Documents such as the academic calendar and student handbook are terms of the contract to which students are taken to have agreed,⁶⁶ but in many cases copyright is not mentioned in any of these documents (although plagiarism is usually addressed). University policies may form part of the contract as well.⁶⁷

However, the proposition that statutory rights cannot be waived by contract applies to employment contracts and student contracts as well as licence agreements. Furthermore, any restriction on a faculty member's ability to exercise exceptions such as fair dealing in their research and teaching may run afoul of a collective agreement.⁶⁸

⁶⁴ Often it is unclear whether a copyright policy is in fact a policy (with consequences for failing to follow it) or merely a guideline.

⁶⁵ *Bella v. Young*, 2006 SCC 3, 261 D.L.R. (4th) 516, 1 S.C.R. 108 at para. 31, online: CanLII <<http://canlii.ca/t/1mfl2>>; *Hazanavicius v. McGill University*, 2008 QCCS 1617, 2008 CarswellQue 3458 at para. 58, online: CanLII <<http://canlii.ca/t/1wr83>>; *Wong v. University of Toronto*, 1990 CarswellOnt 825, 45 Admin. L.R. 113, 79 D.L.R. (4th) 652 (Ont. Dist. Ct.) at para. 18.

⁶⁶ *Rittenhouse-Carlson v. Portage College*, 2009 ABQB 342 at para. 72, online: CanLII <<http://canlii.ca/t/23vg2>>.

⁶⁷ *Lobo v. Carleton University*, 2011 ONSC 4680.

⁶⁸ For example, the "Faculty Collective Agreement between The University of Western Ontario and The University of Western Ontario Faculty Association" protects the academic freedom of faculty members, including the right to "select, acquire, disseminate, or critique documents or other materials in the exercise

Access to electronic resources is often predicated not only on signed subscription agreements (which may be negotiated) but also on so-called click wrap agreements. The end user agrees, by using the electronic resource, to abide by its terms and conditions. For example, WestlawNext Canada's Licence Agreement, found behind a link at the login page, defines "Subscriber" as "any person who/which accesses and/or uses the Features and/or data."⁶⁹ The User Agreement for the website of *The Chronicle of Higher Education* states that "You will be legally bound to these terms by accessing or using any part of the site, whichever occurs first."⁷⁰ (The agreement prohibits the creation of course books or educational materials using any of the site's content.) Such an agreement is not likely to be upheld, given the preceding analysis.

4.4 Contracts and digital materials

In response to a claim that copyright exceptions such as fair dealing are statutory rights that cannot be waived in contract, copyright owners (and particularly publishers of electronic materials) might argue that the economic aspects of copyright have not been suitably addressed, and that copyright exceptions such as fair dealing are no longer necessary when access to materials is increased. Copyright owners would note that the fair dealing doctrine developed in an age of printed materials and cannot be cleanly

of the Member's Academic Responsibilities." (2014, p. 6) The collective agreement for librarians and archivists contains a similar provision ("Collective agreement between The University of Western Ontario and The University of Western Ontario Faculty Association - Librarians and Archivists," 2011, p. 11).

⁶⁹ "License agreement for WestLaw Next Canada"
<<http://www.carswell.com/DynamicData/AttachedDocs/LicenceAgreements/Westlaw-Next-Canada-Licence-Agreement.pdf>>.

⁷⁰ *Supra* note 4.

imported into the digital environment. Certain uses of a work are permitted in order to ensure access to a work by as many people as possible. Although the *Copyright Act* does not address access per se, copyright law is predicated on the assumption that someone other than the author or creator will at some point use the material in some way, even if only to look at it. Fair dealing allows more than one person to have access to a work at the same time; an individual can copy small portions of the material for later reference and leave the physical good for the next user.

This argument comes from a “practicality” and “market failure” perspective of fair dealing – that it is cheaper and more efficient for copyright owners to ignore certain uses of a work than it is to control them or seek compensation for them (see Cohen, 1998). In a digital environment, the cost and effort associated with a more thorough control over access to and use of a work is greatly reduced. For example, copying of a work can be limited contractually or by technological protection measures, and licensing fees can be easily collected through an online portal such as the Copyright Clearance Center.

Libraries will benefit from this regime: for example, there is not necessarily a limit on how many users can access materials at one time; printed materials will not become damaged, nor will they need to be replaced; storage costs are greatly reduced (Cooper, 2006; Odlyzko, 2013).

Once access is assured by means of private contracts, there is no longer a need for copyright exceptions.⁷¹ The “invisible hand” will guide the market to an equilibrium that is (economically) beneficial for all.

Critics point out that such a “cybereconomic” theory of copyright does not fully consider the non-monetary factors of copyright policy. Treatment of information as a commodity on par with physical goods ignores or downplays the inherent social worth of information, and phenomena such as the network effect, where the value of a resource increases the more it is used. There is a presumption that scientific and creative progress is better served by private ordering rather than public regulation, but this presumption is simplistic and unproved (Cohen, 1998, pp. 489, 491). For example, a cybereconomic argument does not adequately account for transformative uses of a work that are encouraged by fair dealing. Even supposing that private ordering would increase access to a work, thus diminishing the need to make reproductions for later use, there does not appear to be room to integrate works or parts of them into new creative endeavours. The *Copyright Act* was amended in 2012, adding, among other things, a “User-Generated Content” (UGC) exception that permits an individual to use a copyrighted work in the creation of a new work for non-commercial purposes.⁷² This provision is intended to encourage the creation and dissemination of creative works by non-professionals (those who neither expect nor desire direct monetary reward), activities facilitated by digital

⁷¹ It might even be argued that there would be no need for copyright law at all; the objective to encourage the production of creative works would be better met by contract law on its own (Olson, 2006, p. 117).

⁷² *Supra* note 1, s. 29.21(1).

technologies (see Scassa, 2013). A subscription agreement or terms of use agreement that prohibits any copying of materials necessarily prevents the exercise of this right, as do agreements that allow copying but limit the types of uses to which the text, song, or video may be put. For instance, *The Chronicle of Higher Education*'s user agreement allows users to download and print content, but does not allow the creation of derivative works or educational materials.⁷³ Of course, copyright owners could allow these types of uses by those who are willing to pay a bit extra, but this is precisely the type of situation the UGC exception was enacted to avoid.

The cybereconomic theory also does not consider the difference in bargaining power that may be present. The Court in *Royal Trust*, in deciding that Potash was not, in fact, contractually waiving his right to prepay a mortgage, considered whether there was an imbalance in bargaining power:

Contracting out or waiver, it seems to me, envisages a mortgagor's agreeing or acknowledging at the commencement of a five-year period that he has no option, that only one route is open to him and that is to renew with the same mortgagee. Potash did not have to sign any renewal if he did not want to. He did not contract out of his right to repay; he made a free choice not to exercise it.⁷⁴

A perfect free market presumes equality in bargaining power. In mass-market transactions involving click-wrap, unilateral terms of use, users have no choice but to accept the contract in order to access the information. There is no “bargaining” involved

⁷³ *Supra* note 4.

⁷⁴ *Supra* note 47 at para. 41.

whatsoever: the user can agree to the terms or go without. Even in ostensibly negotiated agreements (de Werra, 2003, pp. 363–364), such as those between publishers and libraries, the nature of academic materials such as journals puts the libraries in a weaker position. Generally, academic journals are non-substitutable resources, and certain publications are considered essential for a library’s collection (McGuigan, 2004, p. 18). An academic library’s mandate is to support the teaching and research of its college or university, and if a department or faculty requires access to a given publication, the library does not necessarily have the power to “walk away”. This, of course, has always been an issue in academic library collection management, but now the issue is not only the price of the material but also the use of it. The pressure to accept overly-restrictive terms has been eased somewhat by the rise of consortial licensing,⁷⁵ but publishers raise prices and bundle titles in an attempt to retain power over the acquisitions process (McGuigan, 2004).

Various commentators have proposed changes to the copyright regime that take into account the new ways of accessing and using digital works. Ginsburg calls this new way “experiencing” rather than “having” (2006). She argues that an “access right” is an integral part of copyright, and that copyright owners should accordingly be afforded protection, but that this exclusive right, like others in copyright, should be subject to exceptions and limitations on behalf of users.

⁷⁵ For example, the Canadian Research Knowledge Network is a consortium of universities that negotiates and acquires subscriptions to electronic materials on behalf of its members. The network has developed its own model subscription agreement for use in negotiations (Canadian Research Knowledge Network, n.d.).

De Werra asserts that we need to find a way to combine contract law and copyright law to address conflicts (2003, p. 360). He suggests a legal test rather than a legislative approach, and outlines the criteria that would be taken into account, much like the factors addressed in a fair dealing or fair use analysis (2003, pp. 362–369).

4.5 Technological protection measures

Technological protection measures, or “digital locks”, are an additional method used by copyright owners to control access to or use of an electronic work. The 2012 amendment of the Canadian *Copyright Act* added prohibitions on the circumvention of digital locks and the creation of or dealing in circumvention tools or services.⁷⁶ Certain copyright exceptions such as reproduction for private purposes,⁷⁷ time-shifting,⁷⁸ and making backup copies⁷⁹ are expressly conditioned on the non-circumvention of digital locks.

Many of the economically-based arguments in favour of contractual ordering of copyright have been applied to digital locks. During the House of Commons debates on Bill C-11, the Conservative government (who introduced the bill) focused on the economic aspects of access and use of works, and issues such as digital innovation, profit, and the creation of jobs:

⁷⁶ *Supra* note 1, ss. 41-41.1.

⁷⁷ *Ibid.*, s. 29.22.

⁷⁸ *Ibid.*, s. 29.23.

⁷⁹ *Ibid.*, s. 29.24.

Copyright law is about balance. It is about a balance between those who wish to purchase items and those who have created items (Del Mastro, 2012).

Let us say, for example, I am a creator and I choose to sell something that is locked. It is like if my colleague had a store of suits and decided that he would lock the store when there was nobody around. He could choose to lock it or unlock it but if he unlocked the store perhaps people would come into his store and take all of his suits. With that business model, unfortunately, he would go bankrupt (Carrie, 2012).

While digital locks are similar to a standard form contract in that they (ostensibly) allow a copyright owner to unilaterally control access to or use of a digital work, some of the arguments against the validity of contract provisions that conflict with the *Copyright Act* cannot be applied to digital locks. The reason is that the digital lock provisions were duly enacted by Parliament and incorporated into the statute. However, the provisions (and versions of them in previous bills) have been criticized in journal articles, books, and blogs as being overly broad, anti-competitive, and possibly unconstitutional (Craig, 2010b; de Beer, 2006).⁸⁰

The inclusion of digital locks in the bill seems to suggest that Parliament is supportive of private ordering within the copyright regime. Even if this were the case, the support does not necessarily extend to all uses of a work. The fair dealing and user-generated content exceptions, for example, are not explicitly conditioned on the non-circumvention of a

⁸⁰ Blogs that discuss digital locks include those of Michael Geist <<http://www.michaelgeist.ca/tags/digital+locks>>, Ariel Katz <<http://arielkatz.org/archives/category/blog>>, Howard Knopf <<http://excesscopyright.blogspot.ca/search/label/tpm>>, and Meera Nair <<http://fairduty.wordpress.com/tag/tpms/>>.

digital lock. The digital lock provision itself does not forbid the circumvention of copy-control protection measures, only access-control measures, although it does forbid any person to “manufacture, import, distribute, offer for sale or rental or provide – including by selling or renting – any technology, device or component” if the primary use is to circumvent digital locks.⁸¹ Additionally, the Governor-in-Council may make regulations that allow circumvention of an access-control measure for the purpose of certain acts, or that require the copyright owner to provide access to a work protected by a digital lock.⁸²

4.6 Conclusion

While many educational institutions assume that contract terms restricting certain uses of digital materials take legal precedence over copyright legislation that permits them, I have argued that the issue is not quite as clear cut in Canadian law. In fact, several arguments can be made that statutory copyright exceptions cannot be waived by contract (whether standard form or negotiated), and even if they could, those whose rights are being waived are generally not a party to the agreement. The purpose of the *Copyright Act* is to maintain a balance between the rights of the copyright owner and the rights of the user, ultimately benefiting the public via the progress of science and art, and there is no compelling evidence that Parliament intended that this balance should be disrupted by private ordering. Canadian educational institutions must keep this in mind before asserting or conceding that licence terms trump copyright exceptions, lest they prevent

⁸¹ *Supra* note 1, s. 41.1(1).

⁸² *Ibid.*, s. 41.21(2).

their faculty and students from making their entitled full use of copyrighted materials, estop themselves from making use of a fair dealing defence in court, and in the long run contribute to a standard or custom that has the potential to affect how courts will interpret fair dealing.

5 Review of Canadian university fair dealing policies

5.1 Introduction

As outlined in Chapter 2, the past 10 years have seen a number of changes in the area of copyright law, particularly in the area of education. As a result, Canadian universities have had to make policy decisions to account for these changes and the resulting expansion of fair dealing rights. The content and consistency of the resulting policies may have a significant effect on the future interpretation of fair dealing rights. This chapter is an analysis of the fair dealing policies and supporting information found on university web sites, comparing results over three years from May 2013 to May 2016, demonstrating the general move towards in-house copyright management as opposed to the use of blanket licences through collective societies such as Access Copyright.

The first section provides context to the chapter, discussing legislative and jurisprudential events that have led up to the need to look closely at universities' approaches to fair dealing. Related literature is reviewed and the methodology and research questions that form the framework for the chapter are presented. Finally, results are provided and discussed in the context of the dissertation's thesis.

5.2 Background

As discussed in Chapter 2, a number of events in the past six years left universities with a range of factors to consider in addressing copyright compliance policies and practices within their institutions. In 2010 the breakdown of negotiations between schools and Access Copyright on the terms and rates of a new blanket licence led the collective to turn to the Copyright Board for a tariff. At the end of 2010 the Copyright Board certified

an interim tariff while it considered the main application (which has not been decided at the time of this writing).

In 2012 the Supreme Court decided the Copyright Pentology, confirming that the copying and distribution of excerpts for classroom use in elementary and secondary schools can be fair dealing, falling under the enumerated purpose of “research”. Not long after, the *Copyright Act* was amended to add “education” to the list of fair dealing purposes, and educational exceptions were expanded to account for digital and online uses of materials (among other amendments).

In 2012, two major universities – University of Toronto and The University of Western Ontario – negotiated and entered into new licences with Access Copyright, a move that was decried by many copyright scholars, including members of the schools’ own faculties.¹ Other schools (such as University of Ottawa) entered into a different model licence with the collective, one that had been negotiated by the Association of Universities and Colleges of Canada. Still others (like University of British Columbia and York University) opted out of any relationship with Access Copyright or the interim tariff, preferring instead to rely on publishers’ licences, transactional licences, fair dealing and other exceptions, and open access sources. Whereas until 2010, the vast majority of Canadian universities relied on a licence with Access Copyright, in 2012, there was less consistency.

¹ See, for example, Samuel Trosow (2012) of The University of Western Ontario, and Ariel Katz (2012b) of University of Toronto.

Organizations that have developed, or are in the process of developing, copyright policies and guidelines must ensure that users can locate and understand the documents. Horava (2008) notes that “copyright is a complex topic that is notoriously difficult to explain, due to the layered intricacy of the legislation and the nuances of interpretation depending upon the type of work and the intended use.” (pp. 1-2) Wilkinson (2000) points out that the use of copyrighted works in universities is diverse, and it is not always clear to the users whether or not they are infringing copyright. As Horava (2010) reports, a lack of a coordinated approach to copyright leaves organizations facing challenges in interpreting the issues and in educating faculty and students. A user’s understanding of what she is or is not permitted to do with copyrighted works depends heavily on the manner in which the concepts are communicated to her. If the information is not readily available, if it is unclear, confusing, or a burden to read, a user is less likely to take heed of policies or guidelines, making them essentially moot from a practical point of view (Horava, 2008).

The availability of clear information is especially important when it comes to fair dealing. Because fair dealing in Canada is, by its very nature, a flexible concept (Katz, 2013a), it is understandable that most non-expert users would prefer to follow an “official” policy or set of guidelines in order to avoid trouble for themselves or for their employer (Crews, 2001).

Furthermore, the existence of a comprehensible fair dealing policy or set of guidelines provides an element of legal defence in a copyright infringement suit. In relying on the fair dealing exception, an institution’s own policies (for example the Great Library’s “Access to the Law Policy”) can themselves be evidence of fair dealing, and it is not

necessary to show that every individual dealing made by the institution was fair.²

D'Agostino (2008) suggests that policies that are consistent across the industry are more useful in this regard.

Fair dealing policies can also contribute to the determination of fair dealing in general. In its *CCH* decision the Supreme Court stated that “[it] may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”³ How universities approach copyright compliance (in policy and in actual practice) may affect how fair dealing is interpreted in future cases. It is important, then, that copyright policies and guidelines consistently give due weight to fair dealing and other exceptions. Trosow (2010) notes that the failure to rely on fair dealing could “lead to serious rights accretion [to copyright owners] that only becomes more difficult to reverse over time.” (p. 549) Gibson (2007) calls this phenomenon “doctrinal feedback”: the practices of the affected sectors feed back into the interpretation of what is considered permissible; the law is transformed “from the bottom up” (p. 885). He discusses this phenomenon in the context of American fair use doctrine; however, it is perhaps even more relevant with regards to Canadian fair dealing, where there is less guidance in the legislation as to how “fairness” is to be determined. While a fair dealing analysis (unlike a fair use analysis) does not directly take the availability of a licence into consideration,⁴ the tendency or willingness of a sector to enter into transactional or

² *CCH*, *supra* note 1 at para. 63.

³ *Ibid.* at para. 55.

⁴ *Ibid.* at para. 70.

blanket licences could very well be relevant, as it could set a “custom or practice” that influences future fair dealing analyses in the courts.

Not all commentators agree, however, that policies or guidelines are always helpful or necessary. Crews (2001) acknowledges the attraction of a comprehensive, easy-to-understand policy, but argues that such policies are in danger of being inaccurate reflections of the legislature’s intention to create a flexible exception to copyright infringement. In fact, they can serve to subvert legislative intention, by “ossifying perceptions of fair use and denying the law its intended flexibility.” (p. 693) Crews is speaking here of particular U.S. fair use policies developed in the 1970s, 1980s, and 1990s. For example, the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals (“Agreement on guidelines for classroom copying,” 1976), negotiated by representatives of copyright owners, creators, and educators, includes definitions and provisions that Crews believes are unduly limiting, for example:

Brevity is defined, in part, thusly:

- i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.
- ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

These guidelines certainly address the issue of vagueness, but, according to Crews, they “seek to quantify a law that Congress took pains to keep flexible.” (2001, p. 665) They

also include restrictions based on “spontaneity” and “cumulative use” that are not actually required by the law.

In the Canadian context, Katz (2013a) argues that fair dealing was historically intended to be much more flexible than had been conceived in UK and Canadian courts. Before fair dealing was codified in the British *Copyright Act, 1911*⁵ (and imported into the Canadian *Copyright Act of 1921*)⁶, such uses were dealt with in the common law of the courts. Katz asserts that the more open-ended common law doctrine was meant to co-exist with, not be supplanted by, the statutory provision. In other words, the enumerated list of fair dealing purposes in the statute is not a closed list but a “flexible standard” (p. 140). Thus, the *CCH* decision, which called for a broad interpretation of fair dealing, served to bring the exception back to its open-ended, purposive roots.

D’Agostino (2008) suggests that “because of *CCH*, the Canadian common law factors relating to fair use are more flexible than those entrenched in the United States.” (p. 315) However, she supports the creation of fair dealing policies and best practices, and argues that they should be developed on a grassroots level, via a process that includes all stakeholders in a given sector, including creators, copyright owners, users, and administrators (p. 337).

⁵ (UK), 1 & 2 Geo. 5, c. 46, online: WIPO <<http://www.wipo.int/edocs/lexdocs/laws/en/il/il013en.pdf>>.

⁶ S.C. 1921, c. 24, online: Digital Copyright Canada <<http://www.digital-copyright.ca/dcc-static/Copyright1921.pdf>>.

Trosow (2013) also suggests that “local campus fair dealing guidelines should be crafted that provide useful guidance to academic staff and students about their copyright rights and obligations, but that also avoid bright-line rule making that has plagued past efforts at drafting copyright policies.” (p. 215) These past efforts include the AUCC’s model fair dealing policies, both versions of which contain language (“no copying may exceed; “up to”) that caps the proportion allowed to a certain percentage of the work.

The AUCC issued a revised model fair dealing policy in October 2012 that had been adopted in some way by many of the sampled universities (Association of Universities and Colleges Canada, 2012).⁷ This policy replaced the earlier one from March 2011. Some university fair dealing guidelines in 2013 were still based on the older, non-updated policy.

There are significant differences between the two AUCC policies. The revised policy, subsequent to the 2012 *Copyright Act* amendments, adds “education, satire, or parody” as fair dealing purposes. Following the Supreme Court’s decision in *Alberta*, the revised policy allows that the creation of course packs (anthologies of required or supplementary course readings), and the copying of individual required course readings may be fair – the previous guidelines explicitly limited these dealings and suggested that they could not be fair. While the previous guidelines listed the six factors outlined by the Supreme Court in *CCH*, the revised policy does not.

⁷ The text of this model policy can be found in Appendix A.

The new policy permits “short excerpts” of works to be provided to each student in a course as a class handout, as a post on a password-protected course management system, or as part of a course pack (s. 3).

“Short excerpt” is defined in s. 4 as:

- (a) up to 10% of a copyright-protected work
- (b) one chapter from a book
- (c) a single article from a periodical
- (d) an entire artistic work from a work containing other artistic works
- (e) an entire newspaper article or page
- (f) an entire poem or musical score from a work containing other poems or scores
- (g) an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work

It is not obvious whether this definition can be seen as expansive or restrictive. On the one hand, the enumerated list items are meant to be comprehensive (“a short excerpt means”), but on the other hand, they appear to be mutually exclusive, so that a chapter from a book may be permissibly copied under fair dealing although it makes up more than 10 percent of the total work.

Section 5 of the revised AUCC policy advises that “Copying or communicating multiple short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, is prohibited.” This section is certainly a

limitation, and one that may not be necessary in a fair dealing policy, as the Supreme Court has stated that “It may be possible to deal fairly with a whole work.”⁸

The “Guidelines for the Use of Copyrighted Material” was issued by the Canadian Association of University Teachers (CAUT). The CAUT guidelines (2013a) are broader in subject matter than the revised AUCC policy, concerning copyright as a whole rather than only fair dealing. Unlike the AUCC policy, the CAUT guidelines refer to fair dealing as a “right” to reproduce works without permission or payment (s. III). The guidelines also list the six fairness factors along with a short explanation and examples of each, but do not attempt to set out a precise limit or percentage that is permissible (s. III.D):

In assessing how much of a work is fair to copy, copyright law does not set a single fixed percentage. However, as a general rule:

- Copying 10 percent of a work is likely to be fair.
- Copying more than 10 percent of a work (up to and including the entire work) may be fair depending on the circumstances.

As such, the scope of fair dealing in the CAUT guidelines is wider than that presented in the revised AUCC fair dealing policy.

It is important that university copyright policies avoid the pitfalls described by Crews, Trosow, and others, whether or not the university has signed a licence agreement with a

⁸ *CCH*, *supra* note 1 at para. 56.

copyright collective. Policies should present copyright as a balance and copyright exceptions as user rights; they should provide contextual information to allow readers to understand the policy to be followed; and they must not concede legal points that have not yet been made by Parliament or by the courts, as this could lead to the establishment of an industry practice that might then be taken under consideration by the legislature in crafting amendments, or by the courts in future fair dealing analyses.

5.3 Prior research of university copyright policies

In 2009, Nair (2009) performed a content analysis on copyright policies related to the use of works for research by graduate students. Her study of 21 doctorate-granting Canadian universities led her to conclude that “it does not appear that Canadian universities have placed a priority upon codifying robust fair dealing practices” in the wake of *CCH* (Nair, 2010, p. 101)

Crews (1993) studied copyright policies of 98 U.S. research universities and concluded that the policies were generally inflexible and seemed to exist mainly to avoid litigation. Keogh and Crowley (2008) surveyed U.S. college and university librarians about the content of their schools’ copyright policies, but did not ask specifically about fair use.

Horava (2008) looked at Canadian university web sites for pages designed to communicate copyright issues to faculty and students. He found that 43 of them (just over half) had a copyright page on the library site, seven had a copyright page on another, non-library site, and 23 had no such page at all. He counted the occurrence of certain

terms on the existing pages, finding that “Access Copyright / Copibec”⁹ was used 373 times, while “Fair dealing / Utilisation équitable” was used 212 times, suggesting a lack of balance between two objectives: making users of copyrighted works aware of their legal and contractual obligations, and promoting public policy interests. Horava also found that about one third of the respondents felt that university policy had an influence on the library’s approach to copyright issues, although he did not indicate in his results the number of schools that had specific copyright compliance policies.

The research discussed in this chapter will build upon Horava’s and Nair’s work to provide a more in-depth analysis of the content of university copyright web sites and fair dealing policies. The results of this project provides further guidance for the development of best practices for the creation of fair dealing policies and the communication of copyright issues in Canadian universities, as discussed later in Chapter 7. Research of this kind is particularly timely due to recent events. Access Copyright has brought legal action in Federal Court against York University, who had previously opted out of the interim tariff. The action is based in part on what Access Copyright claims are deficiencies in York’s fair dealing policy, specifically that it is “arbitrary and purely mathematical” and does not suffice to prevent impermissible copying by York faculty members.¹⁰ Access Copyright further claims that faculty members have, in fact, copied works in its repertoire outside the scope of fair dealing, causing the school to fall under

⁹ Copibec is the Quebec equivalent of Access Copyright.

¹⁰ *Access Copyright v. York*, *supra* note 7 at para. 23.

the terms of the interim tariff approved by the Copyright Board in 2011. The lawsuit, which is still in progress as of this writing (Knopf, 2016b), has been criticized by copyright academics, professional associations, and student associations, on the grounds that it essentially ignores the Supreme Court's reasoning in *CCH* and the Copyright Pentology, as well as the amendment adding "education" as an enumerated fair dealing purpose in the *Copyright Act*, and is meant to intimidate other universities into signing a blanket licence with the collective.¹¹

As university fair dealing policies remain "in the spotlight", as it were, a comparison of the various policies and guidelines throughout the university sector may help to establish what the "industry practices" are at this point, and what they could be in the future.

5.4 Methodology of policy review

This chapter describes a longitudinal content analysis of university policies and web pages related to faculty and staff use of copyrighted material.¹²

The target population is the group of Canadian universities outside Quebec (i.e., the universities that may enter into a relationship with Access Copyright). Community colleges have not been included in this study for reasons of manageability. The sample frame is the group of universities outside Quebec that are members of the Association of Universities and Colleges of Canada (AUCC; now called Universities Canada). The

¹¹ See, for example, Canadian Association of Research Libraries (2013), Canadian Federation of Students (2013), Geist (2013), Katz (2013b), Ontario Council of University Libraries (2013).

¹² I am not including policies relating to copyright ownership in works created by university faculty and employees, nor patent policy or other intellectual property policies.

AUCC web site lists 72 non-Quebec universities; affiliated colleges will not be separately considered as they are generally bound by the copyright policy decisions of the parent university. The non-random sample comprises all non-Quebec AUCC-member universities with total student populations of 5,000 or more as of 2011 (“Enrolment by university,” 2011), and the University of Prince Edward Island.¹³ The total sample size is 41 universities.

At the first stage, I determined whether the university had signed a current Access Copyright licence (either the model licence negotiated by the AUCC, or a *sui generis* licence), or whether it had opted to proceed without a blanket licence.

I then attempted to locate fair dealing policy documents on the schools’ web sites. Generally, but not always (see Horava, 2008), the policy will reside on the library section of the web site. In some cases the copyright web pages can be found in the university administration section, or in the more general intellectual property section. The limitation of my approach is that web pages can change overnight, and there is no obvious way to track the history of the site.

I sought documents titled “Fair Dealing Policy”, “Fair Dealing Guidelines”, or other documents that would include a fair dealing policy, such as “Copyright Policy” or “Copyright Guidelines”. I engaged in an exploration of the various policies (or guidelines) via content analysis. Content analysis is a “technique for making inferences

¹³ Total enrolment at the University of Prince Edward Island as of 2011 was approximately 4,600; however, I include the school in my study as it is the only AUCC-member university in the province.

by objectively and systematically identifying specified characteristics of messages.”

(Holsti, 1969) Content analysis involves looking at the structure of the document, the words that are used, and other characteristics of the text to determine a pattern and create a summary that can be used to make inferences and comparisons. It allows a researcher to make inferences and predictions based on textual data, and is used when other methods would be inappropriate, too costly, or too intrusive (Krippendorff, 2013). It is often used in situations where in-depth interviews would not be possible due to the volume of information to be collected, such as in the analysis undertaken here. While a survey might also be an appropriate method of collecting data (as used by Keogh and Crowley (2008) and Horava (2010)), there is a concern that response rates in this situation would not be high enough to obtain a useful sample.

The approach taken will be both a contextual analysis as well as an analysis of the use of certain words or phrases. I am interested not only in the presence or absence of terms such as “fair dealing”, but also in the backdrop in which the terms appear, and how they are characterized. Krippendorff (2013) suggests that frequency counts, classifications, and characterizations must be related to other phenomena in order to be fully useful as inferences.

Other researchers have examined information policies using the methods of content analysis. McKechnie (2001) looked broadly at policies and implementation regarding children’s access to services in Canadian public libraries. Hatfield (2001) strove to examine publishers’ electronic reserve copyright policies at a large U.S. university, but was unable to achieve a high enough response rate. Nevertheless, she described her methodology and intended content analysis of policies where electronic reserve requests

were denied by publishers. Mangrum and Pozzebon (2012) engaged in a content analysis of electronic collection policies in academic libraries to determine how libraries are addressing electronic resources. They sampled 41 universities and found 23 policies in total from the schools' web sites. Whitworth (2011) used content analysis to examine national information literacy policies in various countries (including the U.S., but not Canada) to determine whether the policies address the political consequences of information literacy. Library vendor privacy policies were the subject of research by Magi (2010). Here, the policies were compared against established privacy standards such as the FTC Fair Information Practice Principles. Likewise, Marshall (2002) compared archival appraisal and selection policies to an existing model. Conversely, descriptive, qualitative approaches are more appropriate for new and emerging research areas; this is how Meyer (2009) proceeded in her content analysis of the copyright policies of education journals.

The content analysis in this study will be carried out from a primarily qualitative point of view, with some quantitative elements.

The policies, if available, and other pages linked within the copyright web site were examined and analyzed in the context of the following research questions:

1. Is the content updated to reflect the most recent changes in copyright law?
2. Does the copyright web site mention digital locks or technological protection measures in the context of limiting access or use of a work?

Search string used: `site:[university web site] ("digital lock" OR "digital locks" OR "technological protection measure" OR`

"technological protection measures" OR "digital rights management" OR TPM OR DRM) AND copyright

This search string (along with those shown below) is meant to determine whether these particular phrases appear anywhere on the web page, and the context in which they appear. However, an examination was also performed of web pages on the site that were likely (based on their subject matter) to include some discussion of the issues.

3. Does the web site describe fair dealing and other exceptions to copyright infringement, or copyright in general, as a “balance”, and does it characterize them as “user rights”?

Search strings used: site:[university web site] balance AND copyright AND "fair dealing" and site:[university web site] ("fair dealing" OR exception OR exemption) AND ("user right" OR "user's right" OR "users' right" OR "rights of the user" OR "rights of users")

4. Does the web site list the six factors of the second step of the test set out in *CCH*?

Search string used: site:[university web site] character AND copyright AND "fair dealing"

5. Is there an internal contact listed?

The initial analysis was performed in 2013. A second analysis of most of the variables was performed in May 2016, to determine how universities had continued to address fair dealing and copyright policy issues in the intervening three years.

5.5 Results and discussion

5.5.1 Access Copyright relationship

Of the 41 universities in the sample, 19 (46.3 percent) opted by 2013 not to sign a new licence with Access Copyright, while 22 (53.7 percent) had signed. Of those 22, most of them had signed the Model Licence as negotiated by the AUCC, and two had entered into separate agreements.

In 2016, according to publicly available web pages, three universities (7.3 percent) had decided to retain a blanket licence with Access Copyright, and 31 universities (75.6 percent) opted out. For seven universities (17.1 percent), it was not clear from the web sites or other public Internet sources whether there was a continued relationship with the copyright collective.

	2013	2016	Difference
Licence	22 (53.7%)	3 (7.3%)	-19 (-46.3%)
No licence	19 (46.3%)	31 (75.6%)	+12 (+29.3%)
Unclear	0 (0%)	7 (17.1%)	+7 (+17.1%)

Table 3: Access Copyright relationship, 2013 and 2016.

5.5.2 Copyright web sites

In 2013, all of the universities in the sample had a site or page dedicated to copyright guidance. In a few cases there was sparse information contained in one or two pages. Others offered multi-page sites with a wealth of documents and tools. In most cases the sites were hosted by the library, but in a few cases the pages were part of an administrative site, for example, the within the site of the Office for Fair Practices and

Legal Affairs, the Office of the University Secretariat, or the Centre for Learning Design and Development. By 2016, all of the universities but one had a specific part of the institutional web site (again, hosted by the library for the most part) dedicated to copyright information.

5.5.3 Fair dealing policies

In 2013, 27 (65.9 percent) of the sampled schools had an up-to-date fair dealing policy available on their web sites. Of the remainder, seven (17.1 percent) had no fair dealing policy available at all, and seven had policies that did not incorporate the amendments to the *Copyright Act* (specifically, the addition of education to the list of enumerated permissible purposes).

A chi square analysis showed a relationship between the availability of an up-to-date fair dealing policy and the school's Access Copyright relationship. Universities in the sample that had opted out of a blanket licence were, in 2013, significantly more likely than would be expected by chance to have an up-to-date fair dealing policy available, while universities that had signed an Access Copyright licence are less likely than would be expected to have a fair dealing policy ($X^2 = 5.306$, $df = 1$, $p = 0.021$, $\alpha = 0.05$).

	Up-to-date fair dealing policy	No updated fair dealing policy	Total
Licence	21.9%	31.7%	53.6%
No licence	36.6%	9.8%	46.4%
Total	57.5%	41.5%	100%

Table 4: Chi square: Access Copyright licence x up-to-date fair dealing policy.

A possible explanation for this correlation is that the institution might not feel it necessary to provide guidance on fair dealing (at least on its web page) when it has a blanket licence that covers much the same copying.

In 2016, 36 (87.8 percent) of sampled universities had an up-to-date fair dealing policy available on their web sites, while five (12.2 percent) had either an older policy, or none at all. Of those 36 with up-to-date policies, 35 of them (97.2 percent, or 85.4 percent of the total) relied on the AUCC model policy in some way.

	2013	2016	Difference
Up-to-date fair dealing policy	27 (65.9%)	36 (87.8%)	+9 (+21.9%)
No updated fair dealing policy	14 (34.2%)	5 (12.2%)	-7 (-17.1%)

Table 5: Fair dealing policies, 2013 and 2016.

In September 2013, AUCC introduced a series of “application documents” interpreting and expanding on their earlier Model Fair Dealing Policy (Knopf, 2013b). Of the 34 sampled universities that adopted or adapted the 2012 AUCC Model Fair Dealing Policy, 11 of them (32.4 percent, or 26.8 percent of the total), also referred to some or all of the AUCC Application Guidelines, while 23 (67.6 percent, or 56.1 percent of the total) did not.

5.5.4 Course packs

Instructors who are developing a curriculum may choose to require readings from various works, or to supplement required readings with additional articles or textbook chapters. There are several ways that a student can access these excerpts: by tracking them down from a list and copying or downloading themselves; by reproducing copies kept in a

library's course collection; by purchasing a pre-printed course pack; or by logging into a course management system where the excerpts (or links to them) are stored.¹⁴

The previous AUCC fair dealing guidelines (developed before the *Copyright Act* amendments came into force and the Copyright Pentology decisions were issued) states in its preamble that it does not permit the making of copies for sale in course packs, nor the making of copies of required readings for course collections on reserve (Association of Universities and Colleges Canada, 2011). The new AUCC fair dealing policy, however, does allow for the distribution of short excerpts to students via a course pack, either in print or electronically, and does not distinguish between required and optional readings (Association of Universities and Colleges Canada, 2012, s. 3(c)). (Note, however, that some publishers of electronic journals do not allow this in their subscription contracts; see Section 5.5.8 *infra* for further discussion.)

In 26 (63.4 percent) of the available fair dealing policies in 2013, it was advised that fair dealing can apply to copies made for the purpose of inclusion in a course pack. In seven (17.1 percent) of the policies (all but one of which were based on the 2011 AUCC guidelines), fair dealing did not apply to course packs. Among the remaining eight universities, six did not have fair dealing policies available at all, and two had policies that were not clear about the status of course packs.

¹⁴ A "course pack" is traditionally a printed anthology of readings, while a "course collection" is a set of readings (for example, a whole books or photocopied articles) reserved in a library for use by students in a particular course or program of study. Increasingly, course packs and course collections are stored electronically on the university's or library's password-protected web site.

In 2016, 34 university web sites (82.9 percent) have policies that apply fair dealing to course packs, while four (9.8 percent) had no up-to-date fair dealing policy, and three policies (7.3 percent) were unclear on the matter.

	2013	2016	Difference
Fair dealing applies to course packs	26 (63.4%)	34 (82.9%)	+8 (+19.5%)
Fair dealing does not apply to course packs	7 (17.1%)	0 (0%)	-7 (-17.1%)
Unclear / no policy	8 (19.5%)	7 (17.1%)	-1 (-2.4%)

Table 6: Fair dealing application to course packs, 2013 and 2016.

5.5.5 Digital locks

Although they do not affect the evaluation of whether or not a particular dealing is fair, the controversial technological protection measure provisions in the amended *Copyright Act* may affect the final determination of whether or not the dealing is permitted. In other words, a use may be clearly fair dealing (or it may fall under the scope of another exception), yet may be disallowed because a digital lock prevents access to or copying of a work, and circumventing the digital lock is copyright infringement. (This point is arguable, because although the statute's sections relating to certain other exceptions such as Reproduction for Private Purposes¹⁵ and Backup Copies¹⁶ include subsections prohibiting the circumvention of digital locks, no such subsection appears in the fair

¹⁵ *Copyright Act*, *supra* note 1, s. 29.22.

¹⁶ *Ibid.* s. 29.24.

dealing provision. It could be said that Parliament did not intend to allow technological protection measures to limit fair dealing rights.) It has been argued that the digital lock provisions have the potential to tip the copyright balance too far in favour of the rights of the owners and away from the public interest (Craig, 2010a).

Because digital locks do not directly influence a fair dealing determination, it might seem inappropriate to include information about them in a fair dealing policy. However, if it affects the practical utility of the policy, it is important that users are aware of its significance (Horava, 2008). D'Agostino (2008) argues (speaking of American copyright): “[F]air use must also be seen within a wider backdrop, including the operation of laws like the [*Digital Millennium Copyright Act*] and the courts’ interpretation of these laws.” (p. 354)¹⁷

Of the sampled universities, in 2013, 28 (68.3 percent) mentioned technological protection measures or digital locks somewhere in their copyright web site, while 13 (31.7 percent) did not. Many discussed them only in relation to videos or Internet materials, since these are the types of works where one would mostly likely find a technological protection measure. Some documents were explicit in explaining that digital locks cannot be circumvented even to take advantage of statutory exceptions. In 2016, 33 (80.5 percent) of the universities address digital locks in their web sites, while eight (19.5 percent) do not.

¹⁷ This article was written before the *Copyright Act* was amended to include digital locks provisions.

	2013	2016	Difference
Web site addresses digital locks	28 (68.3%)	33 (80.5%)	+5 (+12.2%)
Web site does not address digital locks	13 (31.7%)	8 (19.5%)	-5 (-12.2%)

Table 7: Digital locks, 2013 and 2016.

5.5.6 Balance and user rights

The Supreme Court, in its 2002 decision *Théberge*, notes that copyright is a balancing act between the rights of owners and those of users. The law is meant to be an instrument for encouraging creation and innovation. While due reward is to be given to the author (or copyright owner) of a work, it is also important to protect the ability to use the work in ways that further contribute to the growth of culture: “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.”¹⁸ The notion of copyright as a balance was repeated in *CCH* and in *Bell*. In *CCH* the Court was clear that exceptions in the *Copyright Act* are more properly understood as “users’ rights”¹⁹ and fair dealing as “an integral part of the *Copyright Act* rather than simply a defence.”²⁰

One objective of a university’s copyright web page should be to make clear the purpose of copyright law, and specifically to “promote a balanced and informed approach between the interests of creators, owners, and users.” (Horava, 2008, p. 4)

¹⁸ *Théberge*, *supra* note 5 at para. 31.

¹⁹ *Supra* note 1 at para. 12.

²⁰ *Ibid.* at para. 48.

The preamble of the AUCC 2012 fair dealing policy does not use the word “balance”, nor does it speak of the purpose of copyright law. It does, however, aim to “provide reasonable safeguards for the owners of copyright-protected works.” It does not describe the fair dealing provision as a “user right”.

The majority of the copyright web sites of the sampled universities (24, or 58.5 percent) characterized copyright law or policy in 2013 as a “balance”, in regards to copyright as a whole, or to fair dealing in particular, or to the institution’s own approach. Even more university web sites (26, or 63.4 percent) note – though generally not in the fair dealing policy itself – that statutory copyright exceptions are users’ rights. Thirty one sites (75.6 percent) used either the term “balance” or the phrase “user’s right” in relation to copyright or its exceptions. In 2016, interestingly, fewer university policies or web sites (27, or 58.5 percent) explicitly used one of these terms, perhaps because more of them were using the 2012 AUCC model policy.

	2013	2016	Difference
Refers to copyright as “balance” or “user’s right”	31 (75.6%)	27 (58.5%)	-4 (-9.8%)
Does not refer to copyright as “balance” or “user’s right”	10 (24.4%)	14 (34.1%)	+4 (+9.8%)

Table 8: Balance and users' rights, 2013 and 2016.

5.5.7 Two-step, six-factor fair dealing test

Another recommendation of Crews’ (2001) is that guidelines address the fairness factors. In U.S. copyright law, the four fairness factors are codified in the statute, while in Canada the test arises out of case law (*CCH*). Users should be able to understand the purpose and

basis of the fair dealing analysis. By including the six factors, along with a short description of each one, the guidelines will reinforce the idea of a flexible exception that contributes to a balanced copyright regime.

The old AUCC fair dealing guidelines list the six fair dealing factors. The new AUCC policy, for reasons unknown, does not. This is especially puzzling given that the AUCC had earlier recommended to Parliament that the six factors be codified in the legislation for greater clarity (Geist, 2011).

However, in 2013 the six factors were mentioned somewhere on the copyright web site of 33 universities in the sample (80.5 percent), and not mentioned at all on eight sites (19.5 percent). In 2016, 35 web sites (85.4 percent) mention the six fair dealing factors, and six (14.6 percent) do not.

	2013	2016	Difference
Web site mentions six fair dealing factors	33 (80.5%)	35 (85.4%)	+2 (+4.9%)
Web site does not mention six factors	8 (19.5%)	6 (14.6%)	-2 (-4.9%)

Table 9: Fair dealing factors, 2013 and 2016.

5.5.8 Licences and contracts

University libraries have, over time, switched from print copies of works (particularly journals) in favour of electronic subscriptions. Instead of owning a copy of the journal, the university enters into licence agreements for online access to journal articles. As part of the licence agreement, some journal publishers restrict certain uses of the works, even though these uses might otherwise be within the scope of fair dealing or another statutory exception.

For example, the University of Toronto Press (UTP), a publisher of a suite of journals in various disciplines that offers online access to certain publications, stipulates in its site licence agreement that “Authorized Users may incorporate no more than 5 articles at one time from the Licensed Materials in printed and electronic Course Packs and Electronic Reserve collections for the use of Authorized Users in the course of instruction at the Licensee’s Institution, but not for Commercial Use.”²¹ Of all the increasingly electronically-accessible journals under the UTP umbrella, and the thousands of articles that are published within them, a user may only use a maximum of five articles in a course pack. In order to have access to the works at all, the contractual terms must be accepted and adhered to. They are, in a sense, licence agreements backed up by technological protection measures.

The *Copyright Act* addresses user contracts only in the context of collective societies; it does not regulate contracts between individual publishers and users. Furthermore, the courts have not yet heard a case where statutory exceptions to copyright come into direct conflict with the terms of a contract for online access. Thus, there is very little on-point guidance available for these situations. Various considerations may come into play, including the freedom to enter into private agreements and the intent to be legally bound by a contract, Parliament’s willingness to enact broad digital lock anti-circumvention provisions, the Supreme Court’s assertion that the availability of a licence is not a bar to a finding of fair dealing, the distinction between owning a lawful copy of a work and

²¹ “Site licence agreement” <<http://www.utpjournals.com/blog/wp-content/uploads/2012/09/UTP-Site-License-Agreement.pdf>>

having lawful access to the work, and the business model of online publishers. This section focuses only on whether and how universities incorporate discussion of user licences into their fair dealing policies and guidelines.²²

The old AUCC fair dealing guidelines explicitly warn that copies may only be made from a “lawful copy in the possession of the university, and if the lawful copy is in electronic form, there is no restriction against making a copy under the contractual terms relating to the Published work.” (Association of Universities and Colleges Canada, 2011, s. 2) The new AUCC fair dealing policy itself does not address contracts for access to electronic works, however, the application documents state, in the section called “Digital Licences”, that “Any copying and/or distribution restrictions contained in a licence that permits access to a copyright-protected work will take precedence over the Fair Dealing Policy.” (Association of Universities and Colleges of Canada, 2013, s. C)

In 2016, the web sites of 24 of the sampled universities (58.5 percent) stated that in the event of a conflict between the fair dealing policy and a publisher or database licence agreement, the terms of the licence agreement will prevail. In 17 cases (41.5 percent) there was no mention of the matter.

5.5.9 Contacts

In 2013, the majority of the universities studied (31, or 75.6 percent) supplied contact information for a copyright office or coordinator. Another six (14.6 percent) provided

²² See Chapter 4 for a more thorough discussion of the interaction between licencing contracts and copyright exceptions.

contact information for an individual or office that did not appear to be copyright-specific. Four schools (9.8 percent) did not provide any contact information, or the contact was not internal to the university.

By 2016, all but one of the sampled universities (97.6 percent) had an e-mail contact listed specifically for copyright questions. The nature of the contact varied: in most cases the contact was for the Copyright Office (or Officer); other contact titles included Advisor, Advisory Committee, Advisory Group, Legal Advisor, or Librarian. In nine cases only an e-mail address was provided with no corresponding title.

	2013	2016	Difference
Copyright-specific contact	31 (75.6%)	40 (97.6%)	+9 (22%)
Other internal contact	6 (14.6%)	0 (0%)	-6 (-14.6%)
No internal contact	4 (9.8%)	1 (2.4%)	-3 (-7.3%)

Table 10: Contact listed, 2013 and 2016.

5.6 Summary and conclusion

This research was undertaken to explore the information that is available and how it is presented to users of copyrighted works (mainly university faculty and instructors). It found that the sampled universities have been making an effort over the past three years to create policies and information sources that will allow them to manage copyright issues in-house without the use of blanket licences from Access Copyright.

Far more of the studied universities in 2016 have decided to manage copyright in-house rather than enter into a blanket licence with Access Copyright. Consequently, they have adopted up-to-date copyright policies that address fair dealing and other issues such as its

application to course packs, the six fair dealing factors, and digital locks. In addition, nearly all of the studied universities in 2016 have a copyright-specific contact listed to provide assistance to users.

While these developments are encouraging, some of the content of the policies and accompanying information could do more harm than good in the short and long run. The issues that the university chooses to include in the policies or elsewhere, and the language used to describe these issues, cannot be considered lightly. In particular, it is disheartening to see that fewer of the universities in 2016 describe copyright as a balance, or exceptions as user rights. That more than half of the studied schools claim in policy documents or on their web sites that contract terms take precedence over fair dealing is even more worrying. To concede this issue when even the courts have not yet dealt with it is to set a dangerous standard that may negatively affect the individual school if it is subject to a breach of contract suit (via estoppel or waiver of rights), and negatively affect future fair dealing analyses in the educational environment.

In Chapter 7 recommendations are made as to how copyright issues can be communicated within official policy and other avenues.

6 Faculty survey of copyright awareness and perception¹

6.1 Introduction

The previous chapter described the current content of universities' copyright policies, guidelines, and accompanying web pages, with a focus on how fair dealing is characterized. The need for these documents arises not only from a need to protect the university in case of a copyright infringement lawsuit, but also to communicate copyright concepts to end users such as teaching faculty. Effective communication and education ensures that teaching faculty will be copyright literate enough to avoid infringing owner's rights, and, just as importantly, to confidently use copyrighted works in all the ways the law permits in order to educate their students.

This chapter describes the results of a preliminary study investigating faculty awareness with regard to Canadian copyright law, how it affects the ability to teach, the people and resources faculty are mostly likely to go to for guidance, and faculty members' own practices related to copyright compliance.

6.2 Background

Copyright is being managed more and more "in-house." For example, according to the study discussed in the previous chapter, in 2013, 75.6 percent of the largest AUCC-member universities had a copyright-specific contact person, office, or e-mail address; in 2016 the proportion rose to 97.6 percent.

¹ A version of this chapter was originally published in 2015 in *Partnership* (Di Valentino, 2015).

There is more focus in universities on the exceptions in copyright law such as fair dealing, which can be a bit “fuzzier” in application from the point of view of the user.

Institutions can also rely on specific educational exceptions – such as making copyrighted works available as part of an online lesson,² or reproducing and communicating works available on the Internet³ – which are more circumscribed than fair dealing in that the permissions are clearer, but there are also more limitations, which can lead to confusion.

Faculty members at these institutions cannot rely on the existence of a blanket licence when deciding what materials will be used in course curriculum, and how the materials will be disseminated to students. Instead, faculty would need to determine the copyright status of each work that would be used, any licence terms, how each work can be used, and any alternatives that may be available. However, most faculty members are not experts in Canadian copyright law. It is in the interests of post-secondary institutions to become familiar with what faculty know and think about copyright, particularly as sharing of materials is infinitely easier in the digital age, and there exist demonstrable gaps in copyright literacy even among scholars in information studies (Burkell, Fortier, Di Valentino, & Roberts, 2015, p. 7). It is also in the interest of students and the public for university faculty to be familiar with what they are permitted to do with copyrighted materials, particularly with respect to fair dealing, so that teaching and learning are not

² *Copyright Act*, *supra* note 1, s. 30.01.

³ *Ibid.*, s. 30.04.

unnecessarily restricted (Hobbs, Jaszi, & Aufderheide, 2007, pp. 16–20; Schlipp, 2008, p. 18; Trosow, 2013, p. 215).

When educators lack understanding of copyright law, there is a danger that they will use copyrighted materials improperly. To mitigate against this possibility, administrators craft overly conservative policies (Chase, 1993, p. 1; Crews, 1990, cited in Chase, 1993, pp. 5-6; Nair, 2013; Trosow, 2010, p. 546). However, conservative policies may discourage faculty from using the materials in ways they are legally permitted, and may ultimately lead to the weakening of user rights over time (Trosow, 2010, p. 549, 2013, p. 215).

6.3 Prior research

Existing studies of individuals' awareness of and attitude towards copyright issues in education have examined administrators (Chase, 1994; Gatlin & Arn, 1999; Kordsmeier, Gatlin-Watts, & Arn, 2000), librarians (Charbonneau & Priehs, 2014; Eye, 2013; Granbery, 2013), and archivists (Dryden, 2010). Several studies have looked at copyright knowledge levels in American K-12 and university educators. James (1981) surveyed teachers at different school levels in Arkansas and concluded that there is a lack of copyright understanding among educators, both in actuality as well as in the teachers' perceptions of their own knowledge (cited in Chase, 1993, p. 3). Even media directors, who one would imagine would have a more developed knowledge of copyright law than their colleagues in other subjects, were found to demonstrate limited competency in their understanding (Clark, 1984, cited in Chase, 1993, p. 4). Elementary and secondary school teachers were found to lack proficiency in understanding of copyright law, although those with at least five years of experience using multimedia in the classroom knew more than

those with less experience (Shane, 1999). A survey of university faculty in Ohio showed that, generally, copyright knowledge levels of post-secondary educators and administrators in the U.S. are low, that instructors of web-based courses have some knowledge of copyright legislation and the issues but are mostly unaware about major provisions of the statute, and that instructors who were aware of their institution's copyright policy knew more than those who were not (Renner, 2005). In 2006 a group of librarians provided a survey to faculty members at two health sciences departments in Alabama and Texas. They found that respondents reported a limited knowledge of copyright and admitted gaps in their understanding, but that they did not want a required copyright course due to time constraints (Smith et al., 2006). Sims (2011) surveyed and interviewed faculty and library staff at the University of Minnesota and found that there is a gap in faculty understanding of the fundamentals of copyright law, including how copyright rights manifest and how long they last. She also found that fair use (the American equivalent of fair dealing) is “an area of tremendous confusion.” (p. 295)

There is very little discussion of Canadian university faculty awareness of copyright in the literature; this is unsurprising as the changes leading to the necessity of such a study have only occurred in the past five years. Horava reports that a lack of a coordinated approach to copyright leaves libraries facing challenges in interpreting the issues and in educating faculty and students (Horava, 2010). Trosow notes the importance of copyright literacy, particularly of user rights and exceptions, in order to avoid "serious [copyright] rights accretion that only becomes more difficult to reverse over time." (Trosow, 2010, p. 549, see also 2013, p. 215).

More universities have up-to-date copyright policies, but having a policy is only part of the solution. The policy needs to be communicated to and understood by those who are expected to abide by it, for example, university faculty.

This study aims to determine what university faculty think about copyright and about their institution's policy and training efforts, and whether they take advantage of them. It is also meant to discover what faculty would actually do when faced with copyright questions in teaching.

6.4 Methodology of faculty study

An online survey was devised that asked teaching faculty whether their institutions had copyright policies or training. The survey also asked if faculty members took advantage of the training and where they went if they had questions about copyright. The survey provided a few copyright-related scenarios that often arise in teaching, and asked faculty members how they would respond. The survey included space for individual comments about policies, training, and copyright in general.

There was no incentive offered to complete the study, except that the results would be made openly available. The study underwent ethics clearance at The University of Western Ontario.

The target population is all teaching faculty in Canada: full-time, part time, contract, adjunct, and post-doctoral fellows, who are responsible for constructing the syllabus for and teaching a course. In order for the survey to circulate as widely as possible among many universities, the list of members of the Association of Universities and Colleges of Canada (now Universities Canada) was consulted, and the respective faculty associations

were contacted asking them to distribute the request to their members. The survey was open from October 27 to December 2, 2014, and resulted in 201 complete responses.

6.5 Results and discussion

A breakdown of the responses to each question (excluding comments) can be found in Appendix B.

Demographically, a quarter of the respondents were in the Arts & Humanities (25.4 percent), followed by Science (17.9 percent), then Social Science (16.9 percent).

The survey asked whether the respondent's university had a copyright policy or set of guidelines, a question that was intended to determine whether the respondent knew about the policy or guidelines. Just over 90 percent said that their institution did have a copyright policy or set of guidelines, 1 percent said that it did not, and 8.5 percent did not know. (These results do not necessarily indicate whether the institution does or does not have a copyright policy, only what the participant believes to be the case.)

Next, the survey asked whether the university offered training in copyright literacy to faculty. While 40 percent said that it did, another 40 percent said that they didn't know.

For those who said "yes," a follow up question asked what kind of training is offered.

The respondents could choose more than one option. The majority of these respondents, 70 percent, indicated that workshops were offered. Thirty seven and a half percent noted one-on-one sessions and 19 percent online tutorials. Those who said that their university offers training were asked whether they have personally attended any of this training.

Only 26 percent of these participants had attended training. However, of those that

attended training, only one respondent said that her/his knowledge of copyright was not in any way enhanced by the experience, while the rest said that their copyright knowledge was “greatly” or “somewhat” enhanced. So training and education works from the point of view of the learner, and the issue is how to encourage them to attend.

The next set of questions asked whether copyright information was sought from another person in the past 12 months. The respondent could choose more than one response. The results were about evenly split with somewhat more responding that they hadn't asked anyone else for copyright information (53 percent) than had (47 percent). Of those who did, 55 percent asked a librarian, while 40 percent asked a colleague. Twenty-seven percent of respondents asked people who were not on the list of options, such as a copyright officer or an e-mail list such as ABC Copyright. All but three of these 94 respondents (97 percent) found an adequate answer to their question. Of the three who left unsatisfied, two had asked colleagues and one a librarian.

Participants were then asked if they had consulted any print or online resource in the past 12 months for answers to a copyright question. The respondent could choose more than one response. Slightly more respondents had consulted a resource than had not. More than half (54 percent) went to the university policy and 47 percent went to their university's web site. Thirty one percent went to another web site, and 23 percent went straight to the *Copyright Act*. Again, the vast majority (91 percent) found an adequate answer although a few more were disappointed as compared to those who asked human beings.

There was no statistical relationship between who or what was consulted and whether the faculty member received an adequate answer, likely because there were so few responses that indicated inadequate answers.

The survey included four scenarios to see how respondents would act if they were deciding how to use information in teaching.

The first scenario asked if they would show a YouTube video to students during class, if the video was on an official-looking account. This scenario is based on the new educational exception for Internet materials, which states that it can be displayed if there is no notice stating otherwise, and the instructor has no reason to believe that the posted material is itself infringing copyright.⁴ It is likely then, that the faculty member would be permitted by the law to show the video. Fifty-eight percent said that they would show the video, while 16 percent would ask the copyright owner for permission, and 14 percent would ask someone else such as a librarian. Seven and a half percent said they would not show the video at all.

In the second scenario, the instructor has a copy of an older academic article in print that cannot easily be found elsewhere. The question was whether they would scan the article and upload it to a learning management system. This sort of case would probably fall under fair dealing,⁵ even under the more restrictive policies such as Universities Canada's model policy (Association of Universities and Colleges Canada, 2012). Thirty-two

⁴ *Ibid.*

⁵ *Ibid.*, s. 29.

percent said they would ask someone such as their department head or librarian whether they can do this. The next highest response was to upload the article, at 27.4 percent. Eighteen and a half percent would ask permission from the copyright owner, but 15 percent would not upload it.

The next scenario concerns distance education. The instructor would like to upload a slide show to the learning management system that contains some copyrighted images. This scenario illustrates another educational exception in the *Copyright Act*, namely to telecommunicate a lesson to enrolled students, such as those in a distance course.⁶ Thirty-three percent of respondents would upload the slide show, while 28.4 percent would ask permission from the copyright owners. Nineteen percent would ask for an opinion from someone else, and 14 percent would not upload the slide show with images.

The last scenario concerns a PDF version of a book that is not protected by a technological protection measure; it asks whether the instructor who has bought the PDF would upload it or part of it to the learning management system. Not surprisingly, only 2 percent said that they would upload the whole book. What may be surprising is that only 25 percent of respondents would upload the most relevant chapter (an act which is quite likely to be fair dealing), and 44 percent would not upload any of it. These responses might relate to the fact that the e-book is a personal copy, and not licenced through the library. Perhaps the respondents felt that by purchasing the e-book themselves they were contractually obligated to keep it to themselves. (That might in fact be a term of the

⁶ *Ibid.*, s. 30.01.

purchase contract, but this issue cannot be adequately addressed in this article.) In many institutional fair dealing policies, including the AUCC's, one chapter of a book is considered an example of a permitted use (Association of Universities and Colleges Canada, 2012). In the *CCH* case, the Great Library had provided a copy of a monograph chapter to a lawyer, but it was not found by the Supreme Court to be copyright infringement.⁷

The survey also included spaces for respondents to make comments on institutional policy, guidance, and copyright in general. Some of the comments added options that were not provided for in the scenarios, such as putting a book on reserve, providing a citation for the students to find the resource themselves, removing images from the slide show before posting it, using course packs, and contacting the copyright officer to obtain clearance (which is required at some institutions).

There were also many comments about the perceived difficulty in understanding copyright rules. Respondents said that the issue is “complex,” “messy,” and has “grey areas.” They complained that it is “confusing” and that “the rules seem to change.” One said “I just want to know whether I can or cannot do something. And if I can't do it, what are my options.” Some are afraid to use copyrighted content at all, and one respondent said that this was the impression left after a copyright education session at her own institution.

⁷ *Supra* note 1 at para. 26.

A few comments made reference to “expertise” and the idea that faculty members are not qualified to make copyright decisions, even with respect to their own teaching – for example one respondent wrote that fair dealing is “a question for the experts,” but did not specify who those experts might be. Another asked “As an untrained amateur, how do [we] know that [we] are right in [our] interpretation and application of information?”

Another theme that arose more than once was the issue of expediency and convenience. Seeking copyright permission can be an “onerous process,” but the respondents are looking for “quick answers.” One respondent said that “life was so much easier with Access Copyright.”

6.6 Limitations and future research

This study is descriptive and cannot be generalized. As noted above, the population studied was all teaching faculty in Canada. According to Statistics Canada, there were approximately 45,000 full-time university teaching faculty in Canada in 2010–2011 (Statistics Canada, 2012). To this must be added the number of part-time and adjunct faculty, as well as graduate and post-doctoral students who are responsible for courses. Given the size of the population, the response rate is extremely low, less than one half of a percent. Furthermore, participants were recruited for the most part via the institution’s faculty association, which might not include faculty other than full-time. The survey did not ask for the participant’s job status, so it is impossible to determine whether the responses are an accurate and valid representation of the population. The respondents are self-selected, so perhaps the faculty members who have no complaints did not bother to respond.

The study did not ask whether the respondent's institution had a blanket licence with Access Copyright. The options available for the scenario questions were not comprehensive, as some respondents noted. More than one respondent commented that their answers would depend on other factors that were not outlined in the questions. There are also many other scenarios that could have been included to increase validity. Further research could include interviews with teaching faculty to get more information about how they perceive copyright and copyright management, and how they use copyrighted materials. Respondents would then have the opportunity to explain in more detail why they would respond to the scenarios the way they did. It would also be interesting to know the reasons that respondents have not attended their institution's copyright training sessions.

6.7 Conclusion

It was concerning to see that while nearly all respondents are aware of their institutions copyright policy or guidelines, 40 percent didn't know whether copyright training was offered. Perhaps the institution or its library provides effective copyright training, but if the intended audience doesn't know about it, it might as well not exist. As Horava points out, copyright communication and education are key (2010, p. 4). However, simple communication might not be enough, since only a quarter of respondents who knew about their institution's training options actually attended them. Without knowing the particulars of the training options, it is not possible to surmise why this might be.

When respondents have questions about the use of copyrighted works in their teaching, they will, more likely than not, go to a librarian or to the institution's copyright policy. Furthermore, some of the comments had to do with the time-consuming process of

getting copyright permission or clearance if necessary. If it takes days and weeks to see if the materials can be used, the instructor may not bother to ask for permission, or may elect not to use the material at all. One respondent pointed out that adjunct faculty are not always on campus, and if they're looking for a quick answer from a librarian it is not always easy to obtain. It would be a good idea, then, for institutions to have an up-to-date and easily accessible copyright policy and guide, and a designated copyright contact in the library who is able to answer questions on a timely basis.

From the scenario responses and some of the comments, it seems that respondents are more comfortable reproducing and displaying materials that are freely available on the Internet, like YouTube videos and images, but more likely to ask for permission or guidance when it comes to print materials or even electronic versions of print materials like PDFs. So, 58 percent of respondents would go ahead and show a YouTube video in class, while less than half of that number (27 percent) would scan and upload a print article without asking for guidance first.

Many of the comments suggested that the respondents were not confident in their ability (or power) to make copyright decisions, or they think they do not have the qualifications to engage in what they consider a question for legal experts. These attitudes may arise from knowledge gaps along with a perception of copyrighted materials as "belonging" to the copyright owners, while users are meant only to use as much as allowed those with the power to bring (or threaten to bring) legal action. Instead, faculty have not only a responsibility to the copyright owners, but also – in the context of the university's mission to encourage inquiry and spread knowledge – a responsibility to maximize their use of copyrighted materials within the bounds of the law. Without copyright literacy

training to close gaps in copyright knowledge, these perceptions will persist, creating a reality that disadvantages the educational process, and ultimately the public.

The recommendations that follow in the next chapter are meant to encourage universities to treat users not as consumers of commodified information, but as participants in the process of knowledge creation.

7 Recommendations and directions for future research

7.1 Policy

A comprehensive and comprehensible fair dealing policy or set of guidelines is crucial for any organization that uses copyrighted works regularly, and particularly for educational institutions, even if they have entered into a blanket licence. A policy can contribute to protecting the university in the event of a copyright infringement suit, such as Access Copyright has brought against York University.¹

Policies provide guidance to librarians and faculty who have questions about copyright. As noted from the survey responses in Chapter 6, of those respondents who consulted a print source in the prior year for copyright guidance, more than half of them looked at the university's policy or guidelines (the top answer to the survey question).

Consistent policies that give due weight to fair dealing (and in particular its flexible nature and status as a user right rather than a mere defence) and other exceptions within the post-secondary education sector will help to prevent the erosion of users' rights through atrophy and subordination to licence terms.

As discussed in Chapter 2, the assumptions underlying policy and practice considerations will be reflected in the policy and its language. These assumptions – how information is perceived, defined, and operationalized – and the university's objective in using copyrighted works, should be made explicit during the policy-making process. If

¹ *Supra* note 7.

copyrighted works and the information contained within are considered in market-based terms, as commodities with exchange value that can be “stolen” like clothes from a shop, the focus will be on economic efficiency and avoidance of risk. In this context, a blanket licence might be considered the “best” option by administration and legal counsel, although not necessarily the best way to achieve the mandate and mission of a university.

On the other hand, if copyrighted works are considered as part of an inherent process of transformation vital to education, and the use value of the information is given primacy, the policy will more closely reflect the goals of the university.

The analysis in Chapter 5 reveals that while most of the universities have opted to manage copyright in-house, and have some sort of fair dealing policy in 2016, there remain inconsistencies among schools in the information provided, a lack of up-to-date information, inaccurate information, and unnecessarily restrictive, risk-averse guidelines and accompanying resources.

An “ideal” fair dealing policy would address all of the issues discussed in Chapter 5. It would avoid “bright line rule making” that obscures the broad and flexible nature of fair dealing (as examined in Chapter 3). Instead of limiting copying to arbitrary amounts like 10 percent (as in the AUCC’s model policy and most of the university policies based on it), the policy should acknowledge that a fair dealing analysis is fact-specific and is a holistic (rather than arithmetical) analysis taking into account several factors.

The policy should also address the context underlying fair dealing, in particular its rationale (that it is meant to balance owner rights with the right to make use of the work),

and that the Supreme Court has, several times, emphasized that fair dealing is not to be analyzed in a rigid and narrow fashion.

The content analysis of web sites in Chapter 5 also revealed that most of the sampled universities made the claim somewhere on their web site that fair dealing and other exceptions are preempted by the terms of a subscription licence. As discussed in Chapter 4, Canadian courts have not dealt with this issue directly, so this claim has no legal foundation. In fact, a legal analysis suggests it is more likely that the court would rule that copyright exceptions are statutory rights and cannot be preempted by contract terms. A concession on this point, especially by so many universities, could be taken by courts as a “practice or custom” of the industry, which would then be taken into account in future fair dealing analyses.²

A copyright or fair dealing policy, then, should either state that the matter has not been considered by the courts, or the policy should not bring up the matter at all, and advise users to refer the question to a copyright librarian.

The closest to ideal among the sampled universities might be The University of Western Ontario’s “Fair Dealing Exception Guidelines”.³ The document is easy to understand; there are no circumscribed limits to fair dealing, and it acknowledges the flexibility of the provision, that fair dealing is based on the particular circumstances, and that it is a

² *CCH*, *supra* note 1 at para. 55.

³ “Fair dealing exception guidelines”
<http://copyright.uwo.ca/guidelines_requirements/guidelines/fair_dealing_exception_guidelines.html>

“judgment call” (while at the same time noting that 10 percent of a work can be considered a “rule of thumb” although not an upper or lower limit); it describes fair dealing as a “user right”; it incorporates the six fairness factors; it mentions *CCH* and *Alberta* by name (among other decisions of the courts and the Copyright Board) and provides links to the full text; it mentions the Copyright Pentalogy; it does not claim that contract terms trump fair dealing; and it provides specific contacts for further information.

7.2 Copyright literacy

Graham and Winter’s survey reveals that communicating copyright information is still the biggest challenge facing university libraries (2016). The utility of a policy depends on whether those subject to it are aware of it and can understand it. Moreover, the practices of a university with respect to copyright literacy could act as an element of a defence in the event of an infringement lawsuit: the *Copyright Act* provides that the good faith of the defendants is a factor in determining statutory damages.⁴

There is a lack of copyright literacy among university faculty and librarians, as there is among Canadians in general. Ignorance in copyright matters is not due to a lack of intelligence – clearly there is not a dearth of intelligence in academia – but to a lack of education and training. Students in Ontario, for example, can go from pre-kindergarten through graduate school without having had any significant exposure to the particulars of copyright law (Burkell et al., 2015).

⁴ *Supra* note 1, s. 38.1(5).

Some of the comments from the faculty survey described in Chapter 5 referred to copyright as “confusing” or “messy”, as being an issue “for the experts” rather than the “untrained amateur”, and one respondent said s/he was “afraid” to use copyrighted content. Faced with these attitudes, it would be tempting to enter into a blanket licensing arrangement that lays out what faculty “can” and “cannot” do with the works – in fact, one respondent said that life was “easier” with Access Copyright.

It is obvious that most people are not comfortable with copyright and are not confident in their own knowledge of the subject. Increasing copyright literacy may lead to a higher level of confidence among faculty when they are faced with copyright decisions.

Along with a specific policy document or set of guidelines, the university should provide additional, contextual information about copyright on a web site. Other documents in the copyright web site, for example an FAQ, would address other aspects of copyright (including the other statutory exceptions) and provide further details and examples supporting the fair dealing policy. A comprehensive web site is a relatively inexpensive method of copyright communication. Several universities use LibGuides to provide copyright materials in a way that is comprehensive yet allows users to easily locate specific information.⁵ These documents can be adapted from other university web sites that use a Creative Commons public licence.

⁵ For example, see University of Saskatchewan <<http://libguides.usask.ca/copyright>>, Dalhousie <<http://dal.ca.libguides.com/copyright>>, Kwantlen Polytechnic <<http://libguides.kpu.ca/copyright>>.

Fair dealing evaluators can be found on some university web sites, for example University of Guelph,⁶ and Queen’s University.⁷ These evaluators ask the user a series of questions about the proposed use and conclude as to whether the use is *more or less* fair. BowValley College’s fair dealing evaluator⁸ also allows faculty to submit materials to the Copyright Advisor for further evaluation (Swan, 2016).

According to the results of the survey in Chapter 6, those respondents who attended training sessions offered at their institutions said that their knowledge was enhanced by the experience. However, though faculty might know about copyright initiatives in their university, they don’t always take advantage of it, as noted in Chapter 6; among those respondents who knew that their university offered copyright training, only one quarter of them have ever attended. While the survey did not ask the reasons for non-attendance, it is clear that something must be done to encourage faculty to take advantage of these resources.

Training must to be designed in a way that communicates the importance of copyright but does not present the subject in an intimidating way. Furthermore, training should not take more time than faculty are able or *willing* to spend. In-person workshops or one-on-one sessions are ideal, but take time out of faculty members’ schedules. Additionally, adjunct and contract faculty are often not on site and it may be difficult for them to incorporate

⁶ “Is your copying fair dealing?” <<https://www.uoguelph.ca/fairdealing/welcome>>

⁷ “Fair dealing evaluator” <<http://library.queensu.ca/fairdealing/>>

⁸ “BowValley College copyright evaluator” <<https://copyright.bowvalleycollege.ca/>>

campus visits. Online tutorials that can be taken at leisure may be an alternative option; however, they do not allow the user to ask questions or request clarification.

Although one-size-fits-all workshops or tutorials would be easier to offer, customized training (for different faculties, or different teaching styles) might provide more relevant information. Graham (2016) studied the use of copyrighted materials for teaching at one university and found that the range of materials uploaded to learning management systems (LMS) is broader (incorporating visual and interactive elements) than that used in printed course packs and library reserves (which is mostly textual, like book chapters and journal articles) (p. 349). Additionally, the source of permissions for use of the material varies: permissions is usually different: publisher's agreement and subscription licences are used for LMS materials, and fair dealing is used for course packs and library reserves (pp. 346-348).⁹

Because copyright literacy is a subset of information literacy ("Framework for information literacy for higher education," 2015), and because "librarians have historically been equated with assistance, research and answers" (L. E. Harris, 2015), the academic library is the most appropriate part of the university to handle this function. Per Chapter 6, the librarian is the person that survey respondents were most likely to approach if they had questions about copyright.

⁹ She also found that the Access Copyright blanket licence was least used as a source of permission (Graham, 2016, p. 350).

While copyright is a legal issue, the person providing guidance need not be a member of the legal bar association. The Supreme Court in *CCH* did not take issue with the fact that the Great Library's "Access to the Law Policy" referred copyright questions to a librarian rather than a lawyer. According to a 2016 study, more copyright specialists in Canadian universities had only library degrees (65.3 percent) than who had law degrees (either alone or in addition to the library degree) (14.3 percent). In 77 percent of cases, copyright was handled by the library, although 62.5 percent of those had consulted with a lawyer (usually an IP lawyer rather than in-house counsel) (Patterson, 2016). Harris points out that copyright policies, to which librarians are likely to refer in answering copyright questions, are usually reviewed by a lawyer (L. E. Harris, 2015, p. 35).

7.3 Alternatives to all rights reserved

Copyright outreach and training programs in libraries, should promote alternatives to "all rights reserved" such as public domain, open licences like Creative Commons, and open access resources. Faculty may be more confident in using resources where they know they have permission, and do not have to determine whether the use falls under one of the education exceptions or fair dealing (Iansavitchene & Di Valentino, 2016).

Initiatives could include a dedicated web page that provides links to databases and sites to find open materials (including public domain, such as materials produced by the United States federal government and its agencies), and instructions on how to find other materials by using search engines such as Google Images. Libraries could offer workshops dedicated to hands-on experience in finding materials that are "some-rights-reserved".

It is also important to encourage faculty to give back to the information commons by publishing in open access journals and creating other open access materials to support teaching (such as open textbooks and open educational resources). The major Canadian government granting agencies¹⁰ now require that grant recipients “ensure that any peer-reviewed journal publications arising from Agency-supported research are freely accessible within 12 months of publication.” (Government of Canada, 2014)

Unfortunately there is still an uphill battle to get faculty interested in depositing their work in a repository (Basken, 2016). The solution is likely complex, but it is important to make faculty aware of the real-world and personally-relevant consequences of allowing knowledge to be commodified and controlled by a small set of copyright owners (publishers), which is that the library may not be able to afford subscriptions to certain journals because of the high costs (Faculty Advisory Council, Harvard University, 2012; Pyati, 2007). The answer may lie in placing some of the decision-making power in the hands of faculty, by requesting that they indicate which journals they would most like to keep, and which they would not miss (Memorial University Libraries, 2015).

From a more theoretical perspective, encouraging faculty to seek retention of their copyright rather than transferring it to a publisher, or to deposit their work in an institutional repository, is a statement against the alienation of the cognitive worker (the faculty member), in that the worker would not be required to pay for access (via the

¹⁰ Canadian Institutes of Health Research (CIHR), Natural Sciences and Engineering Research Council of Canada (NSERC) and Social Sciences and Humanities Research Council of Canada (SSHRC).

institutional subscription) to the product of her own labour (the journal article), for which she is not directly paid by the publisher (Peekhaus, 2012).

7.4 Collaboration

Maintaining a comprehensive copyright management and literacy program requires resources (financial and labour) that many smaller institutions cannot spare. Inter-university collaboration, and the assistance of existing consortia, could address this problem. Collaboration also ensures that policies, guidelines, and practices are consistent enough to be considered industry standards, which may be taken into consideration in fair dealing analyses by the courts.

As noted in section 7.2, web site information could be shared among universities via Creative Commons open licences. Institutions could collaborate with each other and with consortia such as Ontario Council of University Libraries to create resources such as online copyright mini-courses. For example, several Ontario colleges have worked together to develop and use copyright training modules (“Copyright literacy in Ontario colleges,” 2014). These modules include graded quizzes, and those who pass are awarded a completion certificate. Most of the faculty were able to complete the training within two hours.

Collaboration is crucial for developing best practices, not just for fair dealing but in all aspects of copyright management, e.g. record keeping, auditing, outreach, literacy, etc.

7.5 Advocacy and best practices among administrators and associations

Fair dealing and fair use advocacy by professional library and education associations will help to ensure that the interests of these groups are represented in government policy. Furthermore, development by associations of best practices in copyright will provide guidance to administrators, instructors, and librarians in understanding and taking advantage of fair dealing or fair use.

7.5.1 Advocacy

United States

For decades, educational and library associations in the U.S. have engaged in activism on issues, including copyright, that affect the ability of universities and libraries to fulfill their objective of providing access to information (Henderson, 2006; Herman, 2012).

Since 2007, the American Library Association (ALA) has maintained a Copyright Discussion Group “designed to respond quickly [to] hot topics” and allow for the exchange of ideas among members about copyright issues that affect academic and research libraries (American Library Association, 2010). The director of the Program on Public Access to Information is responsible not only for advocacy but also for the development of educational programs and public resources related to copyright, and for responding to government requests for input (American Library Association, 2015). The association’s “Advocacy, Legislation & Issues” web page contains a discussion of fair use (American Library Association, 2012), including a link to a fair use evaluator to help

users understand and apply the four factors (American Library Association, n.d.), and free webinars.

The ALA, along with the Association of Research Libraries (ARL) and the Association of College and Research Libraries (ACRL), is a member of the Library Copyright Alliance (LCA), an organization that advocates on issues of copyright, including fair use; its mission is to “foster global access and fair use of information for creativity, research, and education.” (Library Copyright Alliance, n.d.)

The Association of American Universities maintains a web page on the subject of fair use, mainly relating to technological protection measures (Association of American Universities, 2016). The American Association of University Professors (AAUP) likewise discusses fair use in various parts of its web page, particularly with regards to its impact on faculty (Springer, 2004).

These organizations are also active in the courts, filing or signing on to amicus curiae briefs in fair use cases such as *Williams & Wilkins* (ALA, ARL, Medical Libraries Association, and American Association of Law Libraries in the Circuit Court; ALA, ARL, and the Special Libraries Association in the Supreme Court), *Texaco* (ALA and ARL), *Princeton* (ARL), *HathiTrust* (ALA; and LCA in the District Court), the *Cambridge* appeal (ALA, ARL, ACRL, AAUP, and a group of academics and legal scholars), and *Google* (ALA, ACRL, and ARL).

Canada

The Association of Universities and Colleges of Canada (AUCC, now Universities Canada), the board of which is made up of university presidents, has in recent years been taking an overly-cautious stance towards fair dealing. The AUCC (along with the Association of Community Colleges of Canada) had originally filed with the Copyright Board an objection, on behalf of its member universities, to Access Copyright's proposed tariff in 2010. However, in April 2012 the AUCC reached an agreement with Access Copyright on a model blanket licence, and subsequently withdrew its objection to the tariff (Bloom, 2012). Additionally, it did not seek judicial review of the interim tariff set out by the Copyright Board in April 2011.

Access Copyright filed a new tariff application for reprographic reproduction of literary works by post-secondary educational institutions in May 2013.¹¹ The AUCC did not file an objection to this tariff application (Knopf, 2013a). The organization has engaged in some advocacy, as it appeared as an intervener in the *Alberta* case, where it was permitted to make an oral argument.¹²

¹¹ *Access Copyright Post-Secondary Educational Institution Tariff, 2014-2017* (18 May 2013), online: Copyright Board <http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2013/Supplement_18_may_2013.pdf>.

¹² *Supra* note 12 (Factum of the intervenors Association of Universities and Colleges of Canada and Association of Community Colleges of Canada).

Interestingly, the AUCC has not made any public statement regarding Access Copyright's lawsuit against York University, despite that York's fair dealing policy is based on the AUCC's revised guidelines.

The Association of Community Colleges of Canada (ACCC, now Colleges and Institutes Canada) is the AUCC's sibling organization for community colleges and polytechnics. Although the associations are made of up of different types of institutions, they often collaborate in advocacy activities. The ACCC joined the AUCC in its objection to the proposed tariff in 2010, but unlike the latter, it did not withdraw its objection. The ACCC had also, on its own, filed an objection relating to the new tariff in 2013 (Knopf, 2013a).

Like the AUCC, the ACCC had negotiated a model licence with Access Copyright that was subsequently entered into by several institutions. However, its own legal counsel has advised it that there is "little value" to signing the agreement ("Access Copyright isolated," 2012; Geist, 2012b).

While the AUCC and ACCC are made up of administrators, the Canadian Association of University Teachers (CAUT) is a federation of faculty associations and faculty unions. Along with the Canadian Federation of Students, the association filed objections to both of Access Copyright's tariff applications (2010 and 2013) (Canadian Association of University Teachers, n.d.) – although they did withdraw from the 2013 hearing (Canadian Association of University Teachers, 2013b) – and made a submission as interveners in *Alberta*.

The Canadian Library Association (CLA, which has been superseded by the Canadian Federation of Library Associations), advised by its Copyright Advisory Committee,

advocated on copyright issues that impact libraries and their patrons, and provided a “grassroots advocacy kit” for individuals and organizations (Canadian Library Association, 2012a). The CLA had also made public statements in relation to Bill C-11 and filed an objection to the 2010 tariff application (though not the 2013 tariff application) (Canadian Library Association, 2010). It had released a statement criticizing Access Copyright’s suit against York University (Canadian Library Association, 2013), but also characterized the negotiation of a model licence as a “welcome development” (in relation to the alternative of facing a tariff proceeding) (Canadian Library Association, 2012b). Furthermore, unlike its American counterpart the ALA, the CLA has not yet been involved as an intervener in fair dealing court cases.

The Canadian Association of Research Libraries (CARL), whose board is made of library directors, advocates for fair copyright legislation (Beasley & Haigh, 2015). CARL has spoken at the House of Commons during the Bill C-32 consideration process (Legislative Committee on Bill C-32, 2011), and made statements against Access Copyright’s suit against York University (Canadian Association of Research Libraries, 2013), but has failed to participate in some litigation as interveners and did not make any statements in regards to the model licence negotiated by the AUCC.

7.5.2 Best practices

Best practices and policies are important tools for managing copyright compliance within institutions, and for avoiding liability. In Canada, a reasonable official institutional policy may be considered in a judicial fairness analysis in lieu of individual dealings with works

(see Section 3.4.6, *supra*). A policy may be more persuasive if it is based on best practices established across the industry or sector (D'Agostino, 2008, p. 362).

United States

In the U.S. there are several model policies and codes of best practices for fair use that have been developed by various organizations. While the fair use provision was being debated in the House of Representatives in the mid-1970s, representatives of publishers and educational administrators negotiated what would become the Classroom Guidelines. Guidelines also emerged from other negotiations, such as the Proposal for Educational Fair Use Guidelines for Distance Learning, and the Proposal for Fair Use Guidelines for Educational Multimedia (see Crews, 2001).

Meanwhile, American library and educational societies have put together model policies and codes of best practices for specific types of institutions or particular subject matters.¹³ In 1982 the ALA developed a model policy for copying by colleges and universities (American Library Association, 1982). In 2012, the ARL, the Program on Information Justice and Intellectual Property, and the Center for Media and Social Impact jointly coordinated a code for academic and research libraries (“Code of best practices in fair use for academic and research libraries,” 2012). The Society for Cinema and Media Studies has developed a code for film and media instructors (Society for Cinema and Media Studies, 2008), and the International Communication Association has authored a Code of

¹³ For a discussion of best practices and examples, see Aufderheide & Jaszi (2011, p. 108ff) and the accompanying web site of the Center for Media and Social Impact <<http://cmsimpact.org/program/fair-use/>>.

Best Practices in Fair Use for Scholarly Research in Communication (International Communication Association, 2010).

Canada

In December 2010, Michael Geist wrote a blog post in which he suggested that best practices will “quickly emerge” if fair dealing were to be expanded to include education as an enumerated purpose (Geist, 2010). Since then, both the AUCC and the CAUT have developed guidelines or model policies.

The AUCC guidelines were created in 2012 (Association of Universities and Colleges Canada, 2012); they represent a significant revision of the previous copying guidelines of 2011 (Association of Universities and Colleges Canada, 2011). The policy adds “education, parody and satire” as permissible fair dealing purposes (following the enactment of Bill C-11), and allows for the creation of print or digital course packs. However, there is less background and context provided in the revised policy, and the accompanying application guidelines make assertions that do not have support in Canadian law and that serve to disadvantage the use of copyrighted material in universities. (See Section 5.5.3, *supra*, for a more detailed discussion of these policies.)

The CAUT fair dealing guidelines, created in 2013, are incorporated into a longer document about copyright in general (Canadian Association of University Teachers, 2013a). Unlike the AUCC policy, the CAUT guidelines provide more contextual information (such as the six fair dealing guidelines) and do not specify any particular limit or percentage that might be permissible.

Several universities have adopted or adapted the AUCC fair dealing policy, such as University of Calgary, McMaster University, Memorial University, and York University. None seem to have taken on the CAUT guidelines as an institutional policy, but some university copyright web sites refer to it, such as Lakehead University, University of Prince Edward Island, University of Victoria, and MacEwan University.

7.5.3 Why the divergence?

In terms of fair use advocacy and activism, the American Library Association is more aggressive than its Canadian counterpart. The ALA has filed amicus briefs in several major court cases involving fair use in research or teaching, while the CLA has yet to intervene in fair dealing litigation. The American Association of Universities also seems to promote fair use more strongly than Universities Canada encourages reliance on fair dealing. Universities in Canada are still more likely to sign a blanket licensing agreement than are their American equivalents. If, as it has been argued in Chapter 3, educational fair dealing for the purposes of research or education is easier to demonstrate than fair use, in that the burden on defendants is reduced, why does there seem to be less of an impetus in taking advantage of these users' rights?

One explanation is that the current conception and interpretation of the wider scope of fair use in the educational context has simply been around longer. The Circuit Court in

Williams & Wilkins decision (which predates the codification of fair use), asserted that “in general, the law gives copying for scientific [research] purposes a wide scope.”¹⁴

When § 107 was added to the American *Copyright Act* in 1976, “education” (including multiple copies for classroom use) was explicitly noted in the provision as one of the purposes envisioned by Congress. The four fair use factors were added to the legislation to provide guidance to courts as well as users. At the same time, representatives of publishers and educational institutions created the Classroom Guidelines, which were favourably commented upon by the House Judiciary Committee as being a “reasonable interpretation of the minimum standards of fair use.” (U.S. House Judiciary Committee, 1976, p. 72) The ALA followed a few years later with a model policy addressing fair use rights in the academic and library sectors.

In Canada, on the other hand, although fair dealing has been a part of copyright legislation since 1911, the factors to be taken into consideration in a fair dealing analysis were not set out in Canadian jurisprudence until 2002, and education was not an enumerated purpose until 2012. It was not until 1997 that a fair dealing suit in any court was decided in favour of the defendant,¹⁵ and it was 2004 before the Supreme Court adjudged a dealing to be fair. Even though the Court in *CCH* described fair dealing as a “users’ right” to be interpreted broadly, the case related to the already-enumerated purpose of research, and not education *per se*. Only in 2012, when *Alberta* was decided,

¹⁴ *Supra* note 89 at 1354.

¹⁵ *Allen v. Toronto Star Newspapers Ltd.*, [1997] 36 O.R. (3d) 201; 152 D.L.R. (4th) 518, online: CanLII <<http://canlii.ca/t/g14lw>>.

and the *Copyright Act* was amended, was it undeniable that copying excerpts for use as classroom handouts could be considered fair.¹⁶

Meanwhile, university administrators, on the advice of legal counsel, signed blanket licence agreements with Access Copyright, in part because the alternative was thought to be too risky. In 2012, anticipating the legislative amendments and Supreme Court decisions in favour of fair dealing, some universities opted to “go it alone”, but the majority entered into subsequent agreements with the collective. The AUCC, being made up of administrators, encouraged this outcome by negotiating a model licence for its members and dropping its objection to the proposed tariff. Michael Geist supposes that the AUCC was not prepared to deal with fair dealing issues because permissions were always taken care of by licences in the past:

AUCC has never appeared comfortable with the copyright file. For years, its members paid millions to Access Copyright without giving it much thought. It was only after the collective sought a massive increase that it captured the attention of senior officials at Canadian universities, who began to question the value of the licence (Geist, 2012a).

In other words, it was business as usual until Access Copyright asked for more money.

In the same vein, because universities were accustomed to these licences and the convenience and indemnity that they supposedly provided (not to mention that the fees

¹⁶ Katz (2013a) argues that fair dealing was meant to be interpreted broadly since it was first codified in Canada, but misconceptions of the doctrine in early cases resulted in a more restrictive approach that was not remedied until *CCH*.

were paid by students directly), “very few [of them] developed any internal expertise on copyright or any internal mechanisms that would allow them to feel confident about operating without access copyright.” (Katz, 2012a)

The situation has improved somewhat over the intervening four years, in that fewer schools are opting into blanket licences and more are developing in-house copyright management programs. However, these improvements are tempered by unnecessarily restrictive fair dealing policies, and increasing risk aversion in respect of electronic subscription licences.

As noted above, Canadian associations have been less likely than American associations to involve themselves in third-party litigation as intervenors. One may argue that Canadian courts in general are less amenable to intervenors and *amici curiae* than are U.S. courts, and so organizations are less likely to spend time and money on factums and filings if there is a slim chance of being permitted to intervene. However, while this may or may not have been true in the past, the proportion of applicants who are permitted to intervene at the Canadian Supreme Court has grown over the last 30 years (Alarie & Green, 2010). Between 2000 and 2008, trade associations who applied for leave to intervene were granted leave 95 percent of the time, while public interest groups were granted leave 87 percent of the time (p. 398).¹⁷

¹⁷ While this article does not break down the percentages by area of law, the authors note that cases involving areas of law other than Charter, criminal, and aboriginal had intervention rates “fairly consistent with the average overall level.”

There were, in fact, quite a few intervenors in the Copyright Pentalogy cases. In *Alberta* the Supreme Court granted leave to, among others, the CAUT and CFS, the AUCC, the ACCC, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), and the Centre for Innovation Law and Policy of the University of Toronto. Intervenors in the *Bell* case included the CAUT, CIPPIC, the Canadian Legal Information Institute, and the Federation of Law Societies of Canada.

7.5.4 Going forward

Fair dealing provisions were drafted with flexibility in mind. While copyright may be a “creature of statute”, its interpretation is also guided by the courts. Canadian courts have provided some guidance in the form of the six fair dealing factors; analysis is to be done on a case-by-case basis, and fair dealing must not be interpreted restrictively. There is, understandably, a preference by administrators for more (perceived) certainty and less (perceived) risk, and so they continue to restrict the use of exceptions in official policies. This course of action essentially disregards fair dealing or gives the impression that it is a last resort rather than a user’s right.

University and library administrators must take fair dealing seriously and realize that it is not a mere concession of copyright owners that can be taken back with contracts.

Educational and library associations must continue to advocate aggressively for the rights of users. Advocacy includes intervening in litigation, making submissions to government, and developing model policies and best practices (Crews, 1993, p. 133).

Copyright and fair dealing will continue to evolve along with technologies and practices, and administrators and associations must realize that they are a strong influence on the

direction of this evolution. While in some regards universities have been moving towards a stronger recognition of fair dealing's availability for education, there is still work to be done. From this point they must educate and guide their faculty, staff, and students in copyright with reasonable and appropriate policies, and promote the user-centric approach that has been accorded by the legislators and courts.

7.6 Future research

This dissertation presents background and recommendations towards managing copyright in Canadian universities, but it is a starting point.

More research needs to be done on how faculty, staff, and students perceive and respond to copyright issues, to determine how best to provide copyright literacy initiatives, and also how to encourage them to take part in these initiatives.

Copyright management strategies need to be monitored with continuous, evidence-based review on what users tend to copy to ensure that the initiatives are working most efficiently and most in line with the purpose of universities (see, for example, Graham, 2016). This review should occur not only internally, but in collaboration with other universities, with results being made available in open access articles, reports, working papers, and presentations.

Finally, there are also ethical issues with regards to Traditional Knowledge of Canada's Indigenous groups and how this information is to be treated in the context of copyright. The University of Manitoba houses archival documents and videos in their National Centre for Truth and Reconciliation (NCTR) created in 2015. The institution's web site says that it will ensure that "The public can access historical records and other materials

to help foster reconciliation and healing” (“Our mandate,” n.d.) but does not include any specific information about copyright other than a mention of “cultural access protocols”. Other institutions have collections or libraries dedicated to Indigenous works, such as the University of British Columbia’s Xwi7xwa Library.¹⁸

More research needs to be done in order to determine how fair dealing and educational exceptions intersect with the protection of Traditional Knowledge. There is a potential conflict between the idea of a user’s right to deal with a work and the ethical notion that certain information or knowledge are to be kept within the community and not treated as a mere “object” of inquiry by outsiders (see, for example, the works of Greg Young-Ing (2006) and the background brief from WIPO, n.d., as well as Brunson, 2016). In some cases, such as the NCTR, the information in the archives reveals highly private facts about the individuals who were housed in residential schools (Moran, 2016).

Some institutions already acknowledge the interaction between copyright and Traditional Knowledge – for example, Mount Saint Vincent University’s “Copyright and fair dealing” web page which states “These categories do not include traditional knowledge which exists outside of copyright and its exceptions.” (Harrison, n.d.)

¹⁸ <<http://xwi7xwa.library.ubc.ca/>>

7.7 Conclusion

As Rooksby notes, “there is no separating the centrality of copyright from the essence of higher education.” (2016, p. 198) Universities could not function without informational resources, much of which are copyrighted.

The thesis of this dissertation is that, while Parliament and the courts have ensured that copyright law in the educational context provides ample opportunity for use of copyrighted materials, university copyright policies remain unnecessarily conservative and risk averse in certain respects.

Copyright management policies and practices must be user-focused in order to support the pedagogical and research functions of the university. When crafting copyright policy, guidelines, and practices, universities must keep the unquantifiable aspects of copyright management in mind. Although it may be less expensive from a purely financial perspective to enter into a blanket licence,¹⁹ there are public policy considerations in the long run. Even if money is saved over the course of the blanket licence, universities must ask themselves about the implications of asking for permission where none is needed, or “agreeing” to licence terms that claim posting a link is copying (“Licence agreement,” 2012).

These implications are short-term – for example, faculty may be reluctant to use materials in ways that are not covered by licences (although the use might still be within the scope

¹⁹ Particularly since, in many universities, the cost of the blanket licence is borne directly by the students through a supplementary fee or the price of a course pack.

of an exception) – as well as long-term – if statutory exceptions are widely ignored in favour of private ordering, the courts’ consideration of this “institutional practice” may lead to the erosion of fair dealing. Universities cannot allow a focus on the exchange value of information to dictate policy, when their very existence depends on maximizing its use value.

Educational institutions are not disconnected from the larger society, and cannot afford to stay “neutral” when neutrality is defined by those who have control over information. Copyright policy and practice should reflect the discourse of information as a process (rather than a commodity), and be accompanied by advocacy efforts to ensure the continued existence of the information commons.

Appendix A: Universities Canada model fair dealing policy

Fair Dealing Policy for Universities

The fair dealing provision in the Copyright Act permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties. To qualify for fair dealing, two tests must be passed.

First, the “dealing” must be for a purpose stated in the Copyright Act: research, private study, criticism, review, news reporting, education, satire or parody. Educational use of a copyright-protected work passes the first test.

The second test is that the dealing must be “fair.” In landmark decisions in 2004 and in 2012, the Supreme Court of Canada provided guidance as to what this test means in educational institutions.

This Fair Dealing Policy applies fair dealing in non-profit universities and provides reasonable safeguards for the owners of copyright-protected works in accordance with the Copyright Act and the Supreme Court decisions.

Guidelines

1. Teachers, instructors, professors and staff members in non-profit universities may communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire or parody.

2. Copying or communicating short excerpts from a copyright-protected work under this Fair Dealing Policy for the purpose of news reporting, criticism or review must mention the source and, if given in the source, the name of the author or creator of the work.
3. A copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:
 - a) as a class handout
 - b) as a posting to a learning or course management system that is password protected or otherwise restricted to students of the university
 - c) as part of a course pack
4. A short excerpt means:
 - a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
 - b) one chapter from a book
 - c) a single article from a periodical
 - d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
 - e) an entire newspaper article or page

- f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
- g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

5. Copying or communicating multiple short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, is prohibited.

6. Copying or communicating that exceeds the limits in this Fair Dealing Policy may be referred to a supervisor or other person designated by the university for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.

7. Any fee charged by the university for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the university, including overhead costs.

Retrieved from <http://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>

Application of the Fair Dealing Policy for Universities: General Application

The document provides general information about copyright, copyright infringement and the Fair Dealing Policy for Universities (“Fair Dealing Policy”) adopted by the university.

A. Copyright

Copyright subsists in every original literary, dramatic, musical and artistic work provided that certain conditions are met. These conditions include the citizenship or residence of the author of the work. Copyright also subsists in performers’ performances, sound recordings and broadcast signals. Very few original works do not attract copyright.

Copyright comprises a bundle of exclusive rights owned by the copyright holder. In a university setting, the most pertinent rights are the right to reproduce the copyright-protected work and the right to communicate the work to the public¹ by telecommunication. The latter right is important in relation to the transmission of digital copies of works by email or over the Internet. The communication right protects emailing copyright-protected work to students or posting a copyright-protected work to a learning management system that is accessible by students.

In general terms, with the exception of performers’ performances, sound recordings and broadcast signals, the term of copyright lasts for the life of the author and a period of 50

¹ In general, a communication is to the public, if the recipients are not restricted to individuals that are purely in a domestic relationship.

years from the end of the year in which the author died. For a sound recording and a broadcast signal the term is 50 years from the end of the year in which the recording was made or the signal was broadcast. For sound recordings published before that 50 year period expires, the term is extended to the end of the year 50 years after publication.

Once the term of copyright has expired a work becomes part of the public domain and the work can be used, e.g., reproduced or communicated, without permission.

B. Infringement of Copyright

It is an infringement of copyright to copy all or any substantial part of a copyright-protected work or to communicate all or any substantial part of a copyright-protected work to the public by telecommunication without the permission of the copyright holder, unless copying or communicating the work falls within one of the exemptions in the *Copyright Act*.

Substantial Part

The *Copyright Act* does not define “substantial part”. In determining what constitutes a substantial part the courts have focused on the quality of what was taken from the original work rather than the quantity that was taken. As a result, no quantitative percentage of a work can be used to determine what constitutes a substantial part of a work. In general, reproducing a few sentences from a periodical article or book as a quotation is not a reproduction of a substantial part of the work. It is not an infringement of copyright if only an insubstantial part of a copyright-protected work is reproduced or communicated, e.g. in a thesis or periodical article.

C. Digital Licences

The university has entered into numerous licence agreements with publishers and aggregators pursuant to which it obtains access to published works in electronic form.

The digital licences typically specify the uses that the university can make of the works to which access is provided. In some instances a copyright-protected work is made available to the university under a licence with a publisher or aggregator that prohibits certain uses of the work, e.g., prohibits the copying of the work for inclusion in a course pack. Any copying and/or distribution restrictions contained in a licence that permits access to a copyright-protected work will take precedence over the Fair Dealing Policy. Before using the Fair Dealing Policy to copy or communicate a short excerpt of a copyright-protected work that is subject to a digital licence, it is necessary to ensure that the use is not prohibited by the licence. You can obtain information about the restrictions imposed on copyright-protected works that are made available under digital licences here [insert URL].

D. The Fair Dealing Exemption

The fair dealing exemption in the *Copyright Act* provides that fair dealing with a copyright-protected work for one of the following eight purposes: research, private study, criticism, review, news reporting, education, satire, or parody, does not infringe copyright. Any fair dealing for the purpose of news reporting, criticism or review must however mention the source and, if given in the source, the name of the author or creator of the work.

To fall within the fair dealing exemption, a dealing, e.g., copying or communicating a work, must be for one of the eight purposes and also must be fair. The Supreme Court of Canada has considered the following factors in determining whether a dealing is fair:

- a) the purpose of the proposed copying, including whether it is for research, private study, review, criticism or news reporting;
- b) the character of the proposed copying, including whether it involves single or multiple copies, and whether the copy is destroyed after it is used for its specific intended purpose;
- c) the amount or proportion of the work which is proposed to be copied and the importance of that work;
- d) alternatives to copying the work, including whether there is a non-copyrighted equivalent available;
- e) the nature of the work, including whether it is published or unpublished; and
- f) the effect of the copying on the work, including whether the copy will compete with the commercial market of the original work.

This document and the related documents that discuss the Fair Dealing Policy provide guidance on how the fair dealing exemption would apply. These documents discuss the application of the exemption in particular contexts. They do not however address all of the circumstances in which the fair dealing exemption can be applied.

E. Other Exemptions

In addition to fair dealing, the *Copyright Act* includes a number of other exemptions from infringement of copyright. These include reproducing a work to display it in a classroom, reproducing a work in a test or examination, performing sound recordings or audiovisual works in a classroom, copying and communicating works made available through the Internet, time-shifting and reproducing a work for private purposes. A discussion of these additional exemptions and the conditions applicable to these exemptions is beyond the scope of this document except for the exemption for copying and communicating works made available through the Internet which is discussed below. For more information about the other exemptions contact the **[copyright office or copyright officer]** at **[specify contact details]**. With respect to audiovisual works you can find additional information in the document Application of the Fair Dealing Policy for Universities to Audiovisual works that can be found here **[insert URL]**.

F. The Fair Dealing Policy

The university has adopted the Fair Dealing Policy to provide guidance to faculty members, instructors and staff members on when copying and communicating a copyright-protected work would fall within the fair dealing exemption. The policy permits faculty members, instructors, and staff members to copy and communicate, in paper or electronic form, short excerpts from copyright-protected works for any of the eight fair dealing purposes. The most important purposes for the university are research, private study and education.

Section 4 of the Fair Dealing Policy defines a short excerpt as follows:

4. A short excerpt means:
 - (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
 - (b) one chapter from a book
 - (c) a single article from a periodical
 - (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
 - (e) an entire newspaper article or page
 - (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
 - (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

When considering copying or communicating a short excerpt under the Fair Dealing Policy, the most advantageous of sections 4(a) through (g) may be selected. For example, if one chapter of a book is more than 10% of the book, the one chapter may be copied

under the Fair Dealing Policy. If more than one figure is selected for copying, the number of figures selected that may be copied under the Fair Dealing Policy cannot exceed 10% of the book. For example, if a book is 200 pages long, up to 20 pages may be copied under the Fair Dealing Policy.

The Fair Dealing Policy does not apply to students except to the extent that a student is an employee of the university, e.g. as a teaching assistant or instructor. The policy might however provide a general guidance on how the fair dealing exemption can be applied. For further information, students can refer to the document Fair Dealing Guidance for Students that can be found here **[insert URL]**.

Depending on the circumstances, copying or communicating a copyright-protected work outside the Fair Dealing Policy may be permitted under the fair dealing exemption in the *Copyright Act*. To determine whether copying or communicating a work outside of the Fair Dealing Policy falls within the exemption contact the **[copyright office or copyright officer]** at **[specify contact details]**.

G. Permission

If copying or communicating a copyright-protected work is outside the Fair Dealing Policy and does not fall within one of the exemptions in the *Copyright Act*, permission of the holder of copyright must be secured. Permission may be obtained directly from the holder of copyright or his or her representative. The Copyright Clearance Center, a U.S. non-profit organization, provides transactional permission in respect of a very large repertoire of copyright-protected works on behalf of copyright holders. The **[copyright office or copyright officer]** can assist in obtaining the necessary permissions.

It is advisable to seek written permission to copy or communicate a copyright-protected work outside the Fair Dealing Policy and to retain a copy of the written permission in the event that copying or communicating the work is ever challenged.

H. Exemption for Works Available through the Internet

Section 30.04(1) of the *Copyright Act* provides an exemption from copyright infringement for copying, communicating and performing in public by an educational institution or a person acting under the authority of one, e.g., a faculty member or administrative staff, for educational or training purposes of a copyright-protected work that is available through the Internet. The exemption is however subject to a number of conditions that must be met before the exemption applies. The conditions are as follows:

1. The educational institution, or person acting under its authority mentions the source, e.g., through a URL, and if given the source, the name of the author, in the case of a work, the name of the performer, in the case of a performer's performance and the name of the record label in the case of a sound recording;
2. The copyright-protected work or the Internet site where it is posted is not protected by a digital lock (also known as a technical protection measures or TPM) that either restricts access to the work or restricts copying, communicating or performing in public the work;
3. There is no clearly visible notice other than a copyright symbol posted on the Internet site or on the work, prohibiting the act sought to be done; and

4. The educational institution or person acting under its authority did not know or should not have known that the work was made available through the Internet without the consent of the copyright holder.

Using the exemption under section 30.04(1) is preferable to copying or communicating a copyright-protected work under the Fair Dealing Policy because the entire work may be copied or communicated under section 30.04(1). A faculty member or administrative staff must however be satisfied that each of the conditions is met before using the exemption.

I. Digital Locks

Some copyright holders use digital locks to restrict access to copyright-protected works and/or to limit the use that can be made of such works. The *Copyright Act* now prohibits the circumvention of digital locks to obtain access to copyright-protected works. The Fair Dealing Policy does not permit the circumvention of digital locks to obtain access to copyright-protected works. In order to circumvent a digital lock it is necessary to obtain the permission of the copyright holder.

Retrieved from <https://www.scribd.com/document/165760807/1-Application-of-the-Fair-Dealing-Policy-ForUniversities-GeneralApplication>

Appendix B: Survey results

Q1 In which faculty or faculties are you employed? (can choose more than one) (n = 201)

Arts and Humanities	51	25.4%
Science	36	17.9%
Social Sciences	34	16.9%
Health Sciences (including Medicine, Dentistry, Pharmacy)	28	13.9%
Information Studies / Library Studies / Media Studies	14	7.0%
Other	16	8.0%
Business	13	6.5%
Engineering	11	5.5%
Education	10	5.0%
Law	0	0.0%

Q2 Does your institution have a copyright policy or set of guidelines? (n = 201)

Yes	182	90.5%
I don't know	17	8.5%
No	2	1.0%

Q3 Does your institution offer training in copyright literacy to faculty? (n = 201)

I don't know	82	40.8%
Yes	80	39.8%
No	39	19.4%

Q4 What type of training is offered? (only if answer to Q3 is “yes”) (can choose more than one) (n = 80)

Workshops	56	70.0%
One-on-one sessions	30	37.5%
Online tutorials	15	18.8%
Other	15	18.8%
I don't know	7	8.8%

Q5 Have you attended any copyright literacy training session held by your institution in the past 12 months? (only if answer to Q3 is “yes”) (n = 80)

No	59	73.8%
Yes	21	26.3%

Q6 Do you feel that your knowledge of copyright was enhanced by the experience? (only if answer to Q5 is “yes”) (n = 21)

Yes, somewhat	13	61.9%
Yes, greatly	7	33.3%
No	1	4.8%

Q7 Have you ever asked another person for guidance on copyright issues in the past 12 months? (n = 201)

No	107	53.2%
Yes	94	46.8%

Q8 Whom did you ask? (only if answer to Q7 is “yes”) (can choose more than one) (n = 94)

Librarian	52	55.3%
Colleague	38	40.4%
Other	25	26.6%
Head of faculty or department	8	8.5%
University legal counsel	2	2.1%
Outside legal counsel	1	1.1%

Q9 Did you find an adequate answer to your question? (only if answer to Q3 is “yes”) (n = 94)

Yes, somewhat	48	51.1%
Yes, completely	43	45.7%
No	3	3.2%

Q10 Have you ever searched for copyright information from any print or electronic resource in the past 12 months? (n = 201)

Yes	103	51.2%
No	98	48.8%

Q11 What resource(s) did you consult? (only if answer to Q10 is “yes”) (can choose more than one) (n = 103)

University copyright policy or guidelines	56	54.4%
University web site (incl. library web site)	48	46.6%
Other web site	32	31.1%
<i>Copyright Act</i>	23	22.3%
Other copyright policy or guidelines	18	17.5%
Other resource	10	9.7%
Book about copyright	8	7.8%

Q12 Did you find an adequate answer to your question? (only if answer to Q10 is “yes”) (n = 103)

Yes, somewhat	60	58.3%
Yes, completely	34	33.0%
No	9	8.7%

Q13 You would like to show a YouTube video to students during a class. The video is on the page of an official-looking account. The video description includes a copyright notice and the name of the copyright owner, but no other information. (n = 201)

I would show the video	117	58.2%
I would ask permission of the copyright owner to show the video	32	15.9%
I would ask someone (e.g. dean, librarian) whether I may show the video	28	13.9%
I would not show the video	15	7.5%
I don't know	8	4.0%
I would ask permission of YouTube to show the video	1	0.5%

Q14 You would like students to read an older (but still copyrighted) academic article that is only available in print form. The library does not have a copy of the journal, but you have one. (n = 201)

I would ask someone (e.g. dean, librarian) whether I may copy the article	64	31.8%
I would upload the entire article to the course management system	55	27.4%
I would ask permission of the copyright owner to upload the article	37	18.4%
I would not upload the article	30	14.9%
I don't know	15	7.5%

Q15 You are conducting a distance education course that takes place online. You have created slide shows that you would like to make available to students via the course management system. The slide shows contain some copyrighted images. (n = 201)

I would upload the slide shows	67	33.3%
I would ask permission of the copyright holders to make the images available	55	27.4%
I would ask someone (e.g. dean, librarian) whether I may upload the slide shows	38	18.9%
I would not upload the slide shows	28	13.9%
I don't know	11	5.5%

Q16 You have purchased a PDF version of a book and would like to upload it in its entirety to the course management system for students to access. The book contains a copyright notice but is not protected by a digital lock. (n = 201)

I would not upload the book	89	44.3%
I would upload the most relevant chapter to the course management system	50	24.9%
I would ask permission of the copyright owner to upload the book	31	15.4%
I would ask someone (e.g. dean or librarian) whether I may upload the book	25	12.4%
I would upload the entire book to the course management system	4	2.0%
I don't know	2	1.0%

Appendix C: Ethics approval



**Western
Research**

Research Ethics

**Western University Health Science Research Ethics Board
NMREB Delegated Initial Approval Notice**

Principal Investigator: Dr. Samuel Trosow

Department & Institution: Information and Media Studies\Faculty of Information & Media Studies, Western University

NMREB File Number: 105718

Study Title: Copyright literacy in university faculty

Sponsor: Ontario Graduate Scholarship

NMREB Initial Approval Date: October 14, 2014

NMREB Expiry Date: June 30, 2015

Documents Approved and/or Received for Information:

Document Name	Comments	Version Date
Instruments	Revised survey instrument (pdf version)	2014/09/04
Recruitment Items	Script to be sent to representatives of university faculty associations, to be distributed to faculty members (clean version)	2014/09/04
Revised Letter of Information & Consent	Revised invitation to participate clean version	2014/09/04
Revised Western University Protocol	Revised protocol clean version	2014/09/04

The Western University Non-Medical Research Ethics Board (NMREB) has reviewed and approved the above named study, as of the HSREB Initial Approval Date noted above.

NMREB approval for this study remains valid until the NMREB Expiry Date noted above, conditional to timely submission and acceptance of HSREB Continuing Ethics Review.

The Western University NMREB operates in compliance with the Tri-Council Policy Statement Ethical Conduct for Research Involving Humans (TCPS2), the Ontario Personal Health Information Protection Act (PHIPA, 2004), and the applicable laws and regulations of Ontario.

Members of the NMREB who are named as Investigators in research studies do not participate in discussions related to, nor vote on such studies when they are presented to the REB.

The NMREB is registered with the U.S. Department of Health & Human Services under the IRB registration number IRB 00000941.

✓ Ethics Officer, on behalf of Riley Hinson, NMREB Chair, or Board Member designee

Ethics Officer to Contact for Further Information

Erika Basile,	Grace Kelly	Mina Mekhail	Vikki Tran
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This is an official document. Please retain the original in your files.

Western University, Research,



Greetings,

You are invited to participate in a research study about levels of copyright literacy among Canadian university faculty members. The study is being conducted by Lisa Di Valentino, Ph.D. candidate, Faculty of Information and Media Studies, University of Western Ontario.

Individuals who teach university-level (undergraduate or graduate) courses and who are responsible for assigning readings and other materials to students in a course are eligible to participate in this study. Both full-time and limited-duty faculty are included.

The purpose of this survey is to study faculty awareness with regard to Canadian copyright law and how it affects their ability to teach, their perception of who is primarily responsible for ensuring adherence to the law, and their own practices related to copyright compliance.

Insights gained from the survey will be used in a larger project aiming to develop best practices for copyright compliance management in colleges and universities.

If you agree to participate, you will be asked to complete an online survey comprising 20 or fewer questions. It is anticipated that the entire task will take approximately 10-15 minutes to complete. All data collected will remain confidential and accessible only to the investigators of this study.

There are no known or anticipated risks or discomforts associated with participating in this study. You will not be compensated for your participation in this research.

Participation in this survey is voluntary. Completion of the survey is indication of your consent to participate in this study. You may refuse to participate or withdraw from the survey at any time by closing the browser window.

The principal investigator for this project is Dr. Samuel E. Trosow |

If you have any questions about the content or purpose of the survey, you may contact Lisa Di Valentino |

If you have any questions about your rights as a research participant or the conduct of this study, you may contact The Office of Research Ethics |

To participate, please click the following link:

<http://surveys.fims.uwo.ca/surveys/Surveys/TakeSurvey.aspx?surveyid=1097>

The survey will be open until September 29, 2014.

Thank you,

Lisa Di Valentino

Copyright survey invitation to participate ver. 09/04/2014

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