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Risk, Reality, Regulations?
Finding what's reasonable in Canadian copyright guidance

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Abstract

Copyright guidance at an academic library is often provided at the nexus of the law, university policy, and the personal and professional values of the librarians and users involved in the decision-making. An institution's tolerance for risk (or lack thereof) can create tension with librarians' value systems. Laws are written at a high level, leaving lots of room for differences of interpretation between university administrators, librarians, and users. Professional values, such as the ones articulated by the Association of College & Research Libraries, generally align with enhancing or supporting user's rights and tend toward a more liberal interpretation of copyright. Institutional risk tolerance at best complicates decision-making and at worst entirely drives decision-making. At the University of Waterloo, higher levels of risk are generally accepted with research and teaching endeavors, directly in contrast with the lower level of risk acceptable when it comes to compliance with the law (such as the Copyright Act). Lack of clarity in the law and institutional risk tolerance can be at odds with professional values, which can confuse users and undermine librarians providing guidance.

This article provides a beginning framework for understanding reasonableness in copyright decisions while taking into account the variety of pressures on copyright librarians. A set of cases are used to test the framework, and a reasonableness chart is provided to allow for comparison of the cases.

Risk, Reality, Regulations? Finding what's reasonable in Canadian copyright guidance

This article was originally prepared as a chapter for the *Making Values Based Decisions* published by Association of College & Research Libraries.

The Situation

Copyright librarians (CLs) provide guidance across campus: from students, to faculty, to the campus administration. Administrators are looking to copyright librarians as experts, folks with unique knowledge of the legal, moral, ethical, and practical landscape that surrounds copyright decision-making. CLs also provide guidance and information to faculty and staff related to downstream decision-making on the use of materials for courses and research projects and in operational campus uses (such as movie nights, social media, etc.). This means that CLs must keep up-to-date with copyright legislation, case law, the ways in which users are using content, and the risks all of these pose to the institution.

As the law is written at a high level (dealing in generalities rather than specifics), uses are broad and ever-changing (looking at you, generative AI), and risk management can be difficult to pin down, CLs must balance the guidance they provide. They must be aware of their personal and professional values as well as how those values impact their work and how they align (or don't) with the values of the institution and the law.

The Context

The context of my work informs how decisions are made and what values are relevant. I'm a copyright librarian working in an English-speaking Canadian postsecondary institution. I'll break each of these pieces down and share my understanding of the values attached.

I am a copyright librarian.

Copyright-specific roles are relatively new in Canadian libraries, correlated closely with the changes in Canadian Copyright law over the last 15 or so years. Horava (2010) identified four individual copyright officers working in Canadian academic libraries in 2008. In 2017, Graham and Winter's study identified 27 (Graham & Winter). Patterson (2016) found that the majority of people in copyright roles were situated in the library and did not have a law degree. Further, in exploring how copyright librarians experienced their roles, Patterson found that copyright librarians preferred guidelines, which are viewed as flexible, changeable, and adaptable, and not overseen by administrative structures, such as an institution's senate, over policies (require approval by collegial governance, viewed as proscriptive "inflexible rules"; 2016, p. 6). This preference was linked to both practical and professional values. Practically, guidelines helped manage the bureaucratic structures of postsecondary institutions. Professionally, guidelines were viewed as an educational tool. Guidelines also helped CLs bolster their position as copyright advisor and not copyright police. Patterson (2016) also found that copyright librarians had two lines of thought on copyright work and academic freedom:

> One group was adamant that they had academic freedom in their copyright work; the other group felt that their copyright work was a quasi-administrative function for which they had to "take their faculty hats off and look at things from an institutional perspective." (p. 7)

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Leebaw and Lodgson (2020) looked at academic freedom from a broader view, speaking to a split between the librarian's existence as part of academia and as a professional. This could be applied in a similar way to CLs—with the split happening between their roles as risk managers and advisors to administration and their roles supporting instructors and students to understand and confront the complexities of the law, with a view to facilitating access to knowledge and information.

More generally, librarianship as a profession also provides context for the values at play. As part of an education and outreach program about copyright, many CLs will look to the Association of College & Research Libraries (ACRL) *Framework for Information Literacy for Higher Education* ("the Framework"). The frame that focuses on intellectual property and respect for creators (among other things) is "Information Has Value" (ACRL, 2016). CLs live and breathe this frame—from when they are helping users understand library license agreements to when they explain exceptions to copyright law. This frame indicates "experts also understand that the individual is responsible for making deliberate and informed choices about when to comply with and when to contest current legal and socioeconomic practices concerning the value of information" (ACRL, 2016, p. 6). This encouragement to have thoughtful discussions with users about the gray areas of value and to evaluate when current systems of value should be challenged is increasingly important as librarians work to help users understand the impact of the structure of educational and academic publishing. Providing education and context about the nature of the power dynamics at play in the scholarly communication landscape, where a small number of players control a large percentage of the market (Larivière et al., 2015), and empowering users to explore different ways to pursue scholarly communication and impact is part of that conversation. For a CL, this includes a conversation about the copyleft movement. What that means and how far left the conversation goes depends on the values at play.

What it means to act in a copyleft fashion continues to shift. Its original conception, as applies to software, was described by Dusollier (2006), who stated:

> "Copyleft" is the term that is now commonly used to designate the free software or free art initiatives. Those movements have coined the term copyleft in opposition to copyright to emphasize that contrary to a traditional exercise of the copyright, the author in copyleft … authorizes a broader right to use her work than what is traditionally granted. (p. 271)

This definition speaks to the desire to enable wide use of one's work without permission and is what I would conceive of as a classic approach to copyleft. If the copyleft movement was on a continuum, Dusollier's conception would be more restrictive than other conceptions. A CL teaching about the classic version of copyleft might teach about open licensing systems, such as Creative Commons or the GNU General Public License (GPL). As time has progressed, and power and control over content has consolidated, the copyleft movement has at times become more polemic. For example, Alexandra Elbakyan, creator of the website Sci-Hub, which provides access to pirated versions of research papers, has been referred to as "the champion of copyleft" (Elbakyan & Bozkurt, 2021). On the continuum of copyleft, piracy would then be on the most widely permissive side of the continuum (or perhaps hanging off the end). Kevin Smith, former Director of Copyright and Scholarly Communications at Duke University, provided a great example of how a CL might navigate this continuum. In reference to Sci-Hub, Smith said: "Copyright law is an instrumentality, not a good in itself. Its role in our legal system is to encourage creativity and the production of knowledge. When it ceases to do that it deserves to be challenged and changed" (Smith, 2016).

Values

The above demonstrates a context where copyright experts in general, and librarians specifically may hold the following values:

- Copyright librarians may value balancing their responsibility to their institution and to their users.
- Librarianship as a profession places value on balancing respect for creators with user rights.
- Librarianship as a profession places value on empowering users to make nuanced decisions when it comes to established value systems.

I work in Canada.

Over the last 10 or so years, Supreme Court decisions and changes to copyright law have had an impact on how universities handle copyright. Swartz et al. (2019) provided an in-depth description of many of these changes, which I've summarized here.

Changes to the collective licensing schema and pricing

Access Copyright (AC) is an organization that collects permission fees on behalf of Canadian writers, visual artists, and their publishers. Until 2010, postsecondary institutions paid a price per student for a blanket license with AC covering print-based educational use of AC's repertoire. Ahead of 2011, the rate was CA$3.38 per full-time equivalent student (FTE). Digital copying was not covered by this agreement. In 2010 AC submitted a tariff application to the Copyright Board (an economic regulatory body for copyright collectives and associated royalties) requesting a fee of CA$45 per FTE based in part on the inclusion of digital copying. As the Copyright Board takes a lengthy time to process tariff applications, an interim tariff was issued extending the previous license terms and rate until AC's proposed tariff could be evaluated. While many schools opted to sign on to the interim tariff, the proposed rate along with other concerns with the tariff terms prompted schools to begin looking at other ways to manage copyright. Other strategies included licensing directly with publishers and creators, use of Copyright Act exceptions (mainly fair dealing[1]), and employing educational campaigns with instructors. At this stage there were no standardized approaches to fair dealing.

Legislative changes in 2012 and Supreme Court of Canada decisions

In 2012, the *Copyright Modernization Act* added education to the list of acceptable purposes under fair dealing. This change came after the copyright pentalogy cases—five Supreme Court of Canada (SCC) decisions that affirmed user rights and a flexible approach to copyright law (Canadian Internet Policy and Public Interest Clinic, 2011). While the SCC decision in *Alberta (Education) v. Access Copyright* (2012) provided clarity that fair dealing could be used in education, its explicit addition to the Act provided confidence. Universities Canada (then the Association of Universities and Colleges Canada), "a membership organization providing university presidents with a unified voice for higher education, research and innovation," hired two lawyers to create fair dealing guide-

[1] The fair dealing exception in Canadian copyright law is similar to fair use in the United States, in that it allows use of copyright-protected works without permission and is based on a determination of fairness. There are differences in allowed purposes and factors for fairness determinations that influence decision-making by Canadian CLs.

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lines[2] that could be deployed at all Canadian institutions. These guidelines have been treated as a "safe-harbour" for fair dealing related decision-making (Council of Ministers of Education, 2016, p. 18). Over the following years, schools increasingly opted out of the interim tariff (Di Valentino, 2016, 2019; Table 1).

Table 1. Access Copyright Opt-Out Rate.

	2010	2015	2016	2019
Opt-out rate	0%	37%	57%	76%

A challenge by Access Copyright

In 2013, Access Copyright (AC) sued York University. AC claimed that York (and by extension all English-speaking Canadian institutions) were required to pay for an AC license (Tamburri, 2013). York counterclaimed that its fair dealing guidelines covered their use of copyright-protected works and therefore they did not require a license. In 2017, the Federal Court ruled that the tariff was mandatory and York's fair dealing guidelines were not fair (*Canadian Copyright Licensing Agency v. York University*, 2017). In 2020, the Federal Court of Appeal ruled that the tariff was not mandatory but that York's fair dealing guidelines were not fair (*York University v. Canadian Copyright Licensing Agency*, 2020). In 2021, the Supreme Court of Canada ruled that the AC license was not mandatory and in so doing indicated there was no need to rule on the fair dealing guidelines (*York University v. Canadian Copyright Licensing Agency*, 2021). The SCC corrected lower court reasoning on the guidelines but did not make any declarations with regard to overall fairness. This correction of the lower court's reasoning gave schools confidence to continue relying on the guidelines. Regardless, schools have been rethinking the guidelines. For example, the University of Toronto published new guidelines in October 2022 (Alford, 2022), and the University of Alberta updated their guidelines in May 2023. Additionally, the Canadian Association of Research Libraries (CARL) has organized CLs around the creation of Canadian versions of the codes of best practice to help CLs with decision-making in areas that have traditionally fallen outside of our guidelines—open educational resources (2024a) and Crown copyright materials (CARL & Canadian Federation of Library Associations, 2024).

Continued uncertainty

Starting in 2017 the Copyright Act underwent the mandatory review called for in the Act itself (Innovation, Science and Economic Development Canada, 2017). The Government held open sessions and consultations through two Parliamentary standing committees: Industry, Science and Technology and Canadian Heritage. These committees produced two largely conflicting reports (Dabrusin, 2019; Ruimy, 2019). No changes have been made to the Act since the conclusion of the consultations. As the unchanged legislation calls for a review of the Act every five years, it is due for review again. In the 2022 federal budget, the government promised to "work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users" (Department of Finance Canada, 2022). Creator's rights organizations such as Access Copyright and The Writers' Union of Canada have been actively lobbying the government and the court of public

[2] The Association of Universities and Colleges Canada did not publish these guidelines on their website. The original text of the guidelines were shared by Howard Knopf on his blog: http://excesscopyright.blogspot.com/2013/09/the-aucc-finally-provides-fair-dealing.html

opinion around changes to ensure fair remuneration to creators, focusing on lost income from the postsecondary education sector.[3]

To sum up, the copyright environment in Canada has been in a steady but uncertain state for over a decade. Speaking personally, I feel as though I'm continually waiting for the other shoe to drop—change seems to be on the horizon, but in what direction? The law provides little for users to latch on to in terms of specific rules to follow, which as we'll discuss later, is probably a good thing! But this means there are few definitive yes or no answers. Certainty comes in asking and paying for permission or in abandoning the use altogether. The cost of certainty is often high—either requiring per-student payments for use of materials that might have been used under a Copyright Act exception without payment, or in terms of a lesser teaching and learning experience.

Values

It is difficult to clearly articulate the depth and breadth of values held by the Canadian government, creators generally, their representatives, and of the Act itself. To oversimplify, we could say:

- The Canadian Copyright Act values the balance of creator and user rights.
- Government inaction makes it difficult to determine values. Based on the reports from the Copyright Act reviews and years of SCC decisions that have upheld the values of the Act, it seems likely that the government will continue to try to find balance between users and creators. What the current government understands to be a reasonable balance is opaque.
- Creators' values are as diverse as creators. Generally, creators value being paid for uses of their work and the ability to earn a living wage in their chosen profession.
- Universities value the ability to provide quality (and in certain cases innovative) education to students and need to be able to do this at scale and with a minimum of risk to the institutions.

I work at a large (over 37,000 FTE[4]), research-intensive, PhD-granting institution in Canada, with a commercialization focus.

Over the last 30 years, Waterloo has been ranked the most innovative university in Canada 29 times by Maclean's University Rankings (Quinlan, 2021). The institution is focused on entrepreneurship, supporting incubators that have resulted in over 500 companies started by Waterloo students, faculty, and alumni (University of Waterloo, n.d.). Waterloo is focused on experiential learning and supports the world's leading co-operative education program (University of Waterloo, n.d.). The size and focus of the institution lay the foundation for understanding how the institution makes decisions about risk. The University of Waterloo uses a matrix-based risk assessment structure. Kohn (2019) spoke to the challenges and opportunities of enterprise risk management (ERM) risk matrices being used in copyright decision-making. Kohn explained that the main challenge of ERM is in the amount of information needed and the time it takes to move through a robust risk assessment, as users are often looking for a quick yes or no answer (2019). The opportunity is being able to look at all of the elements of risk, such as the risk of not acting (Kohn, 2019).

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[3] A search run October 27, 2023, for "Access Copyright" in the Registry of Lobbyists, limited by "Intellectual property" as a topic revealed a total of 130 communications with government officials since January 2023. The same search for "The Writers' Union of Canada" showed 69 communications in the same period. In addition, both Access Copyright and The Writers' Union of Canada have run campaigns directed at their members blaming postsecondary educational institutions for the decline of income to Access Copyright (and to creators in general).

[4] Institutional Analysis & Planning. (2023). *Student full-time equivalents (FTE)*. https://uwaterloo.ca/institutional-analysis-planning/university-data-and-statistics/student-data/student-full-time-equivalents-fte

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Waterloo's statement of institutional risk appetite reveals a balance of a low tolerance for risk in university operations (with eight out of 12 categories low), with a higher tolerance for risk associated with academic program management (University of Waterloo, 2015). The description for academic program management risk states that,

> It is in areas of activity contemplated by this Risk that the University's focus on innovation in general, transformational research, scholarship, and instructional innovation is found, and the tolerance of a high level of Risk in these areas is consistent with the University's ambitions as stated in its strategic plan. (University of Waterloo, 2015, "Category 6")

This acceptance of risk collides with the low risk appetite for risks related to statutory and regulatory compliance, under which adherence to copyright law would fall. It is also relevant that the university is in a transitional period at present; the risk statements noted above are approaching 10 years old. Since they were established, the university has moved through the COVID-19 pandemic, which, among other things, acted as a catalyst for revisiting the institution's approach to resilience and values. In a February 2023 report to the provost, the Advisory Committee on a Resilient Waterloo recommended that work needed to be done to "identify gaps and inefficiencies" in a variety of areas, including risk management, to "provide a foundation for transformational change" (Wells et al., 2023, p. 26).

The size of the institution also has an impact on the decentralized nature of copyright management. Strategic and policy decisions are managed through the campus Copyright Advisory Committee with work collaboratively handled by a handful of departments. When it comes to use of materials, decision-making is dispersed. Guidance is provided and copyright clearance services are offered (for example, through Course Reserves), but most copyright decisions are made by individuals (the faculty members teaching a course). Research has shown that faculty knowledge and application of copyright is highly variable and applied unreliably (Di Valentino, 2015; Doubleday, 2016; Olaka & Adkins, 2012; Sims, 2011; Smith et al., 2006).

The CL is trying to balance the guidance they provide to be in line with the institution's risk management threshold, but in a way that honors the focus on innovative teaching and research. The CL also needs to respect academic freedom and the agency of faculty members. To do this, they must constantly be raising awareness of the importance of copyright, while providing timely, consistent, and reliable guidance.

Values

In the context of the institution and the faculty working within it, the following values are in play:

- The university values its reputation.
- The university and faculty value providing quality education to students.
- The university values innovative research.
- Faculty value academic freedom and agency in their teaching and research.

Personal beliefs

While I am loath to admit it, the concept of a gut feeling of right or wrong can play a part in copyright decision-making. That means that my personal beliefs and tendencies end up part of the equation of copyright decision-making on campus. It matters that I am a more anxious person, that I want instructors to be able to develop their courses with relative ease, that I value open access to teaching materials, and that I want to keep copyright balanced to support creators and users alike.

It matters that I care about individual creators but take issue with monopolistic environments that extract rent while providing dubious value. In our day-to-day, this doesn't get added to the "dough" of the copyright cookie very often; the recipe for guidance on campus is tried and true for a wide variety of scenarios. Our fair dealing guidelines, institutional licenses, and funding for one-off licensing combine to allow copyright decision-making to be distributed on campus. In the majority of situations, it's fairly easy to say if *x*, then *y*. It is when we reach the outer bound of those recommendations that the weighing of institutional, legal, professional, and, yes, personal values comes into play.

Values

- I value stability in my day-to-day life.
- I value ease of access to and use of teaching and learning materials.
- I value a living wage for creators.
- I value competition and regulation in economic markets.
- I value a balanced copyright act.

We've set the stage: copyright decision-making is contingent on an understanding of the law and the values behind it, the institution and the values it holds, the values of the profession, and your personal values. Separated, these values can appear straightforward and helpful, but when combined, what seems to be concrete can become shifting sand.

So how can we approach decision-making?

As CLs, we provide guidance to individuals and the institution. In many cases, answers to copyright questions can be pulled from existing guidelines, policies, or contracts, such as the fair dealing guidelines; Codes of Best Practice; our university policy, such as Waterloo's Policy 73: Intellectual Property; and the provisions in our institutional licenses. In cases where that guidance is strong and clear, it may be straightforward to provide guidance without a more in-depth assessment. For example, if a faculty member asks if they can scan one chapter of a book to share with the students in their class on our course management system, I'll tell them that's covered by our fair dealing advisory. If I'm asked a question about fair dealing and OER, I may be able to provide guidance based on the Code of Best Practices in Fair Dealing for Open Educational Resources. The factors below are intended to assist with questions and situations that are outside these well-established frameworks.

To help facilitate the decision-making process, I find it helpful to reframe from the right/wrong or lawful/unlawful binary to one of reasonableness. There are a variety of definitions of "reasonable" and a great deal of controversy around interpretation, especially when it comes to the law (Moran, 2010). For the sake of simplicity and clarity, when evaluating the below factors, keep in mind the Government of Canada's explanation of reasonable:

> A reasonable person is someone who is prudent and shows care for those around them. They think before they act, and where they see a risk of harm to others, they try to prevent it. … A reasonable person … would want to know what the potential effects are – both good and bad – and would also take steps to minimize risk where they see it. The legal duty … is not based on his or her personal characteristics, but rather by the nature of the activity and

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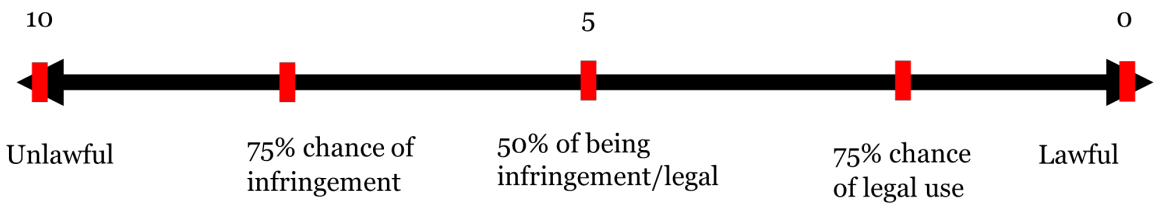
> the circumstances surrounding [their] failure to take the requisite care. These circumstances do not personalize the objective standard; they contextualize it.[5] (2022, Question 5)

Here I use the following three factors as a foundation for evaluating reasonable use:

1) Legal Context. On a scale from immediately understandable as lawful (0), for example, use of licensed content according to the terms of the license, to immediately understandable as unlawful (10), for example, using pirated content, where does the proposed use fit? Since Copyright Act exceptions are a defense to infringement, that means exceptions fit somewhere in between (Figure 1). Whether or not there is confidence in the use of these exceptions is often the difference between making an easy decision (say one based on fair dealing guidelines), and more context-driven decisions, as described in these steps. Think about this factor in terms of how certain you can be that any given use is lawful or unlawful.

Figure 1. Spectrum of Lawful to Unlawful Uses

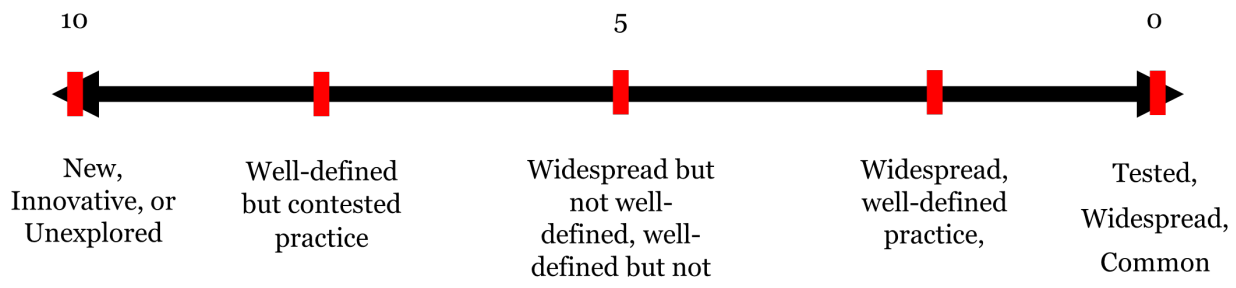


2) Practical Context. What is the connection with the planned use and how people are currently operating in the world? This factor does not exist to endorse pirating or infringing uses, but rather to acknowledge unwritten or unspoken but accepted (and in many cases somewhat well-defined) uses of content. This often relies on an understanding of a particular field or culture. For example, a tested, widespread, common use may be the fair dealing guidelines (at Waterloo, the fair dealing advisory[6]). A well-defined but not widespread practice could be controlled digital lending, in that the practice has been widely described and analyzed (Canadian Federation of Library Associations [CFLA], 2022; De Castell et al, 2022; Hansen & Courtney, 2018) but that only select institutions are engaging with. Over time, depending on your personal comfort with risk or your institution's risk tolerance, you might have slid controlled digital lending into the contested category, given the outcome of the *Hachette v Internet Archive* case (Knibbs, 2024). At present, generative AI uses may be a new, innovative use type; as more understanding of these systems is developed, experiences are shared, and legal decisions and legislation changed, the assessment will change. On a scale from well-defined common practice in a field (0) to new, innovative, or unexplored use case (10) where does the use case fit (Figure 2)?

[5] This definition is drawn from Former Minister of Justice and Attorney General David Lametti's explanation of a reasonable person in the Senate regarding a new criminal bill. The text has been edited to remove examples that refer directly to criminal behavior, as it is not relevant to this discussion.

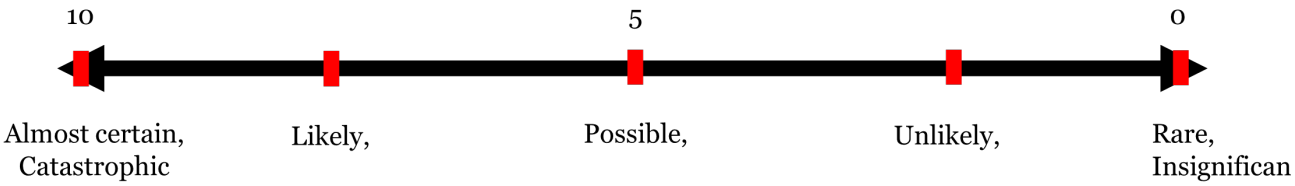
[6] University of Waterloo. (2012). *Fair dealing advisory*. https://uwaterloo.ca/copyright-at-waterloo/teaching/fair-dealing-advisory

Figure 2. Spectrum of Well-Defined to Unexplored Uses



3) Risk Context. Does the use expose the user or the institution to an unreasonable amount of copyright-related risk, such as a lawsuit over infringement? Think about the risk as it relates to the likelihood of a particular action occurring and the impact of the potential outcome. Consider how your institution approaches risk—and what values the risk statement communicates. For example, Waterloo uses a risk matrix (combining likelihood with potential impact). To plot the vectors on the reasonableness chart, I've simplified this matrix to a 0–10 scale (Figure 3). On a scale of risk, from rare and insignificant impact (0) to almost-certain catastrophic impact (10), where does the use case fit?

Figure 3. Spectrum of Risk Contexts for Uses



Of course, I've simplified these factors. Depending on the situation, there may be additional layers, or one of these layers may carry more or less weight than the other. For example, when considering risk, you may wish to consider the risk to teaching of *not* using material, or you may need to consider the privacy risk of using a third-party platform. Neither of these are copyright concerns but could be important to your decision-making. When you are evaluating each of these elements, take care to not create an artificial separation between the facts of the situation and the values that you, the user, and the institution hold.

In the following cases, I'll apply the reasonableness factors above while evaluating the values at play. This will involve assigning a number to each element (legal, practical, risk) and using those numbers to assign the case a position, where each case is a vector in the 3D space of the reasonableness chart (see Figure 4). In the chart, you'll see three colored areas: white for reasonable, light gray for questionable, and dark gray for unreasonable. This process is based on the factors at play in my context, so you may find that you disagree with the numbers I've assigned or with where something ends up positioned on the chart. If (and inevitably when) this happens, think about the values at play in your institution and whether the disagreement lies in values-based factors or interpretation of facts of the situation.

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Case 1: But it's available on YouTube!

The situation

A full spectrum of content exists on YouTube; copyright-wise you can find content from the almost certainly pirated to the fully licensed with creator permission to the Creative Commons licensed. CLs recommend that users start with a known legal copy of content. In this case, an instructor has reached out for help determining legitimacy. This content has been available on YouTube for over a decade. Dedicated searching has not rooted out the source of the content. The username associated with the account that posted the content doesn't provide any clues. The content is no longer published elsewhere, and the YouTube copy is the only copy the instructor has available to them. The distributor of the original video is no longer in business, and there is no information available about the director or other creators involved in the film. To put it simply, there isn't anyone to reach out to for permission. The instructor wants to share this video with the students in her class. She'll be using a link or YouTube embed code to make it available to her students, meaning she isn't creating a copy, she's simply encouraging students to access the video.

Values considerations

Our professional value might weigh the access to the information against the value of ensuring students understand the value of information. As a CL you might consider whether use of the video will create confusion for the instructor and students about what kinds of content are allowed to be used online. The institution's values will also conflict: the institution wants to minimize risk of noncompliance with copyright but maximize the value of educational experiences. The institution also wants consistent, reliable experiences for students, which means using resources that are persistent over time, which this sort of YouTube video may not be.

As CLs we want to give consistent guidance about how to approach this kind of use each time. It might be simplest to tell all instructors that they shouldn't use links to YouTube videos they can't verify as lawful. And when it comes to creating guidelines, that is likely to be the best answer. If an instructor reaches out for clarity, we owe it to them to help them think through the decision. Thinking things through involves evaluating the context of the use, which includes which video is being used, the class it is part of, and how much a part of that class it is, something that can only be done on a case-by-case basis.

Is the use reasonable?

Legal: No verifiably lawful copies are available for use. Using a copy from YouTube with unclear provenance is generally not encouraged. The creators are not locatable. If we decide permission or verification of the copy is necessary, the user will not be able to use the content. The instructor is not making a copy; she is simply linking to or embedding the content in the learning management system, so there's no direct infringement here. **Rating: 5. Equal chance of being infringement or lawful use.**

Practical: YouTube is heavily used in teaching (and around the world for a variety of purposes). The video has been available on YouTube for over a decade without challenge. In a search for information about the video, the YouTube copy is the only one available. If the creator or copyright owner was concerned about misuse of the video, they would have likely been able to find it and request removal. **Rating: 2.5. Linking to YouTube videos as a teaching practice is a widespread, well-defined practice. There is a degree of uncertainty in the untested nature of linking to material that is not verifiably lawful.**

Risk: The user wishes to link to the video (they are not asking to download or copy the content), so the only copyright risk is in endorsement of the use of potentially infringing content. The continued existence of the video on YouTube over multiple years tends toward placing use in a lower risk category. There is some risk that the content might be removed as we can't be sure the user had permission to post it. **Rating: 2.5. It is unlikely this use will result in any impact to the institution. If the video is taken down because of a copyright complaint on YouTube, it will have a minor impact on the course.**

Summary: Showing this video in class seems reasonable based on the factors we have available; see Figure 4 (dot 1). It provides the opportunity for student to learn from the content and doesn't infringe copyright as no direct copies are being made. If the creator or copyright owner wishes to remove the video, they can ask for the video to be taken down via YouTube's takedown form.

Case 2: Generative Artificial Intelligence—Use of generated content in teaching

The situation

Over the last year and a half, generative artificial intelligence services have popped up like daisies (or dandelions, depending on your feelings). I remember a near-immediate feeling of dread as I became more familiar with these services and how they worked. It was clear to me that there were copyright concerns, namely the possibility of mass-scale infringement in the creation of a corpus for training, and the downstream uses of the service therefore being tainted by its source. At the time of writing, Canadian legislation doesn't speak directly to AI use cases. Though a fair dealing argument might be able to be made for some uses of content in AI services, when it gets commercial, it gets complicated (Brown et al., 2021).

Values considerations

In terms of institutional values, we have a highly ranked computer science department and an artificial intelligence institute (1st in Maclean's, 2022, and 25th in the QS Top University Rankings, 2022). It would be irresponsible not to teach about or use AI. That doesn't negate our commitment to make decisions in alignment with the Act, though. This means we needed to provide guidance about using generative AI services, without the benefit of direction from the law, that recognizes that folks are already using it, and they are highly unlikely to stop. Asking them to do so could undermine our standing as part of the institution.

Personally, I have a number of moral and ethical concerns with the way generative AI services are being developed. These concerns impact the way I speak to users about use of AI services, but as they are largely separate from copyright, I can separate them out from decision-making here.

Is the use reasonable?

Legal: At the time of writing, our legal understanding is captured in the University of Waterloo's Generative AI guidance for copyright. In brief, the law hasn't caught up to generative AI, either in terms of copyright of AI-created content or in terms of how an AI service might be allowed to use materials in training its models. It could be that an AI service could use fair dealing to make use of training materials, but it's unclear if they've been sourced lawfully. **Rating: 7. There is a greater chance of infringement.**

Practical: The general public, the postsecondary education sector, and our institution in particular is heavily using (and in some cases involved in creating) generative AI services. Recommending that our faculty and students avoid use of generative AI services would be impractical—it

would put them at a disadvantage as compared to our peers. At the postsecondary education level, no other institutions have put out rules or recommendations that limit use. Even the federal government's recommendations for government staff use (Government of Canada, 2025) do not call for a blanket ban on the use of these services. **Rating: 5. There is widespread use of generative AI tools in the postsecondary sector, but the use cases are not well-defined.**

Risks: There are ongoing lawsuits from creators against generative AI services (Wallace et al., 2025; Weisenberger et al., n.d.). We don't know the provenance of the materials in the corpuses used in these systems, but if the content was lawfully sourced, a fair dealing argument or even an insubstantial use argument might be able to be used to use generated content. The terms of use of many of these services provide for the users to own or to have broad use rights in the generated outputs (Anthropic, 2025; Copilot, 2024; Google, 2024; Midjourney, 2025; OpenAI, 2024), so use in closed teaching environments for educational purposes seems reasonably low risk. The main risk comes from the uncertain environment; should major changes come legislatively or from downstream effects of legal action, it could be disruptive to the classroom environment. **Rating: 3. The likelihood of legislative or legal decision-based changes to this environment during the term of a class is low given the pace at which these activities happen in Canada. Should something change, it may have a moderate impact on how these materials are used.**

Summary: In Figure 4, we can see that this case is at the outer edge of the reasonable zone (dot 2). When it came down to it, it was about helping our users understand what was at play when making decisions about their use of these services. The University's legal team provided a comprehensive overview of the landscape, from which we drafted a high-level summary to present to instructors. We addressed the issues and presented recommendations on how instructors could exercise caution when using the services. The recommendations linked to what we knew about the law, focusing on fair dealing uses of the content created by GenAI services and what would be required to make such a use, steering instructors away from situations where they could be enabling the service to infringe.

Case 3: Memes

The situation

An instructor wants to use a meme in their lecture slides to illustrate a concept in their course. They will post their slides on the learning management system, so students have access throughout the course.

Values considerations

Professionally, memes are a perfect place to have a conversation with users about areas where we might push back on the law. Users have probably engaged with a meme online, and many may have shared them with others by either reposting or downloading and reusing. They likely did not think about the copyright ramifications of their decision; they inferred from cultural practice what was appropriate.

Personally, I sympathize with instructors who have difficulty understanding why something used so widely outside of a classroom context would have stronger protection in an educational setting. And I appreciate when instructors can make classes more engaging by connecting with students through items of cultural relevance. I'm also worried about confusing students about what is or isn't allowed copyright-wise on the internet—and about underscoring misunderstandings by instructors on the copyright status of images online. From that perspective, it makes sense to treat

memes much like unclearly sourced YouTube videos, on a case-by-case basis, with a strong line placed in official guidance. This helps balance the institution's values of quality instruction with the statutory compliance element of our risk-management appetite.

Is the use reasonable?

Legal: In terms of the Copyright Act, memes are a perfect mess. Perfect, in that on its face a good case can be made for fair dealing usage. The use case is educational. Though the entire work is used, it is shared with a limited number of people and does not compete with the original work. Then comes the mess: memes are near impossible to find a lawful source for even if the originator is known. Depending on the meme, they can be even more complicated to properly attribute, as there may be several layers to the content. For example, there may be a background image, layered images overtop, and foreground text, each from a different contributor. Any use of a Copyright Act exception requires us to start with a lawful copy of the work; if a legitimate source isn't available and we don't know how to properly credit the creators, it becomes very difficult to move forward with that analysis. **Rating: 4. Given that there is a good case to be made for fair dealing usage, this skews toward greater chance of lawful use. The uncertainty around the status of the item moves it toward an equal chance of lawfulness and infringement.**

Practical: Memes are used across social media and the internet more broadly without permission and often without acknowledgment. Expecting the instructor to locate the originating image, find the originator of a meme, and ask permission to reuse the original image, as well as to ask permission to reuse content from the downstream modifiers, would have the effect of disallowing the use of memes in the classroom and creating a different, higher standard for teaching uses than for use generally. **Rating: 2. Meme use is a widespread, well-defined practice but is untested in the courts in Canada in this context, and is not included in our guidelines or standards of practice.**

Risk: Memes are used across the internet in a variety of ways. Lawsuits around meme usage have been overwhelmingly connected to commercial usage of the content or to publicity rights (the use of someone's likeness without their permission; Crockett, 2022; Borges, n.d.; Ferreira, 2016; Friend, 2019). It is unlikely that the institution or the instructor would face legal challenge for the use of a meme in a noncommercial, instructional, closed-access teaching context. **Rating: 1. The risk protection factors are high in this context, making the likelihood of challenge rare. Should a challenge be issued, the impact is likely to be insignificant or minor depending on the reliance of the course on the image.**

Summary: The combination of usage consistent with culture, minimized risk through controlled use, and Copyright Act exceptions that align with the use case make this example one that fits well within the bounds of the reasonable zone; see dot 3 in Figure 4.

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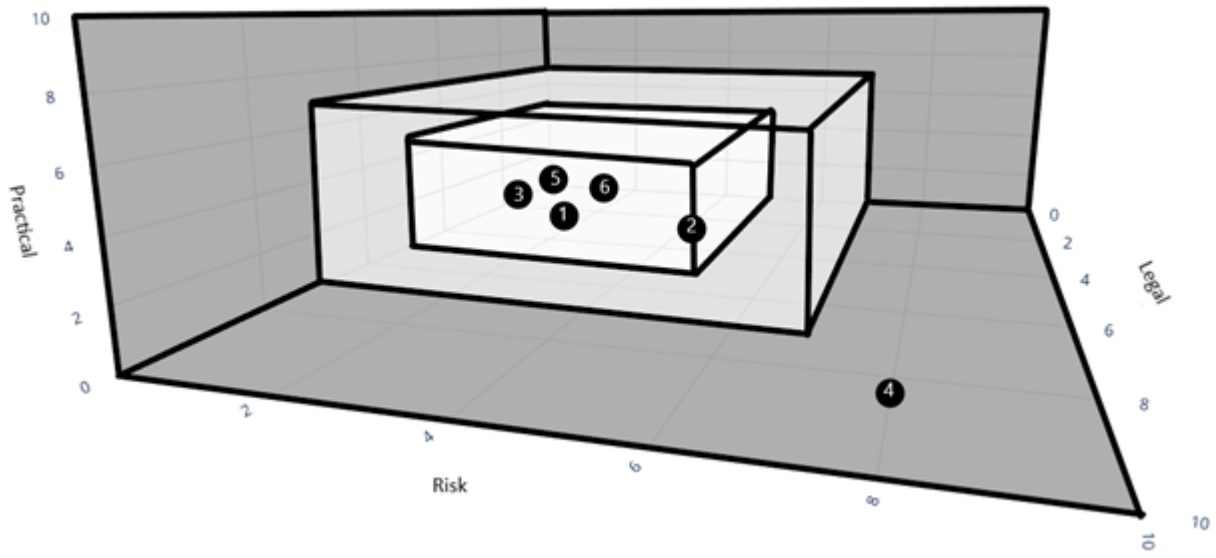
Figure 4. Reasonableness Chart.



Note. Each case above and three additional examples (Table 2) are plotted on three axes: legal, practical, and risk. This chart combines the numbers assigned in each factor into a vector in the 3D space of the reasonableness chart. The white box is the reasonable zone. The light-gray box is the "gray area" between reasonable and unreasonable. The dark-gray area is the unreasonable zone.

Table 2. Case Examples			
Case Name	**Legal**	**Practical**	**Risk**
1: YouTube	5	2.5	2.5
2: Generative AI	7	3	5
3: Memes	4	2	1
4*: Use of a pirated movie for a classroom showing.	10	2	8
5*: Use of Library-licensed article with students on a learning management system	0	0	0
6*: Use of a lawful copy of an image found online under the Work Available on the internet exception in a classroom.	2	2	2

*Cases 4–6 have been added to show my interpretation of where more mainstream ("easy") decisions would fit on the reasonableness chart.

Impact

When I first started as a CL, I was convinced that the answers were in the law and jurisprudence. Both unfortunately (in terms of my desire for certainty and stability) and fortunately (in creating the opportunity for new and innovative uses of materials), the answers are not always found there. Strict adherence to only that which fit into well-defined boxes left a lot of instructors with less-than-helpful guidance. If we froze in the face of uncertainty, the work of the institution wouldn't get done or would be unacceptably impeded. We need to provide reasonable, understandable guidance to our users and institutions to enable teaching, learning, and research. Beyond this, we need to know when to strategically push the institution outside of its comfort zone. When you provide people with too much information, without the right context, without a consideration of the values, they too can freeze in the face of making a good decision.

Professionally we know that information has value and that we should show respect to creators. Professional values tell us it is up to us to evaluate when it is important to push back on established systems of value in information. Institutional values likely encourage reducing risk in use of materials. Institutional values may also prioritize student access to information and innovative teaching models. That's a lot to weigh and consider when developing an instruction session or answering a question. Choosing what to say and, sometimes more importantly, what not to say can feel heavy. Skewing too far to the risk averse can make the guidance you provide your users stilted and disconnected from reality.

When users ask a copyright question, I'm tasked with providing them with enough information for them to make an informed decision. It matters who the user is, their level of knowledge about copyright and how set in their beliefs they are about what is right and wrong in that space. If we are to believe in the land of neutrality, I am simply a vector for providing facts about copyright law, licenses, terms of use, and so on. As others have argued before me (Bourg, 2018; Gibson et al., 2017; Lewis, 2008), libraries are not neutral, and try as hard as I might, I can't be either. The information I provide and how it's framed will undoubtedly influence the way a user makes their decision. And if it didn't, you could reasonably argue I wasn't doing a good job.

After eight years of being a CL, the most helpful change in my framework is to understand copyright decisions as reasonableness decisions. The lack of certainty in copyright demands this. There are very few definite yes or definite no answers. That's not to say there aren't situations and contexts in which work can be copied with a relative degree of safety or where work absolutely should not be copied without permission. It's simply to recognize that each decision demands attention to a complex array of factors, the value systems attached, and the level of risk the user is willing to accept. I find that providing people with this framework gives them some freedom to play with copyright concepts. Once they understand that it is difficult to be "right," they are better able to look at their question and its layers.

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