CHAPTER TEN

Risk, Reality, Regulations?

Finding What's Reasonable in Copyright Guidance

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Introduction

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. The law is often vague, leaving lots of room for differences of interpretation between University administrators, librarians, and users. Professional values, like the ones articulated by the ACRL Framework, generally align with enhancing/supporting user's rights and tend towards a copyleft point of view. Institutional risk tolerance complicates decision making further. Higher levels of risk are generally accepted with research and teaching endeavours, directly in contrast with a lower level of risk acceptable when it comes to compliance with the law (like 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.

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This chapter 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.

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, 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 vague, uses are broad and ever-changing (looking at you, generative AI), and risk management is difficult to pin down, CLs must balance the guidance they provide. They must be aware of their personal and professional values, 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 post-secondary 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. In 2008, Horava (2010) identified four individual copyright officers in Canadian academic libraries. In 2016, Graham & Winter's study had identified 27. 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 (CLs) experienced their roles, Patterson (2016) found that copyright librarians preferred guidelines over policies. This preference was linked to both practical and professional values. Practically, guidelines helped manage the bureaucratic structures of post-secondary

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).

Leebaw & Lodgson (2020) look 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 American 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 16). This encouragement to have thoughtful discussions with users about grey areas of value and to evaluate when current systems of value should be challenged are 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 scholarly communication oligopoly 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, is described by Dusollier (2006), who states:

> "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 on the far right. A CL teaching about the classic version of copyleft might teach about open licensing systems, such as Creative Commons or 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 farthest reaches of the left of the continuum (or perhaps hanging off the end). Kevin Smith, former Director of Copyright and Scholarly Communications at Duke University, provides a great example of how a CL might navigate between these two ends of the continuum. In reference to Sci-Hub Smith says: "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

- 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 ten or so years, Supreme Court decisions and changes to copyright law have had an impact on how universities handle copyright. Swartz et al. (2019) provide 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, post-secondary institutions paid a price per student for a blanket license with AC covering print-based

educational use of ACs repertoire. Ahead of 2011, the rate was $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 per student fee of $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*), 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 [CIPPIC], n.d.). 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 [AUCC], n.d.), "a membership organization providing university presidents with a unified voice for higher education, research and innovation," hired two lawyers to create fair dealing guidelines† 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, Canada, 2016, p. 18). Over the following years, schools increasingly opted out of the interim tariff (Di Valentino, 2016; 2019):

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

* 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.

† The AUCC 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

A Challenge by Access Copyright

In 2013, York University was sued by Access Copyright (AC). 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, 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), and the University of Alberta updated their guidelines in May 2023 (Copyright Office).

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 departments: Industry, Science and Technology and Heritage. These departments produced two, largely conflicting reports (Ruimy, 2019; Dabrusin, 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). Creator's rights organizations like Access Copyright and The Writer's Union of Canada have been actively lobbying the government and the court of public opinion around changes to ensure fair remuneration to creators, focusing on lost income from the post-secondary education sector.

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 value being paid for uses of their work. Creators value earning a living wage.
- 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 37000 FTE), 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 four different incubators, including over 400 ventures started at Velocity (About Waterloo, n.d.). Waterloo is focused on experiential learning and supports the world's largest cooperative education program (About 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. The statement of institutional risk appetite reveals a balance of low tolerance for risk in University operations (with eight out of 12 categories low), with 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.

This acceptance of risk collides with the low 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 ten 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, McRae, Casello, 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 honours 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

- 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 come 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 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.

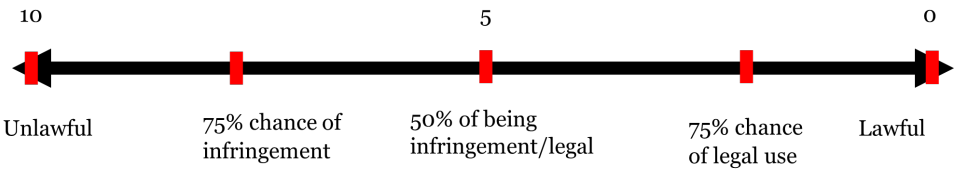
So How Can We Approach Decision Making?

As CLs, we provide guidance to individuals and the institution. 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 Lametti's (2022, Question 5) explanation of reasonable:

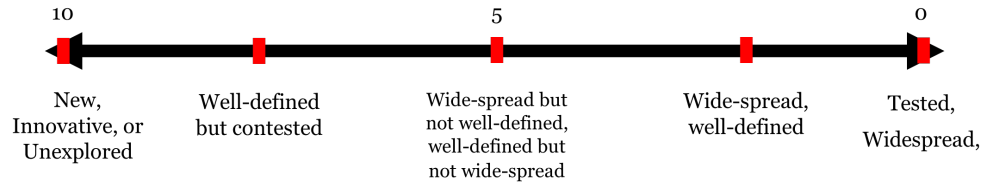
> A reasonable person is someone who is prudent and shows care for those around them. They think before they act, and where they see a risk of harm to others, they try to prevent it.… a reasonable person… would want to know what the potential effects are–both good and bad—and would also take steps to 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 the circumstances surrounding [their] failure to take the requisite care. These circumstances do not personalize the objective standard; they contextualize it.

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

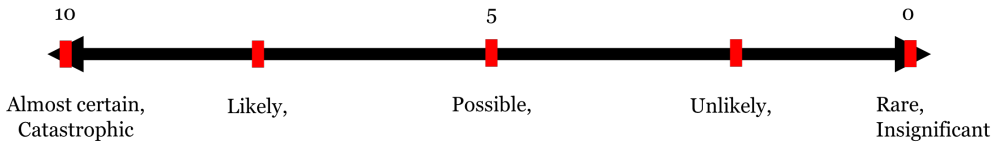
> Legal Context. On a scale from immediately understandable as lawful (0), for example, use of licensed content according to the terms of the license, to immediately understandable as unlawful (10), for example using pirated content, where does the proposed use fit? Since Copyright Act exceptions are a defence to infringement, that means exceptions fit somewhere in between. 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.



1. 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/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. On a scale from well-defined common practice in a field (0) to new/innovative/unexplored use case (10) where does the use case fit?



2. 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. On a scale of risk, from rare and insignificant impact (0) to almost certain with catastrophic impact (10), where does the use case fit?



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 not to create an artificial separation between the facts of the situation and 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 on the reasonableness chart (see Figure 10.1 below). In the chart, you'll see three coloured areas: white for reasonable, light grey for questionable, and dark grey 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 where something ends up positioned on the chart. If (and inevitably when) this happens, think about the values at play in your institution and if the disagreement lies in values-based factors or interpretation of facts of the situation.

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. Users might ask for assistance with determining legitimacy. This content might have been available on YouTube for years, or even decades. Even dedicated searching will not root out the source of the content, and the username associated with the account that posted the content is unlikely to provide any clues. Sometimes this 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. If the instructor is linking to this video to share with her students, then 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 non-compliance 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 a CL 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 legal 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, but simply linking to or embedding the content in the learning management system, so there's no direct infringement here. Rating: 5.

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. When searching 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.

Risk: The user wishes to link to the video, so the only copyright risk is in endorsement of 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.

Summary: Showing this video in class seems reasonable based on the factors we have available; see Figure 10.1 (dot 1, purple). 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 and/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 (Byl, Brown & Grossman, 2021).

Values Considerations

In terms of institutional values, we have a highly ranked (1st in Maclean's Education, 2022 and 25th in the QS World University Rankings, 2022) computer science department and an artificial intelligence institute. It would be irresponsible not to teach about it or use it. That doesn't negate our commitment to make decisions in alignment with

the Act, though. This meant we needed to provide guidance about using generative AI services, without the benefit of direction from the law, that recognized that folks were already using it, and they were 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 (Copyright Advisory Committee & Brown, n.d.). In brief, the law hasn't caught up to generative AI, both in terms of copyright of AI created content and in terms of how an AI service might be allowed to use materials in training materials. 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.

Practical: The general public, the post-secondary 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 post-secondary 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, 2023) do not call for a blanket ban on the use of these services. Rating: 5.

Risks: There are ongoing lawsuits from creators against generative AI services, all of which have been filed in the United States. There are no lawsuits ongoing in Canada. We don't know the provenance of the materials in the corpuses used in these systems, but if the content were lawfully sourced a fair dealing argument or even an insubstantial use argument would be reasonable to use generated content. The terms of use of the vast majority of these services provide for the users to own or to have broad use rights in the outputs of the prompts they enter, 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.

Summary: In Figure 10.1, 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 using 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. We can infer from cultural practice that meme reuse is expected and has few, if any, social or legal consequences.

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. 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. Memes are near impossible to find a lawful source for even if the originator is known. They are even more complicated to properly attribute. When used for teaching purposes, we could use fair dealing if the content was lawfully sourced. Rating: 4.

Practical: Memes are used across social media and the internet more broadly without permission and often without acknowledgement. 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.

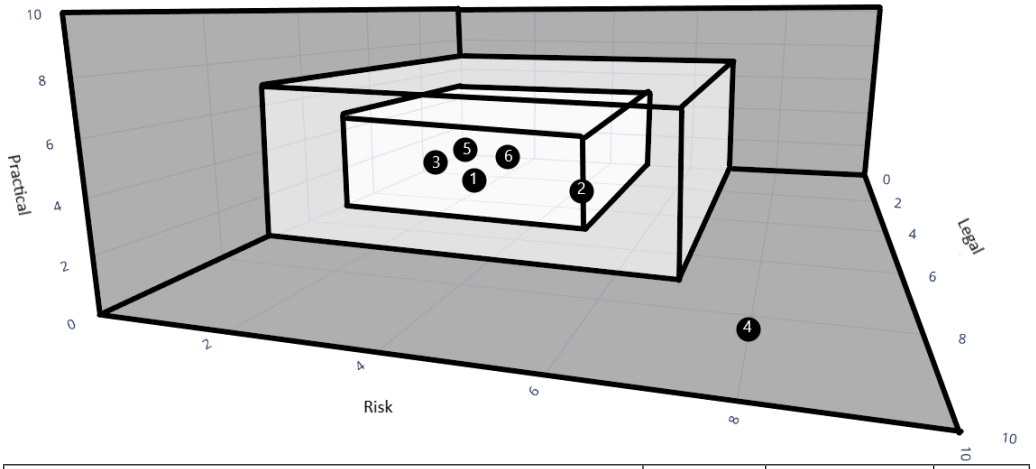
Risk: Memes are used across the internet in a variety of ways. Lawsuits around meme usage have been overwhelmingly connected to commercial usage of the content or to publicity rights (the use of someone's likeness without their permission) (Crockett, 2022; Ferreira, 2016; Borges, 2019; Friend, 2019). It is unlikely that the institution or the instructor will face legal challenge for the use of a meme in a non-commercial, instructional, closed-access teaching context. Rating: 1.

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 reason.

Reasonableness Chart

FIGURE 10.1

Each case above and three additional examples below are plotted on three axes—legal, practical, and risk.



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. 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, etc. Like 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. It matters also 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.

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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