



What Are the Implications if York Loses?

Robert Tiessen
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- Background of Access Copyright & Post Secondary Licencing
- The Original York Lawsuit and What Might Happen Next?
- What Are the Implications if York Loses?

- Founded in 1989
- Officially the Canadian Copyright Licencing Agency
 - Trademarked name *Access Copyright*
 - Previous name *CanCopy*
- Literary Works
- Non-profit owned by 16 publisher & 18 author organizations
- Copibec founded in 1988

- The AUCC (now Universities Canada) negotiated the first model licence with CanCopy in 1994.
- Negotiations over a new licence fell apart in 2010.
 - CCH
 - Copyright Modernization Act
 - Alberta vs. Access Copyright

Obviously after C-60 – the bill that set up CANCOPY – was enacted, we began to negotiate a licence. There was a great fear that we would up licencing away rights to which we should be legally entitled. People thought that if we started negotiating licences, well you could kiss phase II good-bye.

Graham Hill, University Librarian at McMaster.

CARL representative on the AUCC Negotiating Team
Presentation to ARL on Canadian Copyright in 1996.

- University of New South Wales v Moorhouse [1975]
 - Australian equivalent to CCH except it went the other way
 - The UNSW Library authorized reproduction of copyrighted material by operating photocopying machines with no supervision or control over what materials were copied by students ie authorizing copyright infringement.
 - Horror among Canadian education & library administrators

- January – Toronto/Western Deal
- April – AUCC deal with Access Copyright
- June 29 – CMA receives Royal Assent
- June 30 – PSE deadline for signing the new licence with Access Copyright.
- July 12 – Copyright Pentalogy by the SCC

CARL 11 Signed / 12 Opted Out

REGION	INSTITUTION	ACTION TAKEN
WESTERN	Alberta	Licence
	UBC	Opt Out
	Calgary	Opt Out
	Manitoba	Licence
	Regina	Licence
	Saskatchewan	Opt Out
	Simon Fraser	Opt Out
	Victoria	Licence
ONTARIO	Brock	Licence
	Carleton	Opt Out
	McMaster	Licence
	Guelph	Opt Out
	Ottawa	Licence
	Queen's	Opt Out
	Ryerson	Licence
	Toronto	Licence
	Waterloo	Opt Out
	Western	Licence
	Windsor	Opt Out
	York	Opt Out
ATLANTIC	Dalhousie	Licence
	Memorial	Opt Out
	New Brunswick	Opt Out

- 2013 York Lawsuit
- 2014 Bifurcation of the Lawsuit
- 2017 Federal Court Decision

- an injunction prohibiting the defendant and all persons under its authority and control from:
 - i) reproducing or authorizing the reproduction, in whole or substantial part, of all copyright-protected works falling within the *Approved Tariff*; and
 - ii) selling, renting, distributing, exposing or offering for sale or rental or exhibiting in public the copies arising from such reproduction or authorized reproduction

ACTS OF REPRODUCTION AFTER AUGUST 31, 2011

15. The plaintiff claims that the defendant is, and has been since January 1, 2011, obligated to comply with the terms of the *Approved Tariff* if, subsequent to that date, one Educator made or authorized the making of a non-exempted reproduction of one copyright-protected work within the Repertoire.
16. As particularized in Schedule "B" herein, more than one Educator has, on and after September 1, 2011, reproduced, in whole or substantial part, and authorized the reproduction by students and third party copy-shops, in whole or substantial part, of more than one copyright-protected work within the Repertoire.
17. The Educators who have carried out these activities were, to the plaintiff's present knowledge, F. Elavia, V. Patroni, B. Luk, A. Porter and J. Nitzan. The copied versions of said copyright-protected works resulting from such reproduction and authorized reproduction were possessed by the Educators and third party copy-shops for the purposes of sale, offering or exposing for sale, distribution or exhibition in public. The said copied versions have been sold, offered or exposed for sale, distributed and exhibited in public by said Educators and said third party copy-shops.

- ...[York] guidelines authorize and encourage Educators and students to reproduce a substantial part of copyright-protected works, including works within the Repertoire.
- The **arbitrary and purely mathematical extent and systematic**, recurring nature of the reproduction...is not encompassed within the “fair dealing” exemption under the *Copyright Act*.
- In any event, such guidelines are incapable of any effective, reliable or consistent enforcement by the defendant. All such purported “fair dealing” limits have been and will be regularly exceeded... by the Educators and the defendants students.

Violations of York Policy? - From Schedule B

23.	The Myth Of The Machine : The Pentagon Of Power	Anticipations Versus Realizations (ch. 5)	0151639744	L. Mumford		Harcourt Brace Jovanovich	New York	1970
24.	The Myth Of The Machine : The Pentagon Of Power	Mass Production And Human Automation (ch. 7)	0151639744	L. Mumford		Harcourt Brace Jovanovich	New York	1970
25.	The Myth Of The Machine : The Pentagon Of Power	Progress as 'Science Fiction' (ch. 8)	0151639744	L. Mumford		Harcourt Brace Jovanovich	New York	1970
26.	The Myth Of The Machine : The Pentagon Of Power	The Nucleation Of Power (ch. 9)	0151639744	L. Mumford		Harcourt Brace Jovanovich	New York	1970
27.	The Myth Of The Machine : The Pentagon Of Power	The Polytechnic Tradition (ch. 6)	0151639744	L. Mumford		Harcourt Brace Jovanovich	New York	1970

- Not only is the Interim Tariff voluntary, there is no basis under the *Copyright Act* to assert a claim under an interim tariff.
- York is complying with the *Copyright Act*...York is already paying significant amounts to publishers and obtains copyright clearances when needed....
- Course packs within the repertoire of AC produced by 3rd party copy shops licenced by AC.

- Public Domain
- Another licence
- Fair Dealing
- Not part of AC repertoire
- 3rd party copy shop not authorized by York

- In 2014, the lawsuit was bifurcated into two parts.
 - If York wins part one, part two never happens.
- Part one covers whether or not the York Five infringed copyright in the 87 examples in Schedule B.
- Part two will calculate damages and includes discovery.
 - AC will get access to York's records to look for additional instances of infringement.

- July 12, 2017
- York Loses
- York Appeals to the Federal Court of Appeal

So What are the Implications?

So What Happens if York Loses?

- Credit for transactional or publisher licences?
- Enforcement of Guidelines for Faculty
- Fair Dealing Guidelines are Unfair
- Guaranteed Income because of Past Practices
- Mandatory Tariff

- Many Opt Out Institutions are paying a significant amount of money for opting out.
- Transactional Licences
- Licences with Publishers & Aggregators which allow uses that are similar to or better than Access Copyright.

[287] York has argued that because it has separate licences and permissions, the amount of copying at issue is reduced. However, York has conceded that its evidence on licensing information is inaccurate and its ability to marry up copies with the relevant licence or permission is impossible to rely upon.

[78] As established in Lynch's cross-examination, there was no auditing, sampling, or monitoring of compliance. York did not implement safeguards such as periodic reviews. Of the 27% of exposures described as exceeding the Guidelines by the expert Wilk (discussed later), no transactional permissions were sought. **York did not produce a single permission document for any the 1,252 items captured in the sampling.**

[299] Although a portion of this copying was pursuant to permissions, York's evidence on permissions, including its tracking of permissions, was suspect and cannot be relied upon.

- Would other PSEs have the same problems as York in tracking licencing?
- Was Justice Phelan unreasonably harsh?

Compliance

- Is it practical to audit or check teaching faculty and sessionals?
- Can Copyright Guidelines be enforced?
- Does it violate Academic Freedom?

[266] Safeguards were virtually non-existent in the York system. Neither the Copyright Officer nor the librarians (nor anyone else, for that matter) played any role in ensuring **compliance with the Guidelines**. The notice of copyright obligations and the acknowledgement of copyright policies by faculty have proven not to be sufficient to ensure compliance. The absence of safeguards tends towards unfairness

*[46] coursepacks used by York students were produced internally at York ...or externally at third party print shops which were supposed to be licensed by Access.... that was not always the case and some instructors went to a non-licensed print shop, Keele Copy Centre, for which **no sanctions were imposed by the York administration.** This is the foundation for Access's claim that York breached Access's Interim Tariff.*

[58] While York says that it has developed a number of safeguards to ensure that materials on an LMS are only accessible by authorized users, York has no monitoring or enforcement mechanisms to address compliance with copyright laws or even its own policies.

[76] [Patricia Lynch's] evidence confirmed that while she was committed to the protection of copyright, there was no organizational support for monitoring or enforcement of copyright obligations including compliance with the Guidelines. Her job description referred to a role of monitoring and auditing compliance, but she never engaged in those roles and her job evolved away from such mechanisms to one of persuasion and education.

- [77] According to Lynch, the York University Faculty Association objected to any form of monitoring or enforcement of compliance with the Guidelines implemented in December 2010.
- [78] As established in Lynch's cross-examination, there was **no auditing, sampling, or monitoring of compliance**. York did not implement safeguards such as periodic reviews. Of the 27% of exposures described as exceeding the Guidelines by the expert Wilk (discussed later), no transactional permissions were sought. York did not produce a single permission document for any the 1,252 items captured in the sampling.

- [80] None of the professors were subject to any form of process to ensure compliance with the Guidelines.
- [81] ...any form of compliance monitoring or auditing would raise issues of academic freedom with faculty and staff.
- [82] ...compliance with the Guidelines raised internal academic freedom issues that were not worth the “battle”.

[94] Discounting permissions and licences, both parties' experts concluded that approximately **11% of documents in the LMS sample exceeded the Guidelines**. Not only is this a significant amount of unauthorized copying even if the Guidelines are assumed to be a valid response to copyright claims, but if the Guidelines are not valid (as found by this Court), then the amount of unauthorized copying is significantly higher.

[161] The Five Professors appeared at the trial to attempt to explain what they had done. Two professors assumed that copyright had somehow been taken care of, without taking any steps to confirm this one way or the other. One of the five assumed that Keele had obtained the necessary licences and the remaining two professors assumed (Court underlining) that the copying was covered under fair dealing.

[244] It is instructive that, despite York's acceptance that the Keele copying was outside of the Guidelines, it produced no evidence of any **disciplinary actions** taken against the professors, nor did it take any significant or effective **remedial action**.

- Copying at a single location under the supervision and control of research librarians in the Great Library contrasted with no effective supervision, control, or other method of “gatekeeping” at York;
- A policy strictly applied and enforced by librarians versus virtually **no enforcement of the Guidelines by anyone in authority at York**;
- Single copies made versus multiple copies;
- A large amount of *ad hoc* or situational copying for users at the Great Library contrasted with the mass systemic and systematic copying at York; and,
- An absence of negative impacts on publishers in *CCH* as contrasted with the negative impacts on creators and publishers caused or at least significantly contributed to by York.

- Have other PSEs been as lax in enforcement as York?
- Compliance will need to be taken far more seriously, if PSEs aren't already.
- There will be conflicts on this with faculty associations. YUFA isn't uniquely concerned about academic freedom.

Fair Dealing Guidelines

Are the copyright guidelines really unfair?

- Systematic or industrial level copying.
- Aggregate copying rather than whether or not each transaction is a fair dealing?
- Bright Lines

[14] York's own Fair Dealing Guidelines are not fair in either their terms or their application. The Guidelines do not withstand the application of the two-part test laid down by Supreme Court of Canada jurisprudence to determine this issue

- Total exposures rather than exposures per FTE
- [17] *the data is not sufficiently disaggregated to draw conclusions about smaller sub-groups*
- [18] *large volume copying tends toward unfairness*

[261] Of even greater significance is that in *CCH*, the copying at issue was that of a single copy of a reported decision, case summary, statute, regulation, or limited selection of text from a treatise. It was not the mass copying of portions of books, texts, articles, entire artistic work, or portions of collections, nor was it the multiple copying of those materials into coursepacks or digital formats.

[301] It is relevant to consider the aggregate volume of copying by all post-secondary institutions that would be allowed if the Guidelines or similar policies were adopted. There is a problem with the current data because of unreported copying. However, when all such institutions were licensed, they produced 120 million exposures of published works per year in printed coursepacks alone.

[311] ...Similarly, referring in argument and questioning to Margaret MacMillan's superb book *Paris 1919: Six Months That Changed the World*, numerous chapters could individually be segregated for use in different courses, effectively eviscerating the copyright protection on the book.

[29]...unlike the single patron in *CCH*, teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*. Moreover, as discussed in the companion case *SOCAN v. Bell*, the “amount” factor is not a **quantitative assessment based on aggregate use**, it is an examination of the proportion between the excerpted copy and the entire work, **not the overall quantity of what is disseminated**. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a different factor: the “character of the dealing”.

- [324] It is one thing for a teacher to have the school librarian run off some copies of a book or article in order to supplement school texts, and it is quite another for York to produce coursepacks and materials for distribution through LMSs, which stand in place of course textbooks, through copying on a massive scale.

[20] Quantitatively, the Guidelines set these **fixed and arbitrary** limits on copying (thresholds) without addressing what makes these limits fair. The fact that the Guidelines could allow for copying of up to 100% of the work of a particular author, so long **as the copying was divided up between courses**, indicates that the Guidelines are arbitrary and are not soundly based in principle.

[317] Where a chapter from a book can stand alone and be important enough to be taken from the whole for inclusion in a course's required reading, there is little doubt that the copied part is qualitatively significant to the work and to the author's contribution.

[56] The amount taken may also be more or less fair depending on the purpose. **For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision.** However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

[128] There is much to be said for the Board’s adoption of a bright-line rule. It provides guidance to government employees concerning what copying is permitted because it is insubstantial. The respondents other than British Columbia suggest the following (at para. 107 of their memorandum) and I agree:

In the absence of the bright line rule adopted by the Board, individual government employees would obviously reach widely varying conclusions as to what is, and is not, a substantial part of a published work. One employee, for example, could consider 1% of a work to be substantial while another could set that threshold at 5%. To avoid such different, and likely conflicting, interpretations as to what the term “substantial” means, [we submit] that **the bright line rule established by the Board is entirely reasonable.**

[70] The **availability of a licence is not relevant to deciding whether a dealing has been fair**. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.

- [329] While as a general principle this factor favours York and its asserted fairness, the level of fairness is diminished because York has not actively engaged in the consideration or use of alternatives which exist or are in development.
- [330] There are alternatives – these include using custom book services, purchasing individual chapters or articles from the publisher, or purchasing more of the necessary books and articles. **There is just no reasonable free alternative to copying.**

Guaranteed Income

- When the AUCC signed the licence with Access Copyright in 1994 there was a concern that the licence signed away fair dealing rights permanently.
- Does a past practice of paying Access Copyright licences guarantee future income for Access Copyright?

[119] As the evidence of the York witnesses confirmed, post-secondary education budgets are being tightened but the demand for services (materials) is expanding. **The absence of tariff payments, the Guidelines, and their non-compliance results in the wealth transfer referred to by Dobner from copyright owners to educational institutions.**

- [166] York was faced with the question of how to handle the elimination of the per page charge and the increase from \$3.38 per FTE to \$45 per FTE. It was also concerned with the increased record keeping and reporting obligations imposed by the Proposed Tariff, especially with respect to digital copies.
- [167] As matters developed, it chose to ignore the FTE charge, ignore any reporting or record keeping obligations, and develop its own Fair Dealing Guidelines to shield it from the consequences of copyright claims.

- **[173] Even as York was subject to its agreements with Access, it was planning to avoid future agreements** and was examining the use of fair dealing guidelines. On December 22, 2010, it implemented its own Guidelines modelled on those developed by the AUCC.
- **[174] Just before the expiry of the York-Access agreement, York administration advised its faculty and staff that upon such expiry, copies could still be made if there was permission or a licence from the copyright owner or if copying was done within its definition of “fair dealing”.**

[226] ...York was in a position to apply to judicially review the Board's decision and had sufficient knowledge and the legal status to do so – it did not. It waited until these proceedings to question the Board's decision. In fact, it complied with the Interim Tariff until it implemented the Guidelines. **It appears that York's position was that it could opt out of the Interim Tariff at any point it chose.**

[336] Not all the works at issue are written by scholars and faculty who do so as part of their academic duties. Many of the works covered by the Guidelines are written by professional writers or by academics acting beyond their purely academic role. The works are published by professional commercial publishers. Most of **these people are attempting to make a living from writing and publishing.**

[350] As pointed out by Access, the problem of quantifying the impact of the Guidelines on sales is that **copying under the limits now set out in the Guidelines has been occurring for 20 years**. There is no baseline for quantification because the copying had already been substituted for the original. However, under the prior circumstances, the creators and publishers were paid. The loss of revenue to Access is an appropriate surrogate for the nature and quantity of copying and for the negative impacts.

How do we counter the story that past educational practice guarantees future income for Access Copyright?

Mandatory Tariffs

- Phelan claims to agree with SODRAC that tariffs are not mandatory.
- How many violations of a tariff have to occur before a tariff is mandatory?

- [112] I conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users.
- [113] I find that licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline.

[220] If York did not copy any works in Access's repertoire, if it obtained proper permission to copy those works, or if the copying was exempt by law – the fair dealing defence and counterclaim – then the tariff would not be applicable. Absent these conditions, the tariff is mandatory.

- [12] York’s reliance on the Supreme Court’s decision in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 [*SODRAC*], is misplaced because the provision for tariff setting in the present case is distinct from the provisions for licence-term arbitration relevant to the *SODRAC* decision.
- [13] While there are several exceptions to the Act and to the provisions governing tariff setting, including statutory defences such as “fair dealing” and exceptions for obtaining permission for reproduction, these are nevertheless exceptions to an otherwise mandatory scheme. Further, those exceptions are not applicable in these circumstances.

- [239] ...the actions of the Five Professors, in conjunction with Keele, were contrary to the Interim Tariff. Further, the sampling exercise done for the purposes of this litigation established that multiple sets of coursepacks were printed without the permission of the owner. This type of printing went unreported to Access and unpaid, despite the requirements of the Interim Tariff.
- **[241] The unauthorized copying triggered obligations under the Interim Tariff. Those obligations were the obligations of York, which is legally responsible for that copying.**

- [243] While York may not have specifically authorized the offending copying, those acts were so closely connected to the professors' authorized employment activities as to render York vicariously liable.
- [245] York's approach to these copyright infringing actions is consistent with its wilfully blind approach to ensuring compliance with copyright obligations, whether under the Interim Tariff or under the Fair Dealing Guidelines.

- Better Records
- Compliance, Enforcement, Auditing
- PSE needs a better narrative
 - Guidelines
 - Guaranteed Income
 - Mandatory Tariff

- [120] They were not able, either collectively or individually, to overcome the merits of the Plaintiff's experts...[York's] experts were much more focused on criticizing the Plaintiff's experts than on providing the Court with alternative conclusions
- [137] He does not offer a substantial alternative viewpoint but merely offers criticism of PwC