

Seeing the Whole Picture: Insights into Copyright Risk Literacy in Higher Education from Enterprise Risk Management

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For anyone who regularly fields questions related to copyright in a higher education or research setting, a common thread quickly emerges from the wide variety of queries received: the inquirer's desire for a clearly prescriptive response. Users want to be told what they can or cannot do. However, in many cases, a yes or no response is not appropriate or even possible.¹ Matters of copyright are often open to interpretation and fraught with uncertainty and, as such, there is a range of possible courses of action, depending on the inquirer's appetite and/or tolerance for risk. Consequently, a major component of the work of those in a copyright education or advisory role is engendering copyright risk literacy in our users and clients to make informed decisions about their copyright-related activities.

This chapter engages with the concept and practice of enterprise risk management (ERM) to explore what insights it may give to librarians and

patrons to understanding the copyright issues that affect higher education institutions. By looking at copyright risk through the lens of an ERM framework, librarians and copyright advisors can engage their users with an understanding of copyright risk in a research or academic environment that does not begin and end with legal risk but may extend to reputational, operational, and strategic risk. In addition, instead of viewing copyright risk activities in isolation, as a danger to be avoided wherever possible, an ERM approach can facilitate a more nuanced grasp of copyright risk within the context objectives and activities of the entity taking the risk, be that at an institution, a department, a particular project, or an individual.

This chapter begins by introducing the spectrum of copyright-related risk that exists in a research/higher education context. It then discusses some the sources of this risk, including new legislation, court decisions and new interpretations of existing law, and reviews some of the literature and studies suggesting that librarians often approach these risks from a place of caution. This is followed by the introduction of ERM as a conceptual and practical framework and its use in the research and higher education sectors. Three example scenarios are used to illustrate some of the common elements and factors that copyright advisors and librarians engaging with copyright in this environment may grapple with and how they might be viewed and addressed through an ERM framework. The chapter concludes with some reflections on the limitations and possibilities of this approach for librarians.

Copyright Queries and the Continuum of Risk

For a small selection of the copyright queries a librarian faces, a relatively straightforward and definitive answer is possible. For example, if the item that is the subject of the query is no longer protected by copyright due to expiration of the term of protection or the desired course action falls clearly under a specific license or an exception in copyright law, then the user can be given an unqualified go-ahead or a specific set of conditions or directions to render such action risk-free. However, the majority of copyright scenarios a librarian encounters will entail at least some level of le-

gal risk; as one best practices document from the Association of Research Libraries notes: “Perfect safety and absolute certainty are extremely rare in copyright law.”² In these cases, the answer to the question is not a clear yes or no but a highly qualified “it depends.” For these types of queries, taking the desired action exist somewhere on a spectrum of risk, the severity of which is determined the specific facts and circumstances of the scenario.

Sources of Copyright-Related Risk

New Laws, New Court Decisions, New Interpretations

Copyright legislation and practice are constantly evolving, with amendments and new exceptions being introduced on a regular basis and landmark court rulings changing how we interpret and apply existing law. The first few years after a new provision has been introduced, before there is a significant corpus of case law and accepted practice to rely upon, are particularly subject to uncertainty about the parameters of a provision and what actions comfortably fall within its limits. For example, the non-commercial user-generated content or “mashup” exception introduced into Canadian law by Bill C-11 in 2012, which allows individuals to create new work from existing copyrighted works and to disseminate them for non-commercial purposes, has enormous potential but has yet to be tested in the courts.³ As such, the scope of the exception is open to interpretation and the librarian or copyright advisor may feel uncertain about suggesting that her users take full advantage of the exception.⁴ Would posting a video-game modification created for educational purposes on the open worldwide web be considered to “have a substantial adverse effect, financial or otherwise” on the market for the original work (one of the pre-conditions of the exception)?⁵ What about using in-copyright photos on a personal blog? Until such use cases have been put to the test, the viability of taking advantage of this exception for a variety of potential applications is left to the judgment of the user or advisor and, as such, presents a potential risk of copyright infringement.

When cases involving exceptions to copyright law do come before the courts, this can have a significant effect on how risky actions associated with the case are perceived to be. In some cases, accepted and widespread practices may suddenly be called into question when they become the

subject of legal action. For example, the lawsuit brought against York University by the Canadian Copyright Licensing Agency (known as Access Copyright) regarding educational copying for course readings was seen by some as casting doubt on the legal robustness of the fair dealing guidelines that York and many other Canadian postsecondary institutions rely upon to regulate educational copying.⁶

Fair Use and Fair Dealing

The area of copyright law and practice that is perhaps the most prone to uncertainty and where both users and librarians feel the weight of risk most fully is most certainly fair use and fair dealing. As Kenneth Crews notes:

Fair use is indefinite, vague, deliberately flexible, deliberately subjective, and intended to apply in different situations.... We always have to evaluate risk, that is, making a judgment about how likely is it that what we are doing is an infringement of copyright. Fair use is an analysis of that risk, and we have to decide how comfortable we are taking this particular risk.⁷

This uncertainty extends to all jurisdictions in which a fair use or fair dealing doctrine has been incorporated into copyright legislation and practice. Historically, the fair use exception in US copyright law has been more flexible and all-encompassing than fair dealing provisions in other territories, where fair dealing is generally limited to the enumerated purposes, such as research and news reporting. However, scholarship indicates that fair dealing, especially in Commonwealth countries, is starting to more and more closely resemble US-style fair use.⁸

Librarians as Traditionally Risk-Averse in Copyright Matters

For many librarians, an awareness of copyright-related risk along with a fear of legal and possibly financial liability for themselves or their users has led to the adoption of a risk-averse approach.⁹ In advising patrons on

copyright, librarians often start from a position of minimizing risk rather than establishing and asserting the rights their institutions and users may avail themselves of under law.

A 2010 ARL report on fair use in academic and research libraries provides an extensive and far-reaching list of some of the ways in which librarians in research libraries reported placing restrictions on research and teaching activities that arguably comprise the main goals of research universities out of uncertainty and fear of the applicability of fair use.¹⁰ In addition to the frequently explored chilling effect on digitization initiatives, such restrictions also included limitations on courses, research projects, researcher access to collections, inadequate provision of learning materials to students with disabilities and allowing the deterioration of collections in near obsolescent formats. In line with this study, Smith contends that copyright in higher education is frequently looked upon, “not as a subject of risk management but as an obstacle, that must be avoided completely or allowed to completely block a desired...project.”¹¹ Library administrators are fully cognizant that the daily operations of running a library involve some degree of legal risk, for example, liability for injuries suffered onsite and put in place maintenance procedures and policies to mitigate that risk. However, when it comes to copyright risk, this pragmatism toward risk management seems to evaporate and, as a result, risk aversion often takes precedence over educational or research objectives or priorities, with “decisions...being made not based on scholarly needs or the importance of the material itself, but merely to avoid controversy and risk.”¹²

Risk Management and Enterprise Risk Management

Traditionally associated with insurance to protect industries, businesses, and individuals against losses incurred as a result of unforeseen events, risk management is the process of identifying and assessing risks that have the potential to negatively impact the operations of a business or organization and subsequently taking steps to minimize those risks, so that the negative consequences are lessened.¹³

An ERM framework builds upon the basic principles of traditional risk management but conceives of risk in a more multi-dimensional fashion. Instead of examining individual risks in a silo, ERM attempts to look at the effect of risks holistically across an organization. Risks are identified and assessed in relation to how they affect the entity's ability to attain its organizational goals. After risk assessment is conducted, the organization or business selects an appropriate response aimed at minimizing the identified risks, with the understanding that taking on a certain level of risk is often necessary to achieving those goals. Instead of conceiving of risk as a purely negative element, to be avoided to the extent possible, ERM views risks as inseparable from reward, positing that erring toward extreme risk aversion diminishes the potential gains or advances that an entity might make toward its objectives.¹⁴

ERM in Higher Education

ERM has gained prevalence as a risk management strategy over the past decade both in practice and as the subject of academic research. In addition to widespread use in the private sector, particularly in business, finance, and industry, ERM has been adopted increasingly in recent years by a wide variety of organizations in the non-profit and public sectors. Though perhaps not as pervasively as in other sectors, the ERM framework has also been implemented in the higher education sector, with many universities using ERM frameworks or operating ERM offices to manage risk across the institution.¹⁵

At first glance, the application of a framework designed for a corporate environment might appear to be an odd fit for the regulation of a higher learning environment. While both public and private universities and colleges are concerned with profit and financial stability, these goals or concerns are ancillary to the main aim of institutions of higher education—that is, “to gather, develop, and disseminate knowledge.”¹⁶ However, scandals, losses, and mishaps in the sector have led to increased media attention and demand from stakeholders to address risk around a plethora of university activities, such as investments and spending, privacy, conflicts of interest, information technology, security, fraud, research compliance, and transparency.¹⁷ In addition,

the structure of ERM is adaptable to a higher education environment by allowing an organization to frame risks in relation to the main goal of furthering knowledge.

Sources and Types of Copyright Queries in a Research/Higher Education Environment

One of the most rewarding and challenging aspects of answering copyright queries in a higher education context is the breadth and diversity of both the users served and the nature of their questions. Copyright touches every aspect of the operations and activities of the university, and questions can come from administrators, researchers, instructors, students, and student groups.¹⁸ The following scenarios, while by no means exhaustive, are illustrative of both the scope and variety of the type of queries librarians working in these environments may encounter.

Scenario 1:

As part of a grant-funded project, a faculty and postdoctoral music research group designed a website on which they plan to upload sound files of short clips of canonical performances of a selection of pieces of music. Each clip is accompanied by a critical discussion of technical aspects of the performance and the site is set up to crowdsource transcriptions of the clips, which the research group will subsequently analyze.

Scenario 2:

The history department has a collection of departmental meeting minutes, letters, notes, and other documentation that date from the time of a major social movement when the department was the site of protests and sit-ins. The department believes that the documents are of scholarly and public interest and would like to make them widely available online, but the works have multiple unknown authors.

Scenario 3:

A student intern at the university art gallery has been tasked with promoting a little-known collection of the original artwork for mid-cen-

tury advertisements to the university community for research and object-based teaching and learning. She would like to post photographs of the work on gallery's social media pages along with curatorial notes and suggestions for how the works might be used for teaching in various disciplines at the university.

The above scenarios are emblematic of the diversity of stakeholders, materials, and uses and copyright statuses of works librarians may face when advising on matters of copyright in a research or higher education environment. Different stakeholders may vary in terms of copyright knowledge and relationship to the institution faculty. In the above scenarios, in scenario 1, there are faculty and postdoctoral researchers as well as members of the public involved; scenario 2 may include faculty (including emeritus faculty), alumni, and administrators, whereas the main actor in scenario 3 is a student. The profile, copyright status, and rightsholders of the works are also diverse, with scenario 1 dealing with publicly available, creative and potentially highly commercialized works with known creators; the documents in scenario 2, conversely, are mostly unpublished and likely of little commercial value, with many of them constituting orphan works whose rightsholders may never be discovered. Scope and mode of dissemination also vary with scenario 1 dealing with an open website and scenario 3 working with social media. All of these factors may have an effect on the scope, urgency, and risk involved in the query.

Application of the ERM Framework to Copyright Issues in a Research/Higher Education Context

This section outlines the components of an ERM framework in the context of a higher education or research environment and then discusses some of the ways in which these components might be applied when dealing with copyright quandaries in such an environment, with reference to the above example scenarios to illustrate specifics. The ERM literature refers to the enterprise whose risk is being managed as the entity. In applying this framework to copyright queries in higher education, the entity in question may refer to the institution as whole but could equally be

applied to an academic or administrative unit, a library, research group, or a category of users, such as instructors or students.

There are a variety of articulations of ERM frameworks developed by professional associations and consultants, and many organizations use a customized framework,¹⁹ but at its base, it consists of eight interrelated components: understanding environment, objective setting, event identification, risk assessment, risk response, control activities, information and communication, and monitoring.²⁰

1. Understanding Environment

The starting point of setting up an ERM framework is to establish an understanding of the culture of the entity, which includes its values as an organization and its appetite for risk. Given the diversity of disciplines and the variety of academic and administrative units in a university, it can be difficult for librarians to get a handle on the context in which a particular copyright conundrum is taking place.

In a higher education setting, both formal and informal tools can be used to get a sense of the institution's culture. For example, the mission statement of the university, library, or other unit can be a good source of information about how that organization self-identifies and articulates its overarching goals. A mission statement may also provide clues about the entity's appetite for risk, with words like "innovation," "cutting-edge," "leader," and "change" suggesting a higher tolerance for risk in the service of goal attainment. Where an institution already has a formal risk management practice in place, there is likely to be existing documentation where many of these elements are made explicit.

Moving from the institution level to understanding the environment of a department, research group, or project, sector and discipline-specific best practice documents can help flesh out the context in which a copyright issue is being raised by outlining the major issues users in that area face, what is considered accepted practice, and providing a general sense of the spectrum of risk-tolerance or appetite in that context.²¹ Finally, any communication that the librarian or copyright advisor engages in with the user, from a reference interview to casual conversation, can help draw out useful contextual information about the entity's culture and attitude toward risk.

2. Objective Setting

In order to understand the potential impact of both positive and negative events on the organization, it is necessary to first identify the entity's main goals, both strategic and operational. Many entities will have a strategic plan or objective documents, at the institutional level and within academic or administrative units, which will detail both the strategic goals and, in many cases, the concrete metrics by which the entities measure whether said goals are reached. At the research group or individual level, research plans or grant proposals can provide a good indication of the desired objectives.

It is easy to focus on the intricacies of the copyright issues; however, bearing in mind the user's wider objectives throughout the process of grappling with the copyright issues will help both the user and the librarian to understand what level of risk is necessary or appropriate in the service of achieving those objectives, be they learning or teaching objectives, the answering of research question, or communication and outreach goals. A coherent cost-benefit analysis of taking a copyright risk is possible only with a nuanced understanding of how taking the risk helps the user meet an objective or how not taking that risk would interfere with the user's ability to achieve said objective. In addition, understanding the user's objective can also be essential for the purposes of making a fair use or fair dealing determination, as educational and non-profit uses are more likely to sway an activity toward falling under this exception than use for commercial or purely decorative purposes.

Thus, articulating the entity's objectives may also help both the user and the librarian or advisor to understand where and how the activity that is the subject of the copyright concern fits in with its goals and, as such, how risk can best be managed while adhering to those objectives.

3. Event Identification

Internal and external events with the potential to affect the ability of the entity to achieve its objectives must be identified, distinguishing between risks and opportunities. Risks and opportunities are considered in relation to their potential to have a negative or positive impact on the organization's ability to achieve these objectives.

In order to properly identify potential risks, an ERM framework will provide a set of categories of risk that could affect the organization's ability to undertake regular operations and to carry out operational and strategic goals. A typical set of categories might include external (which may include risks from other actors, such as competitors and suppliers or environmental risks, such as natural disasters); financial (changes in financial markets, credit or currency fluctuations); operational (having to do with continuity in the day-to-day operations, including business and administrative, physical plant/estates, etc.); strategic (relating to the entity's business strategy, governance, and external relations); regulatory/legal (compliance with applicable laws and regulations); informational (risks associated with intellectual property and IT).²² In a higher education context, these categories of risk may differ slightly to account for the unique context and the nature of the educational and research environment. In addition to the above, risk categories in higher education may include those related to student/faculty/staff experience, including morale, injury, or illness, and risks relating to continuity in teaching and research activities.²³ There is a distinct lack of consensus in higher education ERM frameworks as to whether reputation constitutes a distinct category in or whether risk to the institution's reputation is implied in the each of the foregoing categories, but in any case, there is a recognition that risk to reputation can have a major impact on the operational and strategic continuity of a university.²⁴

As discussed above, in a copyright context, risk has traditionally been conceived of purely legal risk, perhaps stretching to attendant financial risk. This prompts educational organizations to ask: "What is the risk that we will commit copyright infringement by virtue of this act, have legal action brought against us by the copyright holder, and consequently be held financially liable?" However, approaching risk identification from an ERM perspective provides a space to factor other types of risk into a copyright risk management approach. For example, in the case of the music research website in scenario 2 one risk is that one or more of the copyright holders of the works will either ask or compel the researchers to remove one of the performances from the website. Negative consequences of this could include an interruption of the research process and the resultant inability to collect robust data for analysis, thus jeopardizing the integrity of the research results. If the website has been listed among the expected outputs in the grant proposal, this may also affect the princi-

pal investigator's ability to write a satisfactory end of grant report which could subsequently have a negative effect on the research group's ability to get funding in the future. Conversely, the opposite action, i.e., not taking the risk of posting the material online, will also have a negative effect on the group's ability to achieve its research objectives.

Recently, projects examining risk in the context of large-scale digitization by libraries have also begun to recognize reputational risk as a factor in the making copyright decisions.²⁵ For example, reputation was a major concern in the risk-assessment process of the Wellcome Library's Code-breakers project, which digitized roughly 1.6 million pages of books and archival material relating to the history of genetics, much of it still in copyright.²⁶ Project partners feared that if copyright clearance procedures were seen to be less than robust by donors or members of governing boards, this would damage their institutional reputation.²⁷ However, the Wellcome also has a well-established reputation for advocating open access, which was further affirmed by the successful completion of this project.²⁸

4. Risk Assessment

Once risks are identified, they should be analyzed along in order to evaluate (1) the likelihood that they will occur and (2) the impact they will have on the entity if they were to occur. In this way, the entity can begin to determine whether the potential benefits or opportunities that arise from taking the risk outweigh the possible costs that those risks entail.

In order to assist with this assessment, organizations will often develop a scale with descriptive and sometimes quantitative definitions to help illustrate what each level of likelihood and each echelon of severity of risk means within that organization's context. In developing the scale, several factors might be taken into account. For example, the risk of being compelled to remove materials from a website is likely to be higher when dealing with the works of an identified rightsholder with a history of actively defending their copyright through litigation or otherwise. Potentially litigious rightsholders may be identified through press coverage or a search of legal databases. The music research group in scenario 1 may already be aware of which record labels have a reputation for crawling the web for their content and issuing takedown notices and which are more amenable to innovative non-commercial uses of their work and can build this information into their risk assessment.

Knowledge sharing with peers can also provide useful information about whether certain types of activities have resulted in negative consequences in the past, which can help users to gauge the risk of undertaking such behavior in the future. This was the recommendation of a 2013 study of library copyright policy and practice around electronic reserves.²⁹ The experience of the libraries surveyed as part of the study indicated that publishers did not seem to be targeting e-reserves for legal action, but that since these experiences were not being shared among institutions, libraries had an inflated sense of the level of risk they faced. The art gallery in scenario 3 may be able to gain a greater sense of the likelihood of rightsholders asserting objections to their works being reproduced on social media by reaching out to peers with similar collections and initiatives to learn about their experiences.

5. Risk Response

Following the assessment of the identified risks, the entity should decide how it will respond to each of the identified risks, by selecting one of four courses of action: avoiding, accepting, reducing/mitigating, or transferring/sharing risk. Ideally, this choice will align with the entity's risk tolerances and risk appetite.

Avoidance

In the event that the risk is deemed too high or the perceived cost outweighs the perceived benefit, librarians may suggest ways for the user to avoid the risk completely either by refraining from the risky activity entirely or perhaps by pursuing an alternative. For example, if the art gallery in scenario 3 determines that posting on social media images of works with unclear copyright status is too big of a risk to take, they may elect to post similar Creative Commons licensed or public domain images instead, with promotional text indicating that there are analogous works in the collection that can be used for teaching purposes.

Mitigation/reduction

Reducing risk to a level that is acceptable to the user or institution may be achieved in a variety of ways. Risk mitigation can be achieved by reducing either the likelihood that a negative event will take place and/or by reducing the impact such an event will have if it does occur.

A common risk reduction strategy in the area of copyright is seeking permissions from rightsholders. Even in cases in which the rightsholders cannot be located or are unresponsive, documenting steps taken in this regard can be helpful in demonstrating the user's diligence and desire to respect the rights of the copyright holders. This can help diffuse conflicts in and reduce the risk of litigation.³⁰

There are several additional risk mitigation strategies available to the users the scenarios discussed in this chapter. In scenario 1, in keeping with best practices for sound recordings and in order to help tip the balance toward fair use/fair dealing, several measures can be taken that should not have a significant adverse effect on the group's research goals.³¹ Among these steps, access to the music clips on the website may be limited to streaming only; a click-through terms-of-use screen could be added requiring users to agree that they will not attempt to copy or redistribute the clips and that access is being made available for research purposes only before accessing the site.

Sharing or transferring risk

In some cases, it may be possible to transfer all or some of a specified risk to another entity. Within industry ERM frameworks, this is often accomplished through insurance for some types of financial, incident, or natural disaster-related risk. For copyright risks, this may take the form of indemnification by another party. For example, since the history department in scenario 2 wishes to make part of its archive widely available, if it is deemed to be of sufficient interest, it may look into partnering with a content vendor or cultural memory institution, which, as part of their agreement, may agree to compensate them for any cost or losses incurred in the event that the rightsholders decide to take legal action for copyright infringement.

Accepting

Users may decide that a risk is sufficiently low, either inherently or due to the implementation of a risk reduction measure, that they are willing to actively accept it as part of their organizational strategy because the potential benefits that may be gained by engaging in the risk activity are such that they outweigh the possible negative consequences that may ensue. As part of an ERM framework, many organizations employ a rubric for determining the appropriate response to different levels of assessed

risk, depending on the likelihood that the risk event will materialize and the impact that it will have on the organization in the event that it does, such as the example below:³²

Likelihood	Impact	Response
High	High	Avoid
Low	High	Reduce/Mitigate
High	Low	Transfer/Share
Low	Low	Accept

6. Control activities

Once risk responses are selected, policies and procedures are designed, formalized, and put into practice so that the measures to manage identified risk are adopted efficiently and methodically. This may take the form of a project plan and workflows for each measure. For example, should the history department in scenario 2 decide to make attempts to locate and ask for permissions from the rightsholders of their archive, such efforts should be planned out and then documented in a coherent and systematic fashion.

7. Information and communication

Once the strategies for dealing with risk are established, the processes needed to carry these out should be communicated throughout the entity. In a copyright context, this might mean making sure workflows, project plans, and other documentation are made available to any affected stakeholder. This can include both those involved in carrying out the project as well as the public and/or rightsholders. For example, if the history department elects to make its archive available on a public-facing website, communication may include a section of the website which details attempts to locate copyright holders and invites anyone with information regarding possible rightsholders to come forward.

8. Monitoring

Once risk control activities are put into place and communicated to stakeholders, the risks should be monitored on a regular basis and modifications made as necessary if the risk shifts due to internal circumstances or changes in the legislative policies or laws.

Conclusions: ERM for Copyright Librarianship

Application of the entire ERM framework to copyright queries may not be practical or even possible in every setting. Time constraints often make it difficult to pursue any investigation outside the immediate scope of the query. Information about organizational culture, goals, and objectives and appetite for risk is not always available or easy to find. Users may be reticent or unwilling or unable to invest the time and effort required to provide much of this contextual information. In addition, smaller projects or relatively straightforward queries may not merit a full ERM-style analysis.

However, regardless of the scope of the ERM analysis, application of elements of the ERM framework for risk analysis and management can enable both librarians and their users to have a better sense of their institutions' priorities and appetite and tolerance for risk. This, in turn, can facilitate a more balanced and nuanced cost-benefit analysis when grappling with copyright issues and will allow users and librarians to make a more effective case for recommendations in this area to their administration.

Another insight of ERM that can be brought to bear on the copyright decisions librarians make and the advice we give is the inseparability of risk and opportunity. ERM asks us to consider not only what the risks are in taking a given set of actions but also the risk of *not* acting. What opportunities are lost when we adopt an entirely risk-averse approach? Considering copyright queries through the lens of an ERM framework brings to the fore that taking some degree of risk is inescapable and often necessary to obtain our objectives.

Endnotes

1. As one librarian put it, "For non-copyright queries, the answer is yes or no or a series of instructions. For copyright queries, the actual answer is maybe, maybe—and that is why it is different—you can't give them the answer they want." Chris Morrison and Jane Secker, "Understanding Librarians' Experiences of Copyright: Findings from a Phenomenographic Study of UK Information Professionals," *Library Management* 38, no. 6/7 (July 24, 2017): 30, <https://doi.org/10.1108/LM-01-2017-0011>.

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5. Copyright Act, R.S.C 1985, c. C-42 (2017), <http://laws-lois.justice.gc.ca/eng/acts/c-42/index.html>.
6. Beginning in 2011, an increasing number of Canadian postsecondary institutions have elected not to renew licenses with copyright collectives to cover copying of works for educational purposes, instead managing copyright clearance at an institutional level, in part through the establishment of fair dealing guidelines. A number of factors likely contributed to this movement away from licenses, including a significant increase in the costs being charged for the licenses, a Supreme Court ruling in favor of teachers copying and distributing selections of works as fair dealing, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2 SCR 345 (SCC 2012), and the addition of "education" as one of the enumerated fair dealing purposes to the Canadian Copyright Act in 2012. Lisa Di Valentino, "Laying the Foundation for Copyright Policy and Practice in Canadian Universities," Electronic Thesis and Dissertation Repository, November 29, 2016, <https://ir.lib.uwo.ca/etd/4312/>. York was one of the earlier institutions to opt out of a license with Access Copyright (the copyright collective agency for literary works in Canada except for Quebec). Access Copyright responded to York's decision not to renew its license by bringing legal action against the university. The case concerned two main issues: (1) whether an Interim Tariff issued by the Copyright Board of Canada for reproduction in postsecondary institutions of works in Access Copyright's repertoire was mandatory and enforceable against York; and (2) whether the fair dealing guidelines York used to guide educational copying were fair within the meaning of Section 29 of the Canadian Copyright Act. As of the time of writing, the case has been decided in favor of Access Copyright on both counts and York has filed notice of appeal. Anqi Shen, "Federal Court Rules against York University in Fair Dealing Case," University Affairs, July 25, 2017, <https://www.universityaffairs.ca/news/news-article/federal-court-rules-york-university-fair-dealing-case/>.
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26. Stobo, Deazley, and Anderson, "Copyright & Risk."
27. *Ibid.*, 43.
28. The Codebreakers project was successful in making a relatively high proportion of the desired material (most of which was in-copyright) available on the Codebreakers website using a combination of rights clearance and risk-assessment where permissions were not obtained. Regarding library material (published books), the Wellcome Library was able to make available 1357 of the 2025 works originally selected for inclusion. Of these, 48 percent were made available outright, with 19 percent put online using a risk-managed approach (e.g., released in phases according to date of publication without a download option). For archival material, rightsholders were identified and contacted for 84 percent of the material and 134 letters were sent seeking permission. Of these, 103 rightsholders responded, with all but two granting permissions. For those remaining works where rightsholders could not be identified or located or did not respond, a risk assessment was performed weighing such factors as whether the creators had intended for the material to be widely disseminated (e.g., AIDS awareness posters), whether the content was created for commercial purposes and the relationship of the creator to the donor archive. Low-risk materials were then placed online, with or without delay, and high-risk materials set aside. The high success rate in gaining permissions for this project may issue in part from the subject matter, as scientists and academics working in the field of genetics "may be more positively disposed towards the aim of open access to research than, for example, commercial authors." Stobo, Deazley, and Anderson, "Copyright & Risk," 20. In Stobo et al.'s report, the risk assessment process is characterized as finding a balance between preserving the trusted reputation of the Wellcome Library and upholding its commitment to open access.
29. David R. Hansen, William M. Cross, and Phillip M. Edwards, "Copyright Policy and Practice in Electronic Reserves among ARL Libraries," *College & Research Libraries* 74, no. 1 (2013): 69–84.
30. Hansen outlines four legal strategies to reduce the likelihood of a dispute under these circumstances: (1) using quitclaim grants to obtain partial permissions from authors and others; (2) obtaining broader voluntary permissions from larger rightsholders or collective organizations; (3) using class action lawsuits to clear rights in large numbers of works; and (4) challenging standing of potential litigants. David Hansen,

- "Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works," 2016, <https://dash.harvard.edu/handle/1/27840430>.
31. "Fair Use and Sound Recordings: Lessons from Community Practice," Center for Media and Social Impact, accessed December 9, 2017, <http://cmsimpact.org/code/fair-use-sound-recordings/>.
 32. Adapted from Marchetti, *Enterprise Risk Management Best Practices*, 42.

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