Document generated on 04/24/2024 4:14 p.m.

Partnership
Canadian journal of library and information practice and research
Revue canadienne de la pratique et de la recherche en bibliothéconomie et sciences de l'information

Controlled Digital Lending of Library Books in Canada
Le prêt numérique contrôlé des livres de bibliothèque au Canada

Christina De Castell, Joshua Dickison, Trish Mau, Mark Swartz, Robert Tiessen, Amanda Wakaruk and Christina Winter

Volume 17, Number 2, 2022

URI: https://id.erudit.org/iderudit/1095272ar
DOI: https://doi.org/10.21083/partnership.v17i2.7100

See table of contents

Publisher(s)

The Partnership: The Provincial and Territorial Library Associations of Canada

ISSN

1911-9593 (digital)

Explore this journal

Cite this article

De Castell, C., Dickison, J., Mau, T., Swartz, M., Tiessen, R., Wakaruk, A. & Winter, C. (2022). Controlled Digital Lending of Library Books in Canada. *Partnership*, *17*(2), 1–35. https://doi.org/10.21083/partnership.v17i2.7100

Article abstract

This paper explores legal considerations for how libraries in Canada can lend digital copies of books. It is an adaptation of A Whitepaper on Controlled Digital Lending of Library Books by David R. Hansen and Kyle K. Courtney, and draws heavily on this source in its content, with the permission of the authors. Our paper considers the legal and policy rationales for the process—"controlled digital lending"—in Canada, as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending, with the intention of helping Canadian libraries to explore controlled digital lending in our own Canadian legal and policy context. Our goal is to help libraries and their lawyers become better informed about controlled digital lending as an approach, offer the basis of the legal rationale for its use in Canada, and suggest situations in which this rationale might be strongest.

© Christina De Castell, Joshua Dickison, Trish Mau, Mark Swartz, Robert Tiessen, Amanda Wakaruk, Christina Winter, 2022

This document is protected by copyright law. Use of the services of Érudit (including reproduction) is subject to its terms and conditions, which can be viewed online.

https://apropos.erudit.org/en/users/policy-on-use/

This article is disseminated and preserved by Érudit.

Érudit is a non-profit inter-university consortium of the Université de Montréal, Université Laval, and the Université du Québec à Montréal. Its mission is to promote and disseminate research.

https://www.erudit.org/en/

PARTNERSHIP
The Canadian Journal of Library and Information Practice and Research
Revue canadienne de la pratique et de la recherche en bibliothéconomie et sciences de l'information

vol. 17, no. 2 (7100)
Features (peer-reviewed)
DOI: https://dx.doi.org/10.21083/partnership.v17i2.7100
CC 4.0

Controlled Digital Lending of Library Books in Canada

Le prêt numérique contrôlé des livres de bibliothèque au Canada

Christina De Castell
Vancouver Public Libraries
christina.decastell@vpl.ca

Joshua Dickison
University of New Brunswick
jjd@unb.ca

Trish Mau
Burnaby Public Library
trish.mau@bpl.bc.ca

Mark Swartz
Queen's University
mark.swartz@queensu.ca

Robert Tiessen
University of Calgary
tiessen@ucalgary.ca

Amanda Wakaruk
University of Alberta
amanda.wakaruk@ualberta.ca

Christina Winter
University of Regina
christina.winter@uregina.ca

Abstract / Résumé

This paper explores legal considerations for how libraries in Canada can lend digital copies of books. It is an adaptation of *A Whitepaper on Controlled Digital Lending of Library Books* by David R. Hansen and Kyle K. Courtney, and draws heavily on this source in its content, with the permission of the authors. Our paper considers the legal and policy rationales for the process—"controlled digital lending"—in Canada, as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending, with the intention of helping Canadian libraries to explore controlled digital lending in our own Canadian legal and policy context. Our goal is to help libraries and their lawyers become better informed about controlled digital

lending as an approach, offer the basis of the legal rationale for its use in Canada, and suggest situations in which this rationale might be strongest.

Cet article tient compte des considérations juridiques concernant la façon dont les bibliothèques au Canada peuvent prêter des copies numériques de livres. Il s'agit d'une adaptation de A Whitepaper on Controlled Digital Lending of Library Books par David R. Hansen et Kyle K. Courtney et son contenu s'inspire largement de cette source, avec la permission des auteurs. Notre article examine les justifications juridiques et politiques du processus - « prêt numérique contrôlé » - au Canada ainsi qu'une variété de facteurs de risque et des considérations pratiques qui peuvent guider les bibliothèques cherchant à mettre en place un tel prêt dans le but d'aider les bibliothèques canadiennes à explorer le prêt numérique contrôlé dans notre propre contexte juridique et politique canadien. Notre objectif est d'aider les bibliothèques et leurs avocats à être mieux informés sur le prêt numérique contrôlé en tant qu'approche, d'offrir la base du raisonnement juridique pour son utilisation au Canada et de suggérer des situations dans lesquelles ce raisonnement pourrait être le plus fort.

Keywords / Mots-clés

Controlled digital lending, copyright, digital exhaustion, fair dealing, information access, information policy, library, technological neutrality; Prêt numérique contrôlé, droit d'auteur, épuisement numérique, utilisation équitable, accès à l'information, politique d'information, bibliothèque, neutralité technologique

Introduction

This paper explores legal considerations for how libraries in Canada can lend digital copies of books. It is an adaptation of *A Whitepaper on Controlled Digital Lending of Library Books* by David Hansen and Kyle C. Courtney, and draws heavily on this source in its content, with the permission of the authors.

Our paper provides a high level overview of the legal and policy rationales for the process "controlled digital lending" in Canada, as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending, with the intention of supporting informed choices about controlled digital lending at Canadian libraries. Our goal is to help libraries and their lawyers become better informed about controlled digital lending as an approach, offer the basis of the legal rationale for its use in Canada, and suggest the situations in which this rationale might be strongest.

For this paper we adopt the definition of "controlled digital lending" (CDL) offered in the *Position Statement on Controlled Digital Lending*:

> Properly implemented, CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and

> two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an "owned to loaned" ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.[1]

Thus, CDL would permit circulation of copies equal in number to those that had been legitimately acquired and catalogued by the participating libraries. When a patron is reading the digital copy, the corresponding physical copy is restricted and unavailable for consultation, so there is no situation in which the library is getting use of more copies than the number in its collection. A library can lend a physical book to a patron through standard circulation or to another library through interlibrary loan. CDL shifts that lending to a new format that opens up access possibilities for readers with disabilities, physical access limitations, research efficiency needs, or other needs for digitally accessible content. We are aware that libraries across Canada are discussing the value of CDL in a range of areas, such as to improve the efficiency of interlibrary loan, to support lending among institutions that share last copies for preservation, and to enable access during periods of library closure. We also contend that CDL may be used more generally for library lending, including to improve availability of out-of-print materials for all Canadians.

A CDL system is not a new concept. There are multiple versions of CDL-like systems currently being used in libraries. The idea was explored in the pioneering article "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries" by Michelle Wu, Professor of Law and Law Library Director at Georgetown University School of Law. [2] In 2010, the Internet Archive launched the Open Library: Digital Lending Library project, which successfully uses a unique CDL-like system.[3] Multiple Canadian libraries have now harnessed the same CDL system and partnered with Internet Archive to loan digital copies of books. These partners include large academic library systems such as the University of Alberta Library[4] and public libraries such as the Hamilton Public Library.[5]

---

[1] David R Hansen et al, "Position Statement on Controlled Digital Lending", (September 2018), online.

[2] See Michelle M Wu, "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries" (2011) 103:4 Law Libr J 527–552, online.

[3] See "Open Library", online. See also Geoffrey Fowler, "Libraries Have a Novel Idea", *Wall Str J* (29 June 2010), online.

[4] See Lila Bailey, "University of Alberta Opens Up Digital Access to Historic Curriculum Materials", (24 September 2019), online: *Internet Arch Blogs*.

[5] See Chris Freeland, "Hamilton Public Library joins Open Libraries", (3 June 2019), online: *Internet Arch Blogs*.

At its core, current understanding of CDL is about maintaining a library's role in lending works protected by copyright within the digital environment. To accomplish CDL, libraries must truly exercise control in the process. The *Position Statement on Controlled Digital Lending* identifies six specific requirements to do so. It states that for CDL, libraries should:

1. ensure that original works are acquired lawfully;[6]
2. apply CDL only to works that are owned and not licensed;[7]
3. limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an "owned to loaned" ratio);
4. lend each digital version only to a single user at a time just as a physical copy would be loaned;
5. limit the time period for each loan to one that is analogous to physical lending; and
6. use digital rights management to prevent wholesale copying and redistribution.

CDL makes it possible for libraries to fulfill their vital function in society by enabling the lending of books to benefit the learning, research, and intellectual enrichment of readers. It allows readers limited and controlled digital access to content that libraries own. The principal argument for controlled digital lending is that it permits libraries to do online what they have always done with physical collections: lend books. As the Supreme Court noted in one of Canada's leading copyright cases, *Théberge v Galerie d'Art du Petit Champlain inc.*, "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[8] Libraries have been part of maintaining this balance to support the public interest since the introduction of copyright law.

In the 2021 decision *York University v Canadian Copyright Licensing Agency*,[9] the Supreme Court reinforced this intention of balance, quoting Professor Carys Craig:

---

[6] It should be noted that works in a library that is part of a public institution in Canada will have been acquired lawfully in almost every case, and that the acquisition of an unlawful copy of a work would be limited to rare scenarios, for example a purchase that is later determined to be of illegally copied content from an unauthorized distributor.

[7] Since the initial statement, discussion continues on the application of CDL to licensed content. For example, CDL may have appropriate and practical applications for digital collections where the public loses access or terms are not reasonable.

[8] *Théberge v Galerie d'Art du Petit Champlain inc*, [2002] 2 SCR 336 at para 30.

[9] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32.

"Fundamentally, copyright policy assumes that the restriction of the public's use of works through the creation of private rights can further the public's interest in the widespread creation and distribution of works. The limits to these private rights, defined by fair dealing and other exceptions—and circumscribed by the boundaries of the public domain—are therefore essential to ensure that the copyright system does not defeat its own ends."[10]

As we discuss below, since *Théberge,* libraries' use of CDL can be understood to follow the principles applied in Canadian courts, including the Supreme Court of Canada*,* maintaining the balance integral to the purposes of the *Copyright Act*. CDL is a vital and necessary library service to address the lack of digital access to historical print collections held in Canada's libraries and some of the limitations of the current licensing approach to ebooks.

The 21st Century Book Problem

The UNESCO Public Library Manifesto observes that "Constructive participation and the development of democracy depend on satisfactory education as well as on free and unlimited access to knowledge, thought, culture and information."[11]

For decades, libraries and other cultural institutions have sought to continue to fulfill their role of providing and preserving access in the digital era, as they have fulfilled it for centuries in print.[12] However, the continued shift to digital licensing and digital rights management (DRM) and away from ownership, along with extension of copyright terms, have hampered these efforts. When digital versions of in-copyright works are available to libraries, it is under licence terms set by the publisher that vastly limit how libraries and their patrons can use the content, or terms that are negotiated in circumstances where the library does not have bargaining power. These circumstances are most problematic when libraries license content from multinational publishers. In addition, while many publishers are converting their backlists to digital format, nearly half of Canadian publishers had converted less than three-quarters of their backlists in 2019.[13] Libraries would like to provide digital access for new materials, but some rights holders do not offer titles for sale or licence in digital format.[14] In 2019, nine percent of independent Canadian publishers had no plans to begin publishing ebooks, and 10

---

[10] Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" (2010) Radic Extrem Balanc Copyr Can Copyr Digit Agenda. Tor Irwin Law 2010, online at 179.

[11] *UNESCO Public Library Manifesto*, by UNESCO, 172853 (Paris, 1994).

[12] See e.g. "Project Gutenberg", online at *Proj Gutenberg* (Project Gutenberg is a volunteer effort to digitize and archive cultural works, founded in 1971 by Michael S. Hart and the oldest digital library.); See e.g. "Project Gutenberg Canada", online; See e.g. "HathiTrust Digital Library", online; See e.g. "Google Books", online.

[13] See *State of Publishing in Canada 2019*, by BookNet Canada (2020).

[14] See Roën Janyk & Arielle Lomness, "Primary Rights and the Inequalities of E-Book Access" (2020) Charlest Libr Conf, online at 132–139.

percent did not offer ebooks for sale to libraries.[15] Multinational publishers periodically withhold the digital format of new titles from libraries for a period of time after their release.[16] In addition, many publishers, and particularly large multinational publishers, do not offer libraries reasonable terms and conditions for ebooks, routinely applying excessive prices and limiting licence terms in ways that prevent libraries from building diverse collections over time.[17] While the impact of these challenges is largest when libraries seek new content, the lack of negotiating power and persistence of short-term licences mean that, without CDL, libraries will not be able to fulfill their role as repositories for historical works in the digital environment.

Expanding the copyright term threatens to further reduce access and availability of works in libraries' digital collections. In 2021, the term of protection for a literary work in Canada is life of the author plus 50 years. However, with the Canada-United States-Mexico Agreement that came into force in 2020, Canada is required to extend the term to life plus 70 years at the end of 2022.[18] This increased term adds another 20 years of works for which librarians must puzzle over questions such as whether a work is still protected by copyright,[19] whether the publisher or author owns the digital rights, and whether the rights holder can be found (or whether the work is an orphan).[20] Attempting to clearly answer those questions on a title-by-title basis has proven prohibitively costly,[21] making equitable digital access for large numbers of works based on rights holder permission difficult. Particularly for books and other published materials for which

---

[15] See BookNet Canada, *supra* note 14. (Note that in this context "sale" refers to a licence).

[16] See Lynn Neary, "You May Have to Wait to Borrow a New E-Book From the Library," (2019) NPR, online.

[17] See generally "CULC/CBUC's Statement on Changes to Digital Loans for Public Libraries", online: *Can Urban Libr Counc* (Discussing the impact of a shift from perpetual to two-year licence models by Hachette Book Group).

[18] See Global Affairs Canada, "Canada-United States-Mexico Agreement (CUSMA) - Intellectual property chapter summary", (15 August 2014), online: *GAC* Last Modified: 2020-01-20.

[19] See e.g. The Copyright Office at the University of Alberta, "Canadian Public Domain Flowchart", online (The University of Alberta provides this flowchart to assist those seeking to determine the status of a work).

[20] See generally David R Hansen, "Orphan Works: Causes of the Problem" (2012) (Berkeley Digital Library Copyright Project White Paper No. 3), online.

[21] See e.g. Sarah Thomas, "Response to the Notice of Inquiry Concerning Orphan Works", (23 March 2005), online (spending $50,000 in staff time to identify rights holders for 198 books); See also Denise Troll Covey, "Response to Notice of Inquiry about Orphan Works 2", (22 March 2005), online (similar); See also Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers" (2010) 73:2 Am Arch 626–636, online (reporting on similar efforts in the context of special collections); See Victoria Stobo et al, "Report 3: Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options", (May 2018), online ("This study shows that digitization remains a paradox for [cultural heritage institutions]. Rights clearance in particular remains expensive and ranges considerably depending on the nature of the work and the approach taken by the institution." at 50).

there is no longer an active market, libraries have not yet been able to provide broad full-text access online.[22]

The effort required for title-by-title rights management, combined with the orphan works problem, the increase in copyright term length, and the application of unreasonable pricing and licensing terms has made it complicated to see a path forward to broad digital access.

For library patrons whose research and information-use patterns increasingly prioritize digital access,[23] this means that a whole world of research and learning that depends on books published from the mid-20th century to the present is effectively invisible. For some library patrons, physical access is not feasible owing to their inability to travel to a library, whether due to distance, financial situation, or mobility. For others, physical access is inefficient in comparison to digital. For a large research library with holdings of millions of volumes already purchased at a cost of hundreds of millions of dollars, works are not accessible in a format that is meaningful or optimal for many researchers today.[24]

For users with print disabilities—those who currently have some digital access to print collections due to the exceptions found in section 32(1) of the *Copyright Act* for persons with perceptual disabilities—access is hampered by hurdles that require users to self-identify as persons with a disability and request special access to digital copies. Even when digital copies are available, the platforms that control the content and the content itself may not be sufficiently accessible for a user with a print disability.

These conditions mean that in order for libraries to continue to meet their mandate of providing access to knowledge, thought, culture, and information, it is necessary for libraries to provide digitized access to their print collections, and as described below, CDL offers a practical, effective, and legal means to do so.[25] Without access to the breadth of knowledge and culture, libraries' fundamental role in society as a gateway,

---

[22] See David Hansen, "Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works" (2016), online (Example of 30 different online digital collections in the U.S. in which libraries have openly disclosed the likely orphan status of their materials and have used fair use as a basis for online digital access).

[23] See John Palfrey & Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives*, reprint edition (New York: Basic Books, 2010).

[24] Some of the most popular, commercially viable books remain in print and are available in a variety of formats. For many 20th century books, however, the window for commercial viability passes only a few years after first publication. See: William M Landes & Richard A Posner, "Indefinitely Renewable Copyright" (2003) 70:2 Univ Chic Law Rev 471–518, online; See also Paul J Heald, "Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers" (2008) 92 Minn Law Rev 1031–1063, online.

[25] For example, in 2020, the University of New Brunswick was denied the ability to purchase or licence digital materials from Pearson due to the country of sale. See also Paul J Heald, "How Copyright Keeps Works Disappeared" (2014) 11:4 J Empir Leg Stud 829–866, online.

providing a basic condition of lifelong learning, independent decision-making, and cultural development,[26] is compromised.

In fulfilling this role for the digital era, CDL holds significant promise, particularly for books from the mid-20th century – those that are presumptively still protected by copyright but are rarely available in digital form from their rights holders. We believe the legal rationale for lending books that are not available digitally is among the strongest of all types of works.[27] Some of these books may well be described as "orphaned," without identifiable or locatable owners. Others may have identifiable owners but are in practice neglected: unavailable in the digital marketplace and with no plan for revitalization in modern formats. For books of any age, the limitations described above mean that the current situation is not fully meeting the basic goals of the *Copyright Act* as stated in *Théberge*: "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[28] The practical inaccessibility of these works digitally benefits neither creators nor the reading public.

To determine how libraries can provide reasonable access to works in the digital era using CDL, this paper explores in detail three fundamental Canadian copyright law principles that already empower libraries to fulfill their missions: technological neutrality, fair dealing, and exhaustion.[29]

Technological Neutrality

A primary use of CDL systems is to make certain print books available in limited and controlled ways in a digital environment. The principle of technological neutrality, provided by the Parliament of Canada and interpreted by the courts, makes it clear that decisions about the use of copyright-protected works should be independent of, and thus not determined by, format.

It is recognized that copyright law "should not be interpreted or applied to favour or discriminate against any particular form of technology."[30] Specifically, the Supreme

---

[26] See UNESCO, *supra* note 12.

[27] Controlled digital lending may be well adapted to other types of library lending, for example of serials, or of audio or audiovisual works, or archival materials. The same principles may also support other related activities such as users' donation of ebooks to libraries. See generally Paul J Heald, "The Demand for Out-of-Print Works and Their (Un)Availability in Alternative Markets" (2014) (Illinois Public Law Research Paper No. 14-31), online (noting differences between the book markets and music markets).

[28] *Théberge v Galerie d'Art du Petit Champlain inc.*, *supra* note 9 at para 30.

[29] In addition to economic rights that are limited by these principles, Canada recognizes the moral rights of the author in section 14.1(1) of the *Copyright Act*, including the right of integrity, the right of attribution, and the right to remain anonymous. These rights are unlikely to be implicated by CDL.

[30] Kendrick Lo. "What is Technological Neutrality (in Copyright) Anyway? Revisiting CBC v SODRAC | CanLII Connects", (1 August 2017), online: *Canlii Connects* at para 2.

Court of Canada has noted that the principle of technological neutrality is reflected in section 3(1) of the *Copyright Act*, which describes a right to produce or reproduce a work "in any material form whatever"[31] and that "The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity."[32] Parliament directly reaffirmed a commitment to this principle during the last set of comprehensive amendments to the *Copyright Act*, introduced in 2010. The bill's summary provided a list of legislative objectives, including to "ensure that [the *Copyright Act*] remains technologically neutral."[33]

As explained by Carys Craig, "The principle of technological neutrality prescribes that laws can and should be developed in such a way that they are independent of any particular technology, neither favoring nor discriminating against specific technologies as they emerge and evolve."[34] In practice, the aim of this approach is understood to be that copyright law has an "equivalent effect" across media,[35] and results in the non-discrimination of new technologies and the non-interference of the court.[36]

This approach is evident in recent case law from the Supreme Court of Canada, where seeking a balance between the rights of rights holders and users is consistently respected and where the principle of technological neutrality has informed decisions that favoured both rights holders and users.

In *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada (ESA)*, the application of a separate tariff on the basis of format was found to violate the principle of technological neutrality.[37] The Supreme Court went on to say that, "In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user."[38]

---

[31] *Entertainment Software Association v Society of Composers*, [2012] 2 SCR 231 at para 5.

[32] *Robertson v Thomson Corp*, [2006] 2 SCR 363 at para 79.

[33] *Legislative Summary for Bill C-32: An Act to amend the Copyright Act*, Legislative Summary, by Dara Lithwick, Legislative Summary 40-3-C32-E (Ottawa: Library of Parliament, 2010), s 1.

[34] Carys J Craig, "Technological neutrality: recalibrating copyright in the information age." (2016) 17:2 Theor Inq Law 601–632, online at 604–605.

[35] See Pierre-Luc Racine, "Copyright Digital Exhaustion: A Public Interest Approach for the Retransfer of Licensed Digital Content in Canada" (2019) 31:3 Intellect Prop J 361–383, online at 373.

[36] See Cameron Hutchison, "Technological Neutrality Explained & Applied to CBC v SODRAC" (2015) 13:1 Can J Law Technol, online at 110-115.

[37] *Entertainment Software Association v Society of Composers*, *supra* note 32 at para 2.

[38] *Ibid* at para 5.

In *Society of Composers, Authors and Music Publishers of Canada v Bell Canada (SOCAN),* the Supreme Court explained that the goal of technological neutrality is to apply the *Copyright Act* in a way that "operates consistently, regardless of the form of the media involved, or its technological sophistication."[39] This informed the fair dealing analysis with respect to the "amount" used: the Court did not focus on the *aggregate* number of copies, because "to do so would disadvantage digital dealings, thereby undermining the goal of technological neutrality."[40] Similarly, in *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*,[41] on-demand streaming was treated as a public performance. As noted in paragraph 29 of the decision, "If the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes."[42]

The Supreme Court of Canada also commented on technological neutrality in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*[43] Notably, the Court was concerned with whether the reproduction right was implicated, and as part of that analysis made it clear that digital copies engage the reproduction right in the same way as would their analogue predecessors and that, in a regulatory environment, the valuation of those copies should consider both technological neutrality and fairness. While the majority decision held that making broadcast incidental copies involved a compensable exercise of the reproduction right, the ruling has been criticized as a "potential overreach of a rights-based approach."[44] Justice Abella, in her dissenting opinion, strongly criticized the majority's approach to technological neutrality and stressed the need to consider media neutrality and functional equivalence when applying the principle of technological neutrality—as part of considering the reproduction right and not merely the valuation of compensable copies. As Justice Abella explained, "Functional equivalence focuses on what the technology at issue is doing, rather than on the technical modalities of *how* it is doing it. This leads to interpretations of the act that give functionally equivalent technologies similar treatment."[45]

The application of technological neutrality continues to evolve through jurisprudence, with the Supreme Court recognizing in *ESA* that "The traditional balance between

---

[39] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326 at para 43.

[40] Craig, *supra* note 35 at 609.

[41] *Rogers Communications Inc v Society of Composers*, [2012] 2 SCR 283.

[42] *Ibid* at para 29.

[43] *Canadian Broadcasting Corp v SODRAC 2003 Inc*, [2015] 3 SCR 615.

[44] Bita Amani, "Disabused of Copyright's Use?: Not Quite, but You Had Me at Non-use 1" (2016) 29:1 Intellect Prop J 141–154, online at 149.

[45] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, *supra* note 32 at para 152.

authors and users should be preserved in the digital environment."[46] Both the rights of the copyright owners and the fair dealing rights of libraries and users should be interpreted with a view to maintaining this balance in respect of digital copying and lending. In our view, CDL is an approach that can maintain this balance.

Fair Dealing

The U.S. version of the CDL framework relies heavily on fair use to structure any proposed application. Canadian copyright law includes a similar exception to copyright infringement in section 29 of the *Copyright Act* called fair dealing. Like fair use, fair dealing applies to any uses that implicate a copyright holder's exclusive rights, including the right to produce, reproduce, and communicate to the public by telecommunication.[47] The following section applies a fair dealing analysis to a CDL system that follows the principles described in the *Position Statement on Controlled Digital Lending.*[48]

The major difference between fair dealing and fair use is that the list of allowable purposes for fair dealing is widely understood to be exhaustive rather than illustrative.[49] In the United States, fair use is codified in section 107 of the U.S. Copyright Act, which provides that "the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not copyright infringement."[50] Those examples are "illustrative and not limitative,"[51] meaning that fair use can apply in many situations—or "dealings"—that are not expressly listed in the statute.

Canadian fair dealing is available if the dealing is for one of the purposes listed in section 29, 29.1, or 29.2 of the *Copyright Act* of Canada. The purposes are research, private study, education, parody, satire, criticism, or review and news reporting. For criticism or review and news reporting, the user must also mention the source of the work.[52] While this first step must be considered in every application of CDL in Canada, we posit that intended uses of works that libraries provide access to through CDL will fall within these enumerated purposes.

---

[46] *Entertainment Software Association v Society of Composers*, *supra* note 40 at para 8.

[47] Copyright Act, RSC 1985 C C-42, s 3.

[48] *Position Statement on Controlled Digital Lending*, *supra* note 2.

[49] *Contra* Ariel Katz, "Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?" in Shyamkrishna Balganesh, Ng-Loy Wee Loon & Haochen Sun, eds, *Camb Handb Copyr Limit Except* (Cambridge University Press, 2021) (While fair dealing purposes are commonly interpreted as exhaustive, Ariel Katz argues that this was not the intention of the original legislators, and that they may have intended open-ended fair dealing purposes).

[50] "17 U.S. Code § 107 - Limitations on exclusive rights: Fair use", online.

[51] See *Ibid*; See also *Campbell, Aka Skyywalker, Et Al v Acuff Rose Music, Inc*, [1994] 510 US 569.

[52] *Copyright Act*, *supra* note 48, s 29.

To start, we need to look back at the most important fair dealing decision in Canadian history: *CCH Canadian Ltd. v Law Society of Upper Canada (CCH)*. This case was a library-use case, where a group of Canadian publishers sued the Great Library of the Law Society of Upper Canada for copies made as part of their custom photocopy service—a service that is similar to how copies of works are provided by libraries to users through interlibrary loan. This means that the considerations outlined in the decision are particularly applicable and relevant to other library use applications, including CDL.

Importantly, this decision builds on the reasoning from the earlier *Théberge* Supreme Court of Canada decision in recognizing the balance in copyright law and the limited nature of creator rights. This concept of balance is tied back to fair dealing in paragraph 48 of the *CCH* decision:

> The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, supra, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[53]

The *CCH* decision goes on to emphasize that fair dealing is always available, even when another copyright exception might apply, and that the list of purposes that fair dealing is available for—while it is exhaustive—should "not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work."[54] This concept is examined further in paragraph 51, in that research must be given a "large and liberal interpretation" and "is not limited to non-commercial or private contexts."[55]

A "large and liberal interpretation" means that the vast majority of uses of materials made available through CDL would readily pass what is often described as the "first step" of the Canadian fair dealing test. For example, for most library users who check out copies of books made available through CDL, it is reasonable that their uses will be for research, private study, or education, if you consider the "real purpose or motive" in their use.

After a copyright user demonstrates that their copying falls under one of the allowable purposes in the *Copyright Act*, the next step of the "test" is to evaluate the fairness of

---

[53] *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 at para 48.

[54] *Ibid* at para 63.

[55] *Ibid* at para 51.

the copying. As mentioned, we can look to *CCH* once again for the factors that can be used to determine fairness.

The six factors are:

1. The purpose of the dealing
2. The character of the dealing
3. The amount of the dealing
4. Alternatives to the dealing
5. The nature of the work
6. Effect of the dealing on the work.[56]

In *CCH*, the Court noted that the factors can be "more or less relevant," which suggests that they are weighted differently under different circumstances to make a determination of overall fairness, and that these factors are not an exhaustive list; therefore, there may be other factors in novel circumstances.[57] The following explains key considerations under each factor and how these may apply in the case of copies made for the purposes of CDL.

Purpose of the Dealing

The first fairness factor is the purpose of the dealing. This factor may seem redundant after considering purpose in the first step of the test, but there are other considerations to weigh. The most important consideration is one of perspective, as CDL requires that digitized copies be made by a library, and then library users exercise their fair dealing rights when the item is "checked out" of the library. On this point the Supreme Court has been clear that considering the purpose of the end user is critical in considering this factor in a fair dealing analysis.

For example, in *CCH*, the end-user purpose was critical in the determination of fairness, as "[w]hen the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research on behalf of the patron."[58] Another important example is found in *SOCAN.* In *SOCAN*, the Court ruled on whether previews of songs made available in iTunes were fair dealing, and reaffirmed the notion that the purpose of the end user should be

---

[56] See *Ibid* at para 53 (These fairness factors are not specified in the Copyright Act, rather they were adapted for Canada by Justice Linden in the CCH case at the Federal Court of Appeal level from the UK case Hubbard v Vosper, [1972] 1 All E.R. 1023 (C.A.), at p. 1027).

[57] *Ibid* at para 60.

[58] *Ibid* at para 64.

considered in the fair dealing analysis. In this case, the relevant purpose was that of the consumer researching possible purchases. The Court noted that although the purpose was commercial, the dealing was fair as there were reasonable safeguards in place that ensured that the works were actually being used for research.[59]

Finally, both *Alberta (Education) v Canadian Copyright Licensing Agency (Alberta)* and *York University v Canadian Copyright Licensing Agency (York)* emphasized that the end-user perspective is central to the determination of fairness under this factor. Both of these cases involved copies of works made for students' instruction. In *Alberta*, the Court noted that:

> Teachers have no ulterior motive when providing copies for students. Nor can teachers be characterized as having the completely separate purpose of instruction, they are there to facilitate the students' research and private study. … The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.[60]

The Court goes on to state that the word "private" should not be understood as requiring users to view copyrighted works in splendid isolation. "Studying and learning are essentially personal endeavors, whether they are engaged in with others or in solitude."[61]

In *York*, the Supreme Court noted flaws in the fair dealing analyses of both the Federal Court of Canada and Federal Court of Appeal, as their singular focus on the institutional perspective left out the perspective of the students who use the material, and that "teaching staff at a university make copies for their students' education, they are not 'hid[ing] behind the shield of the user's allowable purpose' in order to engage in a separate purpose that tends to make the dealing unfair."[62]

With these considerations taken into account, this factor tends towards fairness for the majority of CDL applications in libraries. As with the Great Library example in *CCH* and the educator examples in *Alberta* and *York*, libraries make copies of legally acquired works in their collections and make them available to patrons using CDL with no motive beyond facilitating the fair purpose of the end user. There is no separate purpose that would tend to make the dealing by the library unfair.[63] And as in *SOCAN*, libraries are

---

[59] See *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, *supra* note 40.

[60] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345 at para 23.

[61] *Ibid*.

[62] See *York University v Canadian Copyright Licensing Agency (Access Copyright)*, *supra* note 10 at para 102.

[63] *Ibid* at para 103.

implementing reasonable safeguards (with CDL) to ensure that libraries maintain a one-to-one lending ratio. *SOCAN* and *CCH* also demonstrate that commercial use can still be considered research, so while the vast majority of uses of CDL will be non-commercial, commercial use of CDL may still be fair.

Character of the Dealing

The second factor considers "how the works were dealt with: Multiple copies, widely distributed, would tend to be unfair, while a single copy of a work for a specific legitimate purpose is more likely to be fair."[64] For example, in *CCH*, "copying a work for the purpose of research on a specific legal topic is generally a fair dealing,"[65] whereas works that are widely distributed online may be less fair, as applied in *United Airlines, Inc. v Cooperstock*.[66] However, in *York*, the Court cited the *SOCAN* decision that discussed aggregate dissemination as a consideration under this factor, but that "'large-scale organized dealings' are not 'inherently unfair' (paragraph 43)," and in particular, the decision in *York* noted that the character of the dealing must be carefully applied in the university context, where the purpose is to facilitate the learning of students.[67] As the Supreme Court of Canada has made very clear in each of these cases, it is important to consider the particular context to determine whether or not a dealing is fair. Focusing on the aggregate amount in cases involving digital works could lead to disproportionate findings of unfairness compared with non-digital works. The character of the dealing needs to be carefully applied in any online context, otherwise all large-scale dealings could be found to be unfair. That would make it impossible for any large institution to use fair dealing, relative to a smaller institution. These findings and affirmations bode well for finding CDL to be fair on this factor.

The core concept of CDL—that it is designed to emulate the conditions of physical lending in libraries—is a central consideration for this factor. CDL applies safeguards so that libraries only loan the same number of digital copies as they have physical copies in their collection, and so that both digital and physical copies are not loaned at the same time. Clearly, this careful practice would favour a determination of fairness, as the reach and the number of copies made are limited.

The use of technical safeguards was considered under this factor in *SOCAN*, in that

> consumers accessed, on average, 10 times the number of previews as full-length musical works. However, no copy existed after the preview was heard. The previews were streamed, not downloaded. Users did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the

---

[64] *CCH Canadian Ltd. v Law Society of Upper Canada*, *supra* note 54 at para 55.

[65] *Ibid* at para 67.

[66] See *United Airlines, Inc v Cooperstock*, [2017] 1 FCR 188 at para 127.

[67] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, *supra* note 10 at para 105.

> user's computer. The fact that each file was automatically deleted meant that copies could not be duplicated or further disseminated by users.[68]

CDL safeguards on lending and copying applied through DRM would, for the most part, be at least as restrictive as those referred to above for music streaming in *SOCAN*. Although copies are made using CDL, the number of circulating copies at any particular time is no greater than the number of print copies owned by the institution.

Amount of the Dealing

The third factor examines "both the amount of the dealing and importance of the work allegedly infringed."[69] Without context, this factor does not seem to favour a fairness determination for CDL as the more content of the original used, the less likely the use is to be fair. However, it is clearly stated in *CCH* at paragraph 56 that:

> It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. 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.[70]

For CDL, the purpose of the use is to enable full-text access to books so readers can choose whether to read the copy online. Arguably, that means the entire work is used. Of course, CDL does place limits on use of the work: It imposes temporal limits on use (loans have a due date) and calls for technological controls on copying that limit further dissemination. These limitations are in many ways similar, for example, to situations in which music previews were found to be fair dealing in *SOCAN*, as mentioned in the character of the dealing analysis above.[71] Technical restrictions on reuse of the files limit their ability to be reused for purposes beyond those intended by the lending library. So, in CDL the third factor should be neutral or weigh in favour of the use because copying the entire work is necessary for the purpose of lending, and controls on reuse effectively place limitations on the "amount" of the work the user obtains access to.

Alternatives to the Dealing

---

[68] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, *supra* note 40 at para 38.

[69] *CCH Canadian Ltd. v Law Society of Upper Canada*, *supra* note 54 at para 56.

[70] *Ibid*.

[71] See *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, *supra* note 40 at para 38.

In the fourth factor, courts examine if there is a non-copyright alternative that can be used instead of the copyrighted work and whether or not the dealing is necessary to achieve the fair dealing purpose. For this factor, it may be considered that users are able to borrow the physical copies of these works from the library rather than the digital. The physical copy, however, is not a reasonable alternative to a digital version for many users. This line of reasoning was dismissed in *CCH*, as it was determined that there were no clear alternatives as "the patrons cannot reasonably be expected to always conduct research on-site,"[72] particularly if they live at some distance from the library. In the case of the Great Library, 25 percent of users lived outside of the Toronto area.

In *SOCAN* and *Alberta*, it was also found that there was no true alternative to the dealing. With *SOCAN*, advertising, album covers, and reviews cannot demonstrate to a consumer what a musical work sounds like, so "listening to a preview probably is the most practical, most economical, and safest way for users to ensure that they purchase what they wish."[73] Similarly, in *Alberta*, it is noted that "buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. … The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them."[74] Similarly, CDL will typically be employed when it is the most practical, economical, and equitable way for library patrons to receive a book from the library's collection. Increasingly, getting the physical copy into the patron's hands is not a realistic or reasonable alternative to digital lending.

CDL is merely a means to facilitate access to the limited number of copies in the library's collection. Libraries implementing CDL will need to consider their specific context and the alternatives for their users, which will differ depending on the library and its collection.

Another significant comment from *CCH* related to this factor is that "the availability of a licence is not relevant to deciding whether a dealing has been fair."[75] In the context of CDL, this means that libraries do not need to consider the availability of either a licence from a publisher, or from a literary copyright collective organization like Access Copyright or Copibec, in their determination of fairness. If the dealing is fair, a licence is not necessary or warranted. With all of this considered, much like in *CCH*, *SOCAN*, and *Alberta*, there is no alternative to the dealing for the vast majority of CDL applications in libraries, and so this factor would strongly favour a finding of fairness.

---

[72] *CCH Canadian Ltd. v Law Society of Upper Canada*, *supra* note 54 at para 69.

[73] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, *supra* note 40 at para 44.

[74] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, *supra* note 61 at para 32.

[75] *CCH Canadian Ltd. v Law Society of Upper Canada*, *supra* note 54 at para 85.

Nature of the Work

Generally, this factor supports a favourable finding of fairness for CDL, and clearly so for works that have been neglected, are orphaned, or are out-of-print—although this could vary depending on the work. The Supreme Court of Canada in *CCH*, referring to the Access Policy of the Great Library, determined that a systematic approach to the user's purpose in the dissemination of copies of works "puts reasonable limits" on the service.[76] In reference to entire works, the same Court later defined this factor as determining "whether the work is one which should be widely disseminated."[77] CDL closely resembles the controlled manner and restrictions that are common to the lending practices of a library's physical collection including interlibrary loan, insofar as CDL restricts the copies in circulation. Books in libraries' collections are, almost by definition, the kind of works that should be widely disseminated and are commercially published, and facilitating access thereto is in the public interest.

Effect of the Dealing

The final factor—effect of the dealing on the work—closely aligns with the fourth factor of the U.S. fair use analysis, which is "the effect of the use upon the potential market for or value of the work."[78] It is important to consider the market effect in respect of the particular book on the shelf and the wider effect for the publication on the market. The Supreme Court of Canada has provided guidance on this factor in a number of rulings. Perhaps most significantly, in *CCH*, the Court indicated that "although the effect of the dealing on the market … is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair."[79] In other words, dealings may be fair even where there is some economic harm or cost to copyright owners, if this harm is outweighed by other equally important factors.

Depending on the types of materials that will be included, this factor favours a CDL strategy that primarily focuses on published materials that are out-of-print and no longer available for purchase. It should also be noted that the Supreme Court later expanded upon the *CCH* ruling in *Alberta* and in *SOCAN*, explaining that broad generalizations regarding market loss are not sufficient to weigh the factor against the fair dealing evaluation. Moreover, the potential or availability of a licence for the dealing does not automatically usurp the factor in the owners' favour either: "The availability of a licence is not relevant to deciding whether a dealing has been fair."[80]

---

[76] *Ibid* at para 71.

[77] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, *supra* note 40 at para 47.

[78] 17 U.S. Code § 107, supra note 51.

[79] *CCH Canadian Ltd. v Law Society of Upper Canada*, *supra* note 54 at para 59.

[80] *Ibid* at para 90.

Finally, the market effect of the copy shares similar considerations as that of the concept of exhaustion or first sale. With CDL there is no increase in the number of copies that members of the public can read. It remains entirely dependent on the number of copies that the copyright owner has chosen to sell.[81] Ensuring that satisfactory controls are established in any CDL strategy reflecting established market realities would tend to support digital lending, along with selecting materials that are not commercially available.

Summary of the Fair Dealing Analysis

Considering the role of a knowledge institution and the gap in access to the vast majority of 20th century published materials that will not be feasibly filled by the rights holder market, CDL is a vital tool for ensuring access to works for the public good. While the above sections address the considerations in a fair dealing analysis, an individual library considering implementing CDL must undertake a fair dealing analysis for their specific implementation of CDL, including the specific category of works that will be made available.

Principle of Exhaustion

Limitations on a copyright owner's control over downstream uses of a work are integral to maintaining the balance between copyright owners and copyright users. Libraries in Canada have not needed additional provisions to allow books to be loaned, resold, or even destroyed, because these are not the copyright owner's exclusive rights as outlined in section 3.1 of the *Copyright Act*. This section outlines the limitations of a copyright owner's control over the downstream use of a literary, dramatic, musical, or artistic work.

The necessity for a balance in rights between owner and user was recognized by the Supreme Court of Canada in the *Théberge* decision in 2002. As Justice Binnie noted for the majority: "[T]he proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it."[82]

Justice Binnie's remarks bring into focus the distinction between owning a copyrighted work (e.g., a book) and owning a copyright of a work (the intellectual property that addresses the content of that book). U.S. copyright law specifically indicates that a copyright owner's control over the distribution of the object embodying the protected

---

[81] See Ariel Katz, "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge" (2016) 13:1 J Law Policy Inf Soc at 95, online. Accepted: 2018-07-17T18:41:41Z.

[82] *Théberge v Galerie d'Art du Petit Champlain inc.*, *supra* note 9 at para 31.

work extends only to its first sale.[83] After that first sale, a new owner may do as they please with the object. For instance, a book owner may choose to resell the book to a used bookstore, with the subsequent owner eventually donating it to charity, whereby it is sold once more. While Canada lacks a similar statement within its *Copyright Act*, section 3.1 details the activities that a copyright owner may control, and distribution subsequent to the first sale is not among them.[84] Thus, Canadian libraries can lend out books without implicating one of a copyright owner's exclusive rights.

Non-profit libraries, archives, museums, and educational institutions have specific exceptions in the *Copyright Act* and have been recognized as fundamental to maintaining the balance of copyright law since its inception. Specific to libraries, Ariel Katz reminds us that these institutions not only pre-date copyright law but have subsequently been built into—indeed are fundamental to—any design of copyright law; fair dealing or fair use would be of little value if no single copy of the work was available to the public.[85] This balance between the rights of owners and users is critical to the mission of libraries and is necessary to enable libraries to continue to practice the centuries old tradition of lending books to the public without permission from or financial compensation to copyright owners.

Further, the *Copyright Act* of Canada does not grant the right of destination, known as *droit de destination* in France. *Théberge* considered the right of destination, which "gives the author or artist the right to control to a considerable extent the use that is made of authorized copies of his or her work."[86] In discussing this right, *Théberge* observes that the right of destination does not exist in the *Copyright Act* of Canada, and that "the copyright holder does not by virtue of his or her economic rights retain any control over the subsequent uses made of authorized copies of his work by third party purchasers."[87]

In the *Théberge* decision, the Court found that a copyright owner's reproduction right was not infringed by an art gallery that purchased paper reproductions of the art and then transferred the ink to display the art on canvas. The process was simply a one-to-one transfer; the reproduction right of the copyright owner was exhausted, and the reproduction right was not implicated by fixing the content to the canvas.[88] While the use of CDL does create a digital reproduction, it imitates print library practices in the

---

[83] See "17 U.S. Code § 109 - Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord", online; See also Jennifer Jenkins, "Last sale?: Libraries' rights in the digital age | Jenkins | College & Research Libraries News" (2017), online.

[84] Copyright Act, *supra* note 48.

[85] See Katz, *supra* note 82.

[86] *Théberge v Galerie d'Art du Petit Champlain inc.*, *supra* note 9 at para 63.

[87] *Ibid* at para 65.

[88] Ariel Katz, Digital exhaustion: North American observations in Research Handbook on Electronic Commerce Law, John A. Rothschild ed. Edward Elgar, 2016.137-167.

digital environment by keeping the one-to-one ratio of owned to loaned copies. Even though a digital copy is made as part of the CDL process, the print copy of the work must be restricted as part of CDL controls so that it cannot be loaned, and only the digital copy is made available to be loaned to one individual at a time. With these controls in place, there are no additional copies in circulation. Ariel Katz has argued that the process of CDL is similar to the reproduction of a work that is described in the *Théberge* decision, and Katz argues that publisher rights should be considered exhausted with respect to both the lending and the additional reproduction made to facilitate CDL on this basis.[89]

System Design and Risk Mitigation

Libraries exploring CDL face certain risks and will need to make decisions about their risk tolerance and mitigation. We believe there is a significant benefit to CDL: it helps libraries fulfill their missions in the broadest sense, using technology to increase effective, non-discriminatory access to collections for their users. Libraries have faced existential challenges for decades, but have survived in part because of their responsiveness to new technology.[90] As new generations of information consumers expect immediate digital access to collections, libraries that fail to make their substantial collections available face anew the risk of becoming irrelevant, or at least minimally effective, in users' eyes. If libraries want to help users find and use the millions of volumes of the past century (which make up the bulk of many library collections), materials need to be available in the digital formats users need. Thus, CDL helps mitigate mission risk for libraries, which is positive for both libraries and society.

There are three primary risks in implementing CDL: 1) the risk that a library is sued in the first place, 2) the risk that the library loses the lawsuit, and 3) the risk of consequences in the face of defeat in a lawsuit. For each aspect of risk, libraries should make an assessment of their risk tolerance, accompanied by advice from legal counsel about how to match the ideas presented in this paper with their institutional risk profile.

First, for the risk of being sued, it is not necessarily about the law itself. The issues include time, resources, and reputational harm in defending a lawsuit. A lawsuit can take a tremendous amount of time for librarians, library administrators, and governing bodies (as well as for legal counsel) and will also have a psychological toll on those involved. For example, the *York* lawsuit reached the Supreme Court of Canada eight years after the initial lawsuit was filed in 2013, with the decision being issued in July 2021.[91] Lawsuits are rarely resolved in a few months. There can be years of pre-trial action after the complaint is filed. There could be challenges to the pleadings through

---

[89] See Sheppard, Adrian, Bailey, Lila, Katz, Ariel, Mills, Andrea, & Slaght, G. Controlled Digital Lending (CDL): A Panel to Discuss Legal and Practical Considerations Involved in the Implementation of CDL by Public and Post-Secondary Libraries in Canada.

[90] See Steve Denning, "Do we need libraries?" (28 April 2015), Forbes, online.

[91] See *York University v Canadian Copyright Licensing Agency (Access Copyright)*, *supra* note 10.

the motion process, which add additional delay. Answering questions, producing documents, or taking testimony can often take months or years, even before the case reaches trial. Although the reality is that most lawsuits do not go to trial,[92] the cost of litigation can be high, and these costs often depend on the issues involved and the location of the trial. Lawyers' fees and costs to go through the process from complaint to trial can range in the tens of thousands of dollars, and, if it does go to trial, the expense can escalate quickly into the hundreds of thousands.[93]

Second, the risk that the library loses in court is primarily addressed by the strength of the legal position under fair dealing, the framework of which is addressed above in Part V. The analysis offered in this paper is general—case law in particular jurisdictions may be more or less favourable—and it doesn't take into account some of the particular facts and design choices (addressed below) that libraries may choose to implement to further enhance their position. There are no fair dealing cases that square precisely with the use scenario of CDL in libraries, so libraries entering this space must embrace a certain degree of legal ambiguity. But, the analysis above shows that there is a good faith, reasonable basis for concluding that such uses would fall under the fair dealing exception.

Finally, there is the concern of what happens if the library loses the lawsuit. Typically, the plaintiff would request that the court enter an order for an injunction or damages (or, on occasion, both) against the losing party. If the court finds in favour of an injunction, this would prevent a library from continuing to make the work available digitally.

There are two types of damages possible in a case of this nature. One is statutory damages, which are the major concern in cases in the United States.[94] The *Copyright Act* of Canada limits most statutory damages to an award limit of $20,000 per work when infringements are for commercial purposes (s.38.1(a)) and not more than $5,000 for all works when the infringements are for non-commercial purposes (s.38.1(b)). In the case of unknowing infringement, the court can limit the award to less than $500 (s.38.1(2)). Given that the proposed purpose of CDL in a public library or library that is part of an educational institution is clearly non-commercial, the most that could likely be

---

[92] See John Barkai, Elizabeth Kent & Pamela Martin, "Court Review: Volume 42, Issue 3-4 - A Profile of Settlement" (2006) Court Rev J Am Judges Assoc, online.

[93] While we primarily address risks associated with legal action, CDL may raise many other types of reputational, institutional, and political risks. See Marg Bruineman, "Steady optimism - 2019 Legal Fees Survey" *Can Lawyer* (8 April 2019), online; See also Arlene Neil et al, "2021 Report of the Economic Survey", (September 2021), online: *Am Intellect Prop Law Assoc* (Reporting that litigation with less than $1 million at stake costs on average around $150,000 through the discovery process).

[94] In the few recent cases litigated against libraries in the U.S., plaintiffs have not sought statutory damage awards. However, statutory damages awards are large and have been awarded in other cases. 17 U.S.C. § 504(c) (setting damage ranges up to $150,000 per work infringed).

claimed as statutory damages in Canada for the use of CDL in libraries would be the limit of $5,000.[95]

In the case of a copyright owner who does not choose statutory damages and elects to pursue a case for infringement, s.35(1) identifies that the infringer is "liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made …"[96] If a library's CDL activity does not produce revenue, the liability for profits is not likely to be relevant, yet the damages portion would remain.

The choices a library makes in what material to include in their digitized collection can create an opportunity to control the risks related to damages based on lost sales. For example, if a library chooses to digitize and make available through CDL only material that is not currently available for purchase, it would be extremely difficult for the copyright owner to establish large damages.[97]

For libraries in Canada, there may be an additional limit on risk exposure in the *Copyright Act*. In the case of an owner that has not authorized a collective society to allow reproduction, the amount recoverable is limited to the amount that would have been payable to the society under a tariff or agreement (section 38.2(1)), should there be an agreement for the category of work and copying of the relevant nature. In the Access Copyright tariff for post-secondary educational institutions filed November 2, 2019, the definition of copy and/or communicate under section 2 includes distribution on a secure network at (g), and could be relevant to a CDL project. However, this tariff would likely not apply to general distribution on the internet.[98]

With the July 2021 decision in *York*, the Supreme Court has clarified that section 68.2(1) of the *Copyright Act* does not provide a collective infringement remedy.[99] The judgement notes that as a non-exclusive licence holder, Access Copyright "has no standing" to bring an action for infringement on behalf of copyright holders. Based on this statement, collective societies with non-exclusive licensing likely cannot take action against a library providing CDL.

It is important to observe that by providing digitized copies of works using CDL that are accessible to users outside of Canada, or works that have non-Canadian rights holders, it is possible that a library could be exposed to legal action in other jurisdictions,

---

[95] See Marcel Mongeon, *Copyright Opinion on Controlled Digital Lending* (2019).

[96] *Copyright Act*, *supra* note 48, s 35(1).

[97] Mongeon, *supra* note 97.

[98] See "Access Copyright | Copyright Board of Canada", online: *Copyr Board Can*.

[99] See *York University v Canadian Copyright Licensing Agency (Access Copyright)*, *supra* note 10; See also *Copyright Act*, *supra* note 48 at para 73 (The section of the *Copyright Act* titled "Effect of fixing royalties").

including in the United States. Several judgements in the United States have considered the issue of jurisdiction in copyright, such as for broadcasting and use of trademarks. These judgements comment on the circumstances for extraterritorial application of copyright legislation, and that conduct relevant to the statute's focus must have occurred in the United States.[100] Libraries in Canada may wish to mitigate this risk by limiting their selection of material for inclusion in any CDL project to Canadian materials, or by limiting access to the works to Canadian users.[101]

As noted above, while some risks such as exposure to damages may be minimized by the limits on non-commercial statutory damages in Canada, libraries can also be proactive to minimize risk with CDL by implementing additional system design choices and library policies, as well as selecting materials to be lent using CDL with an eye toward risk. We conclude with several practical ideas below, with Section A and B largely drawn from the original whitepaper on CDL in libraries by Hansen and Courtney.

A. System Design and Library Policies

The six basic system design elements identified in the *Position Statement on Controlled Digital Lending* and introduced at the outset of this paper are, we believe, all that are necessary to make a compelling legal case for CDL. To reiterate, these design elements are:

1. ensure that original works are acquired lawfully;
2. apply CDL only to works that are owned and not licensed;
3. limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an "owned to loaned" ratio);
4. lend each digital version only to a single user at a time just as a physical copy would be loaned;
5. limit the time period for each loan to one that is analogous to physical lending; and

---

[100] See *Imapizza, Llc v at Pizza Ltd*, [2020] 965 F 3d 871; See also *Spanski Enterprises, Inc v Telewizja Polska SA*, [2016] 222 F Supp 3d 95.

[101] See Kyle Courtney & David Hansen, "A White Paper on Controlled Digital Lending of Library Books" (2018), online ("Unlike most other jurisdictions, under U.S. law, infringements of works registered with the copyright office (most published books are) can carry a damage award within a statutory pre-set range of up to $150,000 per work infringed in cases of willful infringement" at 34 and notes "U.S.C. § 504(C)(2) ("The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.)." at 34).

6. use digital rights management to prevent wholesale copying and redistribution.[102]

There are, however, several other design features that may reduce risk and enhance the fair dealing position, primarily by enhancing the argument that CDL does not cause undue market harm. These design elements attempt to make CDL mimic even more closely the physical environment and its attendant friction, as well as the security limitations that physical lending currently requires.

A fundamental design feature of CDL systems must be controlling both digital and physical copies. While all applications of CDL should restrict access to in-copyright physical copies while the digital is lent, some practical strategies may ensure that such restrictions are rigorously followed. For libraries with open stacks, this may mean removing copies of books from open circulation if they are digitized and lent. For others, a more reliable method may be to only lend books whose physical manifestations are already tightly controlled, either in closed stacks or off-site storage. Libraries will need to consider whether in-library use or copying within the library should be permitted when a work is included in a CDL collection.

Libraries may also limit who they will lend digital copies to as a way to limit the overall reach of the copy and therefore the potential market effect. Libraries serve particular communities of users—an academic library primarily serves its students and faculty; a public library serves its local residents—and so the rationale could be that digital lending be limited to the same group of users who would have access to the physical materials. While many libraries make their collections available broadly to many users, user-group considerations may mean that libraries will want to think carefully about issues, such as who their core users are and, for example, how lending to partner libraries in local or regional consortia with deeply integrated print collections may work, as opposed to users at libraries with more distant interlibrary loan arrangements. In any case, the aim would be to make collections more accessible for those who would ordinarily already be entitled to access.

As a way to support a fair dealing argument, libraries could consider the inclusion of a click-through acknowledgement by the user that their purpose in using the collection meets a fair dealing purpose enumerated in section 29 of the *Copyright Act*, including research, private study, or education.

Another option that could be explored is introducing additional artificial “friction” into the system, such as extending the time between digital loans, more closely mirroring how physical books are lent and returned.

A conservatively designed CDL system could also introduce characteristics that mimic physical degradation. For example, a library might introduce lending limits based on library experience with physical lending. If a physical book could be expected to circulate 2,000 times before it degrades, the library could place the same limit on the

[102] See generally supra note 7 & 8 (discussion of application in Canada).

digital copy before removing it from circulation. In reality, large research libraries hold many books that have circulated very seldom in print,[103] and so, for many obscure materials, ever hitting a maximum loan threshold may be unlikely (although we recognize digital availability may itself drive lending). For such an implementation, it would be important for libraries to develop good data on how long an average book actually circulated before it degrades to the point it can no longer be used. Library experience and publisher expectations diverge significantly on this: Harper Collins at one point believed that 26 loans was all that an average book would handle before it degraded,[104] while libraries lending some books (e.g., books placed on reserve) will regularly see lending run into the thousands before degradation occurs.

In addition, libraries may apply more or less restrictive controls on what users can do with copies while they are lent to them. Ordinarily, a borrower of a physical book can make photocopies, scans, or other basic reproductions, complying with fair dealing. Practicality usually limits users from reproducing the entire physical work. While all CDL systems should implement some type of technological protection measures to prevent wholesale copying, libraries that seek to take a conservative approach to CDL may seek to limit any copying at all, while others may allow users to reproduce or print only a small selection from the work.

Finally, libraries may choose to limit access to books based on feedback from rights holders about specific materials loaned through CDL. While ultimately the rationale for CDL remains the same regardless of a rights holder objection, libraries may choose to limit risk and exposure to litigation by employing a takedown policy and including in their system design a mechanism for rights holders to communicate about digitized books that they would prefer not be lent. Many libraries already employ such policies with digitized collections, particularly those that include materials from unknown or unlocatable owners. For CDL, extending those policies may be a natural and simple way to reduce risk before CDL culminates in a potentially costly dispute.

B. Collection Choices

The choice of what books are selected for CDL can also play a significant role in risk mitigation. Book candidates with the lowest risk—and the strongest fair dealing argument, though those analyses are not necessarily tied together—are generally those with the lowest likelihood of market exploitation. Our analysis above pays special

---

[103] See Allen Kent & And Others, "Use of Library Materials: The University of Pittsburgh Study" (1979) (indicating that fewer than 40 percent of books purchased in the preceding 10 years had circulated at all, and predicting that fewer than two percent ever would); *Report of the Collection Development Executive Committee Task Force on Print Collection Usage, Cornell University Library*, report, by Kizer Walker et al, ecommons.cornell.edu, report (2010) Accepted: 2016-12-14T14:48:46Z (Approximately 55 percent of monographs purchased since 1990 have never circulated).

[104] See Dan Misner, "HarperCollins sets checkout limits on library e-books | CBC News", (9 March 2011), online: *CBC*.

attention to twentieth century books generally, but there are certain subcategories of works that libraries may select for CDL that would yield further reduction of risk.

1. Old Books and the Public Domain

There is some practical risk mitigation in selecting older titles for digitization.[105] In addition to aiding in the likelihood that the market is significantly diminished, many older works may in fact be in the public domain, subject to no copyright restrictions on use at all. Because the public domain analysis can be time consuming and costly[106] for libraries that are unable to undertake a full public domain analysis for each work, using older works as a proxy in combination with a CDL strategy may be an effective way to minimize copyright-related risks. For example, in 2021, a book whose author died in 1970 or prior would be in the public domain and CDL would not be necessary. Rather than determining the year of the author's death for each book, limiting CDL to books published prior to 1960 would be a way to reduce risk.[107]

For a collection of historical material that is in the public domain, often found in libraries' special collections, the limitations of CDL are not necessary. For example, books published prior to 1900 in Canada would likely be in the public domain and public domain books can be freely digitized and loaned without restricting the number of copies in circulation or applying the controls of CDL.

2. Out-of-Print and Not Commercially Available

The phrase "out-of-print" does not mean "out of copyright." In fact, many out-of-print works may still be under copyright. However, the out-of-print status of a book is meaningful for fair dealing analysis. A key, though not necessarily determinative, factor in fair dealing is alternatives available to the potential user. If the work is out-of-print and unavailable for purchase through normal channels, the user may have more justification for reproducing it."[108] Another key factor is the positive effect of copying and disseminating the work through CDL, as this facilitates access to the work and fulfills one of the purposes of the *Copyright Act*. A library might lower risk by selecting works for CDL that are clearly not available in the marketplace, either in print from the

---

[105] See Joseph P Liu, "Copyright and time: A proposal" (2002) 101:2 Mich Law Rev 409–481, online; William F Patry & Richard A Posner, "Fair Use and Statutory Reform in the Wake of Eldred" (2004) 92:6 Calif Law Rev 1639–1661, online (While both U.S. sources, they present compelling arguments demonstrating that the application of fair use - and likely fair dealing - is stronger the closer the work is to entering the public domain).

[106] See "Finding the Public Domain: The Copyright Review Management System", online: *Ithaka SR* (U.S. example, but still relevant in the Canadian context).

[107] For U.S. works, Canadian libraries may wish to review the considerations found in the Hansen & Courtney paper on Controlled Digital Lending.

[108] See *S. Rep. No. 94-473* (1975); See *Maxtone-Graham v Burtchaell*, 803 F2d 1253, 1264 n 8 (2d Cir. 1986) (out-of-print status of copyrighted book supports fair use determination); *see also* Part III(D)(2) (market failure for 20th century books should favor fair use determination).

publisher or electronically as a licensed ebook. Selecting these works has the practical risk mitigation strategy of also reducing the risk that anyone will bring suit in the first place: If the work is not currently exploited by its owner, chances are higher that the owner will not be concerned with use of it by libraries.

However, to determine which books are not currently commercially exploited requires some investment of time and resources. Databases from book jobbers such as EBSCO's GOBI Library Solutions and ProQuest's OASIS, as well as online searches through Amazon and the library's digital suppliers, may be sufficient to give an indication that titles are no longer exploited through normal commercial channels. For older books, especially those without ISBNs, searches are more challenging.[109]

A second and likely larger category of not-commercially-available books is orphan works, which are works protected by copyright but for which a user cannot, after a diligent search, identify the copyright holder.[110] Section 77 of the *Copyright Act* deals with orphan works (i.e., "Owners Who Cannot Be Located"). Under section 77, a library may apply to the Copyright Board for a licence to use an orphan work. There are a number of problems with libraries using section 77 for CDL. Every work (i.e., book) needs to be applied for separately, and a licence from the Copyright Board only lasts for five years. If the owner is not found at the end of five years, the deposit paid by the library is given to the copyright collective rather than refunded to the library as applicant. For the purpose of CDL to patrons not located in Canada, section 77 is further limited in that licences can only be granted by the Copyright Board for use in Canada.[111] This would need to be considered by libraries that wish to use CDL to support distance learners, and for those considering an implementation using Internet Archive's Open Library. Given the practical implications of using section 77, making a determination of risk based on a fair dealing analysis is likely of more utility to a library than using section 77 for a significant digitization project.

Determining which works may be orphaned or in the public domain is potentially hard, as demonstrated by guides produced by universities in Canada such as the *University of British Columbia's Public Domain Guide* and the *University of Alberta's Canadian Copyright Term and Public Domain Flowchart*.[112] However, it is clear that librarians—

---

[109] See *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums*, SSRN Scholarly Paper, by Elizabeth Townsend Gard, papers.ssrn.com, SSRN Scholarly Paper ID 3049158 (Rochester, NY: Social Science Research Network, 2017) (Low risk works published in the 1920s through the 1960s, if they have not been reissued after 1970, would not have an ISBN number, and so there is likely no present commercial exploitation).

[110] See Library of Cong, Copyright Office, "Notice of Inquiry: Orphan Works & Mass Digitization" (2012) 77:204 Fed Regist 64555–64561, online (defining an orphan work as "an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law." at 64555).; See also Hansen, "Digitizing Orphan Works", *supra* note 23.

[111] "Unlocatable Owners: General Information", online: *Copyr Board Can*.

[112] See e.g. "Public Domain", online: *Copyr UBC*; See e.g. note 20.

information professionals who are experts at searching for materials and determining provenance—are among the best suited to conduct such searches.[113] With the research tools available, such as the Access Copyright's Title Search and Permissions Tool, the Canadian Copyright database and the unlocatable copyright owners list, searching for the rights holder for a potential orphan has been somewhat aided.[114]

C. Communicating with Rights Holders

Libraries that are attempting to address the lack of availability or affordability of digital copies of works may be best served by direct communication with the publisher, where opening a dialogue could result in the publisher investing in a digital work that is more appropriate for library users, with greater accessibility features, and with less risk for the library. CDL projects require considerable investment in system and policy design, equipment, and digitization effort, and are not the only option for providing quality digital access to some works. CDL as an approach to providing digital access is intended to fill a gap where publishers and rights holders are not providing digital access on reasonable terms.

In addition, when a library chooses to make digital content available using CDL, a library can reduce the risk of legal action by, as noted above, providing a clear way for the rights holder of any work in the collection to contact the library and request removal of the digital copy of their work(s) from public access and by acting on removal requests by legitimate rights holders.

D. Public Lending Right

Canada's Public Lending Right (PLR) program sends yearly payment to writers and other contributors whose works are held in Canada's public libraries, based on criteria set by the PLR Commission, an advisory body of Canada's Council for the Arts.[115] Only Canadian writers and permanent residents are eligible. Public libraries can reduce reputational risk by ensuring that digitized materials are included in catalogues that would be sampled by PLR, so that they could be appropriately considered in PLR payment calculations. Since the present calculations for PLR in Canada are based on titles held by libraries and do not count copies or circulation, and eligible publications

---

[113] See Hansen et al, *supra* note 2 ("We do not believe libraries should adhere to rigid search standards that have been implemented in other jurisdictions, though they may provide useful guidance. Experience so far in those jurisdictions has shown that those search standards, rather than reliance on the reasoned expertise of information search professionals in line with general best practices, is not efficient or effective. at note 164); See "Orphan Works Diligent Search Guidance for Applicants", online: *GOVUK*; See also Aura Bertoni, Flavia Guerrieri & Maria Lillà Montagnani, "Report 2: Requirements for Diligent Search in 20 European Countries", (June 2017), online.

[114] See e.g. "Title Search & Permissions", online: *Access Copyr*; See e.g. "Canadian Copyright Database", online: *Can Intellect Prop Off*; See e.g. "Unlocatable Owners Search", online: *Copyr Board Can*.

[115] See "Eligibility", online: *Public Lend Right* (current criteria for eligibility for PLR).

are from the last 25 years, CDL projects will not be likely to affect PLR payments. However, since the criteria for PLR can be changed by the PLR Commission, libraries may wish to consider designing systems that will enable circulation of digitized copies to be counted in the future.

Conclusion

Libraries across Canada and the United States have begun to discuss the application of CDL to interlibrary loan and services to distance learners and those with disabilities, as well as the implications of using CDL for consortia and regional systems. While this paper has not explored potential use-cases for CDL in detail, projects such as the recently announced NISO development of a consensus framework will define best practices for this new service model and further lower barriers for adoption.[116] This paper is intended to support Canadian libraries in their discussions about how CDL can be applied to meet user needs, and expand understanding among library workers about how CDL can fit within the Canadian legal framework.

CDL offers the opportunity for libraries to continue to meet their mandates of providing free and equitable access to knowledge in the digital environment. We find that there are strong arguments supported by existing case law for why CDL, appropriately used, is permissible in Canada under the doctrine of fair dealing. Our conclusion is that CDL is a viable system in the Canadian context, and that a library is exercising fair dealing when it digitizes and lends to users the full text of certain in-copyright books, provided the library does so with the appropriate controls applied, and with the intention of supporting purposes that are permissible under fair dealing in the *Copyright Act*.

[116] See "NISO Awarded Mellon Funding for Controlled Digital Lending Project | NISO website", (20 September 2021), online: *NISO*.

References

Legislation

Copyright Act, RSC 1985 C C-42.

"17 U.S. Code § 107 - Limitations on exclusive rights: Fair use", online.

"17 U.S. Code § 109 - Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord", online.

Jurisprudence

Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 SCR 345.

Campbell, Aka Skyywalker, Et Al v Acuff Rose Music, Inc, [1994] 510 US 569.

Canadian Broadcasting Corp v SODRAC 2003 Inc, [2015] 3 SCR 615.

CCH Canadian Ltd v Law Society of Upper Canada, [2004] 1 SCR 339.

Entertainment Software Association v Society of Composers, [2012] 2 SCR 231.

Imapizza, Llc v at Pizza Ltd, [2020] 965 F 3d 871.

Maxtone-Graham v Burtchaell, 803 F2d 1253, 1264 n 8 .

Robertson v Thomson Corp, [2006] 2 SCR 363.

Rogers Communications Inc v Society of Composers, [2012] 2 SCR 283.

Society of Composers, Authors and Music Publishers of Canada v Bell Canada, [2012] 2 SCR 326.

Spanski Enterprises, Inc v Telewizja Polska SA, [2016] 222 F Supp 3d 95.

Théberge v Galerie d'Art du Petit Champlain inc, [2002] 2 SCR 336.

United Airlines, Inc v Cooperstock, [2017] 1 FCR 188.

York University v Canadian Copyright Licensing Agency (Access Copyright), 2021 SCC 32.

Secondary materials: Monographs

BookNet Canada, *State of Publishing in Canada 2019*, by BookNet Canada (2020).

Hansen, David, "Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works" (2016), online.

Katz, Ariel, "Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?" in Shyamkrishna Balganesh, Ng-Loy Wee Loon & Haochen Sun, eds, *Camb Handb Copyr Limit Except* (Cambridge University Press, 2021).

———, "Digital exhaustion: North American Observations" in John A Rothschild, ed, *Res Handb Electron Commer Law* (Northampton, Massachusetts: Edward Elgar Publishing Inc., 2016).

Kent, Allen & And Others, "Use of Library Materials: The University of Pittsburgh Study" (1979).

Mongeon, Marcel, *Copyright Opinion on Controlled Digital Lending* (2019).

Palfrey, John & Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives*, reprint edition (New York: Basic Books, 2010).

Walker, Kizer et al, *Report of the Collection Development Executive Committee Task Force on Print Collection Usage, Cornell University Library*, (2010), online.

Secondary materials: Articles

Amani, Bita, "Disabused of Copyright's Use?: Not Quite, but You Had Me at Non-use 1" (2016) 29:1 Intellect Prop J 141–154, online.

Barkai, John, Elizabeth Kent & Pamela Martin, "Court Review: Volume 42, Issue 3-4 - A Profile of Settlement" (2006) Court Rev J Am Judges Assoc, online.

Bruineman, Marg, "Steady optimism - 2019 Legal Fees Survey" *Can Lawyer* (8 April 2019), online.

Craig, Carys, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" (2010) Radic Extrem Balanc Copyr Can Copyr Digit Agenda Tor Irwin Law 2010, online.

Craig, Carys J, "Technological neutrality: recalibrating copyright in the information age." (2016) 17:2 Theor Inq Law 601–632, online.

Denning, Steve, "Do we need libraries?" *Forbes* (28 April 2015), online.

Dickson, Maggie, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers" (2010) 73:2 Am Arch 626–636, online.

Fowler, Geoffrey, "Libraries Have a Novel Idea", *Wall Str J* (29 June 2010), online.

Hansen, David R, "Orphan Works: Causes of the Problem" (2012) (Berkeley Digital Library Copyright Project White Paper No. 3), online.

——— & Kyle Courtney, "A White Paper on Controlled Digital Lending of Library Books" (2018), online.

Heald, Paul J, "How Copyright Keeps Works Disappeared" (2014) 11:4 J Empir Leg Stud 829–866, online.

———, "Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers" (2008) 92 Minn Law Rev 1031–1063, online.

———, "The Demand for Out-of-Print Works and Their (Un)Availability in Alternative Markets" (2014) (Illinois Public Law Research Paper No. 14-31), online.

Hutchison, Cameron, "Technological Neutrality Explained & Applied to CBC v SODRAC" (2015) 13:1 Can J Law Technol, online.

Jenkins, Jennifer, "Last sale?: Libraries' rights in the digital age | Jenkins | College & Research Libraries News" (2017), online.

Katz, Ariel, "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge" (2016) 13:1 J Law Policy Inf Soc 81–123, online.

Landes, William M & Richard A Posner, "Indefinitely Renewable Copyright" (2003) 70:2 Univ Chic Law Rev 471–518, online.

Liu, Joseph P, "Copyright and time: A proposal" (2002) 101:2 Mich Law Rev 409–481, online.

Neil, Arlene et al, "2021 Report of the Economic Survey", (September 2021), online: *Am Intellect Prop Law Assoc*.

Patry, William F & Richard A Posner, "Fair Use and Statutory Reform in the Wake of Eldred" (2004) 92:6 Calif Law Rev 1639–1661, online.

Pierre-Luc Racine, "Copyright Digital Exhaustion: A Public Interest Approach for the Retransfer of Licensed Digital Content in Canada" (2019) 31:3 Intellect Prop J 361–383, online.

Wu, Michelle M, "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries" (2011) 103:4 Law Libr J 527–552, online.

Other material

"Access Copyright | Copyright Board of Canada", online: *Copyr Board Can*.

Bailey, Lila. "University of Alberta Opens Up Digital Access to Historic Curriculum Materials", (24 September 2019), online: *Internet Arch Blogs*.

Bertoni, Aura, Flavia Guerrieri & Maria Lillà Montagnani, "Report 2: Requirements for Diligent Search in 20 European Countries", (June 2017), online.

Canada, Global Affairs, "Canada-United States-Mexico Agreement (CUSMA) - Intellectual property chapter summary", (15 August 2014), online: *GAC*.

"Canadian Copyright Database", online: *Can Intellect Prop Off*.

"Canadian Public Domain Flowchart", online: *Copyr Off Univ Alta*.

"CULC/CBUC's Statement on Changes to Digital Loans for Public Libraries", online: *Can Urban Libr Counc*.

"Eligibility", online: *Public Lend Right*.

Freeland, Chris, "Hamilton Public Library joins Open Libraries", (3 June 2019), online: *Internet Arch Blogs*.

"Finding the Public Domain: The Copyright Review Management System", online: *Ithaka SR*.

"Google Books", online.

Hansen, David R et al, "Position Statement on Controlled Digital Lending", (September 2018), online.

"HathiTrust Digital Library", online.

Janyk, Roën & Arielle Lomness, "Primary Rights and the Inequalities of E-Book Access" (2020) Charlest Libr Conf, online.

Library of Cong, Copyright Office, "Notice of Inquiry: Orphan Works & Mass Digitization" (2012) 77:204 Fed Regist 64555–64561, online.

Lithwick, Dara, *Legislative Summary for Bill C-32: An Act to amend the Copyright Act*, Legislative Summary, by Dara Lithwick, Legislative Summary 40-3-C32-E (Ottawa: Library of Parliament, 2010).

Lo, Kendrick, "What is Technological Neutrality (in Copyright) Anyway? Revisiting CBC v SODRAC | CanLII Connects", (1 August 2017), online: *Canlii Connects*.

Misner, Dan, "HarperCollins sets checkout limits on library e-books | CBC News", (9 March 2011), online: *CBC*.

"NISO Awarded Mellon Funding for Controlled Digital Lending Project | NISO website", (20 September 2021), online: *NISO*.

"Open Library", online.

"Orphan Works Diligent Search Guidance for Applicants", online: *GOVUK*.

"Project Gutenberg", online: *Proj Gutenberg*.

"Project Gutenberg Canada", online: *Proj Gutenburg Can*.

"Public Domain", online: *Copyr UBC*.

Senate Report No. 94-473 (1975).

Stobo, Victoria et al, "Report 3: Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options", (May 2018), online.

Thomas, Sarah, "Response to the Notice of Inquiry Concerning Orphan Works", (23 March 2005), online.

"Title Search & Permissions", online: *Access Copyr*.

Townsend Gard, Elizabeth, *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums*, SSRN Scholarly Paper, by Elizabeth Townsend Gard, papers.ssrn.com, SSRN Scholarly Paper ID 3049158 (Rochester, NY: Social Science Research Network, 2017).

Troll Covey, Denise, "Response to Notice of Inquiry about Orphan Works 2", (22 March 2005), online.

"UNESCO Public Library Manifesto", by UNESCO, 172853 (Paris, 1994).

"Unlocatable Owners: General Information", online: *Copyr Board Can*.

"Unlocatable Owners Search", online: *Copyr Board Can*.