



**CARL
ABRC**

Seeing the forest for the trees: What contract override looks like in Canadian libraries

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Review: What is contract override?

When the terms of a contract overrides provisions in the law.

Contract override in libraries

In university libraries contract override often limits or restricts the application of copyright exceptions and limitations to licensed digital content.

Generally understood that contractual obligations override copyright exceptions, including user rights

- Not a unanimous interpretation.*

Research libraries regularly explicitly contract out or interpret we have contracted out of user rights.

Poll 1: Have you experienced a contract override situation in your work?

- Yes/No

Poll 2: If yes, would you say contract override is becoming increasingly problematic in your work?

Yes/No

Impact on university libraries

This translates to an difficulties for library staff in:

- confidently apply the robust user rights, such as fair dealing, that are codified in our copyright legislation to activities*
- providing clear guidance to students, faculty and staff.*

And impacts the use of and activities related to digital content that may otherwise be legal.

Contributing issues

- *Contract override is exacerbated by technological protection measures (TPMs) - can't be broken for non-infringing purposes.*
- *Outright prohibition of specific uses.*
- *Licensing conditions associated with permitted uses.*
- *Lack of shared understanding and inconsistency in library, aggregator and rightholders definitions for activities and licensing terms, including permitted and non-permitted uses.*
- *Difficulties in seeking clarity on licensing terms.*
- *Interpretation of “silent” or ambiguous licensing terms.*

Risk and its impact

Contract violation risks and concerns for institutions and individuals include:

- *temporary loss of access to content - individual or institutional*
- *potential damage to vendor relationships and future negotiations*
- *reputational concerns - individual (scholarly record) and institutional*
- *possibility of statutory damages.*

Risk tolerance and copyright chill can have a significant impact on the interpretation of library licenses.

Copyright Anxiety and Chill: Higher Education Employees in the UK and Canada, 2023

Research Team: Amanda Wakaruk, Chris Morrison, Jane Secker, Céline Gareau-Brennan

HOW DOES COPYRIGHT MAKE YOU FEEL?



THE COPYRIGHT ANXIETY STUDY is led by the Bodleian Libraries, University of Oxford in partnership with City, University of London and the University of Alberta. It will explore levels of 'copyright anxiety' across the UK and Canadian higher education sectors, to learn more about the extent to which copyright law inhibits innovative research and teaching practice.



What is copyright anxiety and chill?

Copyright anxiety includes nervousness and apprehension associated with navigating copyright issues.

*This may result in **copyright chill**, where a legitimate use of copyright-protected material is discouraged or inhibited by the threat (real of perceived) of legal action.*

Why study copyright anxiety and chill?

Copyright anxiety and chill can prevent legitimate uses of literary and other works, inhibiting learning and the creation of new works.

The more librarians and other professionals that understand this phenomenon, the better equipped we will be to develop information and copyright literacy practices and services to help reduce and alleviate its impact.

Details of scale creation and data from 2019

Wakaruk, A., Gareau-Brennan, C., & Pietrosanu, M. (2021).
Introducing the Copyright Anxiety Scale. *Journal of Copyright in
Education & Librarianship*, 5(1).

<https://doi.org/10.17161/jcel.v5i1.15212>

Copyright Anxiety Scale Frequency Tabulations September 2019

<https://doi.org/10.7939/r3-y3tq-a337>

Copyright Anxiety Scale Cross Tabulations June 2021

<https://doi.org/10.7939/r3-ptq3-5n82>

What did we learn from 521 respondents in 2019 (across all sectors, Canada and US)?

- Copyright anxiety is real and chill is likely
- People are worried that they do not know enough about copyright
- Very few questions elicited responses with statistically significant variation between genders or geography (i.e., those living in Canada and US)
- Modifications could be helpful if collecting sector-specific data
- **Need scenario-based information to determine chill and assess its impact**

2023 Copyright Anxiety Scale (CAS), Higher Education in Canada and UK

1. I am familiar with copyright legislation and/or copyright case law.
2. I can identify exceptions to copyright infringement.
3. I frequently have concerns about copyright.
4. I get confused trying to navigate copyright issues.
5. I am comfortable performing actions that I think might be copyright infringement.
6. I am confident that the materials I create are protected by copyright.
7. I do not feel safe using copyright-protected materials that I do not hold the rights for.
8. I worry that I do not know enough about copyright.
9. I have access to good instructions and/or policies for using copyright-protected materials.
10. It is easy for me to get help or find information about copyright.
11. I feel hesitant to ask for help with copyright issues.
12. I worry about the consequences of copyright infringement.

13. I am confident that elected officials (e.g., MPs) understand legal issues related to copyright.

14. I am confident that the senior managers / leadership team at my institution understand legal issues related to copyright.

15. I am worried about the amount of copyright infringement that goes on at my institution.

16. I often feel anxious in my professional life.

17. I have had formal training / education related to copyright.* Yes / No

18. True / False question about educational fair dealing.*

19. I have avoided activities or projects in the workplace because of copyright issues.* Yes / No

20. Can you describe a time that concerns about copyright hampered or prevented you from doing something as part of your work?* Yes / No

21. Any additional comments you would like to share?

****Followed by a write-in response request***

2023 CAS HE Survey responses

Please tell us whether you believe the following statement to be true or false:

Fair dealing always applies when the purpose of copying and sharing a copyright-protected work is for educational purposes.

Please explain your response to the previous question, in one or two sentences.

22/509 respondents described contract override, 16 from Canada

“Licences can override fair dealing.”

“...sometimes publishers prohibit certain uses of the work as per the license agreements institutions sign with them. This takes precedence over fair dealing.”

“It depends on the quantity/nature of the content copied, whether or not it's commercially available, whether or not license terms expressly prohibit certain uses (we still don't have a firm answer from parliament or the courts on whether or not contracts can truly override user's rights)”

“Fair dealing generally applies, but sometimes we have signed a license with the publisher/vendor where we have signed away our rights to fair dealing.”

2023 CAS HE Survey responses

I have avoided activities or projects in the workplace because of copyright issues.
(**Yes** / No)

Can you describe a time that concerns about copyright hampered or prevented you from doing something as part of your work? (**Yes** / No)

“There are concerns about contracts overriding the users' provisions in the Copyright Act. I know of contract overrides that prevent the preservation of works, interfere with the use of fair dealing exceptions for its intended public interest purposes, and preventing the distribution of works reproduced in accessible formats.”

70% of respondents answered “yes” to one or both questions. Roughly half of those (233) provided a write-in response.

Only 7/233 respondents described a contract override scenario, and 6 were from Canada.

Why are academic staff in Canada more likely than their UK counterparts to describe contract override -- unprompted -- as problematic for their work?

To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

THIS PROVISION IS CONTAINED IN THE [UK] COPYRIGHT AND RIGHTS IN PERFORMANCES (RESEARCH, EDUCATION, LIBRARIES AND ARCHIVES) REGULATIONS 2014, THE [UK] COPYRIGHT AND RIGHTS IN PERFORMANCES (DISABILITY) REGULATIONS 2014 AND THE [UK] COPYRIGHT AND RIGHTS IN PERFORMANCES (QUOTATION AND PARODY) REGULATIONS 2014

2023 CAS HE Focus groups

“I have many library staff, particularly in our collections unit, that are worried about the way language is phrased in licences. It has caused a lot of confusion and fear and anxiety.”

Negotiable Licences: the terms of licence can be modified, usually as part of a negotiation.

Describes most vendor / publisher licence agreements entered into by libraries. These agreements provide the terms of use by which “authorized users” are allowed to access and use of content.

2023 CAS HE Focus groups: Negotiable licences, licensed library resources

“I always end up going back to the licence to see what the licence says. It never even occurs to me to go to the *Copyright Act* and say well you can do all of these things according to section 29 or whatever it is. Often the licence will say something like, ‘nothing in this licence takes away from your right under copyright’ but then if you dig a little deeper they are very particular about how you can share information.

You are completely forbidden from doing TDM [in some databases]. I’m wanting to tell people that they can proceed with their research because that’s what it is. It’s a method of research, it’s not accessing different content. It’s just using the content differently and something in my contract is saying no, you can’t do that and so I get very frustrated because I feel like you’ve already licensed the content to us and this is just a method of scholarship.”

2023 CAS HE Focus groups: Non-negotiable licences

“Well, your access is legal but the access for you to share it with an entire classroom of students isn’t necessarily that.”

Non-negotiable Licences: user/party (library or end user, in this context) has no opportunity to modify the terms of use set out by the rights holder (or their agent). Describes most “personal” content access agreements (e.g., browse-wrap, click-through / click-wrap, etc.).

2023 Focus groups: Non-negotiated licences

“...commercial streaming services... Netflix, Amazon, Disney etc. It’s very clearly stated that it’s for private use and often these terms are restricting us, seemingly, from what we can do in the *Copyright Act*. Because of the ambiguity of whether or not it’s the *Copyright Act* or contracts it’s caused a lot of pause or even just skipping right over copyright anxiety and going straight to copyright chill. This has caused a lot people to just not touch the service when you could potentially make the argument that you could use it. But of course because it’s [the Act is] silent on that we’re left shrugging and wondering...

I wish we had more clarity about contract override and also just the realm of digital material in general. It’s very difficult to navigate. It’s almost like we have to have two different conversations: here’s the rules for physical and here’s the rules for digital...

These paywalls and more and more ways to block content is an ongoing issue.”

Poll 1: Have you experienced a contract override situation in your work?

- yes/no

No exception to copyright should be overridden by contract

- **CARL Brief to the INDU Committee as Part of the Review of the Copyright Act Recommendation:** Amend the Act to make it clear that no exception to copyright can be waived or overridden by contract. (2018)
- **CFLA Position Statement:** Protecting Copyright Exceptions From Contract Override <https://cfla-fcab.ca/en/copyright/> and **Recommendation:** The Government of Canada should amend the Canadian *Copyright Act* to make it clear no exception to copyright can be overridden by contract.

Briefs submitted to INDU during last review of the *Copyright Act*

Topic	Percent of Briefs	N = 192
Fair dealing	50.0%	n = 96
Technological protection measures (TPMs)	22.9%	n = 44
Term	21.9%	n = 42
Statutory damages	18.8%	n = 36
Whether contracts can override user rights	16.7%	n = 32
Indigenous rights	16.1%	n = 31
Crown copyright	13.5%	n = 26
Whether tariffs are mandatory	13.0%	n = 25
Text and data mining	10.9%	n = 21
Notice and notice	10.4%	n = 20

Table 3. Top ten most addressed topics.

Jennifer Zerkee, Stephanie Savage, Jentry Campbell, [Canada's Copyright Act Review: Implications for Fair Dealing and Higher Education](https://www.jcel-pub.org/article/view/15513/16319), *Journal of Copyright in Education & Librarianship*: Vol. 5 No. 1: The Journal of Copyright in Education and Librarianship, Volume 5, Issue 1, 2021-2022 <https://www.jcel-pub.org/article/view/15513/16319>

Summary

- Contract override has a significant impact on library services and is an increasingly critical issue.
- Data from the Copyright Anxiety Study 2023 indicate that, in Canada:
 - faculty and staff are regularly advised to follow the terms of a licence agreement, even when those terms override statutory user rights
 - library staff may not be aware of the extent of user rights (exceptions to infringement) available in the *Copyright Act*
- CARL and other stakeholders asked the Government of Canada (GC) to address contract override in the last review of the *Copyright Act* (2018/2019).
- This topic will be included, once again, in submissions to the ongoing GC Artificial Intelligence and Copyright review.



Questions?

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