



**MEMORANDUM**  
**PRIVILEGED AND CONFIDENTIAL**

**TO:** The University of British Columbia (“**UBC**”), University of Toronto (“**U of T**”),  
University of Calgary, University of Manitoba, University of New Brunswick and  
Simon Fraser University

**FROM:** Richards Buell Sutton LLP

**DATE:** July 28, 2017

**RE:** University Copyright Compliance Checklist  
File No. 44099-0001

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**Executive Summary**

We have prepared the following copyright compliance checklist, following our detailed review of *The Canadian Copyright Licensing Agency (“Access Copyright”) v. York University*, 2017 FC 669 (“**York**” or the “**York Decision**”), to assist a university in reviewing its copyright compliance processes and its copyright fair dealing guidelines (in each case, “**Guidelines**”).

In York, the York Guidelines were determined to be unfair, with arbitrary and fixed limits without reasonable justification. As a result, each university should assess its own Guidelines to determine changes that would be required in light of the York Decision. As part of an internal review of a university’s copyright compliance processes, we have also included below some of the recommended safeguards from the various application notes that were prepared by Universities Canada (formerly AUCC) (collectively referred to as the “**Universities Canada Application Notes**”). Many of these safeguards were not either specifically implemented under the facts in the York decision, or the York Decision was silent regarding whether they were implemented and in place.

**Production and Sale of Coursepacks**

1. Is all copying and production of coursepacks by the university centralized, e.g. via a university bookstore or other copy centre that is owned and operated by the university? Ideally, the university should try to retain and maximise direct control over coursepack copying (rather than relying on compliance by individual faculty) in compliance with applicable copyright laws, wherever possible.
2. If such copying is not centralized by the university, are university faculty or staff:
  - (a) with respect to print copying, directed to only use a third party commercial print or copy shop that is licensed by Access Copyright?<sup>1</sup>

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<sup>1</sup> See *The Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 (“**York**”), para 48.

- (b) with respect to print copying, clearly advised that they cannot send a coursepack to a commercial copy shop for production and/or sale if they wish to rely on the Guidelines for such copying?
  - (c) clearly informed and required to comply with copyright laws and Guidelines before producing coursepacks?
  - (d) subject to periodic or regular auditing, monitoring or enforcement mechanisms by the university to confirm if their coursepack copying is in compliance with copyright laws?
3. Are there appropriate mechanisms in place to ensure that university faculty exclusively use a university's internal printing services or licensed third party print shops?<sup>2</sup>
4. Are there appropriate mechanisms in place to ensure that the university staff responsible for administering the Guidelines are available to advise faculty and staff on the production of course packs in accordance with copyright laws?
5. If a university is relying on the Guidelines to produce and sell coursepacks:<sup>3</sup>
- (a) no "profit" can be made on course pack production and sale;
  - (b) the university cannot send coursepacks to a commercial copy shop;
  - (c) if any material to be included in a course pack exceeds the scope of the Guidelines, transactional permission for making the copies should be secured from the copyright holder or from the holder's licensing agent, provided that the university maintains clear records of such transactional permissions (see subsection 5(e)(vi) below);
  - (d) copies of copyright-protected works for which the university has a licence with the publisher may be included in course packs, only if the terms of the licence permit the making of copies for inclusion in course packs, provided that the university maintains clear records of such copying pursuant to licences (see subsection 5(e)(vii) below);
  - (e) records should be created and maintained, that show for each coursepack:
    - (i) the identity of each work included in the coursepacks;
    - (ii) identification of the publication from which the excerpt was copied (if applicable);
    - (iii) the length of each excerpt included;
    - (iv) the basis upon which each excerpt was copied (e.g. fair dealing, library licence, work made available over the Internet, transactional licence);
    - (v) the number of copyrighted pages copied and the total number of pages of the work from which the copies were made;<sup>4</sup>

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<sup>2</sup> See *York*, paras 48, 152, 156 and 157.

<sup>3</sup> See Universities Canada Fair Dealing application note #6 (Production and Sale of Course Packs)

<sup>4</sup> See also *York*, para 83.

- (vi) where a transactional permission is obtained to copy a work for a coursepack, a copy of the transactional permission obtained;<sup>5</sup> and
  - (vii) where a license is in place that permits the copying, a copy of the documentation verifying the existence and/or status of the license, and confirmation that the license permits the making of copies for inclusion in course packs.<sup>6</sup>
  - (f) Individuals who produce course packs should either be employees of the university or engaged by the university as independent contractors that are subject to supervision by university employees.
  - (g) Coursepacks should be sold directly to the students and not via an intermediary such as a student association.
  - (h) Is the university limited to only retaining one master copy of each course pack? This copy may be either paper or electronic, may only be used for course pack production in the future, and access must only be limited to the persons responsible for course pack production (e.g. stored on a secure device or in a secure area).<sup>7</sup>
  - (i) Does each copy of a course pack include the following notice on the front cover (or another prominent location in the work)?<sup>8</sup>
    - (i) “This course pack is made in accordance with the university’s Fair Dealing Policy for sale to and use by students enrolled in the course of study for which it was made. This course pack may also include copyright-protected material pursuant to permissions granted by the copyright holder. Any reproduction or other use of this material is strictly forbidden.”
6. Are there monitoring or enforcement mechanisms in place to ensure that copying by faculty and staff is in compliance with copyright laws and the university’s Guidelines, such as:<sup>9</sup>
- (a) implementing safeguards such as periodic auditing, sampling, monitoring or reviews of copyright compliance with copyright laws and Guidelines;<sup>10</sup>
  - (b) review of appropriate record-keeping, such as coursepack copying permitted by transactional permissions and licenses obtained by the university;
  - (c) having a centralised copyright clearance centre to assist with licenses and/or permissions required for compliant copying;<sup>11</sup> and

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<sup>5</sup> See also *York*, para 78.

<sup>6</sup> See also *York*, para 125.

<sup>7</sup> Universities Canada Fair Dealing application note no. 6 (Production and Sale of Course Packs).

<sup>8</sup> Universities Canada Fair Dealing application note no. 6 (Production and Sale of Course Packs).

<sup>9</sup> See *York*, paras 48, 58, 76, 78 and 79.

<sup>10</sup> See *York*, para 78.

<sup>11</sup> See *York*, paras 51 and 52.

- (d) reasonable efforts to guard against systematic, cumulative copying from the same work which in total exceeds the portion of the work that may be copied pursuant to the Guidelines;
  - (e) The York Decision indicated that the following procedures, though helpful, are likely insufficient without including some effective means of compliance monitoring and enforcement of any Guidelines by the university:<sup>12</sup>
    - (i) providing reminders and notices to faculty, staff and students on the importance of complying with copyright laws and Guidelines (when producing coursepacks or otherwise); and
    - (ii) a copyright support office which provides copyright support services to faculty and staff, and copyright information sessions.
7. Are there any disciplinary measures or other consequences taken by the university against faculty that have breached copyright obligations (e.g. by using unlicensed print shops)?<sup>13</sup>

### **Learning Management Systems (“LMS”)**

8. Is the university LMS operated by or under the control of the university? Is the university LMS stored on a secure server or other device?<sup>14</sup>
9. Is the access to copies posted to the LMS limited to those students in the respective course, unit, or program of instruction?<sup>15</sup>
10. Does content that is uploaded or posted to an LMS involve a centralized process under the supervision of staff that are competent to review the content for copyright compliance?<sup>16</sup>
11. Are university faculty or staff who are posting or uploading content to an LMS required to identify the right(s) on which they are relying to post the work or extract? (e.g. permission from copyright holder, paid license, public domain, fair dealing, etc.)<sup>17</sup>
12. Are there monitoring or enforcement mechanisms in place to ensure that faculty and staff use of the LMS is copyright- compliant, such as the following options:<sup>18</sup>
- (a) consider implementing a higher level of central copyright clearance, such as requiring materials that are posted to electronic systems (including without limitation the LMS) to be reviewed and copyright permissions obtained (if required) by the persons responsible for institutional copyright clearance at the university;

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<sup>12</sup> See *York*, paras 59 and 60.

<sup>13</sup> See *York*, paras 48, 157-161.

<sup>14</sup> See Universities Canada Fair Dealing application note no. 5 (Learning Management Systems)

<sup>15</sup> See Universities Canada Fair Dealing application note no. 5 (Learning Management Systems)

<sup>16</sup> See Universities Canada Fair Dealing application note no. 5 (Learning Management Systems)

<sup>17</sup> See Universities Canada Fair Dealing application note no. 5 (Learning Management Systems)

<sup>18</sup> See *York*, paras 59-60, 76, 78 and 79.

- (b) if (a) is not practically feasible, then have periodic or ongoing reviews of LMS content by the university administrative staff that centrally manages the LMS (whether of a random selection of course websites or a more thorough and comprehensive review), to monitor and confirm LMS users' copyright compliance;
  - (c) reasonable efforts taken to guard against systematic, cumulative copying from the same work which in total exceeds the portion of the work that may be copied pursuant to the Guidelines;
  - (d) removal of student and faculty access to any electronic course system, together with deletion and removal of all materials that are copied relying on the Guidelines, within a reasonable time (e.g. 30 days following the date on which students receive final course evaluations);
  - (e) The York Decision indicated that the following procedures, though helpful, are likely insufficient without including some effective means of compliance monitoring and enforcement of any Guidelines by the university:<sup>19</sup>
    - (i) providing reminders and notices to faculty, staff and students on the importance of complying with copyright laws and Guidelines when using the LMS;
    - (ii) requiring university faculty, staff and students to agree to comply with copyright Guidelines before gaining access to the LMS; and
    - (iii) a copyright support office which provides copyright support services to faculty and staff, including copyright information sessions and review and preparation of course materials for an LMS .
13. Are the materials posted on the LMS used as a supplementary resource to course textbooks, or are they the primary source of information that stands in place of a course textbook?<sup>20</sup>

### **Alternatives to Fair Dealing**

14. Have any alternatives to fair dealing been considered and/or used by the university? Some examples of alternatives may include:
- (a) electronic works and publications that are paid for and licensed by the university;
  - (b) obtaining copyright permissions for specific works;
  - (c) materials that are properly in the public domain;
  - (d) providing hyperlinks for students to access on-line materials rather than copies;
  - (e) custom book services;<sup>21</sup>
  - (f) purchasing individual chapters or articles from the publisher;<sup>22</sup> or

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<sup>19</sup> See *York*, paras 59 and 60.

<sup>20</sup> See *York*, para 324.

<sup>21</sup> See *York*, paras 23 and 330.

(g) purchasing more of the necessary books and articles.<sup>23</sup>

15. Has the University purchased originals of the sources that are being copied?<sup>24</sup>

### **Fair Dealing Guidelines**

16. Did counsel for Universities Canada (then AUCC) previously consider fair dealing jurisprudence and a comparative analysis of fair dealing criteria in other jurisdictions to develop the thresholds and current wording under the Guidelines? If so, does the university have access to this information and advice, and does such legal analysis now require updating?

17. Did the university engage in any outside consultations (e.g. with copyright owners, publishers, others outside of the university community) in the development and/or revision of the Guidelines?<sup>25</sup>

18. Based on factors under sections 16, 17 or otherwise, can the university provide a reasonable and justifiable rationale for the threshold amounts for fair dealing under the Guidelines?<sup>26</sup>

19. Does the University regularly hold information sessions for faculty and staff to inform them of the Guidelines and to educate them about the importance of copyright compliance (see our comments under 6(e) and 12(e) above)?<sup>27</sup>

20. Does the university keep records of attendance at such information sessions, and/or provide incentives to faculty and staff for attending? Are such information sessions included as part of orientation sessions for incoming university faculty and staff?

21. Do the Guidelines go beyond the quantitative aspect of the copying and also consider the qualitative aspect of the copying?<sup>28</sup>

(a) there may need to be considerations to address certain provisions within the Guidelines that may have less fair effects. One example in the York Decision was an interpretation of the Guidelines which would permit the copying of a chapter of a book which, in the appropriate context (e.g. an anthology), which may result in an entire work being copied under the Guidelines (i.e. the distinction for protection being based on the format of publication).<sup>29</sup>

(b) York commented that qualitatively, if the parts copied were the core of an author's work, even to the extent of 100%, this would likely be unfair.<sup>30</sup>

22. Would the Guidelines permit copying of up to 100% of a published work across different courses?<sup>31</sup>

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<sup>22</sup> See *York*, paras 23 and 330.

<sup>23</sup> See *York*, paras 23 and 330.

<sup>24</sup> See *York*, para 323.

<sup>25</sup> See *York*, para 177.

<sup>26</sup> See *York*, paras 20, 305 to 308.

<sup>27</sup> See *York*, para 75.

<sup>28</sup> See *York*, para 295.

<sup>29</sup> See *York*, para 21.

<sup>30</sup> See *York*, paras 22, 317.

<sup>31</sup> See *York*, paras 20, 311.

23. Do the Guidelines place limitations on the number of copies or on the “life” of copies made?<sup>32</sup>
24. Do the Guidelines direct faculty and staff to designated university persons that can provide guidance with regard to interpreting the Guidelines, and making decisions in unclear situations?

### **Licenses, Permissions and Record-Keeping**

25. Does the university have comprehensive record-keeping mechanisms and written documentation for the licenses, subscriptions, and permissions acquired for its copying activities?<sup>33</sup>
26. Have the licenses been reviewed in detail to confirm whether copying by the university for coursepacks, LMS purposes etc. is permissible?
27. Does the university maintain reliable records of the volume of copying that is done pursuant to permissions and/or library licenses?
28. If the university able to demonstrate, through its records, the extent of copying that has already been paid for via a license or subscription with publishers, that would overlap with compliance by such university with the Access Copyright tariff?

### **Safeguards for Monitoring of Copyright Compliance**

29. Do monitoring and enforcement mechanisms exist at the university to address compliance with copyright laws and the Guidelines? In addition to specific safeguards already described above, some further examples of safeguards may include:
  - (a) Only permitting coursepack production at internal (printing services operated by the university) or external third party print shops licensed by Access Copyright;<sup>34</sup>
  - (b) Requiring copying under the supervision and control of research librarians;<sup>35</sup>
  - (c) Requiring those requesting copies to identify the purpose of copying;<sup>36</sup>
  - (d) Requiring that any concerns about the purpose of the copying be referred to research librarians or other staff that are responsible for, and with sufficient copyright knowledge to, administer the Guidelines;<sup>37</sup>
  - (e) Mandatory review of any requests for copies that exceed the scope of the Guidelines by research librarians or other staff that are responsible for, and with sufficient copyright knowledge to, administer the Guidelines;<sup>38</sup>

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<sup>32</sup> See *York*, paras 279-280.

<sup>33</sup> See *York*, paras 91 and 125.

<sup>34</sup> See *York*, para 48.

<sup>35</sup> See *York*, para 262.

<sup>36</sup> See *York*, para 265.

<sup>37</sup> See *York*, para 265.

<sup>38</sup> See *York*, para 292.

- (f) Periodic or regular reviews, sampling or audits of individual, department, coursepack and/or LMS copying activity, to determine whether copying is in compliance with the Guidelines;<sup>39</sup>
  - (g) Designating university staff to be specifically responsible for copyright monitoring and enforcement and compliance with copyright laws and the Guidelines, including organizational support from the university for such roles;<sup>40</sup>
30. Do these monitoring and enforcement mechanisms extend to copyright compliance related to coursepack compilation and LMS?<sup>41</sup>
  31. Are faculty and staff aware of the monitoring and enforcement mechanisms and are there any consequences for failing to adhere to copyright laws and Guidelines?
  32. Are there any disciplinary or corrective action(s) imposed or taking against university faculty and staff for failure to comply with copyright laws and Guidelines? The York Decision stated that non-compliant professors should be held accountable for their actions, and it is inappropriate to put copyright compliance on “autopilot” by relying on Guidelines that are not effectively monitored and enforced.<sup>42</sup>
  33. Are written notices referencing both the Guidelines and Canadian copyright laws placed in close proximity to photocopiers, scanners, within the LMS and other sources of copying across campus?
  34. Are university faculty and staff required to agree to accept and comply with the Guidelines and applicable copyright laws?

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<sup>39</sup> See *York*, para 78.

<sup>40</sup> See *York*, paras 62, 76 and 266.

<sup>41</sup> See *York*, paras 58-59.

<sup>42</sup> See *York*, paras 28, 160 and 244.