

Fair Dealing Guidelines

University of Toronto

Introduction:

University of Toronto faculty, staff, and students are creators of material that is subject to the protections of the *Copyright Act*. They are also users of such material. Accordingly, they have both rights and obligations that arise from copyright law as it has been interpreted and applied by Canadian courts.

These Guidelines are intended to assist members of the University community in decision-making about copying and other dealings with works. However, in situations of doubt, the library is available for advice and assistance at copyright@library.utoronto.ca.

Copyright Overview:

As specified in the *Act*, “copyright” in relation to a particular work means the sole right to produce or reproduce the work or any substantial part of it in any material form, to perform the work or any substantial part of it in public, and, if the work is unpublished, to publish the work or any substantial part of it. Copyright extends to other activities such as adaptation, translation, and telecommunication to the public of a work. The definition in the *Copyright Act* also contains several other details that will not be explored here.

In general, if a work meets the definition of a copyright-protected work, copying the work or any substantial portion of it, or engaging in any of the other protected activities, will require permission of the copyright owner unless one of the exceptions in the *Act* applies.

The statutory concept of “fair dealing” is an important exception, particularly in the educational context of a university, and these Guidelines will explain that concept and how it applies. The *Copyright Act* also contains other specific educational exceptions that may apply to your activities. For further guidance, see the Copyright Basics and FAQs and also the Copyright “Roadmap” found at: <https://onereach.library.utoronto.ca/copyright/resources>

Fair Dealing:

The fair dealing provisions in sections 29, 29.1, and 29.2 of the *Copyright Act* permit dealing with a copyright-protected work, without permission from or payment to the copyright owner, for specified purposes: research, private study, education, parody, satire, criticism, review, or news reporting. According to the Supreme Court of Canada, the fair dealing exception is “always available” to users, provided that its legal requirements are met. When these requirements are met, there is no need to look further at the more specific exceptions that follow in the legislation. Fair dealing, therefore, has considerable significance when considering the options available for dealing with copyright-protected works.

“Fair dealing” is not defined in the *Copyright Act*. It is also context-specific. The concept has evolved through case law, including at the Supreme Court level through cases such as *CCH Canadian v. Law Society of Upper Canada* in 2004, *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)* and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, both in 2012, and, most recently, *York University v. Canadian Copyright Licensing Agency (Access Copyright)* in 2021.

Through these decisions, the courts have established a multi-factor analysis for assessing whether a particular dealing or practice of dealings falls within the ambit of fair dealing. They have also endorsed the use of guidelines like these to help actualize the use of fair dealing to facilitate education.

A) A Step-by-Step Approach to Determining if the Dealing is Permitted:

The following sets out four steps, each of which needs to be considered before you copy or upload material for teaching, research, or other educational purposes. Similar considerations may apply to other uses of material, including performance in the classroom, and transmission by electronic means, including via the Internet. In some cases, such as classroom performance of sound recordings and videos, additional exceptions are specifically provided by the *Copyright Act*.

The library is an important resource. It can help you with your copyright and fair dealing questions, including whether the University already has an existing licence or other arrangement that covers your intended use. Every year, the University invests heavily in ensuring that a wide range of licensed works are available for teaching, research, and educational purposes. It may also be possible for the library to help you obtain licences for uses that are not covered by an existing arrangement. When in doubt, the library is available to assist you.

Step One: Is the material you seek to use protected by copyright and owned by a third party?

The *Copyright Act* protects original literary, dramatic, musical, and artistic works, as well as performers’ performances, sound recordings, and broadcast communication signals.

When a work is protected by copyright, permission from the copyright owner is generally required in order to copy, perform, communicate, or publish the work, as well as to make it available via the Internet. Once copyright in a work expires, the work falls into the “public domain” and can be reproduced without permission from the copyright owner.

Generally, in the case of published literary, dramatic, musical, and artistic works, the work will be in the public domain if all of the authors of the work died more than 70 years ago. In some cases, such as with performers’ performances, sound recordings, broadcast signals, and works where the author is unknown, a different term of copyright will apply.

Care must be taken to consider the work itself. If, for example, an original work has fallen into the public domain, but a particular version of the work that you wish to use contains new material, the new material might be subject to copyright even if the original work is not.

In general, it is assumed that most of the material used in University of Toronto teaching and research is subject to copyright.

If no > you may copy and use the material without seeking permission

If yes > proceed to Step Two

Step Two: Does the University already have permission to use the material under an existing licence with the publisher of the work?

The University has licences with a large number of publishers. These licences allow University faculty, staff, and students to copy and use certain works subject to the terms and conditions of the particular licence. Information about licences is available through the library and is also discussed in the Copyright Basics and FAQ document.

If the material is licensed, and your proposed use falls within the scope of what is permitted by the licence, it is not necessary to inquire further.

If yes > you may copy and use the material in accordance with the licence

If no > proceed to Step Three

Step Three: Is your use “substantial”?

Copyright in section 3(1) of the *Copyright Act* includes the sole right to reproduce or perform the work “or a substantial part thereof.” Copying that is not substantial does not require permission or payment and no further analysis is required.

What is considered “substantial” is a matter of degree and context. A small amount copied from a much larger work may not be viewed as substantial, depending on the nature of the work and the proportion of what is copied to the underlying work as a whole. However, *the analysis is not purely quantitative*: even a relatively short passage may be viewed as substantial in some circumstances, especially if it is of particular importance to the original work.

The fair dealing discussion below assumes that, even though an excerpt may be “short,” it still constitutes a substantial part of the work when viewed in context. Please note as well that, whether or not an excerpt is “substantial” for copyright purposes, academic conventions will typically require appropriate citation of the source even if copyright law does not.

If no > you may copy and use the material without seeking permission

If yes > proceed to Step Four

Step Four: Is the use permitted by “fair dealing” or any of the other exceptions to copyright?

Although fair dealing is an exception to copyright, the courts have made clear that it is a “user’s right” that is not to be narrowly or restrictively construed in the research, private study, educational or other applicable context. Indeed, the Supreme Court has said that it should be given a “large and liberal interpretation.”

To qualify as fair dealing, two tests must be passed.

(a) Is the dealing for an allowable purpose?

To be eligible for consideration as fair dealing, an activity must be for one or more of the specific allowable purposes recognized by the *Copyright Act*: research, private study, education, parody, satire, criticism, review, or news reporting.

The use of a copyright-protected work in the context of teaching or research will typically pass the first test. In a decision dealing with fair dealing for the purpose of “research or private study” in the context of K-12 educational institutions, the Supreme Court noted that teachers facilitate the research and private study of students, that their activities cannot be viewed as completely separate from such research and private study and, indeed, that their activities are symbiotic with those of their students.

After that decision, the *Act* was amended to add “education” as a specific allowable purpose under the fair dealing exception, which expanded the availability of the exception in the educational context. The Supreme Court has since confirmed that, when university teachers copy works for use by their students, they are doing so for an allowable purpose: to facilitate their students’ education.

(b) Is the dealing “fair”?

Even the activity is for an allowable purpose, it will not qualify as fair dealing unless it is also “fair.”

In its landmark *CCH* decision in 2004, the Supreme Court of Canada identified six factors that are relevant in determining whether or not the dealing is fair:

1. The purpose of the dealing
2. The character of the dealing
3. The amount of the dealing
4. Available alternatives to the dealing
5. The nature of the work

6. The effect of the dealing on the work

In *Alberta v. Access Copyright*, decided in 2012, and *York University v. Access Copyright*, decided in 2021, the Supreme Court elaborated on the interpretation and application of the *CCH* factors in the context of educational institutions. Other court and tribunal decisions have also refined the analysis.

The relevance of the *CCH* factors depends on the context. Sometimes, certain factors will be much more significant than the others. Occasionally other factors, beyond these six, may be relevant. It is not necessarily the case that all six factors need to be satisfied.

Even if an activity does not constitute fair dealing, it may be permitted under one of the exceptions in the *Copyright Act* that are specific to educational institutions, such as classroom performance of music, sound recordings, and videos, or other exceptions that apply to activities like the creation and dissemination of user-generated content. The University's Copyright Basics and FAQs document provides further practical guidance as to whether a specific exception applies to your activity, including the specific statutory requirements that may apply.

If yes > you may copy and use the material without seeking permission, subject to the conditions or limitations that apply to the applicable exception

If no > you need permission to copy and use the material and should contact the Library for more information and guidance

B) Guidelines as to What Constitutes “Fair Dealing”:

The Supreme Court has acknowledged that fair dealing guidelines are important to an educational institution's ability to actualize fair dealing for its students in a fair manner. That is the purpose of these Guidelines.

The University of Toronto believes that these Guidelines provide reasonable safeguards for the owners of copyright-protected works in accordance with the *Copyright Act* and the relevant Supreme Court decisions. They also provide a good sense of the extent of use that the University views as likely to be considered fair dealing in most contexts. There may be additional scope for fair dealing in the University setting, but those other cases should include some guidance from a knowledgeable expert at the University.

The following points assume that the intended use 1) involves a “substantial part” of a copyright-protected work; 2) arises in the context of a genuine educational or academic activity; and 3) is not covered by an existing University licence.

1. Faculty and other members of the teaching staff, as well as students engaged in academic research or writing and other University staff supporting a genuine

educational or academic activity, may deal fairly with a “short excerpt” (as defined below) from a copyright-protected work (including literary works, scripts, musical scores, sound recordings and audio-visual works), including by reproducing it in paper or electronic form, performing it, or transmitting it via the Internet or otherwise, for the purposes of research, private study, education, parody, satire, criticism, review, or news reporting.¹

2. A “short excerpt” is always assessed contextually. It may include up to
 - a. about 10% of a copyright-protected work (including a literary work, musical score, sound recording, or audiovisual work);
 - b. one chapter from a book;
 - c. a single article from a periodical;
 - d. an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, or plan);
 - e. an entire newspaper article or page;
 - f. an entire single poem or musical score from a copyright-protected work containing other poems or musical scores; or
 - g. an entire single entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work,

provided that in each case you *use no more of the work than you need to achieve the allowable purpose* (see paragraph 5 below).

However, while these quantitative thresholds may be helpful as guidelines, they are not the only considerations to take into account. Whether the use of a particular excerpt is fair may vary according to the exact nature of the work being used, and of the use itself. And it will always depend on the consideration and application of the fair dealing factors, which may differ from case to case.

3. Using multiple different short excerpts from the same copyright-protected work, with the result that substantially the entire work is used, will not usually be considered fair dealing.
4. When assessing a particular “short excerpt,” the qualitative importance of the portion used should also be considered. Even where the portion of a work that is used is relatively short, or otherwise fits within the quantitative guidelines in paragraph 2, the use may nonetheless be considered unfair. For example, the use of a short excerpt may tend toward unfairness when
 - a. the short excerpt is qualitatively significant in relation to the overall work, such that the most important part, or the qualitative core, of the work has been used (i.e., if the short excerpt takes the heart of the work—the climax of

¹ Different considerations may apply where the activity involves parody or satire. In those circumstances, please contact copyright@library.utoronto.ca for assistance.

- a novel, the most revealing part of a biography, the “hook” of a recorded song, and so on); or
- b. the short excerpt is disproportionate in length to the rest of work, such as when one chapter or poem makes up a significant percentage of the entire book or anthology.
5. In all cases, it is important to avoid using more of a work than is truly necessary to achieve the allowable purpose. If the same goal could have been achieved using a shorter excerpt, the dealing may tend toward unfairness. This may be the case, for example, when an entire poem or musical score is reproduced, but only a couple of stanzas or a few dozen bars are being taught, or when an entire journal article is reproduced but only one section or a few specific paragraphs are relevant to the course or lesson.

Further, although the “short excerpt” guideline in paragraph 2 refers to the use of “up to” an entire work, that should be understood to apply only where it would not be possible to achieve the allowable purpose by using an excerpt of any length—for example, when a photograph, drawing, or short poem cannot be excerpted in a meaningful way, or where the portion to be studied cannot practically be separated from the rest of the work. Just because a work is relatively brief (e.g., a journal or periodical article or a short musical score), it should not be assumed that it is necessary to copy or communicate the entire work, as opposed to a few pages or paragraphs from it, to achieve the educational purpose.

6. If it is necessary to use an entire work—particularly an artistic work—or if using an excerpt from an audio-visual work or a sound recording, consideration should be given to presenting it in a lower-resolution format that, while still effective for the allowable purpose, cannot effectively serve as a substitute for a licensed copy of the original. A dealing that does not interfere with the market for the original work is more likely to be fair.

7. Subject always to the consideration and application of the *CCH* fair dealing factors, a copy of a short excerpt from a copyright-protected work may be provided or distributed to each student enrolled in a class or course as
 - a. a class handout;
 - b. a posting to an online learning management system (LMS) that is password protected or otherwise restricted to students of the University; or
 - c. part of a course pack.

However, when a short excerpt from a copyright-protected work is included as part of the primary teaching materials for a course—whether those materials are provided in a traditional course pack or delivered through an LMS—there is an increased risk that the dealing may be considered unfair. In these cases in particular, alternatives to unlicensed use (such as relying instead on works that the University has permission or a licence to use or works that are in the public domain) should be considered first.

8. It is also important to consider how the short excerpt is being dealt with—or could be dealt with by others—before making your use. For example, it is best practice to remove unlicensed third-party content from lecture slides, or to create a second version of the slides that do not include third-party content, before posting them online in a way that might allow them to be accessed by a wider audience (e.g., on a public website rather than an LMS).
9. When a short excerpt from a copyright-protected work is provided or distributed to students, whether in a digital format (e.g., delivered as an email attachment or posted to an LMS) or a physical format (e.g., distributed as a class handout or included in a paper course pack), it is important that it is used solely for its intended purpose. Among other things:
 - a. The material should be provided to each student on the express understanding that it is to be used solely for their own personal use.
 - b. Each student should be advised that the material is not to be shared with, or copied by, anyone except the student for which it was intended, or used other than for the purpose that it was intended (e.g., printing a copy to read, highlight, or annotate for the student's own studies or cutting and pasting some portion of the material into the student's class notes or other academic work product).
 - c. Material that is uploaded to an LMS should cease to be available to students a reasonable time after the conclusion of the course. (However, it may be kept available long enough to allow for deferred exams, appeals, etc.)
10. When a short excerpt from a copyright-protected work is used for the purpose of news reporting, criticism, or review, the *Copyright Act* requires, in addition to consideration of the fair dealing factors referred to above, that the user must mention the source and, if given in the source, the name of the author or creator of

the work. While the *Copyright Act* does not require attribution of this kind when the use is for the purpose of research, private study, or education, academic conventions may still require appropriate citation.

11. Any fee charged by the University for copying, performing, or communicating a short excerpt from a copyright-protected work must be intended only to cover the University's costs, including overhead costs.

Copying, performance, or communication that exceeds, or that may exceed, the parameters of these Guidelines will require further consideration. If you find yourself in this situation, you should seek guidance from the library. An evaluation of whether the proposed use is permitted under fair dealing will be made based on all relevant circumstances.

The University expects all members of its community to comply with copyright law.

Additional resources are available here:

<https://onesearch.library.utoronto.ca/copyright/resources>.

For clarifications about these Guidelines or for further assistance, contact

copyright@library.utoronto.ca.

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