

Fair Dealing Exception Guidelines

“Fair dealing” is an important statutory exception provided by the Canadian Copyright Act.

These Guidelines expand the concept of fair dealing, give additional background to the 4th question in [Western’s Copyright Decision Map](#), and indicate the kinds and levels of copying typically encompassed by the fair dealing exception. Follow Western’s [Fair Dealing Analysis](#) to apply the fair dealing exception to particular situations. Remember that other statutory exceptions or conditions outlined in the Map may apply to your situation.

Background

Articulated in [Section 29](#) of the Copyright Act of Canada, the Fair Dealing exception permits the limited non-commercial use of copyright protected material without the risk of infringement and without having to seek clearance from of copyright holders or pay a royalty. It is perhaps the most significant statutory exception, particularly for us at Western.

According to the Supreme Court of Canada in its ruling in [CCH Canadian v. Law Society of Upper Canada \(2004\)](#), the fair dealing exception is “always available” to users (49). Provided that its legal requirements are met, there is no need to look to the additional, more specific exceptions that follow in the legislation in order to reproduce a work without seeking copyright clearance. Fair dealing, therefore, has considerable significance as we consider our options when contemplating using copyright-protected works. Although it is called the fair dealing exception in the Act, the 2004 Supreme Court ruling also indicates that fair dealing constitutes a “user’s right” which “should not be interpreted restrictively” (48).

[The Copyright Modernization Act \(2012\)](#) made significant amendments to the Canadian Copyright Act, including the addition of education as a specific allowable purpose under the fair dealing exception. This explicitly expands the availability of the fair dealing exception in the university setting.

In May 2015, The Copyright Board of Canada also provided additional clarity in applying the fair dealing exception in its [Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in Its Repertoire \[Provincial and Territorial Governments – 2005-2014\]](#). As part of its detailed deliberations regarding the tariff amount payable to Access by the Governments, the Copyright Board worked systematically through the CCH fairness factors.

Definition

“Fair dealing” is not explicitly defined in the Copyright Act. [Section 29](#) of the Act merely itemizes the eight specific purposes to which the exception can be applied and for three of them stipulates the added requirement for attribution. It states that copying for these named purposes is not infringement, but gives no indication about what constitutes “fair”.

The concept of fair dealing has evolved significantly over the last decade through amendments to the Act itself as well as specific case law and decisions of the Copyright Board of Canada which assist in interpreting it. [The Copyright Modernization Act \(2012\)](#), expanded the purpose to encompass education and parody and satire. Case law including Supreme Court rulings in cases including [CCH Canadian v. Law Society of Upper Canada \(2004\)](#), [Alberta \(Minister of Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\) \(2012\)](#), and [Society of Composers, Authors and Music Publishers of Canada v. Bell Canada \(2012\)](#), established and refined a multi-factor analysis for assessing fairness; determining whether a particular copying activity or other dealing falls within the scope of fair dealing. The [Copyright Board of Canada](#), in arriving at its decision in setting tariffs for use of material in the Access Copyright repertoire payable by Canadian Provincial and Territorial Governments, worked

systematically through the fairness factors the Supreme Court established in the CCH ruling. This analysis forms Section XII of the decision and provides additional clarity in applying the fair dealing exception.

Application of the Fair Dealing Exception

To qualify for fair dealing, two broad ‘tests’ must be passed. The first considers the purpose of the dealing. The second focuses on its scope. Together these conditions factor into establishing degrees of fairness and subsequent use without seeking specific clearance. Follow Western’s [Fair Dealing Analysis](#) to apply the fair dealing exception to particular situations.

1. Purpose

As articulated in the Act, the activity for which the copying is done must be for one or more of these specified purposes:

- research
- private study
- education
- parody
- satire
- criticism
- review
- news reporting

Since it is a statutory condition, purpose must be satisfied. The use of a copyright-protected work or “dealing” at Western will typically be for a research, a private study or an educational purpose that includes teaching, and thereby pass the first test.

2. Fairness

In its landmark *CCH v. Law Society* ruling in 2004, the Supreme Court of Canada identified six factors that are relevant in determining whether or not a particular dealing is fair. The Copyright Board decision in 2015 acknowledged confusion with terminology in the first CCH factor labeled “purpose” in the English edition of the ruling, and clarified its intent by referring to it as the *goal* of the dealing.

These factors are:

- goal (or purpose) of the dealing
- character of the dealing
- amount of the dealing
- nature of the work
- available alternatives to the dealing
- effect of the dealing on the work

The relevance of the factors depends entirely on the context. Sometimes, certain factors will be much more significant than the others. It is also not necessarily the case that all six factors need to be satisfied. Consult the [Supreme Court CCH Ruling \(2004\)](#) and the [Copyright Board of Canada Decision \(2015\)](#) for additional information.

Fair Dealing Exception Guidelines

Western believes the following Fair Dealing Exception Guidelines and employing our [Fair Dealing Analysis](#) tool will provide reasonable safeguards for the owners of copyright-protected works in accordance with the Copyright Act and the Supreme Court and Copyright Board decisions. They also provide a good sense of the extent of copying that Western views as likely to be considered fair dealing in most contexts, understanding that there may be additional scope for copying in the University setting. These additional circumstances may require some guidance. Contact copyright@uwo.ca when in doubt.

The Fair Dealing Exception Guidelines assume that

- The term of copyright protection has not expired. (see Western's [Term Protection Guidelines](#))
- The copying is of a "substantial part" of the work. (see Western's [Substantiality Guidelines](#))
- A general use or university-negotiated licence does not cover the work. (see Western's [Licensed Use Guidelines](#))

Further, the guidelines concentrate specifically on situations where fair dealing needs to be considered, and not with other exceptions which have separate statutory requirements but may be available even if fair dealing is not; for example, the classroom use of video, or the creation and dissemination of user-generated content.

1. Consider both purpose and group of fairness factors in your fair dealing analysis.
2. Faculty, staff and students at Western may reproduce, communicate or otherwise deal with short excerpts or portions of a copyright-protected work for educational purposes. Copying for the purpose of research, private study, parody, satire, criticism, review or news reporting is also permitted under the fair dealing exception.
3. You must cite the source, and where available the author or creator of the work when your dealing with the work is for criticism, review or news reporting. Of course attribution is always necessary whenever you use the work of someone else in your research, teaching and learning. Of course attribution is always necessary whenever you use the work of someone else in your research, teaching and learning, both from a copyright perspective, and to comply with University policy on plagiarism.
4. As a general guideline, copying a portion of up to 10 percent of a work is likely within your fair dealing rights. More than 10 percent may also be fine under certain circumstances such as copying
 - a journal article from a periodical or a single chapter from a book
 - a short story, poem, play or essay from a book or periodical
 - an entire reproduction of an artistic work or a single music score from a book or periodical
 - an entire entry from an dictionary, encyclopedia, or similar reference work

Keep in mind that both quantity and quality factor into fair dealing analysis. Employing fair dealing scope factors in addition to amount may be necessary if copying of a work exceeds 10 percent or when the copying is of a single chapter of a book that consists of only 2 or 3 chapters in total, for example. In some circumstances an entire work may be reproduced, such as a poem, a photograph or a drawing when it is part of a collection or anthology.

5. Works can include literary works, musical scores, sound recordings and audio-visual works and can be in print or electronic form.
6. As a general guideline, your copies may be provided or communicated to each student enrolled in your class or course in ways including:
 - a print handout
 - a posting to OWL since it is a secure (password-protected) learning management system restricted to Western students
 - part of a course pack
7. Copying multiple different excerpts from the same work in order to satisfy the amount factor and thereby essentially reproduce the work in its entirety is generally not considered fair dealing.
8. Any fees Western charges for copying or communicating portions of works protected by copyright can only cover Western's costs including overhead.
9. If after analysis, your dealing appears to fall outside the purpose and scope factors of the fair dealing exception, you may need to examine additional statutory exceptions or seek clearance from the copyright owner before copying.
10. If you have questions, please direct them to copyright@uwo.ca.

The Fair Dealing Exception is only one of the several statutory exceptions contained in the Canadian *Copyright Act*. Other exceptions or conditions outlined in [Western's Copyright Decision Map](#) may apply to your situation.

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Adapted with permission from [the University of Toronto's Fair Dealing Guidelines](#)