



Copyright Fair Dealing Guidelines

Procedure No.:	7506-PR1
Policy Reference:	7506
Category:	Information Management
Department Responsible:	Library Services
Approval Date:	2013 Oct 17
Effective Date:	2013 Oct 17

Objectives

This procedure applies directly to **BCIT Policy 7506, Use of Materials Protected by Copyright**. This procedure describes the process that BCIT students, employees, and contractors are required to follow when assessing whether a particular copying activity or other dealing falls within fair dealing or other exceptions under the *Copyright Act*.

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Who This Procedure Applies To

This procedure applies to all BCIT students, employees, and contractors (BCIT users) who use material that is subject to the provisions of the *Copyright Act*.

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1. Fair Dealing

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

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the work or any substantial part of it, to perform the work or any substantial part of it in public, and if the work is unpublished, to publish the work or any substantial part of it.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 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

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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 post-secondary institution, and these Guidelines will explain that concept and indicate the kinds and levels of copying that it typically includes. The Act also contains other specific educational exceptions that may apply to your activities.

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. These purposes are 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 legal 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 as people contemplating copying or other dealings with copyright-protected works consider what options are available.

“Fair dealing” is not defined in the Act. The concept has evolved significantly over the last decade through case law, including at the Supreme Court level through cases such as *CCH Canadian v. Law Society of Upper Canada* in 2004; and *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*; and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*; the latter two cases in 2012. These decisions set out a multi-factor analysis for assessing whether a particular copying activity or other dealing falls within the ambit of fair dealing.

These Guidelines set out a short-form guide to assist in decision-making about copying.

BCIT takes the view that these short-form Guidelines should provide a “safe harbour” for a considerable range of copying that occurs in the teaching and research activities of members of our community. However, in situations of doubt, users should make reference to the underlying principles as articulated by the courts, and seek specialized advice .

2. Step-by-Step Approach to Determining if Copying or other Dealing is Permitted

The following sets out four steps, each of which you need to consider before you copy material for teaching or research purposes. Similar considerations may apply to other uses of material, including performance in the classroom, and transmission by electronic means, including via the Internet. For some cases, such as classroom performance of sound recordings and videos, the legislation provides additional specific exemptions.

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

Material that is in the public domain (this will be the case if all of the authors of a published work died more than 50 years ago) will no longer be subject to copyright protection. Care must be taken to consider the work itself, since if it contains new material, for example, it might be subject to copyright. In general, it is assumed that most of the material used in BCIT teaching and research is subject to copyright.

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

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If yes > proceed to Step Two

Step Two: Does BCIT already have permission to copy the material under an existing licence with the publisher of the work, either directly or through Access Copyright?

BCIT has entered into licences with a large number of publishers, both directly and through Access Copyright, which allow BCIT faculty, staff, and students to copy certain works, subject to the terms and conditions of the particular licence. Information about these licences, and advice on how to determine if a work is covered under an existing BCIT licence are available through the [BCIT Copyright page](#) or by contacting copyright@bcit.ca.

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 the copying you propose to do “substantial”?

Copyright in section 3 of the Act includes the sole right to reproduce 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 will often 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. 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 “short excerpt” criteria set out below in the discussion of fair dealing assumes that, even though short, the excerpt constitutes substantial part of the work when viewed in context. Please note that, although not a copyright concept, copying of parts of a work, even if not substantial, will typically require appropriate citation of the source, depending on academic conventions.

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

If yes > proceed to Step Four

Step Four: Is the copying 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” and is not to be narrowly or restrictively construed in the research, private study, educational or any other applicable context. Indeed, the Supreme Court has said that it should be given a “large and liberal interpretation.” In its recent decision dealing with the K-12 context, the Court noted that teachers are there to 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. Although the Court has not ruled on the post-secondary context, one could argue

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that there are many similarities at that level and that the concept of fair dealing as a user's right should likewise expand at the post-secondary level.

Amendments in 2012 to the *Copyright Act*, which added educational use as a specific allowable purpose under the fair dealing exception, will also likely expand the availability of fair dealing in the post-secondary educational setting.

To qualify for fair dealing, two broad tests must be passed.

First, the "dealing" must be for an allowable purpose. The 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. Use of a copyright-protected work for teaching or research will typically pass the first test.

Secondly, the "dealing" must be "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. In 2012, the Supreme Court elaborated on the interpretation and application of those factors in the context of K-12 educational institutions, and that elaboration will doubtless influence the application of the six factors in the post-secondary context as well. In abbreviated form, the six factors¹ are:

- 1) The purpose of the dealing
- 2) The character of the dealing
- 3) The amount of the dealing
- 4) The nature of the work
- 5) Available alternatives to the dealing
- 6) The effect of the dealing on the work

The relevance of the 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 the copying does not constitute fair dealing, it may be permitted under one of the exceptions in the Act that are specific to educational institutions, such as classroom performance of music, sound recordings, and videos. For further practical guidance as to whether a specific exception applies to your activity, contact copyright@bcit.ca.

If yes > you may copy and use the material without seeking permission, and, if you are using a specific exception, subject to the conditions or limitations that apply to that exception.

If no > you need permission to copy and use the material and should contact copyright@bcit.ca for more information and guidance.

¹ For the Supreme Court's full commentary, see paragraphs 54 to 60 of CCH: <http://canlii.ca/en/ca/scc/doc/2004/2004scc13/2004scc13.html>

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3. Guidelines as to What Constitutes “Fair Dealing”

BCIT believes that these Fair Dealing Guidelines provide reasonable safeguards for the owners of copyright-protected works in accordance with the *Copyright Act* and the Supreme Court decisions, and that they also provide a good sense of the extent of copying that BCIT views as likely to be considered fair dealing in most contexts—all with the understanding that there may be additional scope for fair dealing in the post-secondary educational setting, but that these will require some guidance from the BCIT Copyright Office.

The following points assume that 1) the copying is of a copyright-protected work; 2) an available BCIT licence does not cover the work; and 3) the copying is of a “substantial part” of the work. Further, they deal only with situations where fair dealing needs to be considered, and not with specific exceptions such as classroom use of video, or the creation and dissemination of user-generated content, which have separate statutory requirements but may be available even if fair dealing is not.

- A. Faculty and other members of the teaching staff, as well as other BCIT staff supporting the educational activity may communicate and reproduce, or otherwise deal with, in paper or electronic form, short excerpts (as defined below) from a copyright-protected work (including literary works, musical scores, sound recordings and audio-visual works) for the purposes of research, private study, education, parody, satire, criticism, review, or news reporting.

In some limited circumstances, such as with a photograph or drawing, an entire work may be copied.

- B. Copying or communicating short excerpts from a copyright-protected work for the purpose of news reporting, criticism, or review must mention the source and, if given in the source, the name of the author or creator of the work.
- C. Subject always to the consideration and application of the fair dealing factors referred to above, a copy of a “short excerpt” from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:
 - 1) as a class handout
 - 2) as a posting to a learning or course management system that is password-protected or otherwise restricted to students of BCIT
 - 3) As part of a course pack
- D. A “short excerpt” can mean (but is not limited to and may vary depending on the exact nature of the work being used, and of the use itself, all in the context of consideration and application of the fair dealing factors):
 - 1) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, or an audiovisual work)
 - 2) a single article from a periodical
 - 3) a part of a course pack
 - 4) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart or plan) from a copyright-protected work containing other artistic works
 - 5) an entire newspaper article or page

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- 6) an entire single poem or musical score from a copyright protected work containing other poems or musical scores
 - 7) an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work, provided that in each case you copy no more of the work than you need in order to achieve the allowable purpose
- E. Copying or communicating multiple different short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, will generally not be considered fair dealing.
- F. Copying or communicating that exceeds the limits in these Fair Dealing Guidelines will require further analysis, including additional scrutiny of the principles enunciated in CCH and the other Supreme Court cases referred to above. If you find yourself in this situation, you should seek guidance through copyright@bcit.ca for an evaluation of whether the proposed copying or communication is permitted under fair dealing, based on all relevant circumstances.
- G. Any fee charged by BCIT for communicating or copying a short excerpt from a copyright-protected work must be intended only to cover BCIT's costs, including overhead costs.

Acknowledgements

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Forms Associated With This Procedure

[Copyright Permission Check Request](#)

Amendment History

1. Created 2013 May 28