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Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

# CAUT Guidelines for the Use of Copyrighted Material

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# CAUT GUIDELINES FOR THE USE OF COPYRIGHTED MATERIAL

## I. INTRODUCTION

Copyright protects the users, creators and owners of expressive works such as paintings, literature, video and music. It does this by setting the rules governing the reproduction of such works. One of these rules is that in certain circumstances it is lawful to reproduce works (or parts of works) without permission or payment. The purpose of this particular rule is to encourage learning and creativity by ensuring that works can be examined, exchanged, discussed and built upon.

The legal foundation to reproduce works without permission or payment consists of:

- A series of miscellaneous rights and freedoms allowing copying (Part II).
- Fair dealing (Part III).
- The rights of the perceptually disabled (Part IV).
- Specific *Copyright Act* exceptions (Part V).

## II. GENERAL RIGHTS AND FREEDOMS

It is lawful to copy without permission or payment:

**A. Material in which Copyright Cannot Exist –** Copyright does not protect facts and ideas, it only protects the particular way that an author expresses them. The novel "Harry Potter and the Philosopher's Stone" is protected by copyright. The idea of a child wizard who confronts an evil wizard is not. Similarly, a textbook on geology may be protected by copyright but the facts in it (about sedimentation, magma, tectonic plates, etc.) are not.

**B. Material no Longer Protected by Copyright –** In Canada a work's copyright protection typically ends 50 years after the death of its creator, regardless of the citizenship of the author or where the work was originally published.

**C. Insubstantial Portions of Works –** Copying quantitatively and qualitatively insubstantial amounts of a work does not require permission or payment. Examples of insubstantial use include quoting selected sentences or paragraphs from an article, book, poem or song and displaying short clips from a video production.

**D. Open Access Material –** Material presented for public use - including Open Access publications, works placed in Institutional Repositories and works under Creative Commons licenses - can be copied with minimal restrictions.

**E. Publically Available Internet Material –** Material posted on the Internet, even when under copyright, is subject to an implied license for use – if the use is consistent with the material's presentation. This includes actions that the website allows such as viewing or displaying from a computer screen, linking, or exercising the web-browser's "print", "save", "copy" and "send" functions. It is not likely to include republishing the material in a separate website or document, although permission can often be obtained for such use.

Beyond this implied license, section 30.04 of the *Copyright Act* allows educational institutions, for educational purposes, to reproduce, communicate and perform for students publically available Internet materials - if the materials are legitimately posted on the Internet by the copyright holder, attribution is given and there is no notice attached to the materials that clearly prohibits such use (a copyright symbol alone is insufficient to void the exception).

**F. Government of Canada Works –** Government of Canada material may be reproduced for personal or public non-commercial purposes unless there is a specific indication to the contrary attached to the work. Permission is required to revise, adapt or translate a work or to reproduce it for commercial distribution. Materials produced by other governments in Canada and around the world are subject to similar rules.

**G. Licensed Material –** Post-secondary institutions purchase licenses to use collections of digital works. Academic librarians know the content of these collections and the permitted uses of material within them.

Note – Even where a particular use is not covered under the terms of a license it may be permitted by fair dealing (see below) or the general copying rights and freedoms outlined above.

**H. Links –** Providing an Internet link to a work does not constitute reproduction and does not trigger the requirement of permission or payment.

## III. FAIR DEALING

Fair dealing is a right to, within limits, reproduce works without permission or payment. When the options listed in Part II above are not available, fair dealing may still allow a work to be copied.

The *Copyright Act* states that fair dealing for the purposes of research, private study, education, parody, satire, criticism, review, and news reporting does not infringe copyright. While the Act lists these allowable purposes, it does not actually define fair dealing. In the absence of a statutory definition, Parliament has assigned Canadians the task of determining if the reproduction of a work without permission or payment is fair. Canadians, assisted by the courts, have developed and codified practices of fair dealing.

In the post-secondary environment:

### A. Form of the Copy

- Fair dealing operates regardless of format, meaning it applies to paper and digital works.

### B. Purpose

- The use must fall within the broadly defined purposes of research, private study, education, parody, satire, criticism, review, and news reporting.

**C. Number of Copies**

- Making a single copy from a work for each member of a defined group is likely to be fair.

**D. Amount of Work Copied –** In assessing how much of a work is fair to copy, copyright law does not set a single fixed percentage. However, as a general rule:

- Copying 10 percent of a work is likely to be fair.
- Copying more than 10 percent of a work (up to and including the entire work) may be fair depending on the circumstances.

For example:

- Copying an entire chapter from a book is likely to be fair.
- Copying an entire article from a periodical publication is likely to be fair.
- Copying an entire short story, play, poem or essay from a book or periodical publication is likely to be fair.
- Copying an entire entry from an encyclopedia, dictionary, annotated bibliography or similar reference book is likely to be fair.
- Copying an entire reproduction of an artistic work from a book or periodical publication is likely to be fair.
- Copying a single musical score from a book or periodical publication is likely to be fair.

As the percentage of a work being copied increases towards and past 20 percent, more care should be exercised. If, for example, a book only contains two chapters then reproducing an entire chapter may be unfair.

**E. Availability of Copies –** Copying is more likely to be fair if it is done for a limited audience. For example, posting materials on a secure system with password protection is more likely to be fair than uploading material to the open Internet.

**F. Nature of the Work –** The likelihood that an instance of copying is fair depends in part on the nature of the work. For example:

- Academic articles published to disseminate ideas, often with no motive of direct financial gain, strongly favour a fair dealing analysis of their use.
- General literary or artistic works favour a fair dealing analysis of their use.
- Proprietary workbooks, work cards, assignment sheets, tests, examination papers, business cases and course manuals may disfavour a fair dealing analysis. For materials such as these, copying should be limited to incidental uses and the general rule that copying should not act as a substitute for the purchase of learning materials is particularly applicable.

**G. Alternatives –** Reproducing a work is more likely to be fair if there are no practical alternatives to copying it (such as providing an Internet link). The mere existence of a license for the work is not a practical alternative.

**H. Lawful Copy –** Reproductions should only be made from a lawful copy of a work.

**I. Attribution –** Copies should reference the name of the author or artist (where known), the title of the publication from which the copy was made, and the name of the publisher. Sections 29.1 and 29.2 of the *Copyright Act* provide specific attribution requirements for purposes of criticism, review and news reporting.

**J. Fees –** Copying fees must be no greater than the actual cost of making and delivering the copy.

**K. Fair Dealing on Behalf of Others –** It is lawful for individuals to make fair dealing copies for themselves and for others. For example, a student, librarian or professor may make a personal copy of a work as well as copies for other students, librarians or professors.

**L. Reserves –** The traditional practice of copying articles/chapters on reserve by members of a class is likely to be fair – whether exercised in the paper or digital environment. The systematic and widespread copying of an entire textbook on reserve by members of a large classroom group where students would be normally expected to purchase the book is not fair.

## IV. REPRODUCTION OF WORKS FOR PERSONS WITH PERCEPTUAL DISABILITIES

Members of the education community with perceptual disabilities, including members with visual or hearing impairments, struggle to secure works in accessible formats. Section 32 of the *Copyright Act* is of some assistance in this regard:

> 32. (1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to
>
> (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
>
> (b) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
>
> (c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
>
> Limitation
>
> (2) Subsection (1) does not authorize the making of a large print book.
>
> Limitation
>
> (3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (a) of the definition “commercially available”.

In the event that the section 32 exceptions are not of assistance, persons with perceptual disabilities and the education community as a whole can rely on general fair dealing rights to ensure equal access to educational opportunities. As the Supreme Court of Canada explained in paragraph 49 of the 2004 *CCH Canadian Limited v. Law Society of Upper Canada* decision:

> As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

## V. EXCEPTIONS

The *Copyright Act* contains a number of specific exceptions that allow works to be reproduced without permission or payment. Some of these exceptions are limited to the educational context; others are open to all users of copyrighted material. The exceptions include:

### A. Display

It is lawful for an educational institution or a person acting under its authority to:

- Display a work by projector or other device for the purposes of education or training on the premises of the educational institution - section 29.4 (1).
- Reproduce on the premises of the educational institution a work required for a test or examination - section 29.4 (2)(a) and (b)

Note – These exceptions are limited if there are commercially available copies of the work suitable for the intended purposes of display or examination.

### B. Performance

It is also lawful in an educational institution and for educational purposes before an audience consisting primarily of students to perform:

- A work live as long as the performers are primarily students - section 29.5 (a).
- A sound recording of a work or performer's performance that is embodied in a sound recording - section 29.5 (b).
- A work or other subject-matter at the time of its communication to the public by telecommunication - section 29.5 (c).
- A cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy - section 29.5 (d).

### C. News and Commentary

It is also lawful in an educational institution and for educational purposes before an audience consisting primarily of students to:

- Make, at the time of its communication to the public by telecommunication, a single copy of a news program, excluding documentaries, for the purposes of performing the copy for the students of the educational institution for educational or training purposes.

- Perform the copy in public, at any time or times within one year after the making of a copy, before an audience consisting primarily of students of the educational institution on its premises for educational or training purposes - section 29.6 (1)(a) and (b).

### F. Broadcasts

It is lawful in an educational institution to:

- Make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication.
- Keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes - section 29.7 (1).

Note – This exception is subject to certain record keeping requirements.

### G. Publically Available Internet Material

It is lawful in an educational institution, for educational purposes, to:

- Reproduce, communicate and perform for students publically available Internet material – if the material are legitimately posted on the Internet by the copyright holder, attribution is given and there is no notice attached to the materials that clearly prohibits such use (a copyright symbol alone is insufficient to void the exception) - section 30.04.

### H. Non-commercial User-generated Content

It is lawful for the general public, including members of the educational sector, to

- Use, for non-commercial purposes, a published work to create a new work, subject to the identification of the source and author, the legality of the original work or the copy used, and the absence of a substantial adverse effect on the exploitation of the original work - section 29.21.

Note – These special exceptions are in addition to (not instead of) fair dealing. If a particular use does not fall within these exceptions, fair dealing still applies.

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