

## **INTRODUCTION**

Copyright law in Canada provides certain exclusive rights to the owners of copyright in original literary, dramatic, musical, and artistic works, as well as in sound recordings, performers' performances, and broadcast signals. It also includes a number of so-called "user rights", which make it permissible to do certain things that might otherwise infringe copyright if done without a licence. Navigating this sometimes complex web of exclusive rights and exceptions can be difficult even for an educated and savvy user. However, understanding both the opportunities and the limitations of copyright law is critical in the educational setting.

This document, which is derived largely from an analysis provided by copyright counsel at Cassels Brock LLP, provides a general overview of copyright law in Canada as it applies to students, faculty, and staff of the University of Toronto. It also provides answers to frequently asked questions in order to give some context to the exceptions available to educational institutions, as well as certain licensing arrangements that permit practices that would otherwise constitute copyright infringement.

In 2012, Bill C-11, the *Copyright Modernization Act*, introduced amendments to the *Copyright Act* to expand the scope of permissible educational uses. Also in 2012, the Supreme Court of Canada released a series of decisions that point to a broader and more generous interpretation of "user rights" (including fair dealing). However, exceptions to copyright infringement are not unlimited. It is still necessary to take care when using any literary, dramatic, musical or artistic work that is not your own, even in an educational setting.

The University of Toronto takes its copyright obligations seriously, recognizing the legal rights and interests both of copyright owners and of those who use copyright-protected work in their teaching and scholarship. This document is intended to help faculty and staff ensure that their professional activities comply with Canadian copyright law.

## **COPYRIGHT OVERVIEW FOCUSING ON THE UNIVERSITY CONTEXT**

### **I. COPYRIGHT AND THE EXCLUSIVE RIGHTS OF COPYRIGHT OWNERS**

#### **A. Copyright Basics**

Copyright law is generally understood in Canada as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creators of those works (and preventing anyone other than the creators from appropriating whatever benefits may be generated) when the works are used.

Under the *Copyright Act*, copyright subsists in every original literary, dramatic, musical, and artistic work – not in the ideas conveyed by those works, but in the *expression* of those ideas in a material form. In most cases, copyright in these works subsists for the life of the author plus 50 years from the end of the year of his or her death. Copyright also subsists separately in certain "non-traditional" subject matter: performers' performances, sound recordings, and broadcast signals. In these cases, copyright generally subsists for 50 years after the first fixation (or, in the case of a broadcast signal, the first broadcast) of the subject matter.

The *Copyright Act* provides the owner of copyright in these works with a set of exclusive rights for the life of the author plus fifty years. For "traditional" works – i.e., literary, dramatic, musical, and artistic works – those rights are set out in section 3 of the *Copyright Act* and include, among other things, the right to do the following:

- produce or reproduce the work (or any substantial part of it);

- perform the work (or any substantial part of it) in public;
- publish a previously unpublished work (or any substantial part of it);
- produce, reproduce, perform or publish any translation of the work;
- convert a novel, artistic work or other non-dramatic work into a dramatic work;
- make a sound recording or film of the work;
- reproduce, adapt and publicly present the work as a cinematographic work (i.e., in audiovisual format);
- communicate the work to the public by telecommunication (i.e., by television broadcast or over the Internet), including by making it available to individual members of the public on demand;
- rent out sound recordings of musical works and most computer programs; and
- where the work is a tangible object, sell the object, provided that it has not been sold before with the authorization of the copyright owner.

The copyright owner also has the exclusive right to *authorize* others to do any of these things.

The exclusive rights in “non-traditional” subject matter – i.e., sound recordings, performers’ performances, and broadcast signals – are slightly different. In general, the copyright owner (the “maker” of a sound recording, the performer, and the broadcaster, respectively) has the exclusive right to reproduce any of these materials without permission from the copyright owner and to perform them in public or communicate them to the public by telecommunication, including, again, by making them available on demand.

## **B. Copyright Infringement**

### **I. Infringement Generally**

It is an infringement of copyright to do, without permission from the copyright owner, any act that only the owner is entitled to do. Copyright infringement can result in penalties, including monetary damages, injunctions, and even fines or imprisonment in the most extreme cases.

In many cases, permission comes in the form of a licence, either directly from the copyright owner, via a publisher representing the copyright owner, via a public licence such as a Creative Commons licence, or from a collective society that represents various copyright owners, such as Access Copyright (which represents the reproduction rights of and distributes royalties to many Canadian writers, visual artists and publishers) or the Educational Rights Collective of Canada (ERCC) (which represents the rights of many producers, distributors, broadcasters, and others with respect to certain educational uses of works). Permission may also be granted by participation in a tariff certified by the Copyright Board. In most cases permission will require the payment of a fee or royalties, either negotiated by the parties or, in the case of a tariff, set by the Board.

### **2. Using a Substantial Part of a Work**

Where only a portion of a particular work is used, the consent of the copyright owner is required only if the portion constitutes a “substantial part” of the work. What constitutes a “substantial part” is a question of fact, and, in this respect, more emphasis is given on the nature of what was taken from the original work rather than the amount that was taken.

Determining whether any given excerpt of a work is a “substantial part” under copyright law is done on a case-by-case basis; there is no “bright-line” test. 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. 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. For example, even a scene or two from a movie is very likely to be “substantial” and therefore to require consent from the copyright owner (or the protection of an applicable exception) before being copied for classroom use.

### **3. Secondary Copyright Infringement**

It is also an infringement of copyright for a person to sell, rent out or distribute copies of works, or to possess or import the copies for the purpose of doing any of these acts, if the person knows or should have known that the copies infringe copyright or, if the copies are imported, would have infringed copyright if made in Canada by the person who made them elsewhere. These provisions are sometimes known as the “parallel importation” or “gray market” provisions of the *Copyright Act*.

#### **C. When Does Canadian Copyright Law Apply?**

Canadian copyright law will apply whenever the use of a protected work occurs in Canada. For example, whenever a protected literary work is photocopied on the University’s premises, the provisions of the Canadian *Copyright Act* will apply. Similarly, Canadian copyright law will apply if a sound recording of a musical work is uploaded to your course website or to Blackboard in Canada and/or is accessed by U of T students in Canada. It is safe to assume that most of the ways you will use various materials in connection with your teaching and research will be governed by Canadian copyright law.

Although many of the concepts are similar, US copyright law is sufficiently different from Canadian law that you should not rely on US copyright guidance to assist in assessing your Canadian copyright rights and obligations.

## **II. EXCEPTIONS TO COPYRIGHT INFRINGEMENT**

Notwithstanding these exclusive rights, the *Copyright Act* provides for certain exceptions to copyright infringement that can be relied on in order to use works without first obtaining consent from the copyright owner.

### **A. Fair Dealing**

Under sections 29 through 29.2 of the *Copyright Act*, there are a number of circumstances in which “fair dealing” with works is not considered an infringement of copyright. 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.

As will be seen in the analysis below, the concept of fair dealing is complex, fact-specific, and imprecise. For this reason, before assessing whether you need to avail yourself of the fair dealing exception, it is always important to check first as to whether the University already has permission to copy the material under an existing licence with the publisher of the work, either directly, through a collective licence such as with Access Copyright (the University of Toronto’s licence with Access Copyright extended to December 31, 2013; despite good faith negotiations, the license was not renewed) or through a Creative Commons or other public licence.

“Fair dealing” is not defined in the Act; instead, the concept has evolved over the last decade through case law. In general, in order to qualify as fair dealing, a person must prove that:

- the dealing was for one of the allowable purposes set out in the Act – that is, research, private study, education, parody, satire, criticism, review, or news reporting; and
- the dealing was “fair.”

This is always a case-by-case determination, with each individual dealing being subject to its own particular analysis to assess whether it qualifies for the exception.

The fair dealing exception has attracted a great deal of attention and controversy in recent years and was considered by the Supreme Court of Canada in two cases decided in June 2012 (to be discussed in more detail below). Legislative amendments to the exception came into force in November 2012, after the federal government passed a bill to amend the *Copyright Act*. Litigation is already underway in which both the Copyright Board and the courts are being asked to consider the meaning of fair dealing as amended. Until those cases have been decided, however, the scope and application of fair dealing can best be understood in light of a number of existing court decisions, including the recent Supreme Court decisions. To assist faculty and staff in considering the application of the fair dealing exception on a case-by-case basis, the University has adopted a set of Fair Dealing Guidelines, posted at [University's Fair Dealing Guidelines](#).

## **I. Allowable Purposes**

The allowable purposes under the fair dealing exception are limited to the specific categories noted above. Of those, research, private study, criticism, review, and education are likely to be of particular interest to the University, in light of the types of activities usually engaged in by its faculty, students, and staff.

At one time, it was thought that these “allowable purposes” were to be interpreted relatively narrowly. However, the Supreme Court of Canada has since directed that allowable purposes be given a “large and liberal interpretation” (e.g., “research” is not limited to creative or even non-commercial purposes and “private study” need not occur in physical isolation and may occur in the classroom) in order to strike the appropriate balance between the rights of creators and the interests of users in access to works of the arts and intellect. Consequently, even though “education” as an allowable purpose has yet to be interpreted by the courts, it seems safe to assume that the majority of activities involving copyright-protected material in which faculty, students, and staff engage in the course of their day-to-day teaching and learning will normally qualify as either research, private study, or education. Non-academic activities that take place on campus but that are limited to students as part of the student experience may also fit within the ambit of education. In the case of anything further removed from education, very carefully scrutiny will be required.

Despite this liberal interpretation of the first step of the test, the dealing must also be “fair”, which always depends on the specific circumstances.

## **2. Fairness of the Dealing**

In *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>1</sup> (“CCH”), the Supreme Court identified six factors as being relevant in the assessment of whether a given dealing is “fair.” The Court elaborated on those

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<sup>1</sup> [2004] 1 S.C.R. 339.

factors more recently in *Alberta (Education) v. Access Copyright*<sup>2</sup> and *SOCAN v. Bell Canada*.<sup>3</sup> Before a given dealing can be determined to be “fair”, the relevance and application of each of the factors to the specific circumstances of the dealing should be considered. In doing so, it is useful to keep in mind the following commentary, derived from articulation by the courts in *CCH* and subsequent cases. Remember that the examples in the commentary give a sense of the fairness of the dealing, but are not a prescriptive list. No one factor should be looked at in isolation.

(a) **Purpose of the dealing:**

- What is the real purpose or motive of the user?
- The relevant perspective for the first factor is that of the user of the copied work, and not necessarily that of the copier, unless the copier appears to be hiding behind the allowable purpose of the user in order to mask an unfair ulterior motive. In other words, where a copy is made by a faculty or staff member for use by a student, the operative question will generally be whether the *student* is using the copy for an allowable purpose.
- Commercial research may be less likely to be “fair” than not-for-profit or philanthropic research. However, the fact that research may be done for commercial reasons does not itself make a dealing “unfair”, especially if there are reasonable safeguards in place to ensure that the works are actually being used for an allowable purpose. The University believes that its Fair Dealing Guidelines [University's Fair Dealing Guidelines](#) provide such a reasonable safeguard.

(b) **Character of the dealing:**

- Making a single copy for a single requester is more likely to be fair than making and distributing a large number of copies for general distribution.
- However, the Supreme Court of Canada held in the *Access Copyright* decision that making multiple copies of “short excerpts” of literary works and distributing them to primary and secondary students can nonetheless be fair dealing. The same may well be true of post-secondary students, provided that the other factors point in the direction of fairness.
- The Fair Dealing Guidelines [University's Fair Dealing Guidelines](#) indicate that, subject always to the consideration and application of the other factors, 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 as:
  - a class handout;
  - a posting to a learning or course management system that is password-protected or otherwise restricted to students of the University; or
  - part of a course pack. (See the discussion on including “short excerpts” in course packs below, under *Application to University Faculty, Students, and Staff*.)

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<sup>2</sup> 2012 SCC 37.

<sup>3</sup> 2012 SCC 36.

- 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.

(c) **Amount of the dealing:**

- Copying short excerpts of a work (of which the Fair Dealing Guidelines [University's Fair Dealing Guidelines](#) set out a number of suggested examples) will often be “fair.” However, no more of the work should be used than is reasonably necessary to achieve the purpose of the dealing.
- The greater the proportion of a work that is copied, the less likely it is to be “fair”, but there will be some circumstances (for example, a short poem or a photograph) in which copying the entire work may also be “fair.”
- The nature of the work is an additional relevant consideration. For example, short stories (either in an anthology or an author’s collection), may require special scrutiny.

(d) **Alternatives to the dealing:**

- Is there a non-copyrighted equivalent of the work that could have been used instead of and in the same manner as the copyrighted work?
- The availability of a licence is not a factor in determining whether there are other alternatives that should have been used instead.

(e) **Nature of the work:**

- If the nature of the original work is such that little damage is done by the dealing (e.g., an unpublished work that receives welcome publicity as a result of the dealing, as opposed to a confidential work whose author never intended it to be released), the dealing may be more readily considered to be fair.

(f) **Effect of the dealing on the market for the work:**

- If the dealing of the work is likely to compete with the original work, and particularly if it is likely to have a substantial negative impact on the market for the original, this may suggest that the dealing is not fair.

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

**Mandatory Citation:** Under sections 29.1 and 29.2, where the purpose of the dealing is for criticism or review, or news reporting, fair dealing also *requires* that the source of the work (and, if given in the source, the name of the author, maker performer and/or broadcaster, depending on the nature of the work dealt with) be acknowledged. If this requirement is not met, the dealing will be presumptively unfair, regardless of the application of the *CCH* factors.

### 3. Application to University Faculty, Students, and Staff

In *Alberta v. Access Copyright*, the Supreme Court of Canada held that photocopies made by a teacher at the teacher’s own initiative, for use by students, may constitute “fair dealing for the purpose of private

study,” even where the use takes place in the classroom rather than in the student’s private sphere. 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, and the degree to which the *Access Copyright* decision is applicable to post-secondary institutions therefore remains to be seen, the University would argue 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 university level.

***While much of what transpires in an educational setting at the University may well qualify as “fair dealing”, there is not – and cannot be – any presumption that this is the case in all circumstances.***

Accordingly, whether copying “short excerpts” (as that term is defined in the Fair Dealing Guidelines [University's Fair Dealing Guidelines](#)) as part of a course pack will be viewed as fair dealing will depend on the circumstances. On one end of the spectrum, photocopying a few pages of material that is intended to supplement the course’s primary source materials, such as an article that provides commentary on a legal decision referred to in an introductory-level Contracts textbook, might well be viewed as “fair”. On the other end of the spectrum, photocopying more than an entire chapter of a textbook that would otherwise be the primary source material for the course, and including that excerpt in a course pack, would be much less likely to qualify as “fair”. As another example, for certain mainstream courses, there may be several commercially available and reasonably priced textbooks. Creating a custom course pack consisting of photocopied chapters from one or more of these texts, if it has a substantial negative impact on the market for them, would not likely be viewed as “fair”. In contrast, for other courses, the only alternatives may be either to produce a course pack or to use no source material at all. If not for the custom course pack, there may not be any materials reasonably available to the students. Copying materials to include in a course pack for this latter category of courses would much more likely be viewed as “fair”.

In these examples, the application of several of the *CCH* factors – the character of the dealing, the amount of the dealing, alternatives to the dealing, and the effect of the dealing on the market for the work – is likely to differ according to the nature of the specific copying, distribution, and use at issue. It is not safe to assume, therefore, that all educational photocopying (for example) is fair dealing.

For further assistance in considering the application of the fair dealing exception in any given case, please consult the [University's Fair Dealing Guidelines](#). If it is still unclear to you whether a particular use is likely to constitute fair dealing, please contact Bobby Glushko, Scholarly Communications and Copyright Librarian, at [copyright@library.utoronto.ca](mailto:copyright@library.utoronto.ca) for assistance.

## **B. Specific Educational Exceptions**

In addition to fair dealing, the *Copyright Act* also contains several exceptions that apply specifically to not-for-profit educational institutions such as the University. Even though the fair dealing exception is “always available”, and recourse to a specific exception will not be necessary where fair dealing applies, faculty and staff may wish to consider whether one of the specific educational exceptions – which are somewhat clearer, and therefore more predictable in their application, than fair dealing – applies before attempting the more complicated fair dealing analysis.

In order to qualify for most of the educational exceptions in the *Act*, the following conditions must generally be met:

- the activity must be *for purposes of education or training*; and

- except for the activities described under sections 6, 7 and 8 below, the activity must take place *on the premises of the University* (including any place controlled by the University, where training is provided, controlled or supervised by it).

Students who are enrolled in a course and receive a lesson, test, or examination remotely, via the Internet or some other method of telecommunication, are now deemed to be “on the premises of” the University for the purposes of these exceptions

Briefly, the educational exceptions consist of the following:

### **I. Reproducing a Work for Instruction**

Section 29.4(1) allows the University (or person acting under its authority) , without motive of gain, to reproduce a work, or do any other necessary act in order to display it, for the purposes of education or training on its premises.

Previously, this exception was limited to making manual reproductions on blackboards, flip charts, and other similar surfaces, as well as making copies for projection on overhead projectors or similar devices. As amended by Bill C-11, however, the exception is broader; although “display” is not defined in the Act, it is likely to include, for example, the display of works on computer monitors, tablet computers, and other media.

Note, however, that the exception in respect of non-manual reproductions is permitted only if the work or other subject-matter copied is not “commercially available” in a medium appropriate for that purpose. If it is commercially available – meaning that it is available on the Canadian market within a reasonable time and for a reasonable price and can be located with reasonable effort – a licence must be obtained, either directly from the copyright owner, through a public licence such as a Creative Commons licence, or through other means such as via a collective society, in order to reproduce the work. What is “reasonable” in the circumstances will be a question of fact to be answered on a case-by-case basis.

In practice, most works used in a classroom PowerPoint presentation will not be “commercially available” if the versions available for purchase are not well-suited to the medium and a licence is not readily available from the copyright owner to adapt the work to a more suitable format. Therefore, the exception will generally be available in this context. On the other hand, if a photograph or clip art used in a PowerPoint presentation is available for download at a relatively low fee from a commercial website, it is probably safe to assume that the work is “commercially available” and that the exception therefore does *not* apply.

The “display” exception does *not*, however, extend to creating printed versions of a set of PowerPoint slides for distribution to students or to posting them on a course website. If a licence has not been obtained for those specific uses, or if those uses have not been determined in the circumstances to constitute “fair dealing” (probably for the allowable purpose of education), it is recommended that any copyright-protected works (for example, any graphics or photographs obtained via the Internet, any sound or video clips, etc.) be removed before the slides are printed or posted.

### **2. Reproducing, Performing or Communicating a Work for Tests and Exams**

Section 29.4(2) allows the University (or a person acting under its authority) to reproduce, translate, perform in public or communicate to the public by telecommunication, without motive of gain, a work as required for a test or exam. Any performance of the work in public or communication of the work by telecommunication to the public must take place on the premises of the University. Further, if the

work is “commercially available” in a medium suitable for the purpose, and if its use is not covered by fair dealing or another exception, a licence must be obtained before using it for a test or exam.

### **3. Performances by or for Students**

Section 29.5 states that the following acts, if done on the premises of the University, for educational or training purposes and not for profit, do not infringe copyright:

- a live performance in public (which includes a University classroom) of a work, primarily by University students;
- a performance in public by the University (or a person acting under its authority) of a sound recording that is not an infringing copy (and any works and performers’ performances embodied in it);
- a performance in public by the University (or a person acting under its authority) of lawfully-received TV, radio or Internet content, at the same time as it is broadcast or streamed; and
- a performance in public by the University (or a person acting under its authority) of an audiovisual work, provided that it is not an infringing copy.

In each case, the audience must consist primarily of students of the University or its instructors, or those directly responsible for setting a curriculum for the University.

In practice, this exception may serve to expand the scope of certain other educational exceptions. For example, a law professor who wishes to play a courtroom scene from *My Cousin Vinny* for analysis by students as part of an in-class exam should be able to rely on this exception to do so – even though, since it is clear that the film is “commercially available” in a medium suitable for that purpose (i.e., a DVD that can easily be purchased or rented), the “tests and exams” exception may not apply.

### **4. Reproduction of Broadcast or Streamed News Programs**

Under section 29.6, the University, or a person acting under its authority, may make a single copy of a news or news commentary program (excluding a documentary) at the time of its broadcast, for the purposes of performing the copy for University students at a later time for educational or training purposes. The same section also allows the University, or a person acting under its authority, to perform the copy in public, in front of an audience consisting primarily of University students on the premises of the University for educational or training purposes. However, in order to qualify for this exception, the broadcast or stream must have been lawfully received. Content acquired through unauthorized streaming sites or illegally decoded satellite signals, for example, will not qualify for the exception and may attract liability.

### **5. Reproduction of Other Broadcast or Streamed Programs**

Under section 29.7, the University, or a person acting under its authority, may make a copy of any other program, including a documentary, at the time it is “communicated to the public by telecommunication” and may keep it for up to 30 days while the University decides whether to perform it for educational or training purposes. The Supreme Court recently held that “communication to the public by telecommunication” includes not only traditional broadcasting but also Internet streaming, which means that this exception should apply to programs streamed online as well, to the extent that it is technologically possible to reproduce a program communicated in this way. Note that, as with the exception for news programs, the broadcast or stream must have been lawfully received in order to qualify for this exception.

After the expiration of the 30 day period, the University must either destroy the copy or pay any royalties and/or comply with any terms and conditions applicable both to the making of the copy and to its performance in public (which must be limited to educational or training purposes and an audience consisting of primarily University students). Such terms and conditions are generally fixed by the Copyright Board under a tariff, with royalties collected by the ERCC. Since the University has no existing arrangement with the ERCC, any instructor who wishes to make and perform a copy of a work in this manner will need to make licensing arrangements directly with the copyright owner. For assistance with these licensing arrangements, please contact Bobby Glushko, Scholarly Communications and Copyright Librarian at [copyright@library.utoronto.ca](mailto:copyright@library.utoronto.ca).

Instructors should keep careful records detailing their use of any broadcast programs as described above. The records must include the University's contact information and details of the program, including the program's title and other identifying information, the duration of the segment copied, the date and time of the program's broadcast and the name and network of the broadcaster.

## **6. Distance Education**

Section 30.01 was introduced into the *Copyright Act* by Bill C-11 in order to facilitate distance education. Under this new exception, the University, or a person acting under its authority, may:

- communicate a lesson, test, or exam by telecommunication – including via the Internet – to students enrolled in the course (or to others acting under the authority of the University);
- make a fixation – i.e., a permanent copy – of the lesson, test or exam in order to facilitate its transmission; and
- do any other act necessary for the purpose of these acts.

The general purpose of this exception is to permit the University to rely on other exceptions, which are normally restricted to acts that take place on the premises of an educational institution, when delivering content to students remotely. To achieve this purpose, it deems a student who is enrolled in a course of which the lesson, test, or exam forms part to be “a person on the premises of the educational institution” when participating in or receiving the material by means of telecommunication.

A student who has received a lesson, test or exam under this exception may make a copy in order to be able to listen to or view it at a more convenient time, provided that the student destroys the copy within 30 days after the students enrolled in that class have received their final evaluations.

Note that the University and any person acting under its authority, except a student, must:

- destroy any fixation of the lesson, test or exam within 30 days after the students in the course have received their final evaluations;
- take measures that can reasonably be expected to limit the communication by telecommunication of the lesson to students enrolled in the course and to other persons acting under the University's authority; and
- take measures that can reasonably be expected to prevent students from fixing, reproducing or communicating the lesson, test or exam other than as permitted under this section.

In practice, the latter two requirements probably mean that technological protections need to be used when transmitting lessons, tests, or exams to students. At minimum, it must be made clear to the recipients of this material that they are not to share it other than with their classmates or others who are expressly authorized by the University.

## **7. Work Available Through the Internet**

Under section 30.04, the University, or a person acting under its authority, may, for educational or training purposes, do any of the following things in respect of a work or other subject-matter available through the Internet:

- reproduce it;
- transmit it electronically to University students or other persons acting under the University's authority;
- perform it in public for an audience consisting primarily of University students or other persons acting under the University's authority; and
- do any other act necessary for the purpose of these acts.

This is potentially a very broad exception that will streamline the educational use of a wealth of material available through the Internet. However, care must be taken not to exceed the scope of the exception. First, although it is true that a book or DVD ordered from Amazon.ca might technically be "available through the Internet," it is unlikely that the exception is intended to capture works in physical format, regardless of how they are acquired. Rather, it is safe to assume that the exception applies only to works in digital format that are *posted* on the Internet. Second, the exception is not available if:

- the material, or the website where it is posted, is protected by a technological protection measure that restricts access to the material – for example, newspaper content that is behind a paywall;
- the material is protected by a technological protection measure that restricts the doing of the act itself – for example, a digital lock that is intended to prevent the work from being copied;
- a clearly visible notice prohibiting the act – but not merely the "©" copyright symbol – is posted either on the material or on the website where it is posted; or
- the person who does the act knows or should have known that the material was made available through the Internet without the consent of the copyright owner – for example, if a song or video is streamed or downloaded from an unauthorized website.

## **C. Other Exceptions**

### **I. Non-Commercial User-Generated Content**

Bill C-11 also introduced a significant new exception for user-generated content (UGC). Under Section 29.21, an individual may use an existing work or other subject-matter that is published or otherwise publicly available to create a new original work, and the individual (or, with the individual's consent, a member of the individual's household) may use the new work or authorize an intermediary to disseminate it, provided that:

- the use of the new work, or the authorization to disseminate it, is done solely for non-commercial purposes;
- the source and, if given in the source, the name of the author, performer, maker, or broadcaster of the existing work or other subject matter must be mentioned is reasonable in the circumstances;

- the creator of the new work must have had reasonable grounds to believe that the existing work was not infringing copyright; and
- the use of the new work, or the authorization to disseminate it, must not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the original work, including that the new work must not be a substitute for the existing one.

It seems quite clear that most University teaching and research, including class assignments, are non-commercial. Consequently, this new exception may provide considerable latitude for the creation of UGC, in both digital and physical formats, for educational purposes. However the statutory conditions for the exception must be taken seriously. For example, the exception is unlikely to apply to the creation and distribution of course packs, for which an existing market exists and where a user-generated collection might be a substitute for the original work. Similarly, the UGC must be truly “original”; simply posting an excerpt of a Hollywood movie on a course website is unlikely to suffice (and might well be considered a substitute for the existing work).

#### **D. Exceptions to Infringement: The Bottom Line**

The introduction in the *Copyright Modernization Act* of new educational exceptions, and the amendment of existing ones, represents a significant change to Canadian copyright law as it applies to higher education. Coupled with the increasingly liberal judicial interpretation of the fair dealing exception – and, in particular, the introduction of “education” as an allowable purpose for fair dealing – it is fair to say that the *Copyright Act* gives considerable to educators and students. Even where a specific exception does not apply to a particular use of copyright-protected material, it may be possible to claim the benefit of fair dealing in circumstances that would not have qualified under the traditional rules.

However, it is important to remember that these exceptions are not absolute. They contain strict conditions and restrictions that, if not observed, will render the exceptions inapplicable. Even fair dealing for education, which some commentators consider a blanket exemption for educational use, is subject to a critical and overarching requirement: the use must be qualitatively fair, which is a fact-specific assessment. The University’s Fair Dealing Guidelines are available to help determine when that exception might apply. If the criteria are not met, permission will be necessary to avoid copyright infringement.

### **FREQUENTLY ASKED QUESTIONS**

#### **I. TEACHING**

##### **A. COURSE MATERIALS AND COURSE WEBSITE**

###### **I. When can I copy materials without seeking permission?**

In general, you must seek permission from the copyright owner before copying materials and including them in your course packs, handing them out to your students during class or posting them to your course website unless one of the following is true:

- the work is in the public domain, meaning that the author has been dead for more than 50 years;
- the University has a licence to reproduce the material;

- the material is licensed for use in this manner by a Creative Commons licence or some other form of public licence;
- the copyright owner has made the material available under an open source agreement that permits reproduction of this type;
- the use qualifies as “fair dealing”, meaning that it is both for an allowable purpose (research, private study, education, parody, satire, criticism, review, or news reporting) and is substantively “fair”, including that any mandatory citation requirements have been satisfied; or
- the use is subject to a specific exception in the *Copyright Act*.

## 2. Do I need permission to copy or post articles that I have written?

As long as you own the copyright in the materials you have written, you may copy the materials and include them in your course pack, distribute them to your class and/or post them on your course website. If you are a faculty member, then, pursuant to the [University's Copyright Policy](#), you (and not the University) own the copyright in the works you create during your employment with the University. However, if your work has been published, and no exception applies to your intended use, be sure to check the terms of your publishing agreement; if you have assigned the copyright in your work to the publisher, or if you have granted an exclusive licence in the work, you may need to seek permission from the publisher to copy and distribute it even though you are the author. Also, if you wrote the article in collaboration with someone else, you will need to seek permission from your co-authors before copying or posting it.

## 3. Can I include copies of my lecture slides in my course materials and post them on my course website?

Yes, as long as you obtain permission from the owners of copyright in any third-party content. This includes permission from any guest lecturer or student for the reproduction and making available of their work. You may want to create a second version of your lecture slides (and ask the same of any guest lecturer or student) that do not include the copyright-protected material. In specific cases, the use of third-party materials may qualify as fair dealing for education, in which case no permission will be required. However, that is to be determined on a case-by-case basis, in light of the *CCH* factors; consult the Fair Dealing Guidelines for more information.

## 4. What am I allowed to do under the fair dealing exception?

The general “fair dealing” exceptions under the *Copyright Act* permit certain uses of copyright-protected material for purposes of research, private study, education, satire, parody, criticism, review or news reporting. “Education” was added as an allowable purpose only recently, when the *Act* was amended, so its practical scope is not yet known but it clearly expands permitted uses. Remember to follow the sequence set out in the University’s Fair Dealing Guidelines – if a licence or other permission is available it will not be necessary to engage in the complicated fair dealing analysis.

***Reproducing material for educational purposes does not automatically qualify as fair dealing.*** In order for your use to qualify, it must be both for an allowable purpose (a relatively low threshold in the educational context) and substantively “fair.” To determine whether your dealing is fair, keep in mind the six factors from the *CCH* case, noted in section II(A) of the Copyright Overview above, and the [University's Fair Dealing Guidelines](#). Bear in mind that the Fair Dealing Guidelines are not intended to be applied in an automatic or mechanical fashion. The copying limitations set out in the Guidelines should be considered to be reasonable guidance for many situations, rather than rules.

Finally, keep in mind that the U.S. “fair use” exception to copyright infringement is different from the Canadian fair dealing exception. It should not be relied on when determining whether your actions are acceptable.

## **5. What am I allowed to do under specific exceptions in the *Copyright Act*?**

The following exceptions are set out explicitly in the *Copyright Act*, as described above. You can do the following things on the premises of the University, for not-for-profit educational or training purposes, without first obtaining permission from the copyright owner:

- Make a copy of, or post on your course website, material posted on the Internet (so long as you mention the source of the material and, if given in the source, the name of the author of the material) unless:
  - there is a clearly visible notice on the material you want to use, or on the website to which the material is posted (often located within the website’s terms and conditions of use at the bottom of the webpage), prohibiting the use of the material for this purpose;
  - the work, or the website on which it is posted, is protected by a technological protection measure that restricts access or copying, such that you would have to break a digital lock to use the work; or
  - you know or should have known that the material was made available through the Internet without the consent of the copyright owner (for example, because you acquired it from an unauthorized file-sharing or streaming site).
- Post to your course website (accessible only by students enrolled in the course or other people specifically authorized by the University) any audio or video recording of a lecture that includes the material in question.

## **6. Can I copy a work to replace damaged or missing pages of works located in a University library?**

Yes. If the work is rare or unpublished, and is deteriorating, damaged, lost, or at risk of deterioration, damage, or loss, you can make a copy of the entire work, unless another copy is commercially available within a reasonable time and at a reasonable price.

## **7. Am I allowed to copy a work that is in Braille?**

Yes. Where a work has been copied into an audio, Braille, large print or machine-readable format (an “alternative format”), you are permitted to make a copy for an authorized person who is blind, visually impaired or otherwise unable to view normal print because of a disability, as long the University does not have knowledge of a copy of the work in the alternative format that is commercially available on the Canadian market at a reasonable price and within a reasonable time. Please contact Lari Langford, Head of Access & Information at [lari.langford@utoronto.ca](mailto:lari.langford@utoronto.ca), to find out whether copies of works are available in alternative formats.

When making such a copy, be sure to include:

- the international copyright symbol (©);
- a credit to the publisher of the work and, where known, the author(s) of the work; and

- the following notice: “This material has been in alternate format under permission from Access Copyright. Further reproduction, distribution or transmission is prohibited, except as otherwise permitted by law.”

**8. I am trying to download an article that I found online but the website has some kind of technological measure that is restricting my access to the work. Can I try to deactivate or bypass the technological measure so that I can download the essay?**

No. Even if you are otherwise permitted to make a copy of a work, the Access Copyright agreement does not permit you to circumvent a technological measure that restricts or controls access to, or use of, the work. If you circumvent an access control, you will likely be in violation of the anti-circumvention provisions of the *Copyright Act*. Circumventing a copy control, on the other hand, is not necessarily illegal, but it may disqualify you from some of the exceptions in the *Act*.

**9. Can I make content, such as songs and films, available on my course website?**

If the material is available online, you may post it on your website, provided that:

- only University students and faculty are able to access the website;
- the source of the work (and, if given in the source, the names of any applicable authors, performance, sound recording makers, and broadcasters) is mentioned;
- you do not have reason to believe that the copy of the material is an infringing copy or that its use is prohibited by the copyright owner;
- you did not break a digital lock to gain access to the copy.

***Proceed with caution when accessing materials through file-sharing sites or streaming services like YouTube, since copies posted on these sites are very often infringing.***

If the material is not available online, you need to make sure that you have permission from the copyright owners of any music or films that appear on your website. As with any content, permission generally needs to be obtained from all applicable owners of copyright. In the case of music and video content, this may include a producer or distributor (in the case of a film or TV show), a record label (in the case of a sound recording or music video) and/or a music publisher (in the case of any song – even where permission is obtained from a record label to use the sound recording or music video in which it appears).

**10. Can I provide links to other websites on my course website or on Blackboard?**

Yes, but proceed with caution. Although providing a hyperlink to another website does not necessarily constitute copyright infringement, it is possible that linking to *infringing content* may itself infringe copyright. Further, many websites contain terms and conditions of use that prohibit third parties from linking to them. Before linking to any website, check its terms and conditions carefully to ensure that you are not breaching them by providing a link. Also be careful that the linked website does not contain defamatory material, as providing the hyperlink (accompanied by words of recommendation to view the material) could amount to defamation.

**11. How do I get help connecting course materials to my course website?**

There are two ways to make class readings available to students on your course page. You can:

- check the “how-to” instructions to insert permanent, durable links to articles, databases and catalogue pages within your online course page, available online at: <http://discover.library.utoronto.ca/faculty-staff/blackboard#section-o>; or
- ask your Faculty Liaison Librarian to add permanent links to items in your required reading lists. These lists will appear on your Blackboard course page as documents with active links. To learn more, visit: <http://main.library.utoronto.ca/liaison/index.cfm?sel=all>

## **12. We no longer have a license with Access Copyright? What does this mean for instruction? What do I need to do?**

Since the expiry of the University of Toronto Access Copyright License on December 31<sup>st</sup>, 2013, removal of published works that appear to be in the Access Copyright repertoire and have not been otherwise license or that are not covered by fair dealing should have been removed. Assessing the Access Copyright repertoire can be a complicated exercise, since the extent and scope of the repertoire is somewhat uncertain, both as a matter of fact and of law. Where uncertainty exists, it is best to contact library staff at [copyright@library.utoronto.ca](mailto:copyright@library.utoronto.ca).

- ***What do I do if my information posted on a course management system does not fall under ‘fair dealing’?***

For further information regarding the permitted use of materials please refer to the Guide to Library Course Readings [Copyright FAQ](#). In addition, if you have any questions, or require any further information please do not hesitate to contact Bobby Glushko, our Scholarly Communications and Copyright Librarian, at [bobby.glushko@utoronto.ca](mailto:bobby.glushko@utoronto.ca), or our copyright help service at [copyright@library.utoronto.ca](mailto:copyright@library.utoronto.ca).

## **B. LECTURES, TESTS, AND EXAMINATIONS**

### **1. Can I write the lyrics of a song on the blackboard without seeking permission?**

Yes. You may make a handwritten copy of copyright-protected material in order to display it.

### **2. Can I type or scan the lyrics and show them to the class on a projector, or a computer monitor, without seeking permission?**

Yes. You may make a non-manual copy of copyright-protected material in order to display it, unless the material is commercially available – i.e., available on the Canadian market within a reasonable time and at a reasonable price – in which case a licence needs to be obtained.

### **3. Am I allowed to play a song or a DVD/Blu-ray video during a lecture?**

Yes. In accordance with the exceptions in the *Copyright Act*, you do not need to seek permission to play a song or an audiovisual work, for educational purposes, to an audience consisting primarily of University students and located on the premises of the University. Bear in mind, however, that this exception applies only to *playing* the song or film/TV show; you are not allowed to *copy* the material without permission, and the applicable exception requires that you not have reasonable grounds to believe that the work is an infringing copy. Therefore, the material must be obtained lawfully – either purchased commercially, licensed from an authorized source or obtained through the Internet in accordance with the guidelines set out in the previous question.

**4. Am I allowed to play a live broadcast of a program during my lecture?**

Yes. Whether the program is broadcast on radio or television or streamed via the Internet, you may play it in class *at the same time as it is transmitted to the public* without seeking permission.

**5. Am I allowed to make a video recording of a television program and show it in class?**

Sometimes, if you're diligent. Certain news programs (but not other programs) may be copied and performed in public without payment to the copyright owner or any collective society.

Under the *Copyright Act*, you are entitled to make copies of news and news commentary programs – excluding documentaries – and show them during your lectures.

For programs other than news and news commentary (such as sitcoms or movies shown on TV), royalties must be paid, or permission granted by the copyright owner, before showing them in class. You can make a recording and use it strictly for evaluative purposes – i.e., to determine whether or not you want to show it in class – for up to 30 days, but a licence must be obtained before it is shown to any audience. After 30 days, the copy must be destroyed or royalties are required to be paid.

Please make sure to maintain careful records detailing when copies of broadcast programs are made, performed in public, and destroyed. Also, please note that none of the above exceptions to infringement applies where the copy of the broadcast was received by unlawful means. For example, it would be a copyright infringement to show any program – even a news or news commentary program – that was copied from an illegal satellite transmission or an unauthorized Internet streaming site.

**6. Does the University own any audiovisual materials that I can use during a lecture?**

Yes. Go to Media Commons, 3<sup>rd</sup> floor, Robarts (formerly the Audio/Visual Library) to locate materials purchased by the University. You may also look through the University's online video collections available to the University community (1) [purchased online video collection](#); (2) [Internet Archive](#); (3) [CBC Digital Archives](#). For information contact Joan Links, Librarian, at [joan.links@utoronto.ca](mailto:joan.links@utoronto.ca).

**7. Am I allowed to access and show a website live during a lecture?**

Yes, subject to any terms and conditions governing the use of the content on the website. Make sure to check the website's terms and conditions before showing the website to your class. Also, if you have reason to believe that the material is infringing someone's copyright, do not show it to your class. For example, do not play a clip of a film downloaded from an illegal file-sharing website, and use caution when accessing material from user-driven streaming sites like YouTube.

**8. Are students allowed to perform a song or a play during a lecture?**

Yes. University students may publicly perform a song, play, or other "work" on the premises of the University for educational purposes as long as the audience consists primarily of University students or instructors.

**9. Do I need to obtain permission to record student performances...**

**... from the student performers themselves?**

Yes. Every performer has a copyright in his or her performance, including the sole right to "fix it in any material form." While the exception described in the answer to the previous question provides the University with the right to have University students *perform* live music (under certain circumstances), it does not permit the performance to be recorded. Therefore, permission must be obtained from the

performer. One way to do this is to include in the course syllabus a statement that, by taking the particular course, the student provides the University with consent to record any student performances.

**... from the composer(s) and/or author(s) of the work?**

Yes, at least in theory. Under section 3(1)(d) of the *Copyright Act*, the composer of a musical work or the author of a literary or dramatic work has the sole right to make a sound recording or cinematograph film of the work that is being performed. As with a performer's performance, the exception described in the answer to the previous question allows for the *performance* of the work only, not the recording of it. In practice, however, a licence is rarely obtained to make an initial recording of a work; the licence is generally obtained only if and when the maker of the recording wishes to exploit it in public, whether or not for commercial gain.

Obviously, no permission is required to reproduce a work that is in the public domain, but caution must be exercised here as well, since it is not unusual for copyright to subsist in a newer *arrangement* of an older work that has fallen into the public domain.

**... from the conductor or director of the performance?**

Probably. Although the issue has never come up in Canada, there is authority in other Commonwealth countries to suggest that a conductor is to be considered a "performer" for copyright purposes, thus triggering the same rights enjoyed by the other performers (see above).

**10. Do I need to seek permission for the materials I incorporate into my lecture slides?**

If you display your lecture slides only during your class, you are allowed to incorporate copyright material into them without obtaining permission. The *Copyright Act* provides for a limited exception that applies to the display of these materials, for educational purposes, on the premises of the University.

However, if you make copies of your lecture slides to distribute to your students or post online, you may need to obtain permission to use any copyrighted material, subject to the exceptions set out above in connection with course materials (e.g., material that is available online). The "display" exception does not extend to the distribution of printed copies. While it is possible that this use may be fair dealing, that has not been determined conclusively and needs to be assessed on a case-by-case basis. Check the [University's Fair Dealing Guidelines](#) for more information.

To avoid copyright infringement, some instructors make two versions of their lecture slides – one for use in class only, in which they can incorporate graphics, photos, images, excerpts from literary works and other materials that are subject to copyright, and another to hand out to their students, from which they have removed any material that belongs to third parties.

**11. I often use copyright-protected materials in the classroom – I use graphics in my PowerPoint slides, show excerpts from movies, and play recorded music. Can I make audio or video recordings of my lectures and make them available on my course website?**

Yes, as long as you:

- ensure that the website is available only to students enrolled in your course or to other people specifically authorized by the University;
- destroy any fixation of the lecture within 30 days after the students in the course have received their final evaluations; and

- take measures that can reasonably be expected to ensure that the lecture is accessed only by students in your course (or other persons acting under the University’s authority) and that students cannot reproduce or transmit the lecture other than as permitted in the *Copyright Act* – in practice, to other students in the same course.

## **12. What can I include in an exam or test without seeking permission?**

You may do the following acts:

- make a copy of or translate a work (unless the material is commercially available – i.e., available on the Canadian market within a reasonable time and at a reasonable price – in which case a licence needs to be obtained); and
- publicly perform a work (i.e., play a song or movie) or play a radio, television or Internet broadcast.

## **13. What about including copyright-protected material in an exam that I plan to administer online to students located off-campus?**

You can use the material in the same way as you would in an in-class exam, as long as you:

- ensure that the exam is available only to students enrolled in your course or to other people specifically authorized by the University;
- destroy any fixation of the exam within 30 days after the students in the course have received their final evaluations; and
- take measures that can reasonably be expected to ensure that the exam is accessed only by students in your course (or other persons acting under the University’s authority) and that students cannot reproduce or transmit the exam other than as permitted in the *Copyright Act* – in practice, to other students in the same course.

## **C. GOVERNMENT PUBLICATIONS**

### **I. Do I need to obtain permission before using materials created or published by the government?**

The Crown – that is, the federal or provincial government, as applicable – owns the copyright in all works prepared or published by any government department, indefinitely if the work is unpublished and, if the work is published, for a period of 50 years following the end of the first year of publication.

You do not need to obtain permission to copy government works for non-commercial purposes, including education, as long as you comply with the following requirements:

- Exercise due diligence to ensure the accuracy of the materials reproduced;
- Indicate both the complete title of the work reproduced and the author organization; and
- Indicate that the reproduction is a copy of an official work that is published by the government of the particular jurisdiction and that the reproduction has not been produced in affiliation with, or with the endorsement of that government.

If you want to revise, adapt or translate government works, you must first obtain permission. Please contact Sam-chin Li, Reference/Government Publications Librarian at [samchin.li@toronto.ca](mailto:samchin.li@toronto.ca), for assistance.

## **II. RESEARCH**

### **I. From a copyright perspective, does it make any difference whether I am teaching or conducting research?**

Yes. Research, whether conducted by faculty or by students, falls directly within the “fair dealing” exception mentioned above. Therefore, as long as the dealing is qualitatively “fair” – a case-by-case question to be determined by applying the six *CCH* factors, as outlined above – the exception should apply to permit the reproduction of a protected work without the permission of the copyright owner.

### **2. Does it matter whether or not the research is published?**

When research leads to a published article or other work, it is not entirely clear whether the work will continue to be considered fair dealing for “research” or whether another allowable purpose – either criticism or review – will need to be relied upon instead. As a result, it is extremely important, both in your own writing and in that of your students, to observe proper citation practices.

Quite apart from issues of academic honesty, failure to acknowledge all sources relied upon could result in copyright infringement. To fall within the “fair dealing” exception for criticism or review, a work must mention the source (i.e., the publisher) of each work quoted or paraphrased, along with the author of each such work (if mentioned in the published work consulted). So, for example, while quoting substantial portions of a novel in a critical essay may qualify as fair dealing for “criticism or review”, the exception will not be available unless the source is properly acknowledged. Similarly, where audiovisual works are used for criticism or review, both the performers and the maker of the sound recording must be named, if their names are given in the source work.