Copyright Toolkit for Member Institutions of Colleges and Institutes Canada

Copyright Workshops

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Preface

These workshop materials are a starting point for increasing the awareness of the rights and obligations of educational institutions, in selecting and using copyright-protected materials. These materials are not intended by CICan or the authors to provide legal advice to CICan member institutions. These materials simplify a complex subject and are not a substitute for legal advice, which should be sought in cases where the application of general principles is unclear.

About the workshops

CICan organized a series of workshops for its members to explain changes in the copyright law that occurred in 2012. Workshops were held in Toronto on November 12, Halifax on November 14, Ottawa on November 26, Calgary on November 29 and Vancouver on December 6, 2012.

Copyright law for education was significantly changed in 2012 as a result of the passage of the *Copyright Modernization Act* and a landmark decision of the Supreme Court of Canada[1] interpreting the users' right of fair dealing in an education context.

The workshops were designed as a toolbox for educators as they apply the new copyright law in their day to day activities. The workshops describe the tools that are available to educators and what each tool is designed to do.

How does copyright work?

Copyright serves two equally important public policy objectives. One objective is to provide creators with the ability to get paid for the use of their creations. To meet this objective, the copyright law provides creators with legal rights to control who uses their works, under what circumstances and at what cost. The other public policy objective is to permit the use of creators' works for the public good. To accomplish this objective, the copyright law provides users with rights to use copyright-protected works in defined circumstances without permission or the payment of copyright royalties.

Parliament enacts users' rights to serve the public interest of Canadians. Parliament has enacted users' rights in the copyright law for libraries, archives, museums, organizations serving the perceptually disabled and for educational institutions. The copyright law overall strikes a balance between users' and creators rights to enact a law that benefits society as a whole.

The enactment of the *Copyright Modernization Act* on November 7, 2012 added several new users' rights for educators. These new users' rights are the subject-matter of the workshops.

[1] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 ["*Alberta*"].

Contractual obligations v. Users' Rights in the *Copyright Act*: Which trumps?

The question of priority between contractual obligations and users' rights in the *Copyright Act* comes up frequently, particularly in connection with fair dealing and educational use of copyright-protected works on publicly available internet sites.

The *Copyright Act* is silent on whether users' rights are effectively undermined by the terms of use found in contracts. General principles of contract law therefore apply. Contracts can be standard-form agreements, "click" or “shrink-wrap” licences that accompany the work at the time of purchase, or negotiated contractual agreements. With standard-form agreements, click wrap or “shrink-wrap” licences, the act of removing the wrap or clicking "I agree" signals the agreement of the user to the terms in the contract of use. With negotiated agreements, the agreement of the user to the terms in the contract is evidenced by signing the contract. Regardless of the type of contract, users can, by contract, agree to forego their users' rights in the *Copyright Act*.

The rule is that a contractual obligation trumps a user’s right in the *Copyright Act*.

The rule is best illustrated by examples. One example is section 30.2(2) of the *Copyright Act* that provides a user’s right to a library to make a copy of a journal article for a researcher who needs it for research and private study. If a library enters into a contract with a provider that limits use to viewing articles, but prohibits printing them, then the library's user's right to make a copy is trumped by the contract obligation that prohibits making a copy.

There are other examples. Instructors have students reverse engineer a software product for the educational purpose of teaching students to understand the program. The contract for the software specifically states “no reverse engineering.” If the contract forbids an activity, the users' rights in the *Copyright Act*, including fair dealing, are not available. The right has been given away in the contract.

Another example is one institution's inter-library loan department being asked to send an article residing on one of their subscription databases to an instructor in a different institution. The requester wants to distribute the article to his class using a password protected site on his institution’s learning management system (LMS) (also known as course management system). The contract allows for students handouts, but only for the students of the institution that signed the contract. There is no mention of fair dealing in the contract. The issue is whether the institution can transmit the article to the requestor under fair dealing, or whether the terms preclude this. The answer is that a contractual obligation trumps a user’s right in the *Copyright Act*.

It is therefore important when entering into contractual arrangements with providers to read the contract carefully and to negotiate terms that meet instructors' needs.

Fair Dealing

Copyright Act: Sections 29, 29.1 and 29.2

Fair dealing is a user's right in copyright law permitting use, or "dealing," with a copyright-protected work without permission or payment of copyright royalties. To qualify for fair dealing, two tests must be passed:

1. The dealing must be for an allowable purpose

First, the "dealing" must be for a purpose stated in the *Copyright Act*: research, private study, criticism, review, news reporting, education, satire, and parody.[2] The *Copyright Modernization Act* added "education, parody and satire" as new fair dealing purposes. Adding "education" to the fair dealing purposes means that educational use of a copyright-protected work passes the first test.

2. The dealing must be fair

The second test is that the dealing must be "fair." On July 12, 2012, the Supreme Court of Canada issued a landmark decision interpreting what is "fair" in a non-profit educational institution, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright*)[3] (the "*Education Fair Dealing Case*"). It is "fair" for an instructor to copy "short excerpts" from a copyright-protected work for students in a class.

To apply the Supreme Court's decision in the *Education Fair Dealing Case,* it is necessary to know what is a "short excerpt" in an educational context. On August 30, 2102 CICan distributed a Fair Dealing Policy that describes what is meant by the term "short excerpts."

Fair Dealing Policy distributed by CICan

In August of 2012, CICan distributed the Fair Dealing Policy set out below on the advice of legal counsel.

Fair Dealing Policy

The fair dealing provision in the *Copyright Act* permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties. To qualify for fair dealing, two tests must be passed.

[2] Education, satire and parody were added to section 29 by the *Copyright Modernization* Act that was proclaimed in force on November 7, 2012.
[3] Supra, note 1.

First, the "dealing" must be for a purpose stated in the *Copyright Act*: research, private study, criticism, review, news reporting, education, satire, and parody. Educational use of a copyright-protected work passes the first test.

The second test is that the dealing must be "fair." In landmark decisions in 2004 and in 2012, the Supreme Court of Canada provided guidance as to what this test means in schools and post-secondary educational institutions.

This Fair Dealing Policy applies fair dealing in non-profit K-12 schools and post-secondary educational institutions and provides reasonable safeguards for the owners of copyright-protected works in accordance with the *Copyright Act* and the Supreme Court decisions.

Fair Dealing Guidelines

1. Teachers, instructors, professors and staff members in non-profit educational institutions may communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire and parody.

2. Copying or communicating short excerpts from a copyright-protected work under this Fair Dealing Policy for the purpose of news reporting, criticism or review should mention the source and, if given in the source, the name of the author or creator of the work.

3. A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:

    a. as a class handout
    b. as a posting to a learning or course management system that is password-protected or otherwise restricted to students of a school or post-secondary educational institution
    c. as part of a course pack

4. A short excerpt means:

    a. up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
    b. one chapter from a book
    c. a single article from a periodical
    d. an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
    e. an entire newspaper article or page
    f. an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
    g. an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

5. Copying or communicating multiple short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, is prohibited.

6. Copying or communicating that exceeds the limits in this Fair Dealing Policy may be referred to a supervisor or other person designated by the educational institution for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.

7. Any fee charged by the educational institution for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the institution, including overhead costs.

Safe Harbour in the Fair Dealing Policy

The Fair Dealing Policy is designed as a safe harbour. Copying or communicating a copyright-protected work within the limits set out in the Policy will almost certainly be fair.

Communicating and copying copyright-protected works which legally constitute fair dealing do not require permission or payment of copyright royalties. Dealings in CICan's member institutions within the limits set out in the Fair Dealing Policy could, in the authors' opinion, be successfully defended if the dealings were to be challenged as "unfair" in a lawsuit by a copyright owner, publisher or collective.

The risk of copyright infringement increases in proportion to the degree to which the dealing exceeds the guidelines set out in the Fair Dealing Policy. CICan member institutions that keep their copying and communicating of copyright-protected works within the limits described in the Fair Dealing Policy run a very low risk of a court finding instances of copyright infringement. Each instance of copying or communicating beyond the described limits requires an evaluation of whether the dealing is fair based on all relevant circumstances. Such copies may not be fair dealing and may require the permission of the copyright owner.

Exceeding the limits in the Fair Dealing Policy

Copying or communicating beyond the quantitative limits in the Fair Dealing Policy may, or may not, be fair.

Section 6 of the Policy accordingly states that copying and communicating that exceeds the quantitative limits may be referred to a supervisor or other person designated by the educational institution for evaluation.

Institutions should have a procedure in place to assess whether dealings beyond the quantitative limits in the Fair Dealing Policy are fair. The fair dealing assessment would require

the application of the six fair dealing factors established in the *CCH* Case [4] by the Supreme Court of Canada in 2004: the purpose, character and amount of the dealing, alternatives to the dealing, nature of the work and the effect of the dealing on the work.

Fair dealing "evaluator" is required

Institutions should appoint a fair dealing evaluator and train that person to conduct fair dealing assessments. Where the quantitative limits in the Fair Dealing Policy are exceeded, the dealing must be assessed by the evaluator.

Not all dealings are fair. The copyright evaluator, based on an assessment of the dealing involved, may refuse authorization because the dealing is unfair. Conducting a fair dealing assessment involves judgement and training, an understanding of legal principles in case law on fair dealing, and the application of an open list of factors established by the Supreme Court of Canada in the *CCH* decision. One person conducting all the fair dealing assessments in an institution will produce consistent assessments and a consistent application of the Fair Dealing Policy within the institution.

For example, **the effect on the market of the work** is one factor to consider when assessing whether a dealing is fair. In the consultations and discussions that took place in developing the Fair Dealing Policy, it was agreed that copying short excerpts is not likely to substitute for the purchase of textbooks in a post-secondary educational institutions. If the purchasing practices were to change due to the Fair Dealing Policy, that could change the fair dealing assessment. The Fair Dealing Policy was meant to strike a balance between protecting creators and ensuring full access to their fair dealing rights. The authors believe the Fair Dealing Policy reflects this balance.

Safeguarding the interest of copyright owners is important

The Fair Dealing Policy includes important safeguards for copyright owners in Sections 5, 6 and 7. In the 2004 *CCH* case, the Supreme Court of Canada held that adopting an institutional policy on fair dealing that provides reasonable safeguards to copyright owners is an important element in establishing that a dealing is "fair." In that decision, a law library's policy on fair dealing strongly weighed in its favour with the Supreme Court ultimately finding that the impugned copying was fair.

Implementing the Fair Dealing Policy

It is important that CICan member institutions implement the Fair Dealing Policy to enable them to claim the full benefit of fair dealing. The Fair dealing Policy should be disseminated as widely

[4] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339.

as possible. Multiple methods should be used: broadcasting, a separate copyright page or website, a click-through policy when a computer ID is assigned, and quidgets on LMSs.

Outside copy shops

A frequently asked question is whether course packs can be produced by outside copy shops under the Fair Dealing Policy.

Outside copy shops must have licences with Access Copyright because their dealings are not fair dealing under the Fair Dealing Policy.

An outside copy shop is a commercial operation that is intended to make a profit. An outside copy shop that produces course packs at the request of a post-secondary educational institution cannot claim that its copying is permitted without royalties under fair dealing. The copy shop is copying to make money, not for a fair dealing purpose such as education, research or private study. Institutions should require outside copy shops to have licences to make copies for course packs. If an institution do not require outside copy shops to have licences, the institution runs the risk of infringing copyright because it could be authorizing the copying. It would be difficult to defend the use by the outside copy shop of a copyright-protected work to make money as "fair" under the Fair Dealing Policy.

Alternatives to outside copy shops

Another frequently asked question is whether course packs may be produced under the Fair Dealing Policy within an educational institution?

There are alternatives to sending course packs to third party copy shops. An institution may make course pack copies (within the limits of the Policy) without permission or royalty payments as long as the institution charges a fee that is intended to cover no more than the costs to the institution, including overhead costs. See Section 7 of the Fair Dealing Policy. Under the Fair Dealing Policy, an institution may also scan articles and chapters for placement on a course web site or on an institutional LMS instead of having course pack copies printed by outside copy shops and paying royalties.

Short excerpts from different works

Can an instructor make and post on the LMS copies of a chapter - amounting to no more than 10% of the work - taken from each of four textbooks even if there is NO assigned textbook in the course?

Yes, the fair dealing policy permits this. It would be unfair to expect students to have to buy four textbooks if only one chapter is needed from each. The Supreme Court of Canada decision in the E*ducation Fair Dealing Case* stands for the proposition that a teacher may copy or

communicate short excerpts for students in his or her class. What constitutes a short excerpt is described in the Fair Dealing Policy. If the dealing involves short excerpts, and each of the short excerpts is taken from a different book or journal, then the use falls within the safe harbor described in the Fair Dealing Policy. Copying or scanning in these circumstances would be fair dealing.

The Fair Dealing Policy does not permit assembling multiple chapters from different works as a substitute for the purchase of a textbook in a situation where a textbook would normally be purchased. The Fair Dealing Policy is intended to cover situations where one or more short excerpts from works are all that is needed.

Assigned textbooks

Is fair dealing available only if there is an assigned textbook?

No. Students and teachers have fair dealing rights whether or not there is an assigned textbook. The test is whether educational copying under fair dealing is a substitute for the purchase of a textbook. A student would not purchase a textbook for one chapter or for 10% of the textbook. There does not have to be an assigned textbook for fair dealing to apply.

Required v. supplementary readings

Does fair dealing apply differently to required readings and supplementary readings?

No. The issue is whether the dealing is fair under the Guidelines. As long as a teacher is only copying or scanning short excerpts from copyright-protected works, that teacher should be allowed to use those excerpts in a course pack or on a LMS website. The Supreme Court of Canada in the E*ducation Fair Dealing Case* found that the burden of proof in showing an effect on the market for the work is on the copyright owner. The Fair Dealing Policy does not permit using fair dealing as a substitute for the ordinary purchase of a textbook. The Fair Dealing Policy is intended to cover situations where one or more short excerpts from works are all that is needed.

Relationship between the limits in the Fair Dealing Policy

Does the 10% threshold apply to the short excerpt sections in Section 4(b) to (g) of the Fair Dealing Policy?

An educational user may copy or communicate up to 10%, or more than 10%, provided the dealing remains within the limits in Section 4(b) to (g) of the Fair Dealing Policy.

Consider the example of one chapter from a book. An instructor has a legal copy of the work, and wants chapter one put on the LMS for one course but wants chapter 10 on the LMS for a

completely different course. Is this systematic copying or is it fair? This is fair under the policy. The relevant “purpose” of the dealing is the end user's purpose – in this case the student, not the instructor. It would be unjust to deprive students of their fair dealing rights based on the fact that an instructor teaches more than one course.

Consider the example of three different instructors who want to use the same book, but select different single chapters from the same book. Is this systematic copying or is it fair? This is not systematic copying under the Fair Dealing Policy. The relevant purpose to look at in assessing whether this dealing is fair is the student’s purpose, not the instructors. If the student is engaged in an allowable purpose such as research, private study or education, and the student’s dealing is limited to one chapter, the dealing would be within the limits of fair dealing.

Course e-reserves

Some CICan members are moving to an online model of service delivery. Course e-reserves are new territory for many CICan members and guidelines were requested as a topic for the workshop.

Course e-reserve procedures and approaches should reflect the recent Supreme Court of Canada decisions, particularly the E*ducation Fair Dealing Case* as well as the November 7, 2012 proclamation of the *Copyright Modernization Act* and the Fair Dealing Policy distributed by CICan.

Consider the following example. An instructor requests that a copyright-protected work be placed on course e-reserve. Before making a copyright-protected work available to students, library staff must go through a number of copyright steps to make the reading available to students via a web server.

Step-by-step copyright procedure

The copyright steps are:

1. Determine if the institution has a licence to use the copyright-protected work on course e-reserves, for example, an article from an e-journal that is licenced. If the institution has a licence which permits the use, the copyright-protected work may be put on course e-reserve.

2. If the institution does not have a licence, the Fair Dealing Policy may be applied to determine if the use is permitted under fair dealing. If the use is permitted under fair dealing, the copyright-protected work may be put on course e-reserve.

3. If the use is not permitted under fair dealing, the institution should determine whether any other user's right in the *Copyright Act* permits putting the copyright-protected work on course e-reserve. For example, if the source of the work is on a publicly available internet site, section 30.04 permits educational use without permission or payment. If a users' right is available permitting the use, the copyright-protected work may be put on course e-reserve.

4. If the use is not permitted by 1, 2 or 3, the institution must have permission, in writing, before putting the reading on course e-reserve. Permission may be obtained directly from the copyright owner, usually the publisher. Permission may also be obtained from the Copyright Clearance Centre (CCC) in the United States. If the publisher or the CCC authorizes the use, and if there is an associated cost that the institutions is willing to pay, the copyright-protected work may be put on course e-reserve.

5. The permission request must state who is requesting, the reasons for the request, the intended use, how many students will be given access, and the length of time for which access is being requested.

6. If the owner refuses to authorize the use, or if a response is not received, the copyright-protected work may not be put on course e-reserve.

Relationship between Copyright Act, Licenses, and Fair Dealing

The "steps" listed above describe the priority relationship between institutional licences, fair dealing and other users' rights in the *Copyright Act*. First, if an institution has a licence, the terms of that licence establish the institution's copyright rights and obligations. The second level of inquiry is to determine if fair dealing is available. The third level of inquiry is to determine whether other users' rights in the Copyright Act are available. At the next step, permission is necessary. Permission must be sought from the copyright owner or a representative of the owner.

Statutes, regulations and court decisions

Instructors and students may copy and communicate the text of federal, provincial and territorial statutes, regulations and judicial decisions for educational purposes from every province and territory, except Manitoba, Quebec, and Nunavut.

Copying for instruction

Section 29.4 permits an instructor to copy (or do any other necessary act) in order to display a copyright-protected work.

This permits the use of whiteboards and similar tools, overhead projection using a device such as an LCD screen, overhead, opaque, or slide projector.

The work may only be used for the purpose of education and training.

The work cannot be commercially available in a medium that is appropriate for the purpose of instruction. If it is, an institution must buy a copy rather than make one.

Copying for tests and examinations

Sections 29.4(2) and (3) in the Copyright Act provide a users' right permitting copying for the purposes of tests and examinations.

Instructors may copy, translate, communicate electronically or perform any copyright-protected work for a test or examination, provided the work is not already commercially available in an appropriate medium for the purpose of a test or examination.

Persons with perceptual disabilities

Section 32 of the *Copyright Act* permits students with perceptual disabilities to be provided with alternate formats such as audio books, Braille and e-text.

Perceptually disabled students include blind and visually impaired students as well as students with learning disabilities and physical disabilities.

Students, and educational institutions on behalf of students, may make a copy in an alternate format of a literary, dramatic, musical or artistic work (but not an audiovisual work) in a format designed for a person with a perceptual disability.

Translation, adaptation, and performance in public for the purpose of serving students with perceptual disabilities are permitted, as long as the work is not already commercially available in that format.

Educational institutions may not make a large-print book for a student with a perceptual disability without permission from the copyright owner.

Maintenance and management of school libraries

Section 30.1 of the *Copyright Act* permits libraries in educational institutions to manage and maintain their collections.

Institutional libraries may:

- make a copy for the purpose of cataloguing, internal record keeping or for insurance purposes or police investigation
- make a copy for the purpose of restoration
- use digital technology to deliver an inter-library loan copy of a copyright-protected work

Provided a replacement copy is not commercially available in a medium and of a quality that is appropriate for these purposes, school libraries may also:

- make a copy of a work “if the original is rare or unpublished and is deteriorating, damaged, or lost”
- make a copy of a fragile document or recording for on-site consultation if the original cannot be viewed, handled or listened to because of its condition
- make a copy if the original is in an obsolete format, or is in danger of becoming obsolete, or the technology to use the original is unavailable or is in danger of becoming obsolete.

Performing a copyright-protected work, such as a play, on college premises

Section 29.5(a) permits educational institutions, and persons under their authority, such as instructors and students, to give live performances of copyright-protected works such as a play.

An example is the performance of a play in a drama class.

Five conditions must be met before this users' right applies:

- the performance must take place on the premises of an educational institution
- the performance must be for educational or training purposes
- the performance must not be for profit
- the performance must take place before an audience consisting primarily of students of the educational institution, persons acting under its authority, or any person who is directly responsible for setting curriculum, and
- the performance must not involve a “motive of gain”.

Playing sound recordings, radios, and televisions on school premises

Section 29.5(b) and (c) permits instructors to play sound recordings, radios, and televisions subject to all of the following conditions:

- the playing of the recording, radio or television program must take place on the premises of an educational institution
- it must be for educational or training purposes
- it must not be for profit
- it must take place before an audience consisting primarily of students of the educational institution, persons acting under its authority, or any person who is directly responsible for setting curriculum, and
- it must not involve a “motive of gain”.

Showing an audiovisual work (such as a DVD or video) on school premises

Section 29.5(d) of the *Copyright Act* permits showing an audiovisual work such as a DVD or video as long as the work is not an infringing copy or the person responsible for the showing has no reasonable grounds to believe it is an infringing copy.

This users' right permits showing a copy purchased or rented form a retail store, a copy borrowed from the library, a copy borrowed from a friend, and a YouTube video.

What is an "audiovisual" work?

The phrase "audiovisual work" is a commonly used to refer to what the *Copyright Act* calls "cinematographic works." Section 2 of the *Copyright Act* defines "cinematographic work" as including "any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack." Cinematography means the art of making movies, videos and films.

Netflix and iTunes and YouTube

The *Copyright Modernization Act* in Section 29.5(d) changed the copyright law to permit the display of cinematographic works in the classroom without having to pay copyright royalties. There is no condition in Section 29.5 regarding the source of the video, so long as it is not infringing.

A question that is being asked is whether an agreement with Audio Ciné Films (ACF) or the Visual Education Centre (VEC) can operate to limit the terms and conditions agreed with Netflix or iTunes.

End-user license agreements are usually found to be legally binding. An agreement with one party (ACF or VEC) cannot take precedence over a legally-binding agreement with another party (Netflix or iTunes.) Both agreements apply. The fact that one agreement allows an activity has no bearing on the other agreement.

The wording of both the Netflix and iTunes agreement would seem to not allow the use of their videos in the classroom. The Netflix agreement is problematic for the reason that the classroom would not be considered “household use.” The iTunes agreement is problematic for the reason that the classroom would not likely be considered “personal use.” The use would be primarily for students in the class. While classroom use may have copyright authorization under the ACF and VEC licenses, using the videos may still constitute a breach of contract under the end-user license agreements with Netflix and iTunes.

For this reason, it is recommended that videos from Netflix and iTunes not be used in the classroom without written permission from iTunes and Netflix.

This is not a black and white issue. Research has shown that:

1. The University of Missouri has a policy expressly allowing Netflix videos to be shown in the classroom pursuant to a provision in Section 110(1) of the US *Copyright Act* that is similar to Section 29.5(d) of the Canadian *Copyright Act*. See http://libraryguides.missouri.edu/content.php?pid=217735&sid=1809589

2. In 2010, Netflix stated that it would not pursue libraries that lent out Netflix DVDs, despite this being a breach of the Terms of Use. See http://chronicle.com/blogs/wiredcampus/academic-libraries-add-netflix-subscriptions/27018

The Terms of Use for YouTube videos create similar concerns for educational users. There are some alternatives for YouTube videos:

1. YouTube offers a free program of thousands of educational videos specifically for use in the classroom at http://www.youtube.com/schools.

2. Sending students a link to a YouTube video for their own private viewing would not raise concerns about the Terms of Service.

3. In terms of downloading and using YouTube videos, YouTube specifically marks which videos are allowed to be copied and used via their own YouTube video editor. Such videos are marked with a Creative Commons attribution, such as (CC-BY) licence notification. See YouTube's policy here: http://www.youtube.com/t/creative_commons.

Copying an audiovisual work at home

Instructors may not copy an audiovisual work at home and then show it in the classroom. Making a copy of an audiovisual work without permission is an infringement of copyright in Canada. The resulting copy is not a legal copy.

Buying a legal copy of an audiovisual work

Instructors may, however, show a legally obtained copy in the classroom.

A legally obtained copy includes:

- a copy purchased or rented form a retail store
- a copy borrowed from the library
- a copy borrowed from a friend
- a YouTube video.

Mash-ups

Section 29.21 of the *Copyright Act* contains a users' right permitting anyone, not just students and instructors, to use copyright-protected works to create new works.

This users' right is referred to in the *Copyright Act* as "non-commercial user-generated content." The copyright literature refers to this users' right as the mash-up provision.

The following conditions apply to the creation of non-commercial user-generated content.

- it may only be used for non-commercial purposes
- the original source must be mentioned, if it is reasonable to do so
- the original work used to generate the content must have been acquired legally
- the resulting user-generated content does not have a "substantial adverse effect" on the market for the original work.

This users' right allows students to use copyright-protected works to create videos, DVDs or mash-ups, as long as the conditions above are all met.

The mash-up provision permits user-generated content created under this users' right to be disseminated. Dissemination includes uses such as posting a video to YouTube, or on a website.

The users' right is not available if the user circumvents a *Technical Protection Measure* (TPM) in order to access the content for the mash-up.

In the past, the Access Copyright licence and the Interim Tariff prevented the creation of derivative works. For example, copying one paragraph from one source, another paragraph from another source and then another paragraph from yet a different source and then bundling it all together to distribute to students was not permitted. This is now permitted under the mash-up provision.

Student Portfolios

This users' right is new and may address at least some uses of student portfolios that contain copyright-protected material after the student leaves school. For example, once a student graduates, portfolios may appear on recruitment and other open sites. Instructors are looking for guidance in telling their students what are acceptable uses of student work and portfolios after graduation.

If the use after graduation meets the conditions below, a good argument may be made that the use falls within this new users' right for non-commercial user-generated content. The questions to ask before using a portfolio after graduation are listed below.

- Is the intended use of the portfolio for a non-commercial purpose?
- If it is reasonable to do so, is the original source of the copyright-protected material mentioned?
- Was the original copyright-protected material acquired legally?
- Would the intended use of the portfolio have a "substantial adverse effect" on the market for the original work?

Section 29.21 of the *Copyright Act* became law on November 7, 2012. At this time, there is very little experience or literature on how this new provision could apply in different situations. If the answer to the first three questions above is "yes" and the answer to the last question above is "no", then a good argument may be made that the use of a student portfolio after graduation would be permitted under Section 29.21.

News and news commentary programs from radio or television

Section 29.6 of the *Copyright Act* permits an educational institution, or a person acting under its authority, to make a single copy of a news or news commentary program (excluding documentaries).

The copy of the news or news commentary program may be performed before an audience consisting primarily of students of the educational institution, on its premises, for educational and training purposes.

The copy may be made only at the time the program is aired by the broadcaster or communicated over the Internet.

Documentaries: copying radio and television programs that are not news or news commentary

Section 29.7 permits a person acting under the authority of a non-profit educational institution to make a single copy of other types of broadcast programs (i.e., those that are not news or news commentary programs).

This users' right therefore permits a person acting under the authority of a non-profit educational institution to make a single copy of a documentary.

The copy may be made only at the time the program is aired by the broadcaster or communicated over the Internet.

An instructor may examine the copy for up to 30 days, to determine whether the copy will be used on the premises of an educational institution for educational purposes.

If the copy is shown on school premises at any time (including within the 30-day evaluation period) or if it is not erased after 30 days, a royalty payment must be made.

The copy may be viewed only by an audience consisting primarily of students of the educational institution and is subject to terms and conditions relating to the use of the copy and to payment, **whether or not it is ever used**.

The educational institution is required to provide information related to the making, erasing, performing, and method of identification of the copy to the copyright owner or a collective representing the owner. The Educational Rights Collective of Canada (ERCC) is the collective that collects copyright royalties for off-air recordings: <http://www.ercc.ca>

Educational Rights Collective of Canada (ERCC)

In 2002, the Copyright Board of Canada set the ERCC tariff for the copying of radio and television programs. The rates are unchanged as of the date of publication. Educational institutions may choose between a transactional (pay-per-use) and a comprehensive royalty payment for the right to copy and perform radio and television programs:

- Transactional payment: Post-secondary institutions pay $0.17 per minute for a radio program and $2.00 per minute for a television program.
- Comprehensive payment: Post-secondary institutions pay an annual cost based on the number of their full-time equivalent students (FTE). The rate for post-secondary institutions is $1.89 per FTE.

Fair dealing with documentaries

Fair dealing also applies to all copyright-protected works, including documentaries. The limits in the Fair Dealing Policy therefore apply. For example, up to 10% of a documentary may be reproduced and shown for educational purposes. Using an entire documentary is not permitted under fair dealing.

What is a "documentary?"

In 1997, when Section 29.7 was first enacted, the following guidelines were developed to assist educational users in differentiating between news programs, news commentary programs and documentaries.

- To assist in determining whether the royalty exemption is applicable to any particular program, ERCC and representatives of various educational institutions have developed the following guidelines for identifying the three (3) categories of programs in question:

    - **News program** is a program reporting on local, regional, national and international events as they happen and includes weather reports, sportscasts, community news and other related features or segments contained within a news program. Examples: *The National, Ontario Ce Soir, BBC World Report.*

    - **News commentary program** is a program containing discussions, explanations, analysis, observations or interpretations of the news, and possesses a preponderance of the following elements: "talking head(s)", minimal editing; minimal "shelf life" in its original form; and, if in interview or panel discussion format, unscripted responses. Examples*: As It Happens, Studio 2, The Editors, Larry King Live*.

    - **Documentaries** are socially relevant programs with a creative vision and/or viewpoint and possess a preponderance of the following elements: significant research and preparation; pre-scripting; significant editing; and significant "shelf life". Examples: *Life & Times, The Nature of Things, Rex Murphy, Les affaires et la view, D'un soleil à l'autre.*

- Special care should be taken in categorizing segments of so-called "news magazine" programs, which can be either news commentary or documentaries. The guidelines are intended to assist educators in distinguishing the two categories. Examples: *48 Hours, 20/20*.

Online Learning

The new Section 30.01 in the *Copyright Modernization Act* is intended to make sure that the "communication" right of copyright holders is not a barrier to distance education. In other words, it puts distance education students on an even footing with a live classroom experience.

The section is not solely about distance education, but about all lesson communication. It allows teachers to communicate digital lessons for students, enrolled in an in-person course. Students may record and watch the lesson live or again at a later time. Section 30.01 of the *Copyright Act* permits lessons to be streamed live to students or recorded and made available online for students at a time of their choosing.

For example, a student in one educational institution is able to access an online course containing copyright-protected material offered in a different institution.

The word "lesson" is defined in Section 30.01: "For the purposes of this section, *"lesson"* means a lesson, test or examination, or part of one, in which, or during the course of which, an act is done in respect of a work or other subject-matter by an educational institution or a person acting under its authority that would otherwise be an infringement of copyright but is permitted under a limitation or exception under this Act."

Under the *Copyright Act*, the owner of copyright in a work ordinarily has the sole right to communicate that work to the public. Section 30.01 allows teachers to communicate a lesson that includes copyright material without needing permission from the copyright owner, or the payment of royalties, as long as the audience is "only students who are enrolled in a course of which the lesson forms a part, or of other persons acting under the authority of the educational institution".

Persons acting under the authority of the educational institution include staff and faculty.

The student is permitted to make a copy of the lesson and keep the copy until 30 days after the final evaluation (final report card) is received.

Both the student and the educational institution are required to destroy any recording of the lesson within 30 days after the students who are enrolled in the course receive their final evaluations.

The need for section 30.01 is largely due to the structure of the Copyright Act. The right to make a copy and the right to communicate a copy are separate rights, each belonging to the copyright owner. Section 30.01 was intended to make sure that copyright compliant lessons could be fixed and communicated to students and still remain copyright compliant. This is intended to better enable modern forms of distance and home learning.

The section is also technologically neutral as to the original lesson. It does not matter whether the lesson is in print or electronic form originally.

It is important to note that Section 30.01 does not authorize the copying of materials to create the lesson itself. That is to say, the lesson that incorporates copyright materials must be allowed by a users' right in the *Copyright Act* or incorporated with the permission of the copyright owner. If the use of the copyright materials in the lesson is copyright compliant, then Section 30.1 allows the lesson that includes those materials to be communicated to and copied by students to watch later.

Educational use of publicly available material on the Internet

Section 30.04 of the *Copyright Act* permits educational institutions, instructors, and students to save, copy and share publicly available Internet materials, as well as perform and communicate that material to students or others within their education circle.

“Publicly available” materials are those posted online by content creators and copyright owners without any technological protection measures, such as a password, encryption system, or similar technology intended to limit access or distribution.

Routine classroom uses may be made of publicly available Internet materials, such as incorporating online text or images into homework assignments, performing music or plays online for peers, exchanging materials with instructors or peers, or reposting a work on a restricted-access course website.

This users' right is not available:

- unless students and educators cite the source of the Internet materials they use
- if the publicly available Internet material is protected by a technological protection measure (a digital lock) that restricts access
- if the publicly available Internet material has a clearly visible notice (not merely a copyright symbol) prohibiting educational use
- if the educational user knows, or should have known, that the material was made available on the Internet without the consent of the copyright owner.

Music scores

Copying of an entire musical score that is not in a copyright-protected work containing other musical scores is **not** permitted. Permission must be obtained. Normally, the music publisher may provide permission.

Sometimes, the right to copy music is given when music is purchased. The music books or sheets will have a notice stating that copying is permitted. In this case, music may be used without the copyright owner's permission in accordance with the terms of the notice.

Fair dealing with music scores

Fair dealing permits limited educational dealings with musical scores. First, copying an entire single musical score, from a copyright-protected work containing other musical scores is permitted. Second, up to 10% of a musical work may be copied under fair dealing. See Section 4(a) and Section 4(f) of the Fair Dealing Policy.

Frequently Asked Questions

There have been a number of questions asked about how fair dealing applies to music scores.

What is a music score?

A music score encompass an entire score for an orchestra with the many parts involved as well as a one-page song with piano accompaniment.

Are there circumstances where the fair dealing factors could encompass the copying of an entire music score?

Music use is a good place to remind institutions that not all dealings are fair. Ten percent of a musical score is not useful to music students because the entire score is needed to perform it. If the musical score is contained in a book or anthology with other musical scores then an institution may copy the greater of one musical work or 10% of the book. Both Section 4(a) and Section 4(f) of the Fair Dealing Policy would apply. If the musical score is not contained in a book or anthology with other musical scores then Section 4(a) applies and the dealing is limited to copying 10%.

If a book has lyrics and music from different musicals or single songs that did not come out of a one musical (an anthology with many songs) can 10% of the book be copied under fair dealing?

When a book contains many songs or "other musical scores" then you can copy one musical work or 10% of the book. Both Section 4(a) and Section 4(f) of the Fair Dealing Policy apply. If

the musical score is not contained in a book or anthology with other musical scores then Section 4(a) applies and the dealing is limited to copying 10%.

If a book contains both lyrics and music to one single musical, can 10 % of it be copied under fair dealing?

Yes.

If a book contains libretti and lyrics to one musical within a bound book, can 10 % of it be copied under fair dealing?

The answer depends on whether the “book” contains other musical scores. If the musical score is contained in a book or anthology with other musical scores then an institution may copy the greater of one musical work or 10% of the book. Both Section 4(a) and Section 4(f) of the Fair Dealing Policy would apply. If the musical score is not contained in a book or anthology with other musical scores then Section 4(a) applies and the dealing is limited to copying 10%.

Performing music in educational institutions

Section 32.2(3) of the *Copyright Act* permits the public performance of music in schools, when it is "in furtherance of an educational object" without permission or the payment of royalties. Performances that are not in furtherance of an educational object must be authorized by the copyright owner, or by a collective that represents the owner.

Permitted performances

The following uses of live and recorded music are permitted by the *Copyright Act* and therefore **do not require** permission and payment:

- in school assemblies
  (e.g. a recording of O Canada)

- by a student in a presentation to other students, instructors, assessors or parents
  (e.g. as part of a presentation during music class)

- in demonstration activities by students, primarily for other students, instructors, assessors or parents, and for which any admission fee charged covers costs but does not make a profit
  (e.g. a concert by the school choir, gymnastic routines, shows by school bands)

- during school hours for teaching/learning
  (e.g. music/dance/dramatic arts classes)

- before and after classes, if the use is for educational purposes.
  (e.g. school radio operated by students for credit and supervised by an instructor)

Performances requiring permission from SOCAN and Re:Sound

The following uses of live and recorded music in educational institutions are not permitted by the *Copyright Act* and therefore **require** permission and payment:

- at events such as a dance, fashion show or sporting event
- while people are on hold on the telephone
- at an event where the admission fee is intended to make a profit
- on educational institution premises for no other reason than as background music.
  (*e.g. in the classroom, cafeteria, halls, over the PA system, at events such as fairs, carnivals, socio-cultural events)*

Two copyright collectives, SOCAN and Re:Sound, may provide licenses to educational institutions across Canada. A current statement of Re:Sound's applicable fees may be found at <www.resound.ca> . A current statement of SOCAN's applicable fees can be found at <www.socan.ca>.

Performances where SOCAN or Re:Sound cannot give permission

The following uses of live and recorded music by educational institutions are not permitted by the *Copyright Act*, and SOCAN or Re:Sound **cannot** provide licenses to educational institutions:

- for a play performed live (e.g. a drama class' production of My Fair Lady). In this case, the educational institution must obtain copyright authorization from a theatrical agent.
- for performances on educational institution premises by outside performers (e.g. invited singers, magicians, etc.). In this case, obtaining copyright authorization is the responsibility of the outside performers.
- for activities held in educational institution facilities that are rented or are provided free of charge to outside groups. In this case, obtaining copyright authorization is the responsibility of the outside group.

How to assess whether permission is needed

The factors to consider when determining whether a music use requires permission include:

- Did the music use occur during school hours?
- Will the student be graded on the activity involving the music use?
- Does the music use involve a demonstration by a student or instructor for other students, instructors or assessors?
- Is it reasonable to consider the music use to be for educational purposes? The phrase "educational purposes" is not defined in the *Copyright Act* but can be described as an activity that is planned and where the objective is for students to meet one or more subject or program outcomes.
- Was the music used on the premises of the educational institution?
- If admission was controlled, was it free?
- Was the music use for a non-profit purpose?

If the answer to the majority of these questions is "yes," then the performance of the music is most likely permitted by the *Copyright Act*.

Re:Sound's request for retroactive royalties

Many CICan members have received a request from a copyright collective called Re:Sound for retroactive royalty payments. Re:Sound is a relatively new copyright collective that collects royalties on behalf of performers and recording companies for the use of recorded music. The payments are set in tariffs certified by the Copyright Board of Canada. If an institution currently pays SOCAN tariffs, then it must also pay Re:Sound tariffs. SOCAN distributes royalties to composers of music. Re:Sound distributes royalties to the companies that record music and the performers who perform music on sound recordings. The following list is a step-by-step approach to respond to the Re:Sound request.

Institutions should:

- Calculate the amounts due for special event venues that use recorded music at the institution, and pay retroactive fees to Re:Sound as requested.
- In future, institutions should collect fees from users, as and when required, and forward these to Re:Sound and SOCAN.
- When venues, such as theatres, are rented to third parties, institutions should contractually require them to be responsible for copyright royalties.
- For the use of recorded music for educational purposes (such as in a Fine Arts Department), institutions can usually rely on users' rights in the Copyright Act.
- For uses of recorded music that are not permitted by users' rights in the Copyright Act, dedicate a staff person to ensure that all appropriate fees are collected and submitted to SOCAN and Re:Sound.

Student-created works

Any original work created by a student — be it in the form of an essay, a video or DVD, a sound recording, website, art work or other material protected by copyright — is copyright-protected.

The student must authorize the further use of his or her work.

Uses, such as in a publication of the educational institution, an instructor workshop, or in a website posting require written permission from the student.

Digital Locks

A digital lock is a technological protection measure (such as encryption or a password) that restricts the ability of users of digital content from sharing or copying the content.

The *Copyright Act* prohibits breaking a digital lock even for educational uses that are otherwise permitted by the *Copyright Act*.

For example: the encryption on most commercial DVDs, which prevents them from being copied or the serial-key validation required by many software programs, may not be broken even if the purpose of the use is otherwise allowed.