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Access Copyright: What does it mean for Western? A Librarian's Guide

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Access Copyright: What Does It Mean For Western? A Librarian's Guide

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Presentation for the FIMS Graduate Resource Centre

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Overview

- Context
- Copyright Basics
- Fair Dealing
- The Access Copyright License

Context

- On January 30, 2012, the University of Western Ontario announced it had reached a copyright licensing agreement with Access Copyright
- Access Copyright is a collective society authorized by copyright owners to license rights
- “Access Copyright is a not-for-profit collective society that represents the reproduction rights of rightholders, and grants licenses for the use of copyright protected published works.”
(UWO AC Licensing Agreement: Preamble)

Context

- The agreement is harmful to Western
- The agreement features unjustified fee increases, surveillance requirements, and grants Access Copyright rights that do not exist in the Copyright Act
- In the face of the rising number of alternatives, the Access Copyright agreement has become increasingly unnecessary

Context

- Copyright is vital for librarians
- Without a basic understanding of copyright, librarians are at a disadvantage
- An understanding of copyright issues can help ensure fair, equitable, and effective access to information

Copyright Basics

- What is Copyright?
- Owner's Rights
- Copyright Infringement

What is Copyright?

- “The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them...”

(Theberge: Para. 31)

What is Copyright?

- “The *Copyright Act* has **dual objectives**...usually presented 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 creator...The proper balance among these...lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In interpreting the *Copyright Act*, courts should strive to maintain an appropriate **balance between these two goals.**”

(CCH: Para. 10)

Owner's Rights

- “For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...and to authorize any such acts.”

(Copyright Act: S3.1)

- Owners have a set number of economic and legal rights
- Owner's rights are sole exclusive rights
- Includes the right to exclude others from doing that which is the owner's sole right without permission

Copyright Infringement

- “It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.”

(Copyright Act: S27.1)

- To do anything that is an owner’s sole right without permission
- A claim of infringement must be based on one of the owner’s rights set in the Copyright Act

Fair Dealing

- What is Fair Dealing?
- How is Fair Dealing Defined?
- *CCH* and the Six Fair Dealing Criteria

What is Fair Dealing?

- The right, when fair and reasonable, to copy a substantial portion of a copyrighted work without permission from, or payment to the owner
- “...an integral part of the *Copyright Act*...any act falling within the fair dealing exception will not be an infringement of copyright.”

(CCH: Para. 48)

- “The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”

(CCH: Para. 48)

How is Fair Dealing Defined?

- The Copyright Act does not define fair dealing or what is considered fair
- Fair dealing has been clarified through judicial decisions (courts cases)

CCH and the Fair Dealing Criteria

- Historically, fair dealing has been interpreted restrictively by the courts
- This changed in 2004 when the Supreme Court of Canada provided clarification and expanded the scope of fair dealing in *CCH Ltd. v. LSUC*
- Established six criteria to help copyright users assess and evaluate the fairness of their dealings

CCH and the Fair Dealing Criteria

- “...the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing...In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.”

(CCH: Para. 60)

1. Purpose of the Dealing
2. Character of the Dealing
3. Amount of the Dealing
4. Alternatives to the Dealing
5. Nature of the Work
6. Effect of the Dealing on the Work

Purpose of the Dealing

- Fair dealing for the purpose of research, private study, education, parody, satire, review, criticism, and news reporting does not infringe copyright.

(Copyright Act: S29, 29.1, 29.2)

- “...these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”

(CCH: Para. 54)

Purpose of the Dealing

- Fair dealing for the purpose of research, private study, education, parody, satire, review, criticism, and news reporting does not infringe copyright.

(Copyright Act: S29, 29.1, 29.2)

- Copying must fall within one of these broad categories
- If copying does fall within one of the categories, proceed to consider the remaining criteria
- Analyze fairness of the dealing in the remaining criteria

Character of the Dealing

- “If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.”

(CCH: Para. 55)

- “It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of a dealing is fair.”

(CCH: Para. 55)

Amount of the Dealing

- Consider the portion being copied in relation to the entire work
- No set quantitative amount for determining how much of a work can be copied exists
- Exercise individual judgment to determine whether the amount copied is fair and reasonable

Amount of the Dealing

- “The quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work.”

(CCH: Para. 56)

- “Since fair dealing is a “user’s” right, the “amount of the dealing” factor should be assessed based on the individual use, not the amount of the dealing in the aggregate...”

(SOCAN: Para. 41)

Alternatives to the Dealing

- Consider this criterion a test of necessity:
 - Is it necessary to copy this particular copyrighted work?
 - Is it necessary to copy this amount?
 - Does a non-copyrighted alternative exist?

Nature of the Work

- Consider the amenability of the work being copied to fair dealing
- It may not be fair to reproduce a confidential work the owner never intended to release publicly
- It may be fair to reproduce excerpts from a published work or an unpublished work

Effect of the Dealing on the Work

- Consider whether the copy will harm the market of the original work
- “If the reproduced work is likely to compete with the market of the original work, this may suggest the dealing is not fair. Although...an important factor, it is neither the only factor nor the most important factor...”

(CCH: Para. 59)

- In *Alberta (Education) v. Access Copyright*, the Supreme Court dismissed the claim that copying short excerpts in schools for educational purposes had a negative effect on the market of the original work

Fair Dealing: Points to Take Away

- Fair dealing is flexible and open to individual interpretation
- Work through the six *CCH* criteria on a case-by-case basis to assess whether copying is fair
- Our past practices and present actions can help shape what is fair
- Consult the Queen's University Library fair dealing evaluator if you need help applying the six criteria

The Access Copyright License

- What is the Relationship Between Fair Dealing and the AC License?
- What Does the AC License Allow Us To Do?
- What are the Major Concerns with the License?
- What are the Alternatives?

Relationship Between Fair Dealing and the AC License

- “The licensee wishes to obtain a license to legally reproduce copyright protected works in ways that **would be outside the scope of fair dealing**, or any other applicable exception, under the Copyright Act...”
- *(UWO AC Licensing Agreement: Preamble)*
- Fair dealing and the AC license co-exist
- **Our fair dealing rights are not limited or restricted by the AC license**

What Does the AC License Allow Us to Copy?

- Permission to copy excerpts from works within the AC repertoire
- “Repertoire work means a published work in which AC collectively administers the rights, as authorized by the Copyright owner.”

(UWO AC Licensing Agreement: S1)

- Prior to copying, use the Repertoire Look Up Tool, <http://www.accesscopyright.ca/look-up-tool/>

What Does the AC License Allow Us to Copy?

Access Copyright hereby grants a license to the licensee which entitles any Authorized Person, for any authorised Purpose, to

- (i) make a copy of up to ten percent of a repertoire work

- (ii) make a copy of up to twenty percent of a repertoire work as part of a course collection

- (iii) make a copy of a repertoire work that is
 - a. an entire newspaper or periodical article
 - b. an entire page of a newspaper or periodical
 - c. a single short story, play, poem, essay, or article
 - d. an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work
 - e. an entire reproduction of an artistic work (including any drawing, painting, print, photograph, or other reproduction of a work of sculpture, architectural work or work of artistic craftsmanship), or
 - f. one chapter, provided it is no more than 20% percent of the book

What Does the AC License Allow Us to Copy?

- Are we permitted to copy this much under a reasonable interpretation of fair dealing already?

Concerns with the AC License

- Unjustified Fee Increase
- Overbroad Definitions
- Reporting Requirements
- Poor Timing
- Rising Number of Alternatives

Fee Increase - Unjustified?

- A \$26.00 royalty fee assessed per FTE (Full Time Equivalent Student)
- Previous license fee was \$3.75 per FTE and a 10 cent per page fee for course packs
- Course pack use has declined and, given the rise in alternatives, the increase is unjustified

Overbroad Definitions

“Copy” means any reproduction, in any material form whatever, including a digital copy, that is made by or as a consequence of any of the following activities:

- (a) reproducing by reprographic process, including reproduction by photocopying and xerography
- (b) scanning a paper copy to make a digital copy
- (c) printing a digital copy
- (d) transmission by electronic email
- (e) transmission by facsimile
- (f) storage of a digital copy on a local storage device or medium
- (g) posting or uploading a digital copy to a secure network or storing a digital copy on a secure network
- (h) transmitting a Digital copy from a secure network and storing it on a local storage device or medium
- (i) projecting an image using a computer or other device
- (j) displaying a digital copy on a computer or other device and
- (k) posting a link or hyperlink to a digital copy**

(UWO AC Licensing Agreement: S1)

Reporting Requirements

- “Access Copyright and the licensee shall establish a joint task force...to develop a mutually agreeable survey methodology and/or reporting structure for the provision of valid and reliable bibliographic and volume data to Access Copyright.”
(UWO AC Licensing Agreement: S11)
- Mandates survey instruments and reporting requirements
- The intension is to allow AC to monitor the volume and use of copyrighted works at Western
- Given the overbroad definitions featured in the license, reporting requirements may be intrusive

Poor Timing

- *Bill C11 – An Act to Amend the Copyright Act* passed on June 18th 2012 and expanded the fair dealing categories to include education, parody, and satire
- *Alberta (Education) v. Access Copyright* and *SOCAN v. Bell*, Supreme Court decisions from July 12th 2012, provided clarification on fair dealing and expanded the meaning of research and private study
- These recent events strengthened user rights and fair dealing and improved the position of the education sector
- It is not clear why Western did not wait for these decisions prior to signing the AC license

Alternatives

- Alternative ways of using copyrighted works have arisen:
- Western Libraries Site Licenses
- Insubstantial Copying
- Open Access
- Creative Commons
- Public Domain Material
- Internet
- Fair Dealing

Alternatives

- Given the rise in alternative ways to make use of copyrighted works,
- and the strengthened position of user rights and fair dealing as a result of *Bill C11, Alberta (Education) v. Access Copyright*, and *SOCAN v. Bell*,
- **the Access Copyright license has become increasingly unnecessary**
- “The initial term of this agreement is from January 1, 2011 to December 31, 2013. The initial term will be extended automatically by consecutive one-year-terms unless, no later than six months before any such extensions begins, either party notifies the other that it does not wish to extend the agreement.”

(UWO AC Licensing Agreement: S2)

Final Message

- We can educate ourselves about copyright
- We can exercise robust fair dealing rights in our practices
- We can better promote the use of alternative ways to use copyrighted works such as open access, Creative Commons, and Western Libraries Site Licenses
- We can step “into the shoes” of our patrons and students and help them make use of these alternatives and help them exercise fair dealing

Thank you

- If you have any questions about copyright, please feel free to contact me

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@Alan_Kilpat

Queen's Fair Dealing Evaluator

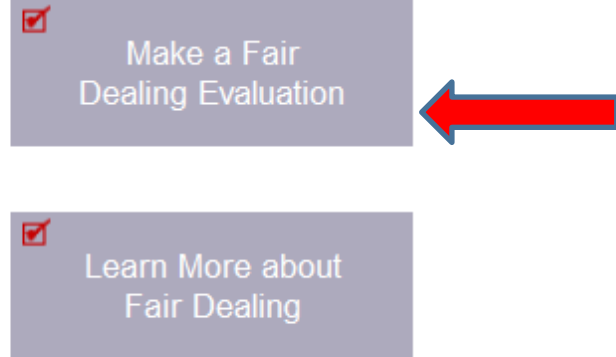
Fair Dealing Evaluator (Beta)

What this tool can do for you:

- Help you better understand how to determine the "fairness" when dealing with copyrighted materials under the [Canadian Copyright Act](#).
- Collect, organize & archive the information you might need to support a Fair Dealing Evaluation.
- Provide you with a time-stamped, PDF document for your records, which could prove valuable, should you ever be asked by a copyright holder to provide your Fair Dealing Evaluation and the data you used to support it.
- Provide access to educational materials, external copyright resources, and contact information for copyright help at local & national levels.

What this tool cannot do for you:

- This tool does not provide legal advice. It records the information you provide it as well as your own judgment on the fairness of the use. See the tool [\[disclaimer\]](#) for more information.
- Only a court of law can definitively rule on whether a use is fair or unfair. This tool does not assume or predict a court outcome.



Queen's Fair Dealing Evaluator

Fair Dealing Evaluator

 20% complete


◀ Back Next ▶

Context [Optional]

Your Name:

Your Job Title:

Your Institution:

Date of Intended Use: Jul 2012 

Title of Work to be Used [?](#):

Author/Copyright Holder [?](#):

Publication Status: published unpublished unknown

Publisher:


Place of Publication:

Publication Year [?](#):

Brief Description of Work [?](#):

Queen's Fair Dealing Evaluator

Fair Dealing Evaluator

 30% complete

◀ Back Next ▶

Factor #1 Purpose

Describe the **Purpose and Commercial Nature** of your intended reproduction and how that relates to fair dealing: [\[get help in describing this\]](#)

Note: If the purpose of the use does not fall within one of the five categories specified in the copyright act (research, private, study, criticism, review, news reporting), your reproduction can not be considered to be fair dealing. If your use does fall under one of these categories, please continue the analysis.

Education - For an upcoming copyright presentation at UWO.

[\[Optional\]](#) Indicate how "fair" you feel the purpose of your intended reproduction is (based on the information you've provided above) by clicking on the appropriate box on the continuum below: [\[disclaimer\]](#)



Queen's Fair Dealing Evaluator

Purpose

What is the **purpose** being considered? Clicking "paste in text" will insert those criteria into your fair dealing Evaluation. Once you've inserted them, you'll be able to go back and modify or expand on them as you see fit.*

Favoring fair dealing

- [+] Reproduction is for the purpose of "research or private study" - [Paste in Text](#)
- [+] Reproduction is for the purpose of "criticism, review or news reporting" and is attributed to the original creator - [Paste in Text](#)

Opposing fair dealing

- [-] Reproduction is NOT for "research, private study, criticism, review or news reporting" (eg. educational, commercial) - [Paste in Text](#)
- [-] Use is for-profit, or by a commercial entity - [Paste in Text](#)

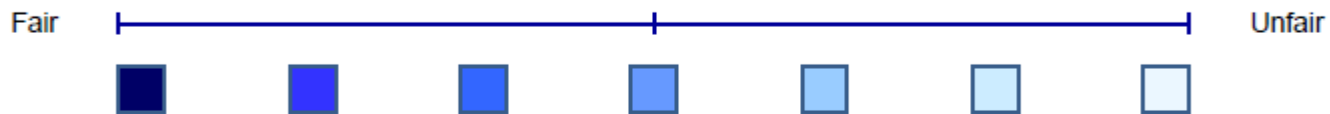
Note: According to the CCH Canadian Ltd. v. Law Society of Upper Canada Supreme Court case, "some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes" ([para. 54](#)). This does not mean that all research done for commercial purposes would not be fair dealing - it would just be less likely to be fair.

Queen's Fair Dealing Evaluator

The Average **"Fairness Level,"** Based on Your Rating of Each of the 6

Factors, Is:

[\[see tool disclaimer for important clarifying information\]:](#)



Based on the information and justification I have provided above, I am asserting this use is **FAIR** under Section 29 of the Canadian Copyright Act.

Signature: _____

Date of Signature: _____

***Disclaimer:** This document is intended to help you collect, organize & archive the information you might need to

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