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Licence Agreements and Copyright: An Examination of the Issues

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Licence agreements and copyright



AN EXAMINATION OF THE ISSUES

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Western's copyright guidelines



copyright.uwo.ca

- Copyright Decision Map
- Fair Dealing Exception Guidelines
- Educational Exception Guidelines
- Personal Exception Guidelines
- Frequently Asked Questions

- adapted from U of T's Fair Dealing Guidelines

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Fair dealing exception guidelines

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“As a general guideline, your copies may be provided or communicated to each student enrolled in your class or course as:

- a print handout
- a posting to a secure (password-protected) learning management system restricted to Western students, such as OWL
- part of a course pack”

(http://copyright.uwo.ca/guidelines_requirements/guidelines/fair_dealing_exception_guidelines.html)

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Fair dealing generally

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- *CCH Canadian Ltd v Law Society of Upper Canada* (2004)
- fair dealing as user right
- six fair dealing factors: purpose, character, amount, alternatives, nature of work, effect on work
 - alternatives to the dealing
 - ✦ “The availability of a licence is not relevant to deciding whether a dealing has been fair.” (para. 70)
 - ✦ even if there is a licence available for the intended use, it may still be fair dealing
 - ✦ contrast with U.S. fair use analysis, where the availability of a licence makes the use less fair

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Contract vs copyright

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- but that does not mean that licences are moot
- fair dealing might not be copyright infringement, but is it breach of contract if a licence agreement forbids it?
- OCUL members — 80K print titles, 847K electronic
- MIT Press Journals:
 - “may not... make multiple copies in either digital or paper form; or store any electronic file of such material on any intranet...”
- *Chronicle of Higher Education* user agreement:
 - “You may not... create course books or educational materials using any of the Site content...”

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Contract vs copyright

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- fair dealing policies approach this issue differently
- AUCC Application Guidelines:
 - “Any copying and/or distribution restrictions contained in a licence that permits access to a copyright-protected work will take precedence over the Fair Dealing Policy.”
- Western fair dealing guidelines does not explicitly address such conflicts

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Canadian law

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- has not been tested in court
- nothing in *Copyright Act* that addresses whether licence agreements trump copyright law
- No copyright except by statute (s. 89)
 - “No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.”

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Canadian law

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- government is generally unwilling to interfere with one's freedom to contract
- can give up a right or property in exchange for something else
- however, there are some rights that cannot be waived or exchanged
- known as “statutory rights”
- for example, *Ontario New Home Warranties Act*:
 - “The warranties... apply despite any agreement or waiver to the contrary...” (s. 13(6))

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Canadian law

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- the statute itself does not have to explicitly state that certain rights cannot be waived by contract
- can be inferred by looking to purpose
- if purpose of the right is to protect the public at large, allowing individuals to waive would weaken effect
- purpose of copyright law in Canada is to promote progress in arts and science
- exceptions maintain balance
- is this for the protection of the public?

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Canadian law

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- one recent case can inform analysis
- *CRTC Reference* (2012)
- whether CRTC could regulate the relationship between private broadcasters and broadcast distribution undertakings
- in conflict with copyright exception allowing certain retransmissions without permission
- majority noted that the purpose of the exception is to balance entitlements of copyright holders with the public interest

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Conclusion

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- it seems then, that copyright exceptions are statutory rights
- the Supreme Court has referred to them as “users’ rights”
- their purpose is to preserve the user’s ability to deal with works in certain ways, which is ultimately in the public interest
- allowing them to be waived would compromise their ability to preserve balance in copyright
- therefore, they cannot be waived in contract

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Practical questions

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- if user rights are protected from contract terms, how will copyright owners react?
 - increase in price?
 - technological protection measures?
 - refuse to deal?
- other options
 - consortia
 - negotiation of fair dealing rights into licence agreement

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Further information

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This presentation is based on the following research paper:

Di Valentino, L. (2014). Conflict between Contract Law and Copyright Law in Canada: Do Licence Agreements Trump Users' Rights? Available at <http://ssrn.com/abstract=2396028>.

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