

TO: All MUNFA Members

FROM: The MUNFA Executive Committee

DATE: May 24, 2011

SUBJECT: CAUT Guidelines for the Use of Copyrighted Material

CAUT has prepared the attached document: Guidelines for the Use of Copyrighted Material.

The document explains the legal foundation of copying rights and provides direction on its lawful exercise.

Copies of the Guidelines are available online at:

http://www.caut.ca/uploads/Copyright_guidelines.pdf

http://www.caut.ca/uploads/Copyright_guidelines_fr.pdf

If you have any questions about the Guidelines, please feel free to contact Paul Jones at (613)820-2270 ext.181 or by email: jones@caut.ca.

CAUT Guidelines for the Use of Copyrighted Material

April 2011



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CAUT Guidelines for the Use of Copyrighted Material

I. PREAMBLE

Copyright protects the interests of creators, owners and users of expressive works such as art, literature, film and music. It is a limited set of rights, not a grant of absolute control over a work.

To encourage innovation, learning and free expression it is lawful, within limits, to reproduce works (or some portion thereof) without permission or payment. This right ensures that the record of human creativity can be examined, exchanged, discussed and built upon.

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

- a series of miscellaneous rights and freedoms allowing copying (addressed in Part 2 below);
- fair dealing (addressed in Part 3 and 4 below); and
- specific *Copyright Act* education exceptions (addressed in Part 5 below).

The reproduction of works without permission or payment is an activity that requires respect for the law, serious engagement with concepts of fairness and recognition of the legitimate interests of creators and owners of works.

II. GENERAL COPYING RIGHTS AND FREEDOMS

It is lawful to copy without permission or payment:

A. Material in which Copyright does not Subsist – Facts and ideas are not protected by copyright and can be freely copied.

B. Material no Longer Protected by Copyright – Works in which the term of copyright has expired can be freely copied. In Canada the typical term of a work's copyright protection ends 50 years after the death of its author/creator, regardless of where the work was created or published.

C. Insubstantial Portions of Works – Copying quantitatively and qualitatively insubstantial amounts of a work does not require permission or payment¹. Examples of insubstantial use may include quoting selected sentences from an article, book, poem or song and displaying short clips from a film or television production.

CAUTION – *Some university and college administrators have wrongly begun to discourage the copying of even insubstantial portions of a work, for example excerpts used in theses. This position must be rejected as it does not reflect traditional academic practices or the language of the Copyright Act.*

D. Open Access Material – Material presented for public use - including Open Access² publications, works placed in Institutional Repositories³ and works under Creative Commons⁴ licenses - may typically be copied with minimal restrictions.

E. Publically Available Internet Material – Material posted on the Internet typically enjoys copyright protection, even in the absence of access controls. However, such material can be considered subject to an implied license for use if the use is consistent with the material's presentation. This would include any action that the website empowers such as viewing or displaying from a computer screen, linking, or exercising the web-browser's "print", "save", "copy" and "send" functions. It is not likely to include republishing the material in a separate website or document, although permission can often be obtained for such use.

F. Government of Canada Works – Permission is not required to reproduce Government of Canada material for personal or public non-commercial purposes unless there is a specific indication to the contrary attached to the work. Permission is required to revise, adapt or translate a work or to reproduce it for commercial distribution.

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

CAUTION – *To avoid confusion and to promote proper citation practices, the source of the linked material should be indicated.*

H. Licensed Material – Post-secondary institutions purchase licenses from digital content providers to allow the use of digital works. Library staff can indicate if particular content is part of the licensed collection, what use can be made of it, and what attribution requirements exist.

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

III. FAIR DEALING

Fair dealing is a statutory right to, within limits, reproduce works without permission or payment. When the principles outlined in parts 2(a) through 2(h) above are not available in a particular situation, then fair dealing may allow the reproduction of a work.

A. Legislation – The *Copyright Act* does not define fair dealing. It only lists its allowable purposes:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if [attribution is provided] ...

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if [attribution is provided] ...

B. Individual Judgment – In the absence of an explicit statutory definition, Parliament has assigned individual Canadians the task of determining if the reproduction of a work without permission or payment is fair. The test of whether something is fair is commonly understood to mean whether it is reasonable, moral and consistent with established standards or rules.

C. The Six Fair Dealing Criteria – The Supreme Court of Canada has provided additional guidance on assessing whether or not particular instances of copying constitute fair dealing. In *CCH Canadian Limited v. Law Society of Upper Canada*⁵ the Court established six fair dealing criteria. It is essential that members of the educational community understand and be able to apply these criteria. The criteria are:

1. Purpose (*Copyright Act* sections 29, 29.1 and 29.2) – Fair dealing for the broadly defined purposes of research, private study, criticism, review and news reporting is explicitly condoned by the *Copyright Act*. Courts have indicated additional purposes might be fair depending on the circumstances. If the copying falls within a fair purpose, as broadly construed, then the following factors must be weighed:

2. Character (number and distribution of copies) – The creation of a single copy or of limited copies for a defined audience is more likely to be fair. Indiscriminately making and distributing multiple copies of a work is less likely to be fair.

3. Amount (portion of the work copied) – Copying an insubstantial amount of a work is always permissible under the *Copyright Act*. Copying a substantial part of a work or an entire work may or may not be fair depending on the circumstances (including the purpose of the use). For research or private study it may be essential and fair to copy an entire poem, photograph, academic article or chapter. However, if a work is copied for the purpose of criticism or review, it may be unfair to include a full copy of the work in the critique, when more limited excerpts would suffice.

For further guidance, some general safe limits are provided in Part IV (Fair Dealing Guidelines) below.

4. Alternatives – Copying is more likely to be fair if it is reasonably necessary to achieve a particular purpose and there are no practical alternatives to using the particular work. Again - copying an article or a chapter for the purposes of research or private study would pass this reasonable necessity test in most instances. Reproducing an entire work for the purpose of criticizing it is less likely to be fair. The possibility of obtaining a license for the use is not a relevant alternative.

5. The Nature of the Work (amenability to fair dealing) – An academic article - published to disseminate ideas, often with no motive of direct financial gain - may favour a fair dealing analysis of its use. If a work has not been published, the dealing may be more fair in that its reproduction with acknowledgment could lead to a wider public dissemination of the work — one of the goals of copyright law.⁶ Copying works such as confidential material that the owner had no intention of distributing would be harder to justify under fair dealing, as would copying a newsletter with a restricted circulation to a fee paying clientele.

6. The Effect of the Dealing on the Work – If copying a work is likely to compete with the market for the original work, this may suggest that the dealing is not fair. However, the Supreme Court explicitly states that although the economic effect of

the copying on the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider.⁷

The Supreme Court of Canada concluded in *CCH Canadian Limited v. Law Society of Upper Canada*:

"... 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 depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair."⁸

CAUTION – *The CCH decision specifically indicates that copying is more likely to be fair if it conforms to existing custom and practice within an institution or community.⁹ Educators currently exercise their fair dealing rights in a robust manner and this document, developed in consultation with the academic community, reflects existing practice.*

IV. FAIR DEALING GUIDELINES

Fair dealing is a flexible right dependent on individual judgment.

Fair dealing is a technologically neutral right applicable to all formats - paper to electronic.

It is appropriate for institutions and their representatives to assist others in the exercise of their fair dealing rights.

To lawfully engage in fair dealing, individuals should:

- Assess the proposed copying in the context of a general understanding of fairness. Would the copying be reasonable and moral? Ask yourself: if this was my work, what unauthorized, uncompensated copying of it would I consider to be fair?
- Assess the proposed copying in light of the six criteria set out in the CCH decision.
- Assess the proposed copying in light of existing institutional custom and practice.

Existing custom and practice in the post-secondary education sector indicates:

A. Attribution – Consistent with long-established citation practices, copies should reference the name of the author or artist (where known), the title of the publication from which the copy was made, and the name of the publisher. Sections 29.1 and 29.2 of the *Copyright Act* provide specific attribution requirements for purposes of criticism, review and news reporting.¹⁰

B. Number of Copies – In the post-secondary environment:

- Making a single copy of a work is likely to be fair.

- Making copies of a work – such as poem or song lyric or a news clipping - for a spontaneous, in class need is likely to be fair.
- Making an electronic copy of an optional or supplementary reading is likely to be fair.
- Electronic copies should not be placed on an unrestricted web-site where they are available to the general public.
- Making repeat, multiple copies of a pre-assigned reading is less likely to be fair.

CAUTION – *The university and college community should guard against systematic, cumulative copying from the same work. Fair dealing is not a substitute for the purchase of learning materials.*

NOTE – In the legal environment the uncompensated reproduction of copies of core judicial decisions for courtroom use is routine - including the reproduction of explanatory notes added to the cases by private entities.

CAUTION – *Reproductions should only be made from a lawful copy of a work.*

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

D. Amount of Work Copied – While the acceptable portion of a work that can be copied is flexible and a matter of independent judgment, post-secondary institutional practice indicates:

As a general rule copying less than 10 per cent of a work is likely to be fair.

Copying more than 10 per cent of a work may be fair depending on the circumstances. For example:

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

CAUTION – *As the percentage of a work being copied increases towards and past 20%, more care should be exercised. If, for example, a book only contains two chapters then reproducing an entire chapter becomes problematic.*

E. Textbooks – Copying from a textbook created primarily for the motive of economic gain for the post secondary education market, especially a trade text written for a particular curriculum, requires a stricter fairness analysis because the copying may undermine the market for specifically produced educational resources.

As a general rule, copying less than 5 per cent of a textbook is likely to be fair.

Copying more than 5 per cent of a textbook may be fair depending on the circumstances. For example:

- Copying an entire chapter from a textbook provided that it does not exceed 10 per cent of the textbook is likely to be fair;
- Copying an entire short story, play, poem or essay from the textbook provided that it does not exceed 10 per cent of the textbook is likely to be fair; and
- Copying an entire reproduction of an artistic work or a single musical score from the textbook provided that it does not exceed 10 per cent of the textbook is likely to be fair.

F. Other Educational Works – Additional caution is exercised in regard to proprietary workbooks, work cards, assignment sheets, tests, examination papers, business cases and course manuals. For materials such as these the general rule that copying should not act as a substitute for the purchase of learning materials is particularly applicable.

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

CAUTION – *Some university and college administrators have begun limiting the mere placement of works onto reserve, even though such action does not implicate copyright. This restrictive position must be rejected as it does not reflect traditional academic practices or the language of the Copyright Act.*

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

I. Fair Dealing Resources – Members of the post-secondary education community should know and be able to apply a general standard of fairness and the six *CCH* factors to their day-to-day copying activities. In situations where the fairness of a dealing may be uncertain, individuals can discuss the matter with colleagues and solicit their opinions on what is fair under the circumstances. Additional assistance may be obtained from members of the library community.

CAUTION – *Fair dealing is undermined by over simplification and the declaration of abstract, bright line rules. Unduly constrained approaches must be rejected as they do not reflect traditional academic practices, court decisions or the language of the Copyright Act. The first test for fairness is individual judgment. The CCH criteria and knowledge of existing institutional custom and practice can assist in this.*

V. EDUCATIONAL EXCEPTIONS

In addition to fair dealing, the *Copyright Act* contains a number of specific educational exceptions that also allow works to be reproduced without permission or payment. These limited and often cryptic exceptions cover:

A. Chalkboards – It is not an infringement of copyright to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material - section 29.4 (1)(a).

B. Overheads – It is not an infringement of copyright to project an image using an overhead projector or similar device (slide or PowerPoint slide) for the purposes of education or training on the premises of an educational institution - section 29.4 (1)(b).

C. Examinations – It is not an infringement of copyright to reproduce, translate or perform in public on the premises of the educational institution, or communicate by telecommunication to the public situated on the premises of the educational institution, a work or other subject-matter as required for a test or examination - section 29.4 (2).

D. Performances – It is not an infringement of copyright to do, on the premises of an educational institution for educational or training purposes and not for profit, before an audience consisting primarily of students of the educational institution:

- the live performance in public, primarily by students of the educational institution, of a work;
- the performance in public of a sound recording or of a work or performer's performance that is embodied in a sound recording (that is, playing music in class); and
- the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication - section 29.5.

CAUTION – *The exemption from copyright infringement relating to overheads and performances does not apply if the work is commercially available in a medium that is appropriate for the purpose.*

E. News and Commentary – It is not an infringement of copyright to:

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

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

F. Broadcasts – It is not an infringement of copyright to:

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

CAUTION: *These special exceptions are in addition to (not instead of) fair dealing. If a particular use does not fall within these exceptions, the fair dealing analysis can still be applied.*

April 2011

Comments to acppu@caut.ca

Endnotes

¹ *Copyright Act* section 3(1) states: 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

² Open Access refers to systems providing Internet access to material in such a way that the material is free for all to read, and to use (or reuse) to various extents.

³ An Institutional Repository is an Internet system for collecting, preserving, and disseminating the intellectual output of an academic institution.

⁴ Creative Commons licenses typically provide less restrictive controls on usage than traditional commercial licensing arrangements.

⁵ *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13

⁶ *CCH Canadian Limited v. Law Society of Upper Canada* at paragraph 58

⁷ *CCH Canadian Limited v. Law Society of Upper Canada* at paragraph 59

⁸ *CCH Canadian Limited v. Law Society of Upper Canada* at paragraph 60

⁹ *CCH Canadian Limited v. Law Society of Upper Canada* at paragraph 55

¹⁰ 29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned: (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned: (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.