

Fair Dealing Policy

The following FAQs relates to the fair dealing policy that ACCC recommends for adoption by its members outside Quebec whether or not they intend to operate under the Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013. Fair dealing is an exception in the *Copyright Act* to copyright infringement intended to provide a balance between the rights of creators and the rights of users.

Part I Background/Introduction

1.Q What is the purpose of the fair dealing policy?

- A. The purpose of the policy is to translate some of the high level principles of fair dealing into practical rules applicable to the setting in an ACCC member institution. It outlines some of the activities that can be conducted under the fair dealing exception without infringing copyright.

2.Q Does the fair dealing policy restrict the use of an original work or other publication?

- A. No. The policy only addresses the making of paper or electronic copies.

3.Q Does the fair dealing policy permit the making of multiple copies to hand out to students for review or private study?

- A. No. The making of such copies is not fair dealing. The Copyright Board of Canada and the Federal Court of Appeal have held that the making of multiple copies to hand out to students for the purpose of education is not one of the fair dealing purposes.

4.Q Can the students in class assign their fair dealing rights to their instructor to enable the instructor to make copies to hand out to the students in class?

- A. No. Under section 30.2 of the Copyright Act in limited circumstances a library, archive or museum (as that term is defined in the Act) may do anything on behalf of any person that that person could do under fair dealing. Section 30.2 doesn't however extend to permit an ACCC member institution (through a instructor) to make a fair dealing copy for a student. In the circumstances posed in the question, the fair dealing rights cannot be assigned.

5.Q Under sections 3(1) and 27(1) of the Copyright Act copyright is infringed if, without the consent of the owner of copyright, a work or any substantial part is reproduced. How is a substantial part determined?

A. The term “substantial part” is not defined in the Copyright Act. The courts have held that both the quality and the quantity of what is copied must be considered, with the quality being more important than the quantity. In considering what constitutes a substantial part a court will consider whether the alleged infringer has taken the distinct traits of the original work. The Copyright Board has held that one per cent of literary works comprising in total 175 pages did not constitute a substantial part of the works because the one per cent did not constitute the central element of the works, the proposed use was different from that contemplated by the author, the one per cent would in no way undermine the market for the original works, and the one per cent was not an essential characteristic of the works. In another case, the Copyright Board held that, from a qualitative perspective, eight excerpts constituting 325 words out of a 342 page book constituted a substantial part. The 325 words, all taken from the same chapter of the book, were the author’s individual perspective of his participation in the Second World War. Reproducing the 325 words would appropriate the author’s knowledge, time and talent.

6.Q Under what circumstances can a faculty member make a copy under the fair dealing policy?

A. A faculty member can make a copy under the policy where the copy is made in the circumstances described in Part III (Interlibrary Loan), Part IV (Library Reserve), Part V (Document Delivery) and Part VI (Faculty Member Fair Dealing) of the policy. The policy does not permit a faculty member to post a copy on an electronic curriculum management system or on a course website. Part VI of the policy permits a faculty member to make a fair dealing copy for his or her own personal research, private study, review, criticism or news reporting in accordance with the Copying Guidelines in the policy.

7.Q Can a copy be made where it is prohibited by the fair dealing policy, but is expressly permitted under an agreement with the publisher?

A. Yes. However, the reverse is not true. If a copy can be made under the fair dealing policy, but is prohibited under an agreement with the publisher, the provisions of the agreement apply and making the copy is prohibited. The terms of an agreement with a publisher always trump the fair dealing policy.

8.Q Does the fair dealing policy apply to the copying of sound recordings and audiovisual works?

A. No. The policy does not address sound recordings and audiovisual works. However, if the purpose of copying of such recordings and works is for research, private study, criticism, review or news reporting, and in the circumstances the making of the copy is fair, fair dealing would apply. A determination of fair dealing for such recordings and works would have to be made outside the scope of the policy.

9.Q Does the fair dealing policy permit an instructor to make a copy to be used to project an image of the copy using a projector to students in a classroom?

A. No. The making of such a copy is however permitted by section 29.4(1)(b) of the *Copyright Act*. The fair dealing policy does not prohibit any activities that would fall within other exceptions in the *Copyright Act*.

Part II Copying Guidelines

10.Q What is a lawful copy?

A. A lawful copy is a photocopy or electronic copy made in circumstances which do not infringe copyright. For example, copies made with the permission of the copyright owner or under an exception are lawful copies. The policy does not address the use of an original book or other publication.

11.Q Clause 2 of the fair dealing policy states that “a copy may only be made from a lawful copy of the work in the possession of the ACCC member institution”. Would this permit the making of a copy from an original book obtained by the institution from a faculty member or through interlibrary loan?

A. Yes. There is no requirement that the ACCC member institution own the material from which the copy is made.

12.Q Clauses 3 and 4 of the fair dealing policy set limits on the percentage of a work that may be copied. Can copies in excess of those percentages be made under the policy?

A. Yes, but only in circumstances where a determination has been made under clause 10 of the policy by the person responsible for administering the policy or by his or her delegate.

13.Q Is it necessary to put the statement referred to in Clause 6 of the fair dealing policy on copies made by students?

A. No. The obligation to include the statement only applies to copies made by a staff member for a student, faculty member, library patron or other staff member.

14.Q Does the fair dealing policy permit the copying of an unpublished thesis?

A. The person responsible for administering the policy or his or her delegate will determine whether, in the circumstances, the copying of an unpublished work is fair dealing. If the ACCC member institution had a practice of copying theses at the time the thesis was deposited, this would be a factor in favour of permitting the making of the copy under fair dealing.

Part III Interlibrary Loan

15.Q Can a copy be made under the fair dealing policy for interlibrary loan to a library in a commercial corporation?

A. No. The interlibrary loan must be for another ACCC member library. Depending on the circumstances, such as an interlibrary loan for a public library, the policy may apply by analogy. With the exception of digital copies, it may not be necessary to consider whether the policy applies by analogy because the library may be able to make the copy for a patron of a commercial corporation under the exception in section 30.2 of the *Copyright Act*.

16.Q Must the ACCC member library making an interlibrary loan in paper or electronic form under the fair dealing policy keep records of the request made for the copies?

A. No. The practice must however be that the forms, properly completed, are received by the library before the copies are made.

17.Q A number of the clauses in the fair dealing policy, including clause 12(c) relating to the use of a paper copy to make an electronic copy for interlibrary loan require that the paper copy made be destroyed. Would placing the copy in a recycling box comply with the policy?

A. Yes.

18.Q A number of clauses in the fair dealing policy, including clause 13(a) relating to electronic copies for interlibrary loan, provide that the library or person who needs the copies confirm in writing that the copies are required for research, private study, review, criticism or news reporting. Would having the library or person tick a box on a paper form or click through on a web form comply with the policy?

A. Yes.

Part IV Library Reserve

19.Q Does the fair dealing policy permit an original book or journal article to be placed on library reserve?

A. The fair dealing policy does not apply to placing an original work on library reserve because no reprographic or electronic copy is made. There is nothing that would prevent putting the original work on library reserve.

20.Q Why is there a restriction in clauses 16(b) and 17(b) of the fair dealing policy on the amount of material that can be copied for library reserve?

A. The limitation is included to prohibit the accumulation of a library of copied materials under the guise of library reserve. The copies made must be of optional and supplementary readings and be no more than 25 per cent of the amount of required reading for a course of instruction.

21.Q Can a student who borrows a photocopy of a journal article placed on library reserve make a copy of the article?

A. If the student requires the copy for research or private study, the answer is yes.

22.Q How is the permissible proportion of supplementary reading that may be placed on library reserve to be calculated under clauses 16(b) and 17(b) of the fair dealing policy?

A. The supplementary readings must be no more than 25 percent of the required readings for the course. For example, if there are 8 articles specified as required reading for a course, copies of no more than 2 articles of supplementary readings may be made under the policy for library reserve. Where the course has multiple sections and the required readings differ from one section to another, the supplementary readings for one section must be not be accessible to the students in the other section.

23.Q Is it necessary for the library to obtain a written acknowledgment from a student under clauses 16(d) and 17(d) of the policy each time the student requests library reserve materials?

A. Yes. It is necessary to do so to ensure that the purpose for which the student requests each of the reserve materials is a fair dealing purpose.

24.Q Is it necessary to obtain the signature of a student on a written acknowledgment under clauses 16(d) and 17(d) of the fair dealing policy?

A. No. A checkmark in an appropriate box would be sufficient. Attached as Schedule A is a sample form for the student to complete under clause 16(d). The signature of the student is optional.

25.Q Must the written authorization referred to in clauses 16(d) and 17(d) of the policy specify that the student is enrolled in the course for which the library reserve material has been copied?

A. There is no requirement under clause 16(d) that the student be enrolled in the course for which the library reserve material has been copied. There is however such a requirement under clause 17(d) in respect of electronic copies.

26.Q Can a copy for library reserve be made on an electronic curriculum management system or on a course website?

A. Yes, but only if the copy is made by a staff member, other than a faculty member who is a course instructor, in the library or in another separate unit of the institution such as, for example, a distance education unit. These limitations are necessary to ensure that the safeguards in the fair dealing policy are complied with.

27.Q Can a student download an electronic copy for library reserve pursuant to the fair dealing policy?

A. Yes, but only if the student has provided the written acknowledgement under clause 17(d) which includes an acknowledgement that the student will not transmit the copy to a third party and that the student will only print out one paper copy of the electronic copy.

28.Q Is it permissible under the fair dealing policy for the library to post a link to an electronic copy for library reserve?

A. The policy does not address this question. If the ACCC member institution has a licence agreement for the electronic copy, the answer will depend on the terms of the licence agreement.

29.Q Clause 16(f) of the fair dealing policy requires that a paper copy made by the library must be destroyed within a reasonable time after the course of instruction for which it was placed on library reserve has ended. Would it be acceptable under the policy to return the copy to the instructor who provided the copy to the library?

A. No, the copy must be destroyed. The intent of this requirement is to prevent the policy being used by an instructor for assembling a library of copied materials which could be used for subsequent library reserve or for other purposes. If however the instructor has made the copy with the consent of the owner of copyright and that copy is placed on library reserve, the policy does not apply and the copy may be returned to the instructor.

30.Q Clause 16(g) and other paragraphs in the fair dealing policy require that a paper copy be destroyed within a reasonable time. How long is a reasonable time?

A. The amount of time will depend on the ACCC member institution's policies and practices and the circumstances. The intent of the requirement is that the copy is only used for the purpose for which it was made and that the policy is not used to develop a library of copied materials. A month or two after the course for which it was made has been concluded would likely be a reasonable time.

31.Q Can a course pack that was made prior to December 31, 2010 be placed on library reserve after January 1, 2011?

A. Yes. This is not an issue governed by the fair dealing policy. It is governed by the terms of the now expired blanket licence agreement that the institution had with Access Copyright. There is no restriction on what can be done with paper copies made prior to January 1, 2011 in accordance with the terms of the blanket licence agreement.

Part V Document Delivery

32.Q What is the difference between Part IV of the fair dealing policy and Part V ?

A. Part IV addresses the making of copies for library reserve for the use by students of the ACCC member institution. Part V addresses the making of a copy to provide to a patron of the library. The patron could be a student or a member of the public. Part V restricts the circumstances in which a member of the public can obtain a copy. The member of public must have requested the copy while physically being on the premises of the library.

Schedule A

Course Reserve Student Request Form

This will confirm that I am a student enrolled in a course of instruction at ●. I require access to a copy (copies) made for library course reserve reading for the following purposes:

research or private study	
review, criticism or news reporting	

Advice to Students

Where a student uses the copy for review, criticism or news reporting the student must mention:

- (a) the source; and
- (b) if given in the source, the name of the author.

Optional:

Signature: _____

Date: _____