

## AC.2.12.1 Copyright of External Materials

### Schedule A: Fair Dealing Policy

January 5, 2016

Copyright law and its application must properly balance the protection of authors' and copyright owners' exclusive rights with reasonable access to and use of copyright-protected works for the dissemination of knowledge and creative innovation in the public interest. SAIT, a non-profit educational institution, is committed to a fair, balanced and informed approach to fair dealing in order to support and facilitate quality education, learning and scholarship.

The Fair Dealing provision, a statutory exception to infringement in section 29 of the *Copyright Act (Canada)* (the "Act"), permits reasonable and fair use of copyright-protected works without permission from the copyright owner or the payment of copyright royalties, within certain limits. The Act does not define "fair dealing". The understanding, analysis and application of fair dealing should be guided by Canadian case law and the customs and best practices of post-secondary education.

In accordance with Supreme Court of Canada decisions, which are referred to at the end of this document:

- The Fair Dealing exception is a user's right and must not be interpreted restrictively (CCH case, para. 48).
- Whether something is fair is a question of fact and must be determined on a case-by-case basis (CCH case, para. 52).
- Instructors share a common purpose with the student who is engaging in research and private study (Alberta case, para. 23).
- The *Copyright Act* should be applied consistently, regardless of the form of media involved, or its technological sophistication (Society of Composers, Authors and Music Publishers case, para. 44).

This Fair Dealing Policy is adapted from the Colleges and Institutes Canada (CICan) Fair Dealing Policy. It is based on the Act and on court interpretations of the Act that recognize the importance of the use of copyrighted works in education, research and private study endeavours. SAIT adopts the Fair Dealing Policy and Guidelines to address the Fair Dealing exception in general terms.

Depending on the situation and facts, further analysis may be required. Contact SAIT's copyright officer with questions ([copyright@sait.ca](mailto:copyright@sait.ca)).



To qualify for fair dealing, the dealing must pass the Supreme Court of Canada's two-step test:

1. The dealing must be for a purpose stated in the Act: research, private study, criticism, review, news reporting, education, satire and parody. Educational use of a copyright-protected work passes the first test.
2. The dealing must be reasonable and "fair" as determined by the six-factor analysis, a flexible analytical framework that the Supreme Court of Canada set out in its CCH case and its Alberta case:
  1. **Purpose of the dealing:** the dealing is fair if it is for one of the allowable purposes under the *Copyright Act*. (CCH case, para. 54)
  2. **Character of the dealing:** the dealing is more likely to be fair if the work is not widely distributed (for example, on SAIT's LMS vs. the open internet). (CCH case, para. 55)
  3. **Amount of the dealing:** the amount (quantity) and importance (quality) of the excerpt used should be considered in context of the whole work. The amount should be no more than necessary to achieve the purpose. In some cases, it may be possible to deal fairly with a whole work. (CCH case, para. 56)
  4. **Alternatives to the dealing:** the dealing is more likely to be fair if there is no non-copyrighted equivalent of the work that may be used or if the purpose cannot be achieved without the excerpt. (CCH case, para. 57)
  5. **Nature of the work:** the dealing is more likely to be fair if the work is already published. (CCH case, para. 58)
  6. **Effect of the dealing on the work:** the dealing is more likely to be fair if it does not compete with and/or negatively impact the market for the original work.

#### Fair Dealing Guidelines

1. Copying, distribution and communication of a whole or substantial portion of a work does not trigger the need for a fair dealing analysis where it is:
  - a) In the public domain;
  - b) Explicitly allowed by the rights holder through a Creative Commons or Open Access license or similar statement; or

- c) Under permission granted by the copyright owner.
2. Teachers, instructors, professors and staff members may reproduce, communicate and distribute, 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.
3. 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 include the source and, if given in the source, the name of the author or creator of the work.
4. 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) Included in print or electronic learning modules for non-commercial use;
  - c) 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; or
  - d) As part of a course collection.
5. As a general best practice, "short excerpt" may mean:
  - 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; or



- g) An entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work.
6. 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.
  7. Contractual obligations take precedence over fair dealing rights. Content from a personal subscription cannot be reproduced or distributed without permission of the copyright owner.
  8. Copying or communicating that falls outside these Fair Dealing Guidelines shall be referred to SAIT’s copyright officer for evaluation ([copyright@sait.ca](mailto:copyright@sait.ca)). An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all known and relevant facts and circumstances.
  9. Any fee that SAIT charges for communicating or copying a “short excerpt” from a copyright-protected work is intended to cover only the costs of SAIT, including its overhead costs.

Supreme Court of Canada case references:

- [Théberge v. Galerie d'Art du Petit Champlain Inc., \[2002\] 2 S.C.R. 336, 2002 SCC 34](#)
- [CCH Canadian Ltd. v. Law Society of Upper Canada, \[2004\] 1 S.C.R. 339, 2004 SCC 13](#)
- [Alberta \(Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\), 2012 SCC 37, \[2012\] 2 S.C.R. 345](#)
- [Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, \[2012\] 2 S.C.R. 326](#)

Other references:

- Canadian Association of University Teachers. (2013). *CAUT guidelines for the use of copyrighted material*. Retrieved from <http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-%28feb-2013%29.pdf>