

Copyright Fair Dealing Analysis

Western has prepared this Fair Dealing Analysis to provide direction for the Western community in the application of the Fair Dealing Exception. Conducting a Fair Dealing Analysis to determine when clearance is required also affords reasonable safeguards for copyright holders, in accordance with Canadian copyright law.

The analysis begins with two “tests”. The first considers **purpose** for copying as articulated in the [Act](#). The second focuses on determining **fairness** as decided by the Supreme Court in its 2004 CCH v Law Society [ruling](#). Section three asks for a weighing to establish a degree of fairness for the particular dealing. The final point is a reminder that for us at Western, attribution is always necessary whenever we employ the work of others in our research, our teaching and learning and in day to day operations on campus.

This analysis, gives additional background to the 4th question in Western’s [Copyright Decision Map](#), and deals specifically with the Fair Dealing Exception in the *Copyright Act*. Remember that other statutory exceptions such as the Educational Institutions Exception as well as additional issues such as substantiality or licensed use outlined in the Map may apply to a particular situation.

The Fair Dealing Exception may also cover instances of copying that are not described in this Fair Dealing Analysis. For additional information and assistance, please consult Western’s [Fair Dealing Exception Guidelines](#) or direct questions to copyright@uwo.ca.

1. Consider the purpose for copying.

As stated in the [Copyright Act](#), the permitted purposes that apply to fair dealing are:

- research
- private study
- education
- parody
- satire
- criticism
- review
- news reporting

Since it is a condition of the statute, purpose *must* be satisfied. The additional statutory requirement for attribution accompanies some of these permitted purposes specifically criticism, review and news reporting.

Reproduction for education, research and private study are particularly relevant for us at Western; but parody, satire, criticism, review and news reporting may also be important.

Education was added as a permissible purpose for fair dealing in 2012 and the Court has asserted that purpose is broadly interpreted. Therefore, we now have greater latitude than was

previously the case, to employ the fair dealing exception in research, teaching and learning on campus, whether face to face or online using OWL, Western's learning management system. However the fact that the copying is done for a campus-related activity is not sufficient alone. Copying for another intention, even though it takes place at the university may require clearance from the copyright holder.

For example, performing sections of a copyright-protected play in an English class may be considered fair dealing, performing the same sections before a paying public audience in a campus theatre would require clearance and payment of a royalty. Likewise, posting a digital copy of a relevant article to a class OWL site may be considered fair dealing, while copying and distributing the same article to delegates at an international learned conference held at the university likely would require clearance.

2. Consider all of the factors to weigh fairness.

a. Goal of the dealing

This fairness factor relates to the specific circumstances surrounding the copy and an analysis that considers "the fairness of the goal for which the permitted activity took place". (Copyright Board, [Decision](#) 2015 s.264). The Supreme Court CCH [ruling](#) (2004) refers to making objective assessment of the "real purpose or motive" behind using the copyrighted work.

Not to be confused with the Purpose of the dealing that is the first test and as a statutory requirement must be satisfied in order to invoke the fair dealing exception as rationale, this analysis provides more specific motivation for copying the particular work. Multiple goals also may be associated with particular copying instances.

For example, for the broader purpose of education, material could be reproduced for the pedagogical goal to illustrate a concept in an OWL lesson, or to provide background information in order to stimulate class discussion or to simplify access to course readings. For the broader purpose of research the specific goal might be to enable sharing of material uncovered in a literature review to shape experimental design or to facilitate further investigation.

b. Amount of the dealing

This fairness factor specifically considers the size of the portion that is reproduced in relation to the size of the original work as a whole.

Copying that consists of any of the following amounts can generally be considered fair dealing:

- up to 10% of a work, or
- one chapter from a book, or
- one article from a periodical, or
- one artistic work (which may include a painting, print, photograph, diagram, drawing, map, chart or plan) from a work containing other artistic works, or
- one entire newspaper article or page from a newspaper, or

- one entire poem or musical score from a work containing other poems or musical scores, or
- one entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work.

The portion reproduced should contain no more of the work than is required in order to achieve the desired fair dealing goal.

These amounts can be considered an all-purpose best practice for reproducing copyright protected works at Western. Copying that exceeds these general guideline amounts may require further application of the other fair dealing factors. This more detailed analysis may result in the need to seek clearance from the copyright holder.

Copying the entire work, except in the situations indicated above, typically requires clearance from the copyright holder.

For example, reproducing and uploading an article from a single volume of a journal, or multiple articles from the same volume provided the number of pages copied does not exceed about 10% of the total page count, into the course OWL site using the resources tool would likely fall within the amount fairness factor. Conversely, reproducing half the chapters from a monograph as a handout to a class or as part of a custom course book would exceed generally acceptable amounts and necessitate receiving clearance prior to copying.

i. Cumulative copying

Sequentially copying or communicating multiple portions from the same copyright-protected work with the effect of reproducing the complete work or a substantial part of it, would be considered systemic or cumulative copying, which is not permitted.

For example, when reproducing different portions from the same book or article in a semester for a class; combine all copying instances to weigh the amount factor in your fair dealing analysis. Keep in mind however that a fair dealing analysis encompasses more than just amount.

c. Character of the dealing

This fairness factor focuses on what is actually being done with the copies. Considering how the reproductions are distributed, to whom and in what way are central questions that impact the character of the dealing.

Copies that may be provided or communicated include:

- a print handout
- a posting to a learning management system such as OWL, that is secure, password-protected and restricted to members of the Western community
- part of a custom course book

Copies that may be displayed include:

- a poster

- a manual reproduction on a board
- an illustration in a classroom presentation such as PowerPoint

Copies that may be performed include:

- a video screened in class
- music played prior to class

Each dealing requires a separate analysis and additional conditions may apply contingent on the character of the particular dealing.

For example, copying an image and:

- displaying it in a PowerPoint presentation
- providing a copy of your slides that includes the image as a handout for the students
- emailing the presentation as an attachment to a message sent to the class *and*
- uploading the entire presentation to a website

represents four distinct dealings with the same work.

In this case, the first two dealings may be more straightforwardly fair since there are several additional conditions that apply, such as the classroom location on campus and the audience limited to students taking the course. The latter two scenarios may require further analysis to determine fairness. It could be argued that these dealings potentially expose the work more widely than to the controlled class environment and point to the need to secure clearance.

E-mailing is not Western's preferred method of providing works to students. In the case of electronic articles or books providing a link to the digital copy that connects students to the online copy, routing them through Western authentication as required is always OK.

Likewise, posting copies of course readings into OWL, Western's secure learning management system is the preferred method of communicating copyright protected material to a class. OWL reduces the risk of infringement since it is secure and access can be restricted to students in a specific class. Destroying the posted copy following completion of the course may also be required in some instances.

i. Fees or Charges

Any fees Western charges for copying or communicating portions of works protected by copyright can only cover Western's costs including overhead. No 'profit' can be realized.

d. Alternatives to the dealing

This fairness factor centres on making the specific content available in other ways other than reproducing it.

Important in considering alternatives to copying the work are issues including:

- availability of a non-copyright-protected equivalent

- necessity to actually reproduce the portion of the work in order to achieve the desired goal

For example, for a particular course, the goal is to make an online article easily available to students as supplementary background reading for a class discussion or tutorial. Is supplying the persistent or durable link to the library-subscribed digital version an acceptable alternative to physically reproducing the article or posting a .pdf version of it into the course OWL site? Linking is always an acceptable alternative.

Likewise, would the pre-print version of the article available via Western's institutional repository be equally as useful to serve the goal as the final formatted copyright-protected version that appears in a published journal?

e. Nature of the work

This fairness factor considers the parent work and its attributes.

Considerations include criteria such as:

- is the work published or unpublished
- if published is it available digitally on an open access platform such as Scholarship@Western or from a proprietary source like an academic journal or e-book
- and if unpublished is it of a 'private' nature, not intended for distribution
- is the content secured by a technological protection measure of some sort

The Court indicates that one of the goals of copyright law is to lead to the wider dissemination of the work. For example, if reproducing and acknowledging a work that is unpublished would give it broader exposure, the dealing may be considered fairer than distribution of a work not intended for widespread circulation.

The Copyright Act specifies that copying must be done from a legal obtained version of the work. Circumventing a Technological Protection Measure in place to secure content cannot be done.

For example, considering preprints, proofs or unpublished editions of research made available in Western's open access Institutional Repository may be a fairer alternative to reproducing a copyright-protected article as it appears in a published journal.

Likewise, images discovered using a filtered Google Image search that retrieves content labeled for reuse may be fairer than reproducing images copied from a photography website. In addition, copying digital content that is encrypted or behind authentication, which requires a key or password in order to access it, by breaking or circumventing the digital lock is not permitted.

f. Effect of the dealing on the work

This fairness factor looks at the implications that copying will have on the work.

Competition with the market for the original work is integral to weighing the effect factor.

Considerations include:

- will reproducing and making the copy available negatively impact the original work by competing with potential sales for example
- are versions of the work reasonably available for the intended purpose

For example, reproducing illustrations or diagrams from an out-of-print textbook for use in a classroom presentation may be considered fairer than copying them from a current textbook available for sale that includes a memory stick containing digital versions of its illustrations and diagrams specifically for teaching purposes.

3. Degrees of fairness

Although each factor should be weighed, except for purpose it is not obligatory that all factors are required to arrive at a 'degree of fairness' that will tolerate copying without seeking clearance from the copyright-holder in every fair dealing analysis. One factor may be more significant and relevant in one situation and less in another.

Since it is a statutory requirement, only the purpose for copying must be considered and satisfied. Of the fairness factors outlined by the Supreme Court, one does not supersede the others in importance when conducting a fair dealing analysis.

The analysis will reveal the 'degree of fairness' applicable to the particular situation. This in turn will decide whether fair dealing applies to the particular instance or whether looking to alternate means such as another statutory exception or securing clearance from the copyright-holder must be done prior to copying.

4. Acknowledgement

The legal requirement for mentioning the source and, if given in the source, the name(s) of the author(s) or creator(s) of the work only applies for the purposes of news reporting, criticism or review.

However for us at Western, attribution is **always** necessary whenever we employ the work of others in our research, teaching and learning, not only for copyright reasons but to satisfy institutional requirements regarding academic integrity and plagiarism.

For example, attribution should appear with the reproduced copy, such as a small caption with an illustration or figure in a presentation or as a footnote on a class handout or online course module. Conversely all attributions may appear together such as inserting *Image Credits* slide(s) at the end of a presentation.