

## **Fair Dealing Policy**

### *Background*

The legal counsel for the Association of Universities and Colleges of Canada has prepared, and recommends for adoption by each AUCC member outside Quebec that intends to operate under the Access Copyright Post-secondary Educational Institution Tariff, 2011 to 2013 (the "Proposed Tariff"), the attached fair dealing policy.

The fair dealing policy outlines the copying of published works that can be made in print or electronic format by a university through its staff and faculty members under the exception for fair dealing in sections 29 to 29.2 of the *Copyright Act*, without seeking permission of the copyright owner. The policy does not apply to audio or video recordings.

The fair dealing policy does not address exceptions in the *Copyright Act* other than fair dealing. Depending on the circumstances, other exceptions in the Act may also permit the copying of works without the permission of the copyright owner. One example of an exception is section 29.4(1). It provides that it is not an infringement of copyright for an educational institution to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for the display of handwritten material. Another example is section 30.2 which provides that it is not an infringement of copyright for a library to do anything on behalf of any patron that the patron could do herself under fair dealing. Your institution may wish to include the fair dealing policy in copyright guidelines or a copyright compliance policy that addresses other exceptions under the *Copyright Act*.

The fair dealing policy does not restrict any copying that your institution is permitted to do under arrangements that your institution has with publishers, e.g., under a Canadian Research Knowledge Network licence, or a transactional permission with the publisher or the publisher's representative, e.g., Access Copyright or the Copyright Clearance Centre.

The fair dealing policy does not permit making copies for sale to students in course packs, making copies of required readings for library reserve, or posting copies on course management systems, e.g., Blackboard, or on course websites, except for a copy in electronic form posted on a course management system by a staff member of a university library or other administrative unit, and not by a faculty member who is a course instructor, for the purpose of electronic library reserve, provided that the posting complies with the safeguards in paragraph 17 of the policy.

Some licence agreements that universities have with publishers that provide access to publications in electronic format restrict the making or dissemination of copies. Where there is a conflict between the terms of a licence agreement and the fair dealing policy, the terms of the licence agreement apply.

The policy contemplates that your institution will appoint a person who will make decisions on whether copying outside the scope of the copying guidelines are for one of the fair dealing purposes of research, private study, review, criticism or news reporting, and in all the

circumstances, whether the making of the copies is fair. Paragraph 10 of the policy sets out the factors to be considered in determining whether the making of a copy for one of the fair dealing purposes is fair. If the copying is for one of such purposes and the making of the copy is fair, the copying can be made under the fair dealing exception without the permission of the copyright owner.

## I. Copying Guidelines

1. Except where otherwise stated, these guidelines apply to a university making a single copy from a work protected by copyright for the purposes of research, private study, review, criticism or news reporting in circumstances in which the consent of the owner of copyright has not been secured and is not required by reason of the fair dealing exception in the Copyright Act. Permission from a copyright holder may be required where the copy falls outside of these guidelines.

2. Single copies that are permitted to be made pursuant to this policy must be made only from publications in which copyright subsists, such as, books, journals and other periodical publications, newspapers and magazines ("Published Works"). A copy may only be made from a lawful copy of the work in the possession of the university, and if the lawful copy is in electronic form, there is no restriction against making a copy under the contractual terms relating to the Published Work.

3. No copying may exceed 10 per cent of a Published Work, other than a textbook produced primarily for the post secondary education market, or the following, whichever is greater:

- (a) an entire chapter from a book provided that it does not exceed 20 per cent of the book;
- (b) an entire article from a periodical publication;
- (c) an entire short story, play, poem or essay from a book or periodical publication;
- (d) an entire entry from an encyclopedia, dictionary, annotated bibliography or similar reference book;
- (e) an entire reproduction of an artistic work from a book or periodical publication;  
and
- (f) a single musical score from a book or periodical publication.

4. No copying may exceed 5 per cent of a textbook produced primarily for the post secondary education market, or the following, whichever is greater:

- (a) an entire chapter from a textbook provided that it does not exceed 10 per cent of the textbook;

(b) an entire short story, play, poem or essay from the textbook provided that it does not exceed 10 per cent of the textbook; and

(c) 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.

5. Notwithstanding any of the other provisions of these guidelines, no copies may be made of the following:

(a) any of the works referred to in paragraphs 3(b) to 3(f) of these guidelines where the publication containing the work does not contain other works. For example, no copy may be made of a play from a publication containing the play but no other work;

(b) unpublished works, subject to the provisions of paragraph 10 below;

(c) proprietary workbooks, work cards, assignment sheets, tests and examination papers;

(d) instruction manuals;

(e) newsletters with restricted circulation intended to be restricted to a fee paying clientele; or

(f) business cases which are made available for purchase.

6. Each paper copy made pursuant to Parts II, III and IV of these guidelines shall contain, on at least one page, the name of the author or artist (where known), the title of the publication from which the copy was made, the name of the publisher of that publication and the following statement:

This copy is made solely for the use by a student, staff member, faculty member or library patron for research, private study, review, criticism or news reporting. Any other use may be an infringement of copyright if done without securing the permission of the copyright owner.

7. Each electronic copy made pursuant to Parts II, III and IV of these guideline shall have the information and statement referred to in paragraph 6 on at least one page, except for an electronic copy made available from a server pursuant to these guidelines, where that information and statement could instead be associated with the copy such that notice of that information and statement would come to the attention of the person who accesses the copy.

8. If a fee is charged for making a copy the fee is set no more than an amount representing a reasonable approximation of the actual cost of making and delivering the copy.

9. University staff shall use reasonable efforts to guard against systematic, cumulative copying from the same work which in total exceeds the portion of the work that may be copied pursuant to these guidelines and to ensure that the number of copies made complies with this policy. If university staff suspects that a student, other staff member or faculty member is engaged in systematic, cumulative copying, the matter must be referred to the university staff member responsible for administering this policy or his or her delegate for review, and any further requests from that student, staff member or faculty member for a copy may be refused.

10. Requests for the making of copies which fall outside these copying guidelines and requests for making of copies of unpublished works may be referred to the university staff member responsible for administering this policy or to his or her delegate for evaluation. A determination will be made as to whether the proposed copies are permissible in all the circumstances relating to the requests and may ultimately be refused. The evaluation will examine all relevant circumstances, including:

- (a) the purpose of the proposed copying, including whether it is for research, private study, review, criticism or news reporting;
- (b) the character of the proposed copying, including whether it involves single or multiple copies, and whether the copy is destroyed after it is used for its specific intended purpose;
- (c) the amount or proportion of the work which is proposed to be copied and the importance of that work;
- (d) alternatives to copying the work, including whether there is a non-copyrighted equivalent available;
- (e) the nature of the work, including whether it is published or unpublished; and
- (f) the effect of the copying on the work, including whether the copy will compete with the commercial market of the original work.

## II. Interlibrary Loan

11. This policy on interlibrary loan applies to a loan from one university library in Canada at the request of another university library in Canada for delivery to that library or for transmission to a student, staff member or faculty member of that other university. This policy does not apply to a loan from a university library to a public or commercial library or to a library located outside of Canada. Depending on the circumstances surrounding the request for the loan, this policy may apply by analogy. Specific consideration of all the circumstances would have to be given to determine whether this policy would apply by analogy.<sup>1</sup>

### Paper Copies

12. A single copy may be made onto paper pursuant to the Copying Guidelines for interlibrary loan, subject to the following safeguards:

(a) the library making the copy has received written confirmation in paper or electronic form from the library requesting the copy or from the patron of that library that the patron requires the copy for research, private study, review, criticism or news reporting, and that the patron is a student, staff member or faculty member of the university requesting the copy;

(b) where the patron requires the copy for review, criticism or news reporting, the library making the copy advises that, in using the copy for any of those purposes, the patron mentions:

(i) the source; and

(ii) if given in the source, the name of the author of the work; and

(c) where the purpose of making the paper copy is to use it to make an electronic copy for use in interlibrary loan, the paper copy is promptly destroyed after the electronic copy is made.

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<sup>1</sup> This policy has been written to clarify fair dealing for access to university library resources. Fair dealing, of course, has wider application and is legitimately and reasonably called upon in other contexts and circumstances. While this particular policy does not specifically address all such circumstances it can, as noted in clause 11 of the policy, apply by analogy in certain situations. It is not unreasonable to expect for example that, subject to a consideration of the facts, fair dealing would apply in the context of an interlibrary loan request from a local public library to a university library.

Electronic Copies

13. A single copy may be made in electronic form pursuant to the Copying Guidelines for interlibrary loan and may be transmitted to the library requesting the copy using Ariel or similar technology, subject to the following safeguards:

(a) the library making the copy has received written confirmation in paper or electronic form from the library requesting the copy that the patron of that library requires the copy for research, private study, review, criticism or news reporting, that the patron requiring the copy is a student, staff member or faculty member of the university requesting the copy, and that once that library received the electronic copy and makes a copy onto paper it will delete the electronic copy;

(b) where the patron requires the copy for review, criticism or news reporting, the library making the copy advises that, in using the copy for any of those purposes, the patron mentions:

(i) the source; and

(ii) if given in the source, the name of the author of the work;

(c) the library making the copy has received written acknowledgement from the library requesting the copy that it will only use the electronic copy transmitted to it for the purpose of making a copy onto paper for the patron of that library that required the copy and will delete the electronic copy once it has furnished the paper copy to its patron; and

(d) the Ariel or similar technology used to transmit the copy is set or configured so that the copy is deleted once the transmission is completed.

14. A single copy may be made in electronic form pursuant to the Copying Guidelines for interlibrary loan and may be transmitted to a patron of the library requesting the copy in electronic form by desktop delivery, subject to the following safeguards:

(a) the library making the copy has received written confirmation in paper or electronic form from the library requesting the copy that the patron of that library is a student, staff member or faculty member of the university requesting the copy;

(b) where the patron requires the copy for review, criticism or news reporting, the library making the copy advises the patron of the library requesting the copy that, in using the copy for any of those purposes, the patron mentions:

(i) the source; and

- (ii) if given in the source, the name of the author of the work;
- (c) the library making the copy has, before transmitting the copy, received written confirmation in paper or electronic form from the patron of the library requesting the copy that the patron requires the copy for research, private study, review, criticism or news reporting, that the patron will only use that copy for research, private study, review, criticism or news reporting, and that the patron will not transmit the copy to any third party;
- (d) the electronic copy is made available to the patron requesting the copy either by email sent directly to the patron, or from a secure server protected by a technological protection measure that ensures that the copy is only made available to the patron requesting the copy;
- (e) the electronic copy is transmitted to the patron requesting the copy in PDF format or a similar format that restricts the copy from being altered by the patron; and
- (f) if transmitting the copy by email, the library deletes its sent email once the email has been transmitted, and if making the copy available from a secure server, the library deletes the copy stored on its server once the patron requesting the copy has downloaded one copy from the server and is not transmitted to another patron requesting a copy.

### III. University Library Reserve

15. This policy applies to paper copies made by a staff or faculty member for library reserve, and to electronic copies made by a staff member of the university library or other administrative unit from Published Works for a student of the university. This policy does not permit the making of electronic copies for library reserve by a faculty member who is a course instructor.

#### Paper Copies

16. One paper copy for each 30 students in a course of instruction up to a maximum of 3 may be made onto paper pursuant to the Copying Guidelines for library reserve, subject to the following safeguards:

- (a) the paper copies are made by or at the request of a faculty member in respect of a specific course of instruction offered by the university;
- (b) the paper copies are made as an optional and supplementary source of information for students and must be a small proportion (no more than 25 per cent) of the required reading for a particular course, and the university library has received, from the faculty member requesting the copies, a written acknowledgement in paper or electronic form confirming that the copies are intended as an optional and supplementary source of information for students and that the copies amount to no more than 25 per cent of the required reading for the course;
- (c) the use of library reserve must not substitute for the purchase of books, course packs or other published materials;
- (d) prior to loaning the paper copy to a student, the library has received from the student a written acknowledgement in paper or electronic form that he or she is a student enrolled in a course of instruction at the university, that the student requires the copy for research, private study, review, criticism or news reporting, and that the student will not use the copy for any other purposes;
- (e) where the student requires the copy for review, criticism or news reporting, the library advises the student that, in using the copy for any of those purposes, the student mentions:
  - (i) the source; and
  - (ii) if given in the source, the name of the author of the work;

- (f) the paper copy is loaned to the student for a period of limited duration;
- (g) the paper copy is destroyed within a reasonable time once the course of instruction or series of courses it pertains to comes to an end; and
- (h) where the purpose of making the paper copy is to use it to make an electronic copy for library reserve, the paper copy is promptly destroyed after the electronic copy is made.

### Electronic Copies

17. A single copy in electronic form may be made available to a student for library reserve from a university server pursuant to the Copying Guidelines, subject to the following safeguards:

- (a) the electronic copy is made at the request of a faculty member in respect of a specific course of instruction offered by the university;
- (b) the electronic copy is made as an optional and supplementary source of information for students and must be a small proportion (no more than 25 per cent) of the required reading for a particular course, and the university library has received, from the faculty member requesting the copies, written acknowledgement in paper or electronic form confirming that the copies are intended as an optional and supplementary source of information for students and that the copies amount to no more than 25 per cent of the required reading for the course;
- (c) the use of library reserve must not substitute for the purchase of books, course packs or other published materials;
- (d) prior to providing a student with access to the electronic copy, the library has received from the student a written acknowledgement in paper or electronic form that he or she is a student enrolled in the course of instruction at the university for which the copy was made, that the student requires the copy for research, private study, review, criticism or news reporting, that the student will not use the copy for any other purpose, that the student will not transmit the copy to any third party and that the student will only print out one paper copy from the electronic copy;
- (e) the electronic copy is made available to the student from a secure server protected by a technological protection measure that ensures that the copy is only made available to the students enrolled in the course of instruction for which the copy was made;
- (f) the electronic copy is made available to the student on a read-only basis in PDF format or a similar format that prevents the copy from being altered by the student; and

(g) the electronic copy made by the university is deleted once the course of instruction or the series of courses it pertains to has come to an end.

#### IV. Document Delivery

18. This policy on document delivery applies to copies made by the university library from Published Works for a patron of the library.

##### Paper Copies

19. A single copy may be made onto paper pursuant to the Copying Guidelines for document delivery for a patron of the university library who is a student, staff member or faculty member of the university, subject to the following safeguards:

(a) the library has received written confirmation in paper or electronic form from the patron that is a student, staff member or faculty member of the university, and that the patron requires the copy for research, private study, review, criticism or news reporting;

(b) where the student requires the copy for review, criticism or news reporting, the library advises the student that, in using the copy for any of those purposes, the student mentions:

(i) the source; and

(ii) if given in the source, the name of the author of the work; and

(c) where the purpose of making the paper copy is to use it to make an electronic copy to provide to the patron, the paper copy is promptly destroyed after the electronic copy is made.

20. A single copy may be made onto paper pursuant to the Copying Guideline for document delivery, for a patron who is not a student, staff member or faculty member of the university, subject to the following safeguards:

(a) the library has permitted the patron to have access to its premises and the patron requests the copy while on the premises of the library;

(b) the library has received written confirmation in paper or electronic form from the patron that the patron requires the copy for research, private study, review, criticism or news reporting; and

(c) where the patron requires the copy for review, criticism or news reporting, the library advises the patron that, in using the copy for any of those purposes, the patron mentions:

- (i) the source; and
- (ii) if given in the source, the name of the author of the work.

### Electronic Copies

21. A single copy may be made in electronic form pursuant to the Copying Guidelines for document delivery for a patron of the university library, subject to the following safeguards:

(a) the library has received written confirmation in paper or electronic form from the patron that the patron is a student, staff member or faculty member of the university, that the patron requires the copy for research, private study, review, criticism or news reporting, that the patron will only use that copy for research, private study, review, criticism or news reporting, and that the patron will not transmit the copy to any third party;

(b) where the patron requires the copy for review, criticism or news reporting, the library advises the patron that, in using the copy for any of those purposes, the patron mentions:

- (i) the source; and
- (ii) if given in the source, the name of the author of the work;

(c) the electronic copy is made available to the patron requesting the copy either by email sent directly to the patron, or from a secure server protected by a technological protection measure that ensures that the copy is only made available to the patron requesting the copy;

(d) the electronic copy is transmitted to the patron requesting the copy in PDF format or a similar format that restricts the copy from being altered by the patron; and

(e) if transmitting the copy by email, the library deletes its sent email once the email has been transmitted, and if making the copy available from a secure server, the library deletes the copy stored on its server once the patron requesting the copy has downloaded one copy from the server.

## V. Faculty Member Fair Dealing

22. This policy on faculty fair dealing applies to paper and electronic copies made from Published Works by a faculty member, or by a staff member of the university for a faculty member.

### Paper Copies

23. A single copy may be made by a faculty member pursuant to the Copying Guidelines, subject to the following safeguards:

- (a) the faculty member requires the copy for the faculty member's personal research, private study, review, criticism or news reporting; and
- (b) where the faculty member uses the paper copy for review, criticism or news reporting, the faculty member mentions:
  - (i) the source; and
  - (ii) if given in the source, the name of the author of the work.

24. A single paper copy may be made by a staff member of the university for a faculty member pursuant to the Copying Guidelines, subject to the following safeguards:

- (a) the faculty member advises the staff member that the faculty member requires the copy for the faculty member's personal research, private study, review, criticism or news reporting;
- (b) the faculty member uses the copy for the faculty member's personal research, private study, review, criticism or news reporting; and
- (c) where the faculty member uses the paper copy for review, criticism or news reporting, the faculty member mentions:
  - (i) the source; and
  - (ii) if given in the source, the name of the author of the work.

Electronic Copies

25. A single copy in electronic form may be made by a faculty member pursuant to the Copying Guidelines, subject to the following safeguards:

- (a) the faculty member requires the copy for the faculty member's personal research, private study, review, criticism or news reporting;
- (b) where the faculty member uses the electronic copy for review, criticism or news reporting, the faculty member mentions:
  - (i) the source; and
  - (ii) if given in the source, the name of the author of the work; and
- (c) the faculty member does not transmit the electronic copy to a third party, except where the transmission is pursuant to the purpose of review, criticism or news reporting.

26. A single copy in electronic form may be made by a staff member of the university for a faculty member pursuant to the Copying Guidelines, subject to the following safeguards:

- (a) the faculty member advises the staff member that the faculty member requires the copy for the faculty member's personal research, private study, review, criticism or news reporting;
- (b) the faculty member uses the copy for the faculty member's personal research, private study, review, criticism or news reporting;
- (c) where the faculty member uses the electronic copy for review, criticism or news reporting, the faculty member mentions:
  - (i) the source; and
  - (ii) if given in the source, the name of the author of the work.