
10 % or 6 factors? Looking beyond the numbers in educational fair dealing guidelines

Who we are

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Libraries

What is fair dealing?

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

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned: [source, and name of author/performer/maker/broadcaster]

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned: [source, and name of author/performer/maker/broadcaster]

What is fair?

“...unless you are talking of cutting a piece of cake exactly in half...there is hardly ever a formula for fair. Decision depends on a range of contextual facts and implicit or explicit norms. We have to know who had it yesterday, who is bigger or littler, who behaved better, and what the alternatives to “it” are.... Fairness is local. **You can’t work fairness out once and for all: you have to practise, improvise, defend yourself, every time.**”

Laura Murray, “Deal with it.”, from Coombe, Rosemary, et al, *Dynamic Fair Dealing: Creating Canadian Culture Online*, University of Toronto Press, 2014.



**CCH v. Law Society of
Upper Canada [2004]:**

“Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.”
[para 53]

Determining what's fair dealing

Two step test

1. Is the dealing for one of the enumerated purposes?
2. Is the dealing fair (determined by 6 factor analysis):

Six factors to be considered when determining fairness:

1. The purpose of the dealing
 2. The character of the dealing
 3. The amount of the dealing
 4. The nature of the work
 5. Available alternatives to the dealing
 6. The effect of the dealing on the work
-



Interpretations

Universities Canada (AUCC)

“Fair Dealing Policy for Universities”

CAUT

“Guidelines for the Use of Copyrighted Materials”

CIC/CMEC (Colleges & K-12)

“Fair Dealing Policy”

Individual institutional policies -

E.g. U of T, Western, U of A

Criticisms, Challenges

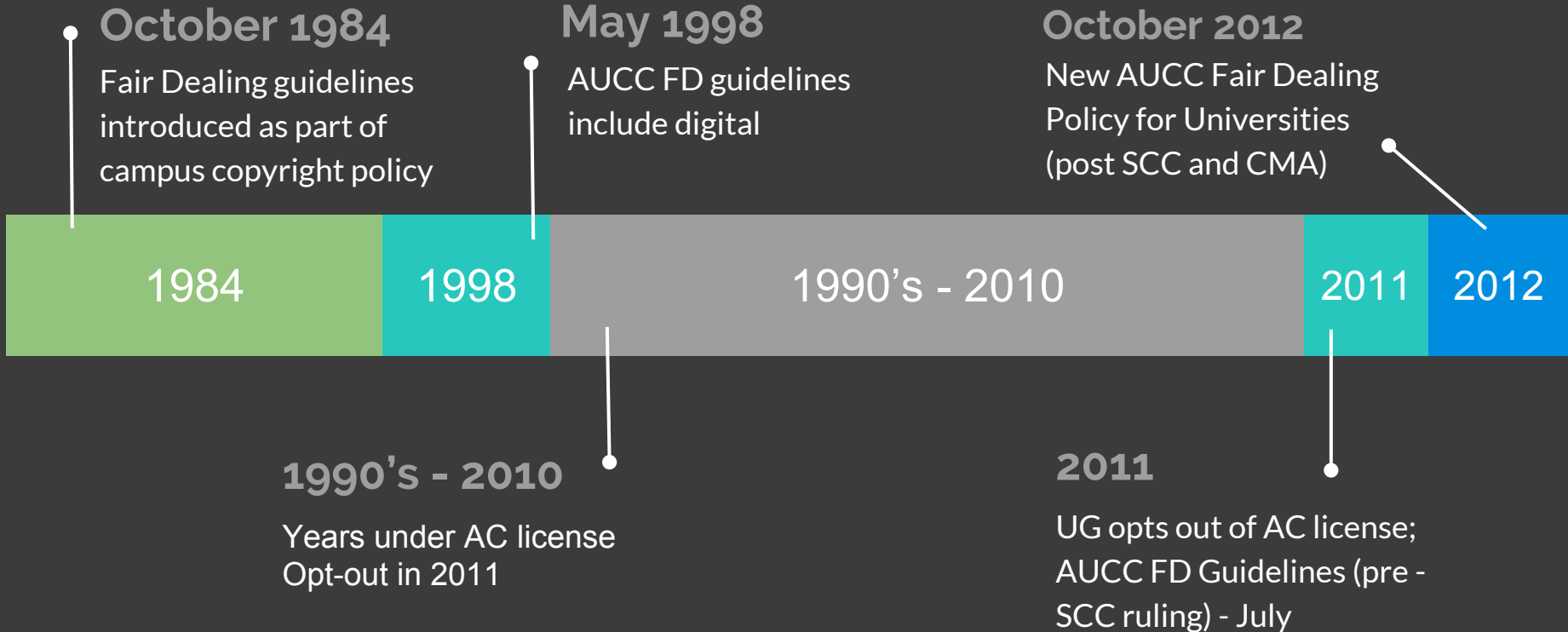
FROM:

- “bright lines” not compatible with fair dealing
- Not all 6 factors are addressed
- 10% amount poached from Access Copyright
- will lead to rampant free copying
- “Not fair in either their terms or their application”

TO:

- too formulaic
- too conservative, “...excessively cautious...”
- instructors not empowered
- will be used more as a ceiling than a floor (will lead to copying of more/less than is needed)
- unnecessarily limit the scope of fair dealing

Fair Dealing at the University of Guelph



Before 6
factors....
there was
10%

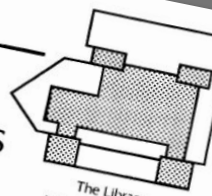
FAIR DEALING

The fair dealing clause in the copyright act permits individuals to make, without permission, single copies of insubstantial portions of a published work for private study, research, criticism or review.

The library's guidelines for fair dealing are as follows:

- a) **Copying from a single monograph**
Copying may not exceed **ten percent** of the monograph whether copying is in sequence or from various segments.

COPYRIGHT GUIDELINES



The Library
University of Guelph

Copyright Law, and with the Universal and Berne International Convention, is signatory. The latter requires that foreign authors receive the same copyright protection accorded to Canadian authors.

COPYING FOR INDIVIDUAL USE

- a) all requests for copying for individual use submitted to library staff must include a signed statement of compliance with the right legislation (fig. 1). Library staff will make copies only when the request is in agreement with the "fair dealing" conditions;
- b) requests for multiple copies or copies in excess of fair dealing guidelines must be accompanied by written evidence of compliance (fig. 2);
- c) documents recording copyright compliance will be retained by the library;
- d) copyright guidelines will be displayed near coin-operated photocopy machines. Individual users are responsible for ensuring that their own copying complies with the Canadian Copyright Act.

COPYING FOR RESERVE

- a) library staff will make a single copy of items requested for use at the Reserve desk, according to the fair dealing guidelines. The original book or journal must accompany the best.
- b) Requests to place on Reserve multiple copies or portions of publications which exceed the fair dealing guidelines, must be accompanied by appropriate authorization from the copyholder (fig. 2);
- c) It is the responsibility of the requestor to obtain and provide copyright clearance. It must be recognized that this procedure could delay Reserve processing, and sufficient lead time should be allowed.

OBTAINING COPYRIGHT CLEARANCE

- 1. Copyright holders generally are receptive to requests for limited authorization to photocopy copyright material, and delays in the process usually relate to inadequacy of information provided. Still, it is most advisable to allow sufficient lead time to obtain permission before the copies are needed. The Association of American Publishers suggests

LIBRARY

1084

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Ryerson University Copyright Timeline

2011

E-Reserve service launched with ARES, Copyright Librarian hired

2012

Licensed with AC with AUCC Model Licence. Fees increase from \$3.38 to \$26.00 per FTE

April 2013

Adopted AUCC fair dealing policy with minor edits, refer fair dealing evaluation to "expert"

Jan 1 2016

Ended site licence with AC, use existing licences, permissions and fair dealing used in E-Reserve

2011-2012

Summer 2012

Copyright Modernization Act and Copyright Pentalogy

2013

January 2016

Course packs sent to outside vendor (Gilmore) who use an AC licence

2016

2017-2018

2017/2018

Some review of current practices, wait and see on York decision

Ryerson University

- Fair Dealing Evaluations done on a case by case basis since 2012
- Some fair dealing evaluations done during AC licence on educational materials not covered by license
- Fair dealing evaluations recommended for students for use in theses
- Whole works are considered

E-Reserve Snapshot: 2016-2017

- 1090 instructors used E-Reserves
- 1242 courses
- 150,000 per year spent on transactional licences
- Buy E-Books before applying fair dealing but use our guideline otherwise
- Used fair dealing mostly in Arts programs

The University of Toronto Experience

January 2012

License with Access Copyright renewed. Fees increase from \$3.38 to \$27.50 per FTE

November 2012

Fair Dealing Guidelines developed

July 2014

Scholarly Communications & Copyright office established

July 2015

U of T instance of UBC's *LOCR* (E-reserves application) launched

2012

2014

2015

2017-2018

Summer 2012

Copyright Modernization Act and Copyright Pentalogy

January 2014

U of T ends agreement with Access Copyright. Expanded course reserves (Syllabus Service) is offered to all instructors

2017/2018

Review of current practices

Fair dealing in practice: everything else

- Focus on the development of copyright resources and education, but “experts” are always available
 - Fair Dealing analyses
- Resources:
 - Copyright Basics & FAQs*
 - Copyright Roadmap
 - Use of Audiovisual Material on Campus*
 - *Future opportunity*: LME (Canvas) Copyright Ed module
- Education:
 - Instructional sessions
 - Copyright Office Hours



How do they compare?

U of T “Guidelines”

- 6 page document
- Background/context for guidelines are included
- Includes decision-tree
- Lists 6-factor analysis; further analysis in FAQs
- Relevance/weight of factors is contextual

Universities Canada “Policy”

- 2 page document
 - 9 “application” guides include context, address details such as 6-factor analysis
 - Less emphasis on individual decision-making
-

Divergences

U of T “Guidelines”

- Doesn't preclude using FD to copy licensed materials
- Notes entire works may be copied in some instances
- More flexibility re definition of “short excerpt”
- Allows for individuals to conduct own 6 factor analysis

Universities Canada “Policy”

- Licence terms prevail over FD
- No leeway for instructors to copy entire works
- Definition of “short excerpt” limited to amounts specified
- Analysis of 6 factors referred to “expert”

Six factor analysis: how do our fair dealing policies stand up?

Purpose of dealing - copying of works must qualify for an allowable purpose

Character of dealing - distribution limited to one copy for each student in a course; distributed via password-protected course management system.

Amount of dealing - must be short excerpt, must be no more than is needed to fulfill purpose

Nature of work - educational materials are intended to be used for educational purposes

Effect of the dealing on the work - copies are not to substitute for the purchase of a work

Beyond the guidelines: what informs a complex fair dealing analysis?

- does copyright exist? (Section 3 right involved?)
 - 6 factor analysis
 - relevant case law
 - common practice
 - level of risk (personal, institutional)
 - instinct (does it feel fair?)
-

So, what are the fair dealing factors?

“...the fair dealing factors are not criteria or elements – they are factors. That is, they are useful considerations in a fair dealing analysis, **not conditions that must be met for a dealing to be fair**. It is also important to note that since fair dealing involves the weighting of factors, **the presence of a single factor that would tend to make a dealing unfair does not automatically make that dealing unfair.**”

Copyright Board of Canada. Provincial and Territorial Governments Tariff (2005-2014) Decision, May 22, 2015, para 394.

Allowable purpose v. purpose of the dealing

*“There is a certain degree of overlap in the case law between the purpose at stage one (“allowable purpose”) and the purpose of the dealing as one of the stage two factors. However, the stage two purpose consideration **examines matters from the users’ perspective.**”*

Access Copyright v. York University, para 264.

“In assessing step one of the fair dealing test, it is not an obstacle that a dealing is done for multiple purposes, as long as it was also done for a permitted purpose.

*Therefore, **even where a dealing is not done predominantly for an enumerated purpose....it will meet the threshold of the first step of the fairdealing test”.***

Copyright Board Tariff Decision, Access Copyright (Provincial and Territorial Governments), para 246

A lower standard required for stage 1, than for 6 factor test:

*“In mandating a generous interpretation of the fair dealing purposes, including “research”, the Court in CCH created **a relatively low threshold for the first step** so that **the analytical heavy-hitting is done in determining whether the dealing was fair.**”* SOCAN v. Bell, para 27

A closer look at the six factors: Purpose

“...these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”

CCH v. LSUC, para 54

“.the predominant perspective in this case is that of the ultimate users of the previews....While the service providers sell musical downloads, the purpose of providing previews is primarily to facilitate the research purposes of the consumers.

SOCAN v. Bell, para 34

- What is the user’s real purpose or motive in using the copyright-protected work?
 - framework must be user’s perspective rather than copier’s
- Purposes must not be interpreted restrictively
- Purpose does not need to be transformative
- Purpose can be commercial, as long as purpose is an enumerated FD purpose (SOCAN v. Bell)

A closer look at the six factors: Effect

“Access [Copyright’s] approach relies on the premise that every dealing with a copyrighted work will be one where there was an opportunity for the copyright owner of the work to sell a one-time right to license that use. If this factor were evaluated on these grounds, every dealing would ‘compete with the market for the original work.’ It is likely for this reason that the Supreme Court of Canada in CCH stated that the availability of a licence to copy a work is not relevant to deciding whether a dealing is fair.”

Copyright Board, Provincial and Territorial Tariff decision, para 388

- Looks at the effect of the dealing on the work
- Is the dealing a substitute for the purchase of a work?
- Is a rival market created for the original work?
Does a market for the original exist?
- Is there a benefit to the market for the work?
- CCH noted that while this is an important factor, “it is neither the only factor nor the most important factor...in deciding if the dealing is fair”.
- Availability of a license is not relevant (CCH)
- Negative impact on the market must be evident in order for this factor to tend to unfairness

A closer look at the six factors: Character

“If multiple copies of works are being widely distributed, this will tend to be unfair.

If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.

If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness”

CCH, para 55

- Examines how the works are dealt with
- It may also be relevant to consider the practices of a trade or industry in this decision
- Where do we see an example of this?
SOCAN v. Bell (at para 38)
 - Consumers accessed 10x the number of previews as full-length songs
 - *But:* streamed not downloaded
 - Copies could not be further duplicated or disseminated

A closer look at the six factors: Amount

“...quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work”

“The amount taken may also be more or less fair depending on the purpose”

CCH at para 55

- Considers both the amount of the dealing and the importance of the work
- The greater the proportion of a work copied, the less likely it is to be “fair”
- Some circumstances (a short poem or a photograph) where copying the entire work may also be “fair”
- Where do we see this discussed?
Alberta (Education) v Access Copyright (at para 29)
 - *“It is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated”*

A closer look at the six factors: Alternatives

“Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court.”

CCH para 57

“The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright.”

CCH para 70

- Availability of a licence is not relevant to deciding whether a dealing has been fair
- Asks user to consider if the copying is necessary for the purpose, or if it can be achieved without copying
- Where do we see this discussed?
Alberta (Education) v Access Copyright
 - *“First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them.”*

A closer look at the six factors: Nature

“Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”

(CCH at para 58)

- If the goal of work is to be disseminated widely (i.e: academic journal articles) would be more fair
- Less fair for a whole work of fiction, consumable workbooks for example
- Work is unpublished and reproduction will lead to wider use would be considered more fair, but confidential materials could be found less fair

Scenario 1

An instructor wants to use the whole of an unpublished 39 page lecture transcript in a course. You can't locate the copyright holder. The lecture was in 1987.



DESIGN FABRICATION ZONE

DFZ INTERNATIONAL SPEAKER SERIES
Design Fabrication Zone: Bell Trinity Centre, 483 Bay St (South Lobby, 103N)
MORE INFO: dfz@ryerson.ca
dfz.ryerson.ca/event

MONOAMBIENTE

MARTIN HUBERMAN

Lecture @ 325 Church St, ARC100
October 29 | 1:00 PM - 2:00 PM

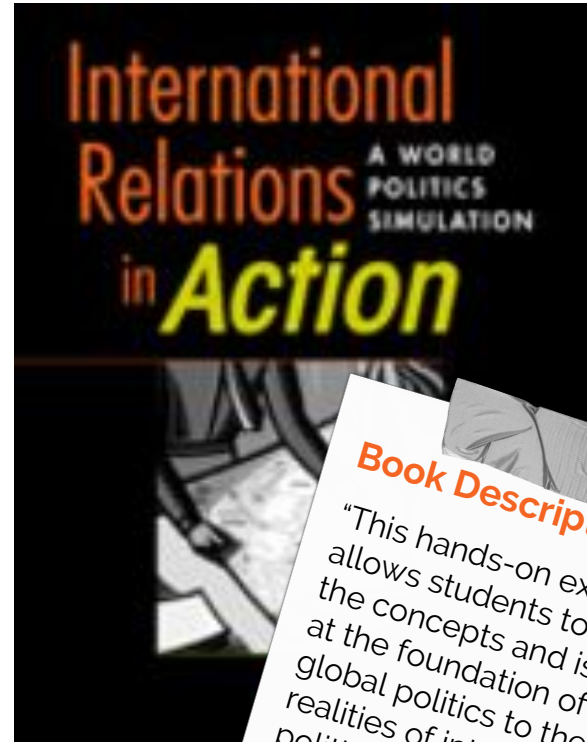
From Buenos Aires, Argentina, Martín Huberman is director and chief curator of Monoambiente, also practicing as a designer and educator. He received his degree from the Faculty of Architecture, Design and Urbanism at the University of Buenos Aires in 2006, then continued his studies through graduate courses in Buenos Aires and the United States. Since 2008, he has established Normal¹, an interdisciplinary office, that explores and researches projects in architecture, design and cultural management.

Please join Ryerson's Design Fabrication Zone for a lunchtime lecture with a focus on material systems by architect and artist Martín Huberman, a recent Graham Foundation Award recipient from Buenos Aires. For more information on Martin's gallery, visit <http://www.monoambiente.com.ar/en>

Ryerson University **MONO AMBIENTE**

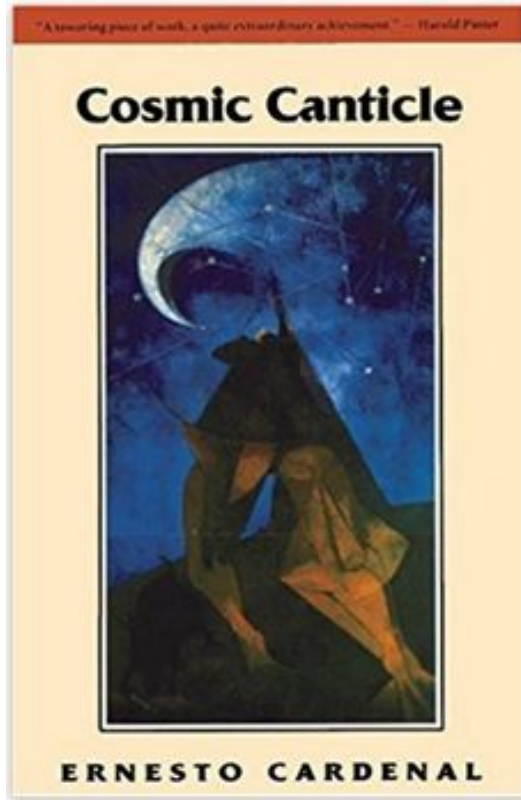
Scenario 2

An instructor wants to use several simulations featured within a 140 page book, in addition to adapting the instructions for group use. Print copies will be distributed to highschool students participating in an outreach event meant to promote a specific undergrad degree program on campus. Event organizers will collect copies at the end of session.



Book Description

"This hands-on exercise allows students to relate the concepts and issues at the foundation of global politics to the realities of international politics today..."



Scenario 3

Faculty member obtains via Interlibrary Loan an out of print French translation of this Spanish-language work, for his research project. Asks department secretary to make a copy of the entire book as he needs it for several months, will be quoting from it extensively, and can only keep the ILL copy for 3 weeks.

Already owns his own copy of the original work, and will destroy the copy of the French one once his research is done.

Fair Dealing Analysis Example

(With a little help from your smartphone)

Join us: <https://kahoot.it/>



How?

**Enter the game pin
on your laptop or
mobile device to
participate. Make up
your own nickname.
Answers are
anonymous!**



Thank you! Questions?
Comments?