1.0 Purpose/ Background

Members of the NAIT community engage with copyrighted material on a daily basis. Misuse of copyrighted materials, meaning use beyond those permitted by the Copyright Act\(^1\), is an offense under the law. Each employee is responsible for his or her copyright compliance and are encouraged to seek guidance from NAIT’s Copyright Office. NAIT also has a responsibility to inform students that the work of others should be used in a lawful manner and that NAIT’s Copyright Office is a resource for their benefit as well.

2.0 General Principles

The use of copyrighted materials falls within the parameters of the Copyright Act.

3.0 Definitions

<table>
<thead>
<tr>
<th>All rights reserved.</th>
<th>A standard notice of copyright indicating that the rights defined by copyright, in the jurisdiction where use is occurring, may be exercised only by the copyright owner.</th>
</tr>
</thead>
<tbody>
<tr>
<td>copyright</td>
<td>The right to “reproduce a work, or a substantial part thereof ...”(^2) with work spanning literary, dramatic, artistic and musical expressions, provided the conditions for protection are met:</td>
</tr>
<tr>
<td></td>
<td>i. Ideas are not protected, only the expression thereof. Facts are not protectable material either.</td>
</tr>
<tr>
<td></td>
<td>ii. The expressions must be original to earn the grant of copyright and (by convention) be fixed in a tangible form.</td>
</tr>
</tbody>
</table>

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\(^1\) Copyright Act, (R.S.C., 1985, c. C-42) <http://laws-lois.justice.gc.ca/eng/acts/c-42/>. Since its inception into modern law, the system of copyright has functioned as a set of limited rights. Creators are afforded some measures of control via copyright; simultaneously, users are afforded some rights of use via exceptions to copyright. A prominent exception within Canadian law is Section 29, fair dealing. See Appendix A for greater detail regarding Canada’s development of fair dealing.

\(^2\) Section 3.1 of the Copyright Act, above note 1.
iii. The author must be a resident or citizen of Canada or another treaty-country.

While *substantial* is not defined, it necessarily follows that an insubstantial amount of a copyright-protected work is not eligible for copyright protection.

<table>
<thead>
<tr>
<th>Copyright Owner</th>
<th>The person or entity who holds the copyright in a protected work.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creative Commons</td>
<td>An arrangement where a copyright holder may choose to make a work broadly available, specifying terms of use chosen from conditions of attribution, commerciality of use, and continued use. It is characterized as a “Some rights reserved” approach. See creativecommons.org.</td>
</tr>
<tr>
<td>Employee</td>
<td>Refers to any person employed by the Board who is one of the following: i. Covered under the terms and conditions of the collective agreement between NAIT and NAIT Academic Staff Association (NASA); ii. Covered under the terms and conditions of the collective agreement between NAIT and Alberta Union of Provincial Employees (AUPE); iii. Not covered by any collective agreement, and referred to as ‘Management’ and ‘Excluded’; iv. Providing their services on a salaried or hourly basis, whether for continuing education or any other purpose.</td>
</tr>
<tr>
<td>Fair Dealing</td>
<td>An exception to copyright; the foremost language as defined in the Copyright Act states: “fair dealing for the purpose of research, private study, education, parody or satire, does not infringe copyright.” Conditions apply; see Section 4.3 below.</td>
</tr>
<tr>
<td>License (Closed)</td>
<td>An arrangement where a copyright holder chooses to make a work available, under specific terms of access and use, to a specific set of users.</td>
</tr>
<tr>
<td>License (Open)</td>
<td>An arrangement where a copyright holder may choose to make a work broadly available, while specifying some terms of use. It is characterized as a “Some rights reserved” approach; Creative Commons being the most widely practiced set of licenses.</td>
</tr>
<tr>
<td>NAIT Community</td>
<td>Refers to the Board of Governors, management, faculty and staff, contractors, vendors, volunteers, and students.</td>
</tr>
<tr>
<td>Reproduce</td>
<td>To make a copy by, including but not restricted to, photocopying, scanning, printing, downloading, broadcasting, or performing in public.</td>
</tr>
<tr>
<td>Some Rights Reserved.</td>
<td>An open notice of copyright indicating that the copyright owner has elected to share some of the rights defined by copyright.</td>
</tr>
<tr>
<td>Work</td>
<td>A variety of expressive formats eligible for copyright protection including, but not restricted to, books, articles, curriculum and learning materials, CDs, DVDs, musical scores, photographs, paintings, sketches, sound recordings, software, or websites.</td>
</tr>
</tbody>
</table>

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3 Section 29 of the *Copyright Act*, above note 1.
4.0 Procedures

4.1 Copyright Act
Regardless of the purpose of activity, all uses of copyrighted works are governed by the Copyright Act. The Act sets out rights of control for copyright owners together with exceptions to those rights. Exceptions are designed to serve copyright users engaged in socially beneficial uses of copyrighted materials and must be applied to serve that intention. NAIT’s Copyright Office is available to assist any member of the NAIT Community who wishes to learn more about copyright and exceptions.

4.2 Determine how to use copyrighted works.
To establish whether a proposed use could be had without payment, is already licensed (with either open or closed terms), allowed by an exception, or, requires permission or payment, consider the following:

(a) What material is needed?
Determine if suitable materials are already available for use. For instance, Library Services provides access to a wide range of materials in multiple formats including ebooks, streaming videos and articles.
Note: Works governed by open licenses are becoming more profuse; NAIT encourages that such resources be given due consideration.

(b) Determining the nature of use – insubstantial
Copyright is defined in Section 3.1 of the Copyright Act as: "the right to produce or reproduce a work, or any substantial part thereof..." Substantial is not defined; it is a matter of impression. But it necessarily follows that if one is copying an insubstantial amount of work, then copyright does not arise. (i.e. Copying a single image from a textbook is an insubstantial reproduction.)
OR

Determining the nature of use – substantial and an open license
Consider if the work has been designated for broad use through some form of open license (i.e. Creative Commons). If so, copying may proceed, provided the terms of the open license (i.e. a requirement for citation) is abided by.
OR

Determining the nature of use – substantial and exceptions (i.e. fair dealing)
If the work is governed by copyright law alone (i.e. All rights reserved), an exception might be appropriate for the need at hand. There are many exceptions within the Copyright Act, but the most relevant is fair dealing. In this regard, NAIT follows the policy developed by Colleges and Institutes Canada (CICan). CICan prescribes modest measures of unauthorized copying; see Section 4.3 below. Copying beyond those measures should be evaluated by NAIT’s Copyright Office.
OR

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4 Section 3.1 of the Copyright Act, above note 1.
Determining the nature of use – substantial, no license, and no applicable exception

Finally, if the copying under consideration is substantial, is not governed by an available license (open or closed) and does not satisfy the conditions of an exception, permission should be sought before using the work. As obtaining permission can take several weeks, the NAIT member wishing to use the material is responsible for discussing the matter with NAIT’s Copyright Office in a timely manner. NAIT’s Copyright Office will determine if permission should be sought from an individual copyright owner or a licensing agency and make the request.

4.3 Affiliation with Colleges and Institutes Canada (CICan), Fair Dealing Policy

Section 29 of the Copyright Act states: "Fair dealing for the purpose of research, private study, education, parody and satire does not infringe upon copyright." No further instruction is given in the law. However, the Supreme Court of Canada has provided considerable guidance on this matter; the Court emphasizes that fair dealing is a contextual matter and must be determined on a case-by-case basis. To facilitate application of fair dealing, CICan provided the following policy:

The fair dealing provision in the Copyright Act permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties. To qualify for fair dealing, two tests must be passed.

First the “dealing” must be for a purpose stated in the Copyright Act: research, private study, criticism, review, news reporting, education, satire and parody. Educational uses of copyright-protected work passes the first test.

The second test is that the dealing must be “fair.” In landmark decisions in 2004 and in 2012, the Supreme Court of Canada provided guidance as to what this test means in schools and post-secondary educational institutions.

These guidelines apply fair dealing in non-profit K-12 schools and postsecondary educational institutions and provide reasonable safeguards for the owners of copyright-protected works in accordance with the Copyright Act and the Supreme Court decisions.

Guidelines

1. Teachers, instructors, professors, and staff members in non-profit educational institutions may communicate and reproduce, in paper or electronic form, short excerpts from copyright-protected works for the purposes of research, private study, criticism, review, news reporting, education, satire, and parody.

2. Copying or communicating short excerpts from a copyright-protected work under these Fair Dealing Guidelines for the purposes of news reporting, criticism, or review should mention the source, and if given in the source, the name of the author or the creator of the work.

3. 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. as a posting in a learning-or course-management system that is password protected or otherwise restricted to students of a school or postsecondary educational institution;
   c. as part of a course pack.

4. A short excerpt means:
   a. up to 10 per cent 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;
g. an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work.

5. 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.

6. Copying or communication that exceeds the limits in these Fair Dealing Guidelines may be referred to a supervisor or other person designated by the educational institution for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.

7. Any fee charged by the educational institution for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the institution, including overhead costs.

4.4 Responsibility

Employees are responsible for their own copyright compliance but are supported by NAIT’s Copyright Office. NAIT members may wish to review the NAIT Copyright Guide available from library website: http://www.nait.ca/library/.

5.0 Exceptions to the Procedure

No exceptions have been delineated.

6.0 Related Documentation

Policy Document – LC 4.0 – Use of copyright-protected work at NAIT

Document History

<table>
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<tr>
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Relevance of fair dealing in development of learning materials

In keeping with international norms, the Copyright Act\(^1\) includes various exceptions to the grant of copyright. Exceptions allow for use of copyrighted materials without seeking permission from the copyright owner; among all exceptions, fair dealing has gained significantly in prominence and substance. Drawing from events which began in 2002, three factors serve to confirm that fair dealing is a robust exception and widely accepted by the government and judiciary of Canada: (i) three decisions by the Supreme Court of Canada (spanning 2004–2012) supporting a “large and liberal interpretation” of fair dealing;\(^2\) (ii) amendment of the statutory language of fair dealing to include the purpose of “education;”\(^3\) and (iii) emphatic recognition of fair dealing by the Copyright Board.\(^4\)

Fair dealing is of great assistance when assembling teaching/learning materials. Fair dealing carries two functions: (i) a means to legitimately distribute portions of existing copyrighted works which serve as reference material (i.e. a chapter from a textbook, a journal article, etc.) and (ii) a means to facilitate creation of new works.

While fair dealing spans three sections of the Copyright Act, the relevant language for educational institutions is Section 29: “fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”\(^5\) No further guidance is provided within the Act. But, in 2004 the Supreme Court set the standard for a multi-faceted enquiry to establish fairness.\(^6\) Individuals should examine a proposed use from a variety of factors; educational uses predominantly\(^7\) focus upon two questions: (i) What is the educational merit of using a work? and (ii) How is the work to be used?

With respect to the nature of learning materials developed at NAIT, it is likely that imagery and legal codes/standards will be among the areas of application of fair dealing. Works from both categories should be reproduced with some exactitude; such reproduction is supported under fair

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\(^*\) Prepared by Meera Nair, Ph.D., Copyright Officer, NAIT


\(^3\) Copyright Modernization Act, Bill C-11, 1st Session, 41st Parliament (60 Elizabeth II, 2011).

\(^4\) The Copyright Board amply demonstrated its support for fair dealing in its decision Statement of Royalties to be Collected by Access Copyright [Provincial and Territorial Governments – 2005-2014] 22 May 2015, para. 213-409 [Statement]; see Meera Nair, Copyright Board Decision, 19 June 2015, on file with the Copyright Office. Furthermore, the Board has for many years emphasized that orphan works (works without known or negotiable copyright owners) were legitimate fodder for fair dealing; see Meera Nair, Orphans at NAIT, (NAIT Copyright Project, White Paper No. 1, 2015), on file with the Copyright Office.

\(^5\) Copyright Act, above note 1, s29.

\(^6\) The Court employed six factors in its assessment of the issue at hand: (i) the purpose of the dealing, (ii) the character of the dealing, (iii) the amount of the dealing, (iv) the alternatives to the dealing, (v) the nature of the work, and (vi) the effect of the dealing upon the market of the work; see CCH, above note 2, para 53-59.

\(^7\) In CCH, the Court also emphasized that the framework of analysis must be malleable; ibid, para. 60. In the context of educational uses, these questions will capture the necessary information.
dealing. The NAIT Community is supported by the Copyright Office; members are encouraged to examine a proposed use from the perspective of fair dealing and make sound choices of when copying is appropriate or not.

**Determining if permission is needed for inclusion of copyrighted materials**

Copyright is defined as: “the right to produce or reproduce a work, or any substantial part thereof...”. The word *substantial* is not defined; it is a matter of impression. But it necessarily follows that if one is copying an insubstantial amount of work, then copyright does not arise.

In a decision dated to 22 May 2015, the Copyright Board gave added guidance to a measure of substantiality. It stated, without any examination of the source work at all, it stood to reason that up to 2.5 percent (to a maximum of a few pages) will be insubstantial. Moreover, if a qualitative and quantitative assessment of the work is possible and confirms that a larger quantity of material still constitutes an insubstantial portion of the work, then more material may be taken without authorization.

If the amount under consideration is substantial, then fair dealing deserves consideration. As noted earlier, the two questions which are most pertinent are:

i. What is the educational objective served by inclusion of the material?
ii. How is the work to be used (i.e. in whole or in part, for finite or boundless distribution, for cost or no cost, etc.)?

If the proposed use is beyond that of insubstantial or legitimate unauthorized use, then permission for use can be sought from the copyright owner of the work in question. Members of the NAIT Community should consult with NAIT’s Copyright Office, in a timely manner, when such permissions are required.

**Universality of exceptions**

While Canada is a recognized leader in the world for upholding legitimate unauthorized use through a flexible exception, it is pleasing that other nations are promoting the use of flexible exceptions. Notably, in the United States (which for years was not hospitable to its own exception of fair use) a multitude of decisions have emerged emphasizing the contextual nature of fair use. Also of note are international developments; in 2013, after some 30 years of discussion, member countries of the World Intellectual Property Organization (WIPO) agreed upon a flexible exception to better support the provision of copyrighted materials for visually disabled people.

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8 An exemplar case concerns an exact reproduction of an image (a magazine cover) by a professional newspaper organization. Predating CCH by seven years, this decision relied on a contextual examination of the use in question, in much the same vein as later case law would emphasize. See *Allen v Toronto Star Newspapers Limited* (1997) 36 OR (3d) 201 (Div Ct).

9 *Copyright Act*, above note 1, s3.1.

10 *Statement*, above note 4, para. 177-212. Furthermore, not all content is eligible for protection, i.e. facts or scientific process are not granted protection. “One should first screen out what cannot in law be a substantial part;” see David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Toronto: Irwin Law, 2011) p.182-183.
