Ontario Health Libraries Association (OHLA)

Revised Guide to Copyright for Canadian Hospitals

2021

An Instructional Resource*

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Contents

Purpose and Use of this Guide

This guide is an instructional resource for creating educational presentations. It is intended to assist hospitals, and the staff and physicians who work in hospitals, to understand copyright law in Canada and is for general information purposes only. It reflects interpretations and practices regarded as valid, based on available information, as of July 2021. It is not intended to provide legal advice or opinion.

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What is Copyright?

At its simplest, copyright means the right to copy a work.[1] In general, only the owner of copyright in a literary, dramatic, musical, or artistic work, a sound recording, a performer's performance or a broadcast is allowed to reproduce it or to permit anyone else to do so.[2]

Why is Copyright Important?

Many materials protected by copyright are accessed and used in hospitals for patient care, research, and education. Infringing copyright can result in penalties for an institution, including loss of access to resources.[3] It is important, therefore, for hospitals, staff, and physicians to be aware of their rights and obligations concerning copyright.

What Law Governs Copyright in Canada?

The rights of copyright owners over material being used in Canada, and exceptions to the rights of copyright owners granted to members of the public to use material in Canada, are, unless otherwise specified in a contract, governed by the Canadian *Copyright Act*. The work or other

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[1] *Copyright Act*, RSC 1985, c C-42, s. 3(1) [*Copyright Act*]. The *Copyright Act* can be found at: < https://laws-lois.justice.gc.ca/eng/acts/C-42/index.html >.
[2] *Copyright Act*, s. 2 "copyright" [*Copyright Act*]; Canadian Intellectual Property Office, "What is copyright?" (7 September 2016), online: *Government of Canada* <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02281.html >.
[3] *Copyright Act*, s. 34(1).

subject matter that is being used in Canada does not need to have been created in Canada or by a Canadian and the owner of the copyright does not need to be located in Canada in order for questions involving copyright in a work or other subject matter in Canada to be decided under the Canadian *Copyright Act*: this is because Canada is party to a number of international agreements about copyright (including the *Berne Convention*[4] and the *TRIPS Agreement*[5]).[6]

It is important to note, however, that if you, in Canada, are accessing materials through an electronic database, you will be doing so pursuant to a licence (a form of contract) entered into either by you or by your institution. Each licensing agreement signed between your institution and the vendor of database services will govern your organization's relationship with those who own copyright interests in works or other subject matter governed by copyright that are included in the databases covered by the licensing agreement. Such agreements typically specify the law that governs the contract (licence) between you or your institution and the vendor of the information – and that law will not necessarily be the law of Canada. If the law mentioned in the contract is not the law of Canada, then the Canadian *Copyright Act* will not be relevant to the uses you can make of the material in the database – it will be the copyright law of the jurisdiction specified in the contract (and the provisions of the contract itself) that will govern what you can do with the material in the database. It is therefore very important to check the "fine print" in the database that you are using in order to determine what law governs your activities and those of your users in relation to material obtained through that database.[7] The terms of each licensing agreement will define and limit copyright permission granted to you as a provider of library services. Such licensing agreements often define who your clients can be for use of the database and where those clients must be located in order to access services. Such agreements may also affect how you provide those services.[8]

What is Protected by Copyright?

Ideas and facts are not protected by copyright, but original literary,[9] artistic,[10] musical[11] and dramatic works,[12] as well as other subject matter (sound recordings,[13] performers'

[4] *Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, 828 UNTS. 221, Can TS 1998 No.18.
[5] *Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization,* 15 April 1994, 33 ILM 1197 (entered into force 1 January 1996).
[6] *Copyright Act*, s. 5(1.1).
[7] Refer to the section "Library Vendors' Terms of Use and Interlibrary Loan Permissions" below for examples of such situations.
[8] *Copyright Act*, s. 13(4).
[9] *Copyright Act*, s. 2 "literary work".
[10] *Copyright Act*,. 2 "artistic work".
[11] *Copyright Act*, s. 2 "musical work".
[12] *Copyright Act*, s. 2 "dramatic work".
[13] *Copyright Act*, s. 2 "sound recording".

performances[14] and broadcasts[15]) are protected by the Canadian *Copyright Act.* Thus, though ideas and facts are not themselves protected by copyright, the form in which they have been "fixed" and communicated generally is protected[16] (for example on paper, in many cases of literary, artistic, musical or dramatic works, or on film or in a digital file).

In relation to a work, copyright grants the copyright owner the right:

> (a) to produce, reproduce, perform or publish any translation of the work,
>
> (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
>
> (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
>
> (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
>
> (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
>
> (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> (g) to present at a public exhibition, … an artistic work
>
> (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
>
> (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and
>
> (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,
>
> and to authorize any such acts.[17]

[14] *Copyright Act*, s. 2 "performer's performance". The rights over the performer's performance that the performer is given are set out in ss. 15(1) (but note that, under ss .17(1), if a performer authorizes embodiment of the performance in a cinematographic work, "the performer may no longer exercise, in relation to the performance where embodied in that cinematographic work, the copyright referred to in s. 15(1)).
[15] *Copyright Act*, s. 2 "communication signal".
[16] *Copyright Act*, ss. 3(1)(a)—(j), 15(1), 18(1), 21(1).
[17] *Copyright Act*, ss. 3(1)(a)—(j).

Copyright essentially protects works and other subject matter from being copied, performed or distributed without the authorization of the copyright owner. The copyright owner can be, but is not necessarily, the author or the creator of the work or other subject matter. Under the *Copyright Act*, the author is the original owner of copyright[18] except where a literary, artistic, dramatic or musical work has been created by an individual who is an employee (in which case the employer will own the copyright).[19] Performers initially own copyright in their performances, the makers of sound recordings initially own the copyright in sound recordings and broadcasters initially own copyright in their broadcasts.[20] However all copyright owners may transfer all or any part of their copyright interest in a work or other subject matter to others.[21] When you are considering using a work, performance, sound recording, or broadcast, it is very important to realize that the author, performer, sound recording maker or broadcaster may not own the copyright for which you are seeking permission.

Storing electronic articles and books on a "shared drive" may both infringe copyright and enable others to infringe copyright.[22] However, it would not be an infringement to store copies of works for your personal use on the hard drive of your own computer.[23]

It is unlikely that providing a hyperlink to a work would constitute publication or be seen in any context as copyright infringement. The Supreme Court of Canada, in *Crooks v Newton*[24], ruled that creating hyperlinks are in essence, creating references, and do not constitute publication in the context of defamation. Since the concept of publication is the same in the copyright context as it is in the defamation (libel and slander) content, it follows that the Supreme Court of Canada's analysis in *Crooks v Newton* would apply in the context of copyright with respect to linking from one website to another.

Copyright is bestowed automatically when a creator creates an original work or other subject matter.[25] The creator does not have to do anything other than create the work or other subject matter. While is it not required that a creator "mark" a work or other subject matter with the commonly-used copyright symbol (e.g. © Jane Doe, 2021), such marking does give the public notice that a work or other subject matter is protected and can direct would-be users of works or other subject matter to the copyright owner, from whom they can seek permission for a contemplated use of the work or other subject matter.

The term "digital lock" is often used to refer to a technological protection measure. While technological protection measure provisions are legislated in the *Copyright Act*, these provisions are distinct from the copyright provisions in the *Copyright Act*.

[18] *Copyright Act*, s. 13(1).
[19] *Copyright Act*, s. 13(3).
[20] *Copyright Act*, ss. 24 (a)—(c).
[21] Copyright Act, ss 13(4) – (5), 15, 18, and 21.
[22] *Copyright Act*, ss.3(1)(f), 27(1); *R v M(JP)*, 1996 NCSA 108 at para 9, 150 NSR (2d) 143.
[23] *Copyright Act*, RSC 1985, c C-42, s.29.22(1).
[24] *Crooks v Newton*, 2011 SCC 47 (see para 27).
[25] *Copyright Act*, s. 5(1).

The *Copyright Act* defines a "technological protection measure" as:

> …any effective technology, device or component that, in the ordinary course of its operation,
>
> > (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
> >
> > (b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.[26]

Circumventing a digital lock is the action of avoiding, bypassing, removing, de-activating or impairing a digital lock.[27] Generally, you are prohibited from circumventing digital locks that protect works or other subject matter.[28] There are exceptions, however, including one for circumventing a digital lock for the purpose of making works or other subject matter perceptible to a person with a perceptual disability.[29]

Changes to Periods of Copyright Protection in Canada

In Canada, copyright has historically lasted for the lifetime of the creator plus 50 years following the end of the year of the creator's still reads death.[30]

With respect to performer's performances, the historic period of copyright protection involving "life plus 50 years" continues, unless the performance is fixed in a sound recording. The *Copyright Act*'s s. 23(1) currently reads:

> …copyright in a performer's performance subsists until the end of 50 years after the end of the calendar year in which the performance occurs. However,
>
> > **(a)** if the performance is fixed in a sound recording before the copyright expires, the copyright continues until the end of 70 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs; and
> >
> > **(b)** if a sound recording in which the performance is fixed is published before the copyright expires, the copyright continues until the earlier of the end of 75 years after the end of the calendar year in which the first such publication occurs and

[26] *Copyright Act*, s. 41 "technological protection measure".
[27] *Copyright Act*, s. 41 "circumventing".
[28] *Copyright Act*, s. 41.1(1).
[29] *Copyright Act*, s. 41.16(1)(a).
[30] *Copyright Act*, s. 6.

> the end of 100 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.[31]

The references in s. 23(1) to periods of 70 year, 75 years and 100 years of copyright protection for performances embedded in sound recordings reflect very recent changes to the *Copyright Act* made by Canada's Parliament: **the periods of protection for anonymous and pseudonymous works,**[32] **cinematographic works,**[33] **performers' performances in sound recordings, and sound recordings**[34] **have now all been lengthened** as a result of a recent international agreement Canada has signed.[35]

The term of copyright for broadcasts (referred to in the *Copyright Act* as communication signals[36]) is not affected by the recent trade agreement with the United States and Mexico and remains 50 years after the end of the calendar year from the time of production.[37]

The new *Copyright Act* s. 6.1 for sole anonymous or pseudonymous authorship reads:

> (1) Except as provided in s 6.2 and in ss (2), where the identity of the author of a work is unknown, copyright in that work shall subsist until the end of **75 years** following the calendar year in which the work is made. However, if the work is published before the copyright expires, the copyright continues until the **earlier of 75 years** following the end of the calendar year in which first publication occurs **and 100 years** following the end of the calendar year in which the work was made.
> (2) Where, during any term referred to in ss (1), the author's identity becomes commonly known, the term provided in s 6 applies [that is, the life of the author plus 70 years after the end of the year of the author's death].[38]

The *Copyright Act*'s news. 6.2 makes virtually identical provisions for the terms of anonymous and pseudonymous works of joint authorship.[39] See **Figure 1**.

[31] *Copyright Act*, s. 23(1).
[32] *Copyright Act*, s. 6.1(1).
[33] *Copyright Act*, s. 2 "cinematographic work".
[34] *Copyright Act*, s. 2 "sound recording".
[35] *Canada-United States-Mexico Agreement*, 10 December 2019, Art. 20.62 (1 July 2020).
[36] The definition of "communication signal" in the *Copyright Act* (s.2) is "…radio waves transmitted through space without any artificial guide, for reception by the public."
[37] *Copyright Act*, s. 23(1.2).
[38] *Copyright Act*, ss. 6.1(1),(2) [emphasis added].
[39] *Copyright Act*, s. 6.2(1).

Figure 1. Protection for Works Created by Anonymous or Pseudonymous Authors and Anonymous or Pseudonymous Joint Authors (*Copyright Act,* ss. 6.1, 6.2)

Identity of Author or Joint Authors	Publication Status	Term of Protection
Unknown	Unpublished	75 years following the end of calendar year work is made
Unknown	Published before copyright expires	Earlier of i) 75 years following end of calendar year of publication or ii) 100 years following the end calendar year work is made
Identity becomes commonly known during terms set out above for "unknown"	Published or unpublished	Currently life of the author plus 50 years after the end of year of author's death – *but legislated change to life of the author plus 70 years after the end of the year of the author's death expected before Jan. 1, 2023*

The new provision for sound recordings provides that the term of copyright:

> subsists until the end of 70 years after the end of the calendar year in which the first fixation of the sound recording occurs. However, if the sound recording is published before the copyright expires, the copyright continues until the earlier of the end of 75 years after the end of the calendar year in which the first publication of the sound recording occurs and the end of 100 years after the end of the calendar year in which that first fixation occurs.[40]

Under the *Copyright Act*'s news. 11.1, cinematographic works are given copyright protection virtually identical to that of sound recordings.[41] **Figure 2** highlights this point.

[40] Copyright Act, s 23 (1.1).
[41] *Copyright Act,* s. 11.1.

Figure 2. Copyright Protection in Sound Recordings and Cinematographic Works (*Copyright Act*, ss. 23(1.1), 11.1)

Identity of Author	Publication Status	Term of Protection
Sound Recording	Unpublished	70 years after end of the calendar year in which first fixation of sound recording occurs
Cinematographic Work	Unpublished	70 years after end of the calendar year following creation of cinematographic work
Sound Recording	Published before copyright expires	Earlier of i) 75 years following end of calendar year of first publication or ii) 100 years following end of calendar year of first fixation
Cinematographic Work	Published before copyright expires	Earlier of i) 75 years following end of calendar year of first publication or ii) 100 years following end of calendar year in which cinematographic work made

Canada's *Canada-United States-Mexico Implementation Act*, has made it very clear that if the term of protection in an anonymous work, a cinematographic work, a performance or a sound recording expired before the coming into force of the new, longer periods of protection now legislated in the *Copyright Act*, no copyright can be revived in the work, performance or sound recording:

> No revival of copyright:
> Sections 6.1, 6.2, and 11.1, paras 23(1)(a) and (b) and s 23(1.1) of the Copyright Act, as enacted by ss 24, 26 and 29 of this Act, respectively, do not have the effect of reviving the copyright or a right to remuneration in any work, performer's performance fixed in a sound recording or sound recording in which the copyright or the right to remuneration had expired on the coming into force of those provisions in that Act [i.e., before July 1, 2020].[42]

[42] *Canada-United States-Mexico Implementation Act*, SC 2020, s.34.

The federal government is expected very soon (by January 1, 2023) to lengthen the term of protection for literary, artistic, musical and dramatic works in general, as well as all performers' performances, because it must do so in order to live up to the international obligations to which it has agreed: to protect works and performances for at least the lifetime of the creator plus 70 years following the end of the year of the creator's death.[43]

What are Moral Rights?

In addition to copyright, the author of a work and the creator of a performance are granted moral rights under the *Copyright Act*. These rights can be classified into three different types:

- Right to attribution – where reasonable in the circumstances, the right of the author or performer to be associated with the work as its author or performer by name or under a pseudonym and the right of the author or performer to, instead, remain anonymous.[44]
- Right to integrity – the right of the author or performer to resist modifications to a work or performance if the modifications would cause the work or performance, "to the prejudice of its author's or performer's honour or reputation, [to be] … distorted, mutilated or otherwise modified"[45]
- Right of association – the right of the author or performer to block association of a work or performance with products, services, causes or institutions if to permit the association would be "to the prejudice of its author's or performer's honour or reputation."[46]

Moral rights in original literary, artistic, musical and dramatic works are protected for the "same term as the copyright in the work",[47] while moral rights in a performer's performance last for the same term as the performer's performance is protected in copyright.[48]

Unlike copyright interests, moral rights cannot be assigned to any other person by the author or performer.[49] However, moral rights in Canada can be waived by the author or performer in whole or in part.[50]

It is relatively common for publishers to require authors to waive their moral rights when submitting their work for publication. Where an author or performer has not waived moral rights in a work or performance, the author or performer can block certain uses of the work or

[43] Canada is required to extend the term of copyright to 70 years, plus the life of the creator (*Canada-United States-Mexico Agreement*, 10 December 2019, Art. 20.62) by January 1st, 2023 (*Canada-United States-Mexico Agreement*, 10 December 2019, Art. 20.89(4)(c)).
[44] *Copyright Act*, ss. 14.1(1), 17.1(1).
[45] *Copyright Act*, ss. 28.2(1)(a)
[46] Copyright Act, ss. 28.2(1)(b)
[47] *Copyright Act*, s 14.2(1).
[48] *Copyright Act*, ss. 14.2(1), 17.2(1).
[49] Copyright Act, ss. 14.1(2), 17.1(2)
[50] *Copyright Act*, ss. 14.1(2), 17.1(2).

performance even though that author or performer holds no copyright interest in the work or performance.

Moral rights protection exists to a greater extent in Canada than in the United States. It may be helpful to their institutions and users for Canadian librarians to bear the existence of moral rights in Canada in mind.

Who Owns Copyright?

In practice, most authors do not hold copyright in the works they have created: either they created the work in the course of employment,[51] or, in seeking publication for their work, they have assigned copyright to a publisher.[52] In the case of sound recordings, the makers of the sound recordings may have assigned their copyright interests to others, in whole or in part – and broadcasters and performers may have done the same.[53]

There is a Register of Copyrights in Canada, which acts "as evidence of the particulars entered into it."[54] The owners of copyright who register their copyrights are given certificates of registration, which are evidence that the copyright subsists and the person who registered it is the owner of the copyright.[55]. There is a small fee charged for making the application.[56] The Register of Copyrights may be searched online back to 1991 (see https://www.ic.gc.ca/app/opic-cipo/cpyrghts/dsplySrch.do?lang=eng) but results of a search will not be reliable because there is no requirement placed on owners of copyright (or others, such as their assignees), since copyright arises upon creation of the work or other subject matter), to register their copyright interests. In this the Canadian registers for trademarks[57] and patents[58] (where registration of a patent or trademark is required) differ from the copyright register.

Under s 77 of the *Copyright Act* there is an ability to ask the Copyright Board to issue a license permitting you to make a use of a work or other subject matter when you have "made reasonable efforts to locate the owner of the copyright and … the owner cannot be located." See https://cb-cda.gc.ca/en/unlocatable-owners.

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[51] *Copyright Act*, s.13(3).
[52] *Copyright Act*, ss. 13(4)-(7).
[53] *Copyright Act*, s. 25.
[54] *Copyright Act*, s.53(1).
[55] *Copyright Act*, s.53(2); Government of Canada, "Registration of copyright – filing online" (24 August 2018), online: *Government of Canada* < https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03915.html>.
[56] *Copyright Act*, s. 59; Canadian Intellectual Property Office, "Complete lists of fees for copyrights", online: *Government of Canada* < https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04196.html >.
[57] Canadian Intellectual Property Office, "Canadian Trademarks Database", online: *Government of Canada* < https://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/home >.
[58] Canadian Intellectual Property Office, "Canadian Patents Database", online: *Government of Canada* < https://www.ic.gc.ca/opic-cipo/cpd/eng/search/basic.html >.

Collective Administration of Copyright in Canada

The Copyright Act establishes a system through which collective societies can represent those who own particular copyright interests (see Parts VII.1 and VII.2 of the Act[59]). The Copyright Board of Canada maintains a full list of Canada's Collective Societies on its website.[60]
If there is a collective on the list that deals with the use either librarian or user is seeking to make of a work or other subject matter, that collective can be approached to assist in getting permission for the use. In many instances where the library in a healthcare setting is part of a larger system, there may be a system-wide tariff (or tariffs) in place with a collective (or collectives) that can be consulted to see whether a given use is already covered by the tariff.

Access Copyright and COPIBEC are both collectives representing authors whose works are being used in Canada – and each appears on the list maintained by the Copyright Board. Access Copyright, for example, describes itself (in the list) as follows:

> Access Copyright is a collective voice of creators and publishers in Canada. A non-profit, national organization, we represent tens of thousands of Canadian writers, visual artists and publishers, and their works.
>
> Through agreements with sister organizations around the world we also represent the works of hundreds of thousands of foreign creators and publishers. This rich repertoire of content is highly valued, by educators, students, researchers, corporate employees and others who need to copy and share content.
>
> We license the copying of this repertoire to educational institutions, businesses, governments and others. The proceeds gathered when content is copied, remixed and shared are passed along to the copyright-holders.[61]

Library Vendors' Terms of Use and Interlibrary Loan Permissions

As an alternative to working with copyright collectives, a library (or its "parent" organization) can approach vendors directly in order to make arrangements for establishing licensing contracts

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[59] *Copyright Act*, ss. Parts VII.1 and VII.2 including ss. 67-78; *Copyright Act*, s.2 "collective society".
[60] Copyright Board Canada, "Collective Societies", online: *Copyright Board Canada* < https://cb-cda.gc.ca/en/copyright-information/collective-societies >. There is currently no collective society that specifically focusses on providing access to uses of copyrighted works specifically in health settings. Copyright collectives, however, tend to have come together to represent given copyright rightsholders, rather than coming together to serve particular target markets for copyright permissions (see the list at https://cb-cda.gc.ca/en/copyright-information/collective-societies).Hospitals are free to deal with collectives in gaining access to applicable works in bulk, instead of having to negotiate individually with each copyright owner.
[61] Access Copyright, "About Access Copyright" (2021), online: *Access Copyright* < https://www.accesscopyright.ca/about-us/ >.

that will allow the library to make available works to their patrons.[62] Entering into such contracts, governed by contract law, can take the relationship between copyright owners and the library and its patrons outside the scope of the Canadian *Copyright Act.* Such agreements typically dictate the law that governs the licensing contract – and that law may not be the law of Canada. The terms of each licensing agreement will define and limit copyright permissions granted both to you as a provider of library services and to your patrons. The following are examples of terms of use and interlibrary loan permission provisions found in the contracts posted by certain vendors.[63]

a) EBSCO

i) Terms of Use and applicable law

https://www.ebsco.com/website-terms-of-use

> "All matters relating to the Website and these Terms of Use and any dispute or claim arising therefrom or related thereto (in each case, including non-contractual disputes or claims), shall be governed by and construed in accordance with the internal laws of the Commonwealth of Massachusetts without giving effect to any choice or conflict of law provision or rule (whether of the Commonwealth of Massachusetts or any other jurisdiction).
>
> Any legal suit, action or proceeding arising out of, or related to, these Terms of Use or the Website shall be instituted exclusively in the federal courts of the United States or the courts of the Commonwealth of Massachusetts in each case located in the County of Essex. You waive any and all objections to the exercise of jurisdiction over you by such courts and to venue in such courts."

ii) Interlibrary Loan Permissions

https://connect.ebsco.com/s/article/What-is-EBSCOs-authorized-user-policy-in-regard-to-electronic-reserves-and-transferring-content-to-other-libraries?language=en_US

> "EBSCO does not have intellectual property rights to the full text content included in databases, other than the right to include this content (articles, images, etc.) in our products. The intellectual property rights are controlled by the publisher. Users must abide by Copyright Act of 1976 as well as any contractual restrictions, copyright restrictions or other restrictions provided by publishers, as specified in the products.

[62] Refer back to the section "What Law Governs Copyright in Canada?" above for more information on the use of contracts in administering copyright.
[63] As of July 2021.

With regard to electronic reserves, it is OK for customers to use EBSCO*host* content for electronic reserves as long they comply with copyright law, the policy of the subscribing library, and the copyright statement within an individual record. Generally, it is acceptable to use one article per issue and to put it on electronic reserve for only one semester. Using more than one article per issue, or using an article for more than one semester, would require permission from the publisher.

With regard to course packs, customers may not use content for course packs unless they first get permission from the publisher.

With regard to transferring articles to another library via an interlibrary loan (ILL), content may be used for ILL unless ILL is specifically prohibited by the publisher in the copyright statement within an individual record."

b) Ovid

i) Terms of Use and applicable law

https://www.wolterskluwer.com/en/solutions/ovid/terms-of-use

"By accessing, browsing and/or otherwise using this Online Service you acknowledge that you have read, understood and agreed to be bound by this Agreement, and you agree to comply with all applicable laws and regulations, including U.S. export and re-export control laws and regulations. For purposes hereof, "you" or "your" shall include yourself, your organization and any entity you represent or on the behalf of which you use the Online Service. If you do not agree to all of these terms and conditions, you may not access, browse and/or use this Online Service. The material provided on this Online Service is protected by law, including, but not limited to, United States copyright law and international treaties."

"All Online Service materials, including, without limitation, text, pictures, graphics and other files and the selection and arrangement thereof are copyrighted materials of Ovid or its licensors, all rights reserved. Except for the Authorized Use specified above, you may not copy, modify or distribute any of the Online Service materials. You may not "mirror" any material contained on this Online Service on any other server. Any unauthorized use of any material contained on this Online Service may violate copyright laws, trademark laws, the laws of privacy and publicity and communications regulations and statutes."

ii) Interlibrary Loan Permissions

Neither Ovid's terms of use nor its website currently mention interlibrary loan permissions.

c) Proquest

i) Terms of Use

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[64] Note that for all purposes connected with this Proquest licence, "fair use" is defined as the law of fair use found in the United States – and "fair dealing" is defined as the law of fair dealing found in England. For the purposes of this Proquest licence, Canada's fair dealing law would be irrelevant.

What is the "Public Domain"?

The "public domain" is a term that has been coined to represent material that has never been covered by copyright law and, as well, works, sound recordings, performers' performances and broadcasts in which copyright has now expired. For instance, a book in Canada written by an author who died 150 years ago is no longer protected by copyright and is said to have fallen into the public domain: it would not be infringement to reproduce the work or any part of it (or take any other action that would be controlled by a copyright holder if copyright existed in the work). On the other hand, if a 2nd edition of such a book, edited by a younger author only 35 years ago, exists, there *will* be in copyright in that work since copyright held by the younger author will not yet have expired. In the case of the 2nd edition, permission will be required from those who hold copyright interests in the 2nd edition (perhaps the younger author – or perhaps the publisher of the 2nd edition – or perhaps another).

What is "Open Access"?

"Open access" to a work online does not mean it is in the "public domain." "Open Access" works are those where copyright owners have made their work (or other subject matter), insofar as they hold copyright in it, accessible for use while still retaining their copyright interests in the work (or other subject matter). Under an open access regime, copyright holders in works or other subject matter do not give up their copyright interests in the works or other subject matter. For example, the Canadian Medical Association Journal (CMAJ), which has, since January 1, 2021 operated through an open access regime (specifically by making material available under either one of two Creative Commons licenses), makes the following statement about copyright:

> All articles published in *CMAJ* are protected by copyright. Subject to fair dealing and any applicable legal exceptions, the reproduction of substantial portions of *CMAJ* content is only permitted as detailed below.
> The copyright in articles is held by the *CMAJ*'s owner for older articles or by the authors and/or their institutions for newer articles. In cases where copyright is retained by authors or their institutions, *CMAJ* usually requires that they sign an exclusive license to publish which makes the journal the sole body able to grant permission for reuse. Commercial reuse is strictly prohibited without prior consent from the *CMAJ*. Please email permissions@cma.ca to obtain consent.
> Any uses or copies of *CMAJ* — in whole or in part — must include a bibliographic citation including author(s), article title, journal name, year, volume and page numbers, plus the URL www.cmaj.ca, and the copyright notice that appears with each article.[65]

The *CMAJ* states that articles published prior to January 1, 2021 in the *CMAJ* "may only be copied or shared for non-commercial educational purposes. Appropriate credits must be

[65] Canadian Medical Association Journal, "Copyright, open access and permission to reuse" (2021), online: *CMAJ* < https://www.cmaj.ca/page/copyright >.

given. The distribution of derivative works is not permitted."[66] Articles published since January 1, 2021, have been and are being published under one of two Creative Commons licences.[67] As the Creative Commons website describes, Creative Commons licences

> give everyone from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions… [Creative Commons] licences do not affect freedoms that the law grants to users of works otherwise, such as exceptions and limitations to copyright law like fair dealing. Creative Commons licences require licensees to get permission to do any of the things with a work that the law reserves exclusively to a licensor and that the license does not expressly allow. Licensees must credit the licensor, must keep copyright notices intact on all copies of the work, and link to the licence from the copies of the work.[68]

Figure 3 shows the array of copyright permissions systems currently in place for use of *CMAJ* material…

Figure 3. Open Access Policies of the *Canadian Medical Association Journal*

For articles published prior to January 1, 2021	**Articles published after January 1, 2021 each appear under one of two types of Creative Commons licence:**	
Journal policy based on copyright licenses between the authors and the *CMAJ*	Creative Commons Attribution Non-Commercial No Derivatives	Creative Commons Attribution
Single copies of articles may only be copied or shared for non-commercial educational purposes, appropriate credits must be given and the distribution of derivative works is not permitted.	Allows author, and any non-commercial users to share, copy and redistribute the material in any format as long as they adhere to: i) giving appropriate credit, ii) there are no commercial purposes iii) modified material is not distributed and iv) no legal terms or technological measure can restrict others from doing anything the licence permits.	All users can share, copy and redistribute the material in any medium or format, as well as adapt, remix, transform and build upon the material for any purpose, so long as they give appropriate credit and do not apply legal terms or technological measures that would restrict others from doing anything the licence permits.

[66] Canadian Medical Association Journal, "Copyright, open access and permission to reuse" (2021), online: *CMAJ* < https://www.cmaj.ca/page/copyright >.
[67] Canadian Medical Association Journal, "Copyright, open access and permission to reuse" (2021), online: *CMAJ* < https://www.cmaj.ca/page/copyright >.
[68] Creative Commons, "About The Licenses", online: *Creative Commons* https://creativecommons.org/licenses/

Exceptions to the Rights of Copyright Holders under Canada's Copyright Act

Special exceptions to use works in copyright are granted to two categories of users by Canada's *Copyright Act*:

- specifically defined "libraries, archives and museums"[69](LAMs); and
- specifically defined "educational institutions"[70] (EIs).

The *Copyright Act* also contains exceptions allowing use of a copyrighted work or other subject matter when the use constitutes "fair dealing" as defined in sections 29, 29.1 and 29.2.[71]

a) What is a "Library, Archive or Museum" as Defined in Canada's Copyright Act?

The *Copyright Act* defines a "library, archive or museum" (LAMs) as:

> "…an institution, … that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers"[72]

This definition indicates that to be a LAM, and institution must meet two criteria:

- it must have a collection of documents and other materials that is open to the public or to researchers and
- it must not be established, conducted or form part of or be controlled, either directly or indirectly, by another institution that is established or conducted for profit.

There are both for-profit universities in Canada and for-profit hospitals and health facilities. Libraries in either of these settings would not be eligible for the Copyright Act's LAM exception. On the other hand, there will be many libraries in healthcare settings in Canada that will fulfill the criteria to benefit from this exception.

The exceptions to copyright available to libraries that fall under the LAM exception can be found in ss. 30.1 – 30.4 of the *Copyright Act*.

[69] *Copyright Act*, s. 2 "library, archive or museum".
[70] *Copyright Act*, s. 2 "educational institution".
[71] *Copyright Act,* s. 29.
[72] *Copyright Act*, s. 2 "library, archive or museum".

Under the exceptions outlined for LAMs, a library may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement.[73] Under the LAMs exceptions, a library may also make a digital copy for a person requesting use the copy for the purpose of research or private study, of a work that is, or is contained in, an article published in a scholarly, scientific or technical periodical (as well as other periodicals and newspapers so long as they are published more than one year before the copy is made).[74] (Note that this exception does not include making chapters of books available.)

If a library is considered a LAM, it is be permissible for the library to send another library, which is also a LAM, a digital copy of an article through interlibrary loan. However, this exception does have limits, as the receiving library must prevent the individual who requested the work from:

- "making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;
- communicating the digital copy to any other person; and
- using the digital copy for more than five business days from the day on which the person first uses it."[75]

In certain cases, there is also an exception to infringement for LAMs to migrate a copyrighted work that is part of its collection to a new format. LAMs can make available work in alternative formats if the library "considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable."[76] However, this exception does not apply "where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes" of migrating the work when the original format is obsolete.[77]

There is also an exception to infringement under the *Copyright Act* for a LAM to copy a work for its permanent collection, but only if the original is rare or unpublished and is "(i) deteriorating, damaged or lost, or (ii) at risk of deterioration or becoming damaged or lost."[78] Again, this exception does not apply "where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes" of preservation.[79]

b) What is an "Educational Institution" as Defined in Canada's Copyright Act?

The *Copyright Act* defines an "educational institution" [EI] as:

> a) a non-profit institution [government] licensed … to provide preschool, elementary, secondary or post-secondary education,

[73] *Copyright Act*, RSC 1985, c C-42, s. 30.2(1); *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, at paras 83 – 84, [2004] 1 SCR 339.
[74] *Copyright Act*, RSC 1985, c C-42, s. 30.2(2).
[75] *Copyright Act*, s. 30.2(5.02).
[76] *Copyright Act*, s. 30.1(1)(c).
[77] *Copyright Act*, s. 30.1(2).
[78] *Copyright Act*, s. 30.1(2).
[79] *Copyright Act*, s. 30.1(2).

b) a non-profit institution directed … by a board of education … and that provides continuing, professional or vocational education or training,
c) a department or agency of … government, or any non-profit body, that controls or supervises education or training referred to in (a) or (b); or
d) any other non-profit institution prescribed by regulation.[80]

Under this definition, all non-profit college and university libraries, and any academic health science libraries operating in them, are both EIs as well as LAMs and, therefore, can take advantage of the provisions of the *Copyright Act* applying to EIs as well as those applicable to LAMs. It would be wise to investigate whether your library or institution is legally part of an EI, that is, whether it is part of either a non-profit institution licensed federally or provincially to provide preschool, elementary, secondary or post-secondary education or part of a non-profit institution directed by a board of education providing continuing, professional or vocational education or training. If your library meets the LAM definition and also forms part of an EI (as defined), s.30.4 of the *Copyright Act* specifically states that the library, as a LAM, can also take advantage of the EI exceptions (ss 29.4-30.3) and the import exceptions set out in s.45.

The exemptions available for EIs can be found in ss. 29.4 – 30.04 and 30.4 in the *Copyright Act*. While it would ordinarily constitute infringement to reproduce or make copies of an entire work,[81] for example, it is permissible for an EI, for the purposes of education or training on its premises, to reproduce a work, or do any other necessary act, in order to display it.[82]

c) What is "Fair Dealing" under Canada's Copyright Act?

The *Copyright Act* permits users to deal "fairly" with copyrighted material as long as the "dealing" is for any one or more of the following set of purposes: research, private study, education, parody, satire, criticism, review or news reporting.[83] In Canada, if the use does not fall within this list, it cannot be considered to fall within fair dealing.[84]

While healthcare-related and hospital libraries in for-profit institutions cannot avail themselves of LAM or EI exceptions in the *Copyright Act*, these libraries (as well as libraries in LAMs or EIs) can look to the fair dealing provisions in the *Copyright Act* to justify uses made of materials in copyright without permission of the copyright holder.

The Canadian *Copyright Act* does not define what "fair dealing" is, nor does it clarify what types of use would constitute research, private study, education, parody, satire, criticism, review or news reporting. In the cases of criticism, review and news reporting, however, certain legislated

[80] *Copyright Act*, s. 2 "educational institution".
[81] *Copyright Act*, ss. 3(1)(a), 27(1).
[82] *Copyright Act*, s. 29.4(1).
[83] *Copyright Act*, ss. 29 – 29.2.
[84] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, paras 65-73. This may be contrasted with the situation in the United States where the list of uses legislated under the concept of "fair use" (see 17 USC § 107 (1992)) is not exhaustive and so other uses besides those listed can be found to fall within "fair use."

conditions have to be met in order for a dealing be considered in terms of coming within any of these three exceptions.[85]

In 2004, the Supreme Court of Canada, in *CCH Canadian Ltd. v Law Society of Upper Canada*,[86] held that the following factors are important in determining whether use of a work in copyright falls within "fair dealing":

- The ***purpose***: does it fall within any of the categories of research, private study, education, parody, satire, criticism, review or news reporting?

- The ***character*** of the dealing: what was done to the work? Was it used repetitively?

- The ***amount*** of the dealing: how much of the work was copied and was it a substantial part of the work in qualitative terms?

- ***Alternatives*** to the dealing: were there commercial alternatives available to the personal claiming fair dealing?

- The ***nature*** of the work: is there a strong public interest in access to the information?

- The ***effect*** of the dealing: does the use made by the person claiming fair dealing compete with the market for the work? To what extent was the copyright owner impacted by the use?

The unanimous Supreme Court of Canada, in the decision in *CCH Canadian Ltd. v Law Society of Upper Canada*, quoted the policy in place at the Law Society's Great Library:

> In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:
>
> Access to the Law Policy
>
> The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

[85] For criticism or review, see s 29.1; for news reporting, see s 29.2.
[86] *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] 1 SCR 339, para 61 (in part).

> This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.
>
> Guidelines to Access
>
> 1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
>
> 2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
>
> 3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
>
> 4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
>
> 5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

The Supreme Court in 2004 went on to specifically approve the policy (quoted above) set out by the Law Society of Upper Canada:[87]

> …The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and

[87] *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] 1 SCR 339, para 73.

> has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

Since *CCH Canadian Ltd. v Law Society of Upper Canada* was decided in 2004, there have been other decisions made at the Supreme Court of Canada that have been important in developing an understanding of the concept of fair dealing. The most recent of these is *York University v Access Copyright*.[88]

The litigation leading to Supreme Court's decision in *York University v Access Copyright* was very lengthy and very complex. On December 23, 2010, the Copyright Board granted Access Copyright an interim tariff for post-secondary institutions.[89] Access Copyright launched its lawsuit against York University in the Federal Court on April 3, 2013, seeking to force York University to adhere to the terms of the interim tariff. York University entered a defence against Access Copyright's claims but also made its own counterclaim for a declaration of fair dealing. On July 30, 2014, Prothonotary Aalto, at York University's instigation, ordered "bifurcation" of the impending trial into two phases.[90] It is only appeals of decisions made by the courts[91] in the course of this "first phase" that reached the Supreme Court of Canada in 2021!

Justice Phelan, in rendering judgment in 2017 on Phase I of the two parts of the action, noted that it would only be in the future Phase II of the trial (the "damages" phase) that York University would be expected to raise the issue of fair dealing.[92]

York University appealed Justice Phelan's decision on Phase I to the Federal Court of Appeal, both in respect of Justice Phelan's decision that York was subject to the interim tariff and in respect of his dismissal of its counterclaim for a declaration of fair dealing.[93] The Federal Court of Appeal rendered its decision in the matter in 2020.[94]

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[88] *York University v Canadian Copyright Licensing Agency* ("*Access Copyright*"), 2021 SCC 32.
[89] Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be Collected by Access Copyright (Post-Secondary Educational Institutions) (2011), 92 C.P.R. (4th) 434.
[90] This process is described in the judgment of the Supreme Court of Canada in *York University v Access Copyright*, 2021 SCC 32, at para 16.
[91] *Canadian Copyright Licensing Agency* [Access Copyright] *v York University*, 2017 FC 669 (Phelan, J) and *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77 (Pelletier, JA, writing also for DeMontigny and Woods, JJA)
[92] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, at paras 219, 220. In making his decision on Phase I, Justice Phelan found in favour of Access Copyright, finding the interim tariff Access Copyright had obtained from the Copyright Board was enforceable against York University and dismissing York University's counterclaim for a declaration of fair dealing (For further information about Justice Phelan's decision focused on the perspective of libraries, see Margaret Ann Wilkinson, "[An Overview] *Access Copyright v York University*, Federal Court, Justice Phelan, 2017 FC 669" (July 19, 2017, 6 pp) at < https://accessola.com/wp-content/uploads/2020/08/2017-Access-Copyright-v-York-U.pdf >.
[93] Notice of appeal filed September 22, 2017.
[94] *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77. Pelletier, J, for the Federal Court of Appeal, in addition to making other dispositions, at para 4 "dismiss[ed] York's counterclaim on the basis that its Guidelines do not ensure that copying which comes

The judgment of the Federal Court of Appeal was multi-faceted[95] and both York University and Access Copyright sought leave to appeal to the Supreme Court of Canada. On October 15, 2020, the Supreme Court of Canada granted both parties leave to appeal.[96] On July 30, 2021, the full Supreme Court unanimously decided the matter[97] (which, it will be recalled, involved only Phase I of the lawsuit between Access Copyright and York University).

The Supreme Court held that the tariff which, in the lawsuit, Access Copyright was seeking to enforce against York University did not apply to York University: in its judgment, written by Justice Abella, the Supreme Court stated that the *Copyright Act* "does not make tariffs approved by the Copyright Board pursuant to s 70.15 [the section that applies to tariffs sought by Access Copyright] mandatory against users who choose not to be licensed on the approved terms."[98] This has two direct consequences, one of general application and one with specific application to the litigation between Access Copyright and York University:

(1) this finding by the Supreme Court of Canada legitimizes the position taken by a goodly number of institutions in Canada that they are permitted to "opt out" of being governed by tariffs which a copyright collective has sought and received from the Copyright Board under s 70.15 of the *Copyright Act*;

(2) this finding knocks out the basis of Access Copyright's lawsuit against York and so "Phase 2" of the lawsuit will now never take place; in order to take further legal action against York University, Access Copyright will have to explore possibilities such as suing for infringement pursuant to s 34(1).[99]

The Supreme Court also found "consideration of [York's] Guidelines in this case inappropriate."[100]The Supreme Court distinguished what it had said in 2004, when it decided

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within their terms is fair dealing". also found York University's dealings with copyright material did not constitute fair dealing (para 310). On the other hand, however, the Federal Court of Appeal also found that Access Copyright could not sue York University on the basis of its interim tariff ordered by the Copyright Board and, as a result, "the validity of York's Guidelines as a defence to Access Copyright's action [did] not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action." (para 206).

[95] For further information about this decision of the Federal Court of Appeal focused on the perspective of libraries, see Margaret Ann Wilkinson, "The Decision of the Federal Court of Appeal in *York University v Access Copyright*" (May 13, 2020, 9 pp) at https://accessola.com/wp-content/uploads/2020/08/2020-05-York-v-Access-FCA-OLA-Comment-FINAL.pdf

[96] Supreme Court case no. 39222.

[97] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32.

[98] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 75.

[99] The Supreme Court recognizes that future internal changes between Access Copyright and its members would permit Access Copyright to maintain infringement actions in the future: see para 74 of the judgment. See also Catherine Lovacs, "Access Copyright calls for legislation to ensure 'functional marketplace for educational publishing,' *Canadian Lawyer* (12 August 2021) where, near the end of the article, Lovics notes "theoretically, we could see class actions for copyright infringement, because that structure would facilitate advancing infringement claims on behalf of members for which there's a repertoire."

[100] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 83. This is because the Supreme Court had established earlier in that same paragraph in the judgment that the

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 [*CCH*], from its refusal to settle the status of York University's Guidelines in this 2021 decision in *York University v Access Copyright*:

> It is true that in *CCH*, the Court granted a declaration to the Law Society that it "does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy" (para 76). But it did so in the context of a live infringement action brought by proper parties, and where the Law Society relied on its "practices and policies" to show that its dealings were fair.[101]

The Supreme Court in *York University v Access Copyright* warns that "the issue of fair dealing … can only be determined in a factual context"[102] but goes on to state that "[a] proper balance [in copyright] ensures that creators' rights are recognized, but authorial control is not privileged over the public interest."[103] Seventeen years later, the unanimous full Supreme Court in 2021 has endorsed wholeheartedly the framework for analyzing fair dealing that was set up by the unanimous full Supreme Court in 2004 in *CCH Canadian Ltd v Law Society of Upper Canada*.[104]

While the Supreme Court did not decide the question of fair dealing raised before it in the litigation between Access Copyright and York University, it did, in its decision, provide guidance on the matter by indicating that its decision "should not be construed as endorsing the reasoning of the Federal Court and Federal Court of Appeal [in the decisions leading to the appeal before the Supreme Court] on the fair dealing issue. There are some significant jurisprudential problems with those aspects of their judgments…".[105] The Supreme Court noted the Federal Court and Federal Court of Appeal below each should have taken into account both the institutional perspective of the university and "the perspective of the students who use the materials" when considering fair dealing.[106] The Supreme Court also endorsed its own approach in its earlier decision in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*: "[s]ince fair dealing is a 'user's' right, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate."[107] Moreover, again quoting itself in *Society of Composers, Authors and Music Publishers of*

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interim tariff under which Access Copyright was suing York "is not mandatory and is therefore unenforceable against York." This, in turn, as the paragraph notes, meant that there was "no live dispute between the parties…The undesirable consequences of assessing fair dealing guidelines in the absence of a genuine dispute between proper parties is that the analysis is inevitably anchored in aggregate findings and general assumptions without a connection to specific instances of works being copied."

[101] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 63.
[102] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 88.
[103] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 94.
[104] See *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 96.
[105] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 87.
[106] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 98.
[107] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 104. citing to *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, para 41.

Canada v Bell Canada, the Supreme Court held " 'large scale organized dealings' are not 'inherently unfair'."[108]

d) Other Notable Exemptions for Uses under Canada's Copyright Act

The *Copyright Act* also provides an exemption from

> infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person or for a non-profit organization acting for the benefit of such a person to
>
> > (a) reproduce a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability.[109]

There is also an exception for Non-commercial user-generated content (s. 29.21) where, within very strict limitations, a person can use a copyrighted image, table or graph in creating a new work:

> It is not an infringement of copyright for an individual to use an existing work…, which has been published or otherwise made available to the public, in the creation of a new work… in which copyright subsists … for the individual… to use the new work… if:
>
> (a) the use of …the new work…is done solely for non-commercial purposes;
> (b) the source – and, if given…, the name of the author …of the existing work if is reasonable in the circumstances to do so; and
> (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, …was not infringing copyright.
> (d) does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on an existing or potential market for it;[110]

Considering how valuable health information and publications can be, the first requirement may be difficult to satisfy when new works, and the existing work being incorporated, are within the health sphere.

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[108] *York University v Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32, para 105, quoting *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, at para 43. The Court in *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, goes on to say at para 105 "the character of the dealing factor must be carefully applied in the university context, where dealings conducted by larger universities on behalf of their students could lead to findings of unfairness when compared to smaller universities. This would be discordant with the nature of fair dealing as a user's right." The Court concludes its decision, at para 106, by commenting "[a]t the end of the day, the question in a case involving a university's fair dealing practices is whether those practices actualize the students' right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the [Copyright] Act. Since we are not deciding the merits of the fair dealing appeal brought by York, there is no reason to answer the question in this case."

[109] *Copyright Act*, s. 32(1)(a).

[110] *Copyright Act*, s. 29.21(1).

For More Information

Copyright Act:
https://laws-lois.justice.gc.ca/eng/acts/C-42/Index.html

Copyright Board of Canada:
http://www.cb-cda.gc.ca/

Canadian Copyrights Database:
http://www.ic.gc.ca/app/opic-cipo/cpyrghts/dsplySrch.do?lang=eng

Canadian Intellectual Property Office:
http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/Home

This is provided for information purposes only and is not intended to be legal advice. You should contact your legal counsel if you have any questions on these issues.