

Mired in Shades of Grey: Copyright Issues

Eva Revitt and Scott Day
NEOS Mini Conference, June 7, 2013

The plan . . .

- How we got here - CCH, Pentalogy, C-11
- Academic institutions and Access Copyright
- Libraries and user rights
- Copyright stumppers

CCH vs Law Society of Upper Canada

Supreme Court Rules . . .

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Supreme Court Rules . . .

“research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained, and is not limited to non-commercial or private context”

CCH vs Law Society of Upper Canada

- Fair dealing is a user right
- Policy is important
- Availability of a license is irrelevant

Supreme Court - two part test

Part 1

Is it for an allowable purpose?

- **Research**
- **Private Study**
- **Criticism**
- **Review**
- **News reporting**

Part 2

Is the copying fair?

- **Purpose** of the dealing
- **Character** of the dealing
- **Amount** of the dealing
- **Alternatives** to the dealing
- **Nature** of the work
- **Effect** of the dealing

EIGHT YEARS LATER

Pentalogy

Pentalogy

- Supreme Court hears five (5) copyright cases, released decision July 12, 2012
 - Entertainment Software Association, et al. *vs* SOCAN
 - Rogers Communications Inc. *vs* SOCAN
 - **SOCAN *vs* Bell Canada**
 - **Alberta Education *vs* ACCESS**
 - ReSound *vs* Motion Picture Theatre Association of Canada

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 - ReSound *vs* Motion Picture Theatre Association of Canada
- CCH fair dealing principles reinforced, technological neutrality and the user perspective

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- Digital locks or technical protection measures (TPMs) trump everything else [41]

What the changes mean

- Fair dealing is a broadly available right, particularly for the educational sector
- *Copyright Act* changes support the Supreme Court's direction - *Education* added as a purpose
- Access Copyright licences and tariffs are no longer needed
- Technological neutrality means vastly expanded use of content online

Fair Dealing Policy

- In response: entire educational sector broadly adopts a Fair Dealing Policy addressing copying and posting by **faculty and staff for students**
- Policy represents a “safe harbour” interpretation of fair dealing
- Policy provides institutional **authorization** to copy and contains safeguards for content owners
- Policy requires that individual instances that exceed the policy receive a fair dealing assessment
- Fair dealing can apply in other contexts

Fair Dealing Policy

A short excerpt includes:

- a.** up to 10% 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 individual 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 publication containing other poems or musical scores
- g.** an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

Impact on Access Copyright

- 85% of Access revenue was from educational sectors
- K-12 sector ended participation in tariff in January, removing 40% of Access Copyright revenue
- 28% of non-Quebec AUCC universities opted out by September 2012
- 75% of ACCC colleges and technical institutes opted out by September 2012

Impact on Access Copyright

- Access laid off of 40% of their staff
- Currently involved in 4 expensive litigations
- Conducting consultations with their stakeholders about changes
- Committed to tariffs and litigation in the shorter term - will examine options
- Not currently interested in the most obvious business model - transactional licensing
- Access recognizes it's legal strategy will lose in the long run

York University Lawsuit

- March 2013: Access files claim to enforce Interim Tariff against York University - not an infringement claim
- Primarily a challenge to the Fair Dealing Policy
- York is not unique - claim addresses copying similar to what any institution has copied under the Fair Dealing Policy
- All institutions will benefit from a York victory in this case
- Suit about Access sending a message - stop loss

York University Lawsuit

- The current legal and legislative climate favours York
- An “industry practice” supports the fairness of a fair dealing approach
- Broad adoption and application of Fair Dealing Policy by universities supports York’s case
- Universities should opt out of Model Licences and apply a fair dealing and permissions model for copyright management

Libraries and Fair Dealing

- Fair dealing should be the foundation for library copyright policies
- Fair dealing is an open ended concept - policy need only be demonstrably fair in order to apply
- Policy amounts for ILL, document delivery, reserves can be based on Fair Dealing Policy amounts
- The above works only if fair dealing assessments by a designated evaluator are readily available for requests that exceed these amounts
- Protections for the rights of content owners should be provided by library policies when necessary - but avoid unnecessary restrictions

Libraries and Fair Dealing

- “Research” is given a broad interpretation: all library patrons would qualify
- Libraries can do anything for a patron that that patron can do for themselves under fair dealing - Risk is low
- Educational Fair Dealing Policy and *Copyright Act* educational exceptions apply to eReserves

Video streams

- PPR, site and “library viewing” licence payments not required for educational performances
- Any classroom use of content can now be used online in the form of a “lesson” including whole video and audio works (30.01)
- A lesson can be a virtual classroom session or content created as a “lesson” and posted in an LMS or eReserves
- Anti-circumvention measures (“Digital Locks”) create a barrier for the use of DVDs

Screen Capture for DVDs

- Canadian anti-circumvention measures mirror U.S. Digital Millennium Copyright Act (DMCA) measures in effect since 1998
- U.S. example is instructive of how to proceed with using locked video sources for education
- Screen capture widely used by U.S. educators to create clips and streams from locked DVDs without circumvention
- U.S. Register of Copyrights recognizes the method as a legitimate alternative to circumventing locks

Screen Capture for DVDs

- The software player must use licensed decryption - players bundled with operating systems or offered for sale are likely to use licensed decryption
- Player provides the legal decryption, **then** screen capture creates a unique digital copy of the video
- Exception applies to lessons - video or audio streams for individual classes at the request of an instructor through an LMS or eReserves (or clips made for in-class performance)
- Exception has important requirements that must be followed in order for it to apply

Contracts

- Digital content is more likely licensed - not purchased and owned by libraries
- Contracts terms associated with library digital content previously provided greater access to content than otherwise available
- Copyright changes mean that contract terms are now often more restrictive than fair dealing uses
- A paper copy of a journal article can be scanned and posted in eReserves for a class under fair dealing
- The same article accessed through a database may have contract terms that disallow posting in eReserves

A copying free for all?

- Fair dealing only deals with limited copying
- Universities and colleges spend hundreds of millions on learning materials each year - including textbook purchases and transactional licensing
- Better messaging is required from the educational sector
- Education is in the public interest

COPYRIGHT STUMPERS

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Policy of the Great Library - *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.*

I have received a request from an instructor who wants to show excerpts of a movie available on Netflix. My initial instinct was to say "no" because it is password-protected (a digital lock). However, would use of Netflix services be considered a rental and, as such, permissible to use in the classroom? (Eva)

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Butler University Copyright FAQ

Type your question here, e.g. "What is fair use?"

Useful Tip: Use natural language or keywords to see if your question has already been asked.

Q Can I show Netflix movies in my classroom?

Topics: [Classroom](#), [Streaming](#), [Netflix](#)

A Answer

We would advise against using Netflix streaming or DVDs in a classroom. We do not allow for the public classroom display of their streaming video. See [Terms of Service](#) for more information.

Technology Teacher

Netflix in the Classroom

Posted on [December 13, 2010](#) by [Barbara Schroeder](#) • Posted in [Tools](#) • Tagged [Netflix](#)

I was a late [Netflix](#) adopter, which is probably a surprise to many readers. Renting movies through Blockbuster or borrowing the library became a non-thinking habit. Late charges, having to actually go to a place to search for and pick up the movies, and high rental rates were

Ask Us!

Ask questions or search for answers

Q Can I show Netflix movies in my classroom?

Topics: [Copyright](#)

Last Updated: Oct 24, 2012 | 357 Views

A Answer

Was this helpful?  1  0

After speaking with a Netflix representative (10/24/2012), they said they have no problem with a teacher streaming a movie to a class and know of several colleges and universities that do that.

Netflix Turns a Blind Eye to Illegal Use by School Libraries

[Adrianne Jeffries](#) · September 20th, 2010

 +1 0  Tweet 317  Share  Like 0



Schools have been illegally showing videos in schools for educational purposes forever. But now universities are [taking advantage](#) of Netflix rentals and streaming video to supplement their media collections.

The practice recently gained attention after some first person accounts of the cost-saving wonders of Netflix showed up in a [library trade publication](#) and on a [blog](#).

Image via [CrunchBase](#)

How does your institution deal with the possibility of instructors uploading infringing material to your learning management system. What is the institution's responsibility? (Scott)

Institution is responsible for the acts of those under its authority

Policies and Guidelines

Education, Support

Academic freedom

Institution may need to demonstrate compliance

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[Result List](#) | [Refine Search](#) | 1 of 1

How to Fix Knowledge Management.

Authors: Gilmour, David¹

Source: [Harvard Business Review](#). Oct2003, Vol. 81 Issue 10, p16-17. 2p. 1 Color Photograph, 1 Chart.

Document Type: Article

Subject Terms: *KNOWLEDGE management
*RESEARCH
*INFORMATION technology
*INDUSTRIAL management
*DATA mining
*COMPUTERS in business
*MANAGEMENT
*INFORMATION resources management
*OFFICE information systems
*BUSINESS logistics
*CORPORATE culture
*INTELLECTUAL capital
EVALUATION

Abstract: People's tendency to hoard their information and release it only selectively is often a core problem in many corporate cultures. But some firms are finding their employees are more eager to share when they perceive there's something in it for them--like appearing more valuable to their company.
[ABSTRACT FROM AUTHOR]

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Ebsco “....*Notwithstanding the above restrictions, this paragraph shall not restrict the use of the materials under the doctrine of “fair use” as defined under the laws of the United States. Publishers may impose their own conditions of use applicable only to their content.*”

Contract issue. Contract law trumps fair dealing.

I would like to copy a chapter and a number of articles from various journals and post to Blackboard. These are required reading for my course and would substitute for using a textbook. Am I violating copyright? (Scott)

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NO

Faculty member has the right to choose whatever materials are suitable for their course - payment is required whenever fair dealing or a *Copyright Act* exception does not apply to the use

Fair Dealing Policy covers this use

No use from a single source should replace the purchase of that source

Supreme Court ruled the amount used must be assessed for each individual source and not the total amount used in the aggregate

The Copyright Modernization Act negates the need for PPR, however, many vendors have individual and institutional pricing. The difference is often hundreds of dollars, do I have to pay the institutional price? What if there is a license available? (Eva)

The issue is not about public performance rights but about tiered pricing

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[Home](#) / [Titles](#) / [Napoleon \(1/6\)](#)



Napoleon (1/6)

This is also part of this series: [Warriors \(6\)](#)

- ☒ DVD: \$249
☐ DVD - Site: \$149

[ADD TO CART](#)

[» Request Preview Access](#)



Subjects: [Ancient Civilizations](#),
[Anthropology](#), [Biographies](#), [History](#), [War](#)


Grade Level: SrH-Adult
Producer: [BBC](#)
Closed Captioned: No

Running Time: 50 mins
Country of Origin: Great Britain
Study Guide: No


Copyright Date: 2007
Available in French: Yes

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Grade Level: SrH-Adult	Running Time: 50 mins	Copyright Date: 2007 Available in French: Yes
Producer: BBC	Country of Origin: Great Britain	
Closed Captioned: No	Study Guide: No	



Audio Cine



☐ **A: BASIC PUBLIC PERFORMANCE COPYRIGHT LICENSE (SCHOOL TIME PRESENTATIONS)**

+ SPECIAL REBATE OF 50% OFF ON ONE PRE-RELEASE!

Allows for the unlimited screening of commercially available copyrighted feature length films during regular school hours, for students from the school (only) and within a non-profit environment i.e. no fundraisers allowed.

\$0.75 per student / minimum charge of \$350 (+ fees and taxes - see below)

☐ **B: ANNUAL PUBLIC PERFORMANCE COPYRIGHT LICENSE**

+ INCLUDES 2 PRE-RELEASE RENTALS!

In addition to the benefits of "A", allows for the unlimited screening of commercially available copyrighted feature length films outside of regular school hours - within a non-profit fundraising environment - and includes two (2) complimentary rentals of any pre-release title available from ACF during the term of your agreement. Subject to the availability of titles.

\$0.95 per student / minimum charge of \$650 (+ fees and taxes - see below)

☐ **C: SPECIAL PRE-RELEASE ENTERTAINMENT LICENSE**

+ UNLIMITED PRE-RELEASE MOVIE RENTALS!

In addition to the benefits of "A" and "B", allows for the unlimited rental and screening of pre-release titles available from ACF during the term of your agreement - within a non-profit fundraising environment. Subject to the availability of titles.

\$1.30 per student / minimum charge of \$1050 (+ fees and taxes - see below)

An instructor would like to include an article found on the Internet in eReserves. The website includes a notice that indicates the content “...cannot be used for any purpose whatsoever without the permission of the website owner.” Does a notice have the same force as a contract? (Scott)

NO

A copyright notice is far different from a signed contract

A notice does not preclude the application of the Internet exception or fair dealing

A clearly visible notice that specifically disallows educational use would apply to uses under the Internet exception

Click through or other agreements made prior to accessing content will have terms that apply

Item must have been legally posted

A citation must be provided

I want to include entire works such as pictures and photographs in a dissertation that will be published, is this OK? (Eva)

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YES

Supreme Court ruled that it may be possible to deal fairly with an entire work

In the context of a dissertation, it is very likely fair to use whole works

Library and Archives of Canada no longer requires that included third party works have permission

Publishers may choose to get permission



Contact

Scott Day
days@macewan.ca

Eva Revitt
revitte@macewan.ca

