



Canadian Federation of Library Associations
Fédération canadienne des associations de bibliothèques

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FAIR DEALING GUIDANCE FOR CANADIAN LIBRARIES DURING THE TIME OF COVID-19

ISSUE

It is imperative for the duration of a national or global health crisis that libraries continue responding to information requests for creative, educational, and information purposes and it is understood that fulfilling these requests may require reproducing content. Fair dealing is an important and vital **user right** that continues to support dissemination of information to the public and empowers library users, scholars and scientists. Fair dealing supports libraries in providing continued opportunities for personal fulfillment, intellectual, and professional growth during these challenging times.

CFLA-FCAB thanks open access publishers and creators of open works. The COVID-19 pandemic highlights the importance of the open access scholarly communication model that continues to improve access to materials for teaching and instruction, and to results of research. CFLA-FCAB acknowledges the current [vendors and publishers](#) who are providing free or enhanced access to their online collections for the duration of the COVID-19 pandemic.

This guidance document is meant to provide clarity to support libraries in considering copyright as they provide services during the COVID-19 pandemic.

BACKGROUND

Canadian libraries are operating in a time of unprecedented limitations in providing access to patrons as a result of the COVID-19 pandemic. Libraries are forced to close physical spaces in order to support social distancing strategies and operate under government-directed limits to group sizes. Libraries are working to find ways in digital environments to continue providing many services that under standard daily operations would make use of purchased print collections in physical spaces.

FAIR DEALING ANALYSIS

CFLA-FCAB provides the following as guidance to librarians and library staff for fair dealing factors to consider when working through a fair dealing analysis in the COVID-19 pandemic.

Fair dealing is one of the users' rights in Canadian copyright law that permits the use of a work (the copying or 'dealing' of a work) without permission or payment. To be sure

the use of a work is fair, a fair dealing analysis is conducted, according to the criteria set out by the Supreme Court of Canada in *CCH*¹.

a) The purpose of the dealing

The fair dealing analysis begins by determining that the use of the work is fair under one of the enumerated fair dealing purposes outlined in the *Copyright Act*². The dealing must be an allowable purpose, mentioned in the Act (research, private study, education, satire, parody, criticism, review or news reporting). It is, and remains, a condition of the statute that purpose *must* be satisfied.

Libraries are further guided by the Supreme Court's statement:

"These allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights."³

b) The character of the dealing

When considering the character of the dealing, libraries must consider how the reproductions are distributed, to whom, and in what way. These questions are central to the impact on the character of the dealing. Adopting "lend like print" distribution strategies may support the delivery of services at this time. What will be done with the copies and how widely they will be distributed should be considered before copying material to digital environments. It is recognized that many works have been removed temporarily from public access, as many libraries are grappling with complete closure of their physical collections.

c) The amount of the dealing

In these extraordinary circumstances, it is difficult to apply standard limitation restrictions to the amount of a work copied. The practical considerations, such as the requester's limited access to physical collections, the ability to identify specific portions of a work for copying, and the staff's working restrictions, will influence the amount of the dealing and affect the ability to follow usual practice for this factor. Restrictive interpretation of this factor could result in the undue restriction of users' rights.

d) Alternatives to the dealing

In considering alternatives to the dealing, it is imperative to consider the factors of social distancing, and limits upon access to physical collections. Fair dealing defense is stronger if no alternatives to the dealing are available. Many alternatives to copying that were previously available in print collections are not available due to shutdowns, and would be a consideration for this factor.

e) The nature of the work

When considering the nature of the work, libraries should consider whether the work is published, unpublished, confidential, or if the work is publicly available. Guidelines,

¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13

² S. 29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

S. 29.1 Fair dealing for the purpose of criticism or review does not infringe copyright...

S. 29.2 Fair dealing for the purpose of news reporting does not infringe copyright...

³ *CCH* at para 54

policies and best practices in this area are largely unchanged. If a work has been published, the dealing may tend to be more fair; if the work is confidential, the dealing may tend to be unfair.

f) The effect of the dealing on the work

When taking into account the impact of the dealing on the market, weigh whether the use of the work will compete with the market for the original work. In instances where works are used in remote teaching and instruction during the pandemic, and for libraries seeking to provide access to vast legally-purchased library print collections that are currently restricted from public access, there may be limited or no impact on the market. Making only short-term use of a copy of the work, for the duration of the pandemic, may further mitigate market impact.

RECOMMENDATIONS

CFLA-FCAB recommends that:

- Publishers align their practices with the International Coalition of Library Consortia [Statement](#) on the Global COVID-19 Pandemic and Its Impact on Library Services and Resources.
- The Government of Canada introduce legislation amending section 29 of the Copyright Act to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one.