

# Fair Dealing in Practice

Version 1.0

Please see [copyright.ubc.ca](http://copyright.ubc.ca) for the latest information on copyright



a place of mind

THE UNIVERSITY OF BRITISH COLUMBIA

# 1. Copying for Teaching

Under the Fair Dealing Requirements, UBC faculty and staff may make a copy of a Short Excerpt for the purpose of teaching students, subject to the safeguards discussed below. In particular, faculty members teaching a course at the university may:

- hand out a hard copy of the Short Excerpt to their students;
- email a copy of the Short Excerpt to their students;
- post a copy of the Short Excerpt on an LMS (see also [Copying for Posting in a Learning Management System](#));
- include a copy of the Short Excerpt in a course pack sold to their students;
- include a copy of the Short Excerpt in a lecture or classroom presentation such as a PowerPoint presentation presented to their students; and
- display a copy of the Short Excerpt in a classroom, to their students.

In each case, a copy of the Short Excerpt may also be provided or made available as required to another faculty or staff member involved in the course.

Please Note: Special circumstances relating to the copying and performance of audiovisual works (e.g. YouTube videos) and musical works are set out respectively here: [Audiovisual Works](#) and [Musical Works and Sound Recordings](#).

## *Safeguards*

The university or a faculty member must be in lawful possession of the Work from which the copy of the Short Excerpt is made. Being in lawful possession includes where:

- a work is in the collection of the university library or a faculty member,
- a work is borrowed by the university library or faculty member through an inter-library loan, and
- the university or a faculty member has a copy of the Work, or a portion of a Work, pursuant to fair dealing or as otherwise permitted pursuant to the *Copyright Act*.

The Fair Dealing Requirements do not permit copying or communicating a Work for a lecture or presentation that is open to the general public, i.e. a lecture or presentation that is not restricted to students specifically enrolled in a course of study at UBC. Depending on the circumstances, the fair dealing exception may apply where the lecture or presentation is open to the public, but a separate fair dealing analysis is required to make that determination. For information and assistance, contact [ubc-copyright@interchange.ubc.ca](mailto:ubc-copyright@interchange.ubc.ca).

## Effect of a Licence

Some electronic versions of Works can only be accessed because the university has entered into a licence agreement. Some license agreements limit how the electronic version of the Works may be copied, distributed or performed by the university (including its faculty and staff). Some licenses also require end users to agree to such limitations. These contractual limitations apply as a separate limitation from the fair dealing exception (including the Fair Dealing Requirements). Therefore, the Fair Dealing Requirements may allow a certain act of copying, but if an applicable license prohibits that act, the license must be complied with if you wish to use that licensed version of the Work.

## Relationship between Fair Dealing and the Exceptions for Displaying a Work and a Lesson

Below are explanations of two additional user rights set out in the *Copyright Act* (called, respectively, the Display exception and the Lesson exception). These are separate and distinct from the fair dealing exception.

In any given instance, both the fair dealing exception and one of these other exceptions may apply. In such an instance, a faculty member may choose which ever is more practical or otherwise preferable— the fair dealing exception or one of the Display or Lesson exceptions.

If the use of a particular Work falls outside what is permitted by the Fair Dealing Requirements, a faculty member may wish to consider whether the fair dealing exception otherwise applies, or whether the Display or Lesson exceptions are more appropriate. Please note that both the Display and the Lesson exceptions contain restrictions that must be complied with. If you have any questions or concerns about either exception, please contact [ubc-copyright@interchange.ubc.ca](mailto:ubc-copyright@interchange.ubc.ca).

### *The Display Exception*

Pursuant to section 29.4(1) of the *Copyright Act*, it is not an infringement of copyright to reproduce a Work, or do any other necessary act, in order to display the work on the premises of a university for the purpose of education or training.

This exception permits the display of more than a Short Excerpt.

Restrictions: The exception does not apply if the work is available for sale in Canada within a reasonable time, at a reasonable price, in a medium appropriate for the display, and the copies may be located with reasonable effort. However, this does not prevent a faculty member making of a manual reproduction of the Work (e.g. on a white board).

### *The Lesson Exception*

Section 30.01 of the *Copyright Act* provides an exception for copies included in a lesson. A lesson would include a lecture, and a presentation, such as a PowerPoint presentation, presented in a classroom.

For the exception in section 30.01 to apply, recordings or reproductions of the lesson must be destroyed within 30 days after the day on which the students enrolled in the course of which the lesson forms part have received their final course evaluation. This would mean that all copies of a presentation stored on an LMS must be destroyed, and not merely rendered inaccessible to students, within the 30 day period.

The following activities are permissible under section 30.01:

- if a presentation made in class contains a work displayed pursuant to Display exception (described above), that presentation may be posted to an LMS.
- if a recording of a lecture or classroom presentation contains a work displayed pursuant to the Display exception, that recording may be posted to an LMS.
- If a recording of a lecture or classroom presentation contains the performance of an audiovisual work or sound recording, that recording may be posted to an LMS. However, the audiovisual work and the sound recording must not be an infringing copy or the person responsible for the performance had no reasonable grounds to believe that the audiovisual work or sound recording was an infringing copy.

## 2. Copying for Research

Under the Fair Dealing Requirements, UBC faculty may make a copy of a Short Excerpt in conducting research on a specific topic of enquiry or for inclusion in a personal collection of research resources, subject to the safeguard discussed below.

The faculty member may share a copy of the Short Excerpt with faculty and students both within UBC and within another university with whom the faculty member is engaged in collaborative research on that specific topic of inquiry.

In sharing a copy of the Short Excerpt, the faculty member may email the copy to the students and other faculty members engaged on that specific topic of inquiry, or post the copy to an LMS used in the performance or administration of such research.

### *Safeguard*

As set out in the Fair Dealing Requirements, copying multiple Short Excerpts from the same Work with the intention or the effect of copying substantially the entire Work is prohibited.

## 3. Copying for Posting in a Learning Management System

Under the Fair Dealing Requirements, UBC faculty and staff may post or upload a Short Excerpt to an LMS, subject to the safeguards discussed below. The LMS may deliver a Short Excerpt stored in its system, or it may deliver such an excerpt from a separate electronic reserve system.

Note, additional guidance for the posting of Short Excerpts of audiovisual works, musical works and sound recordings is set out respectively here: [Audiovisual Works](#) and [Musical Works and Sound Recordings](#).

## Safeguards

The following safeguards must be practiced. (Please note, UBC's LMS system, Connect, employs these safeguards.)

- The Fair Dealing Requirements only permit posting Short Excerpts to an LMS operated by or under the control of UBC. The Fair Dealing Requirements do not apply to the posting of Short Excerpts to a wiki, a blog or a service offered by a third party such as Dropbox, RefWorks or Mendeley.
- The LMS must be stored on a secure server or other device (e.g. password protected).
- Only persons with whom the Short Excerpt can be shared in keeping with the fair dealing purpose should have access to the LMS site where the Short Excerpt is posted. For example,
  - For Short Excerpts copied for a course, unit or program of instruction (i.e. for education, research and private study purposes), access should be restricted to the students enrolled in that course, unit or program of instruction and co-teachers and other faculty and staff members providing assistance on that course.
  - For Short Excerpts copied for a research project, access should be restricted to those faculty, staff and students participating in that research project, and other faculty and staff members providing assistance.
  - Incidental access to the LMS generally, by faculty, staff and contractors, for the purpose of operating and administrating the LMS does not violate this safeguard.
- If content is uploaded or posted to an LMS in a centralized process involving university administrative staff, those staff should review the content posted to the LMS to ensure that copies of Short Excerpts are posted to the LMS in accordance with the Fair Dealing Requirements or that the posting of the copies does not infringe copyright for other reasons.
- If content is uploaded or posted to an LMS by faculty members or their staff, the faculty or staff should identify in the LMS the reason that they are entitled to post each work or excerpt (e.g. permission obtained from the copyright holder, public domain, fair dealing, other exception under the *Copyright Act* (specify) or other (specify)). For certain content posted to the LMS (e.g. classroom presentations containing excerpts from a number of works) multiple reasons may apply and each reason should be noted.
  - Where the functionality of an LMS does not make the identification of copying permission in the LMS practical, the LMS should contain notices and information about faculty and staff's obligations to comply with copyright and measures should be taken to ensure that the content posted to the LMS does not infringe copyright (for example: conduct a review of all content; or periodically review a random selection of content).
- Faculty members or their staff who post content prepared by a student on an LMS should confirm that the content does not include copies of Works that infringe copyright.

### *Including excerpts longer than a Short Excerpt on an LMS*

If an excerpt to be included on an LMS exceeds a Short Excerpt, it may be possible to post the copy on the LMS using other means, which include:

- Posting the copy as permitted by the terms of a digital subscription. To look up permitted uses for particular materials, go to the Library's [License Information Database](#). Please note, if an applicable license prohibits the use of excerpts on an LMS, the licence must be followed with respect to that electronic copy of the Work.
- Posting the copy pursuant to another exception under the *Copyright Act*.
- Obtaining transactional permission from the copyright holder or from the holder's licensing agent. Where a transactional permission is used to make a copy of an excerpt onto an LMS, the permission or a record of the permission should be retained (in paper or electronic form).

If you have questions or concerns about using any of the above means to post materials on an LMS, please contact [ubc-copyright@interchange.ubc.ca](mailto:ubc-copyright@interchange.ubc.ca).

## 4. Musical Works and Sound Recordings

### *Introduction to Copyright in Musical Works*

A musical work typically takes the form of sheet music showing the musical score. Musical works are usually available individually or in a collection containing several musical scores.

Copyright subsists in every musical work, whether published or unpublished—the [Fair Dealing Requirements](#) apply to both.

Musical works include both a musical composition and lyrics. A composer and a lyricist may own copyright in their separate contributions to a musical work.

It is common for new arrangements to be prepared for musical works that are in the public domain. It is likely that copyright will subsist in a new arrangement. Any copyright in the new arrangement will not affect the ability to use the original musical work.

### *Introduction to Copyright in Sound Recordings*

Copyright subsists in a sound recording separate from any copyright that may subsist in the musical work being performed in the sound recording.

### *Copying or Distributing Musical Works and Sound Recordings*

Subject to the safeguards discussed below, under the Fair Dealing Requirements:

- A faculty member or administrative staff may copy or distribute up to 10% of a musical work that is in the form of sheet music.
- If the musical work appears in a book containing other musical works, a faculty member or administrative staff may copy or distribute the entire musical work.
- A faculty member or administrative staff may copy or distribute up to 10% of a sound recording.
- A faculty member or administrative staff may make a copy of a [Short Excerpt](#) of a musical work or a Short Excerpt of a sound recording for inclusion in a classroom presentation or in an LMS.

### *Safeguards*

Copies of Short Excerpts of musical works and sound recordings are only to be provided or otherwise distributed to:

- students enrolled in a course of study;
- to other UBC faculty members and administrative staff of the university; and/or
- to faculty members or students at another university with whom the faculty member is engaged in collaborative research (see also [Copying for Research](#)).

### *Performing a Musical Work and a Sound Recording*

The Fair Dealing Requirements do not apply to the public performance of a musical work or a sound recording. If faculty members and administrative staff wish to do so without the copyright holder's permission, they must comply with section 29.5 of the *Copyright Act*, which permits faculty members to perform a musical work and a sound recording only if the performance is:

- before an audience consisting primarily of students, instructors or any person who is directly responsible for setting curriculum at UBC;
- on UBC premises; and
- for educational or training purposes.

In addition, with respect to sound recordings, the copy of the recording being played must either not be an infringing copy or the person responsible for the performance must have no reasonable grounds to believe that it is an infringing copy.

Note, section 29.5 allows the performance of an *entire* musical work and sound recording.

### *Effect of a Licence*

Some electronic versions of musical works and sound recordings can only be accessed because the university has entered into a licence agreement. Some license agreements limit how these electronic versions may be copied, distributed or performed by the university (including its faculty and staff). Some licenses also require end users to agree to such limitations. These contractual limitations apply as a separate limitation from the fair dealing exception (including the Fair Dealing Requirements) and section 29.5. Therefore, while the *Copyright Act* may allow a certain act of copying or performance, but if an applicable license prohibits that act, the license must be complied with if you wish to use that licensed version of the [Work](#).

## 5. Audiovisual Works

### *Copying Audiovisual Works*

Under the [Fair Dealing Requirements](#), UBC faculty and staff may make a copy of up to 10% of a copyright-protected audiovisual work and distribute the [Short Excerpts](#) for research, private study and educational purposes, among other purposes, subject to the safeguards discussed below.

Acceptable methods of distribution include inclusion in a classroom presentation or in an LMS, and emailing the excerpt to students.

Audiovisual works include motion picture films, television programs and videos in any format or on any medium.

### *Safeguards*

Copies of Short Excerpts of audiovisual work are only to be provided or distributed to:

- students enrolled in a course of study;
- to other UBC faculty members and administrative staff of the university; and/or
- to faculty members or students at another university with whom the faculty member is engaged in collaborative research (see also [Copying for Research](#)).

### *Performing Audiovisual Works*

(a) Performance to students, at UBC premises, for educational or training purposes

The Fair Dealing Requirements do not apply to the public performance of an audiovisual work. However, UBC faculty and staff can rely on the exception in section 29.5(d) of the *Copyright Act*, which permits UBC faculty and staff to perform an audiovisual work:

- before an audience consisting primarily of students, instructors or any person who is directly responsible for setting curriculum at UBC;
- on UBC premises;
- for educational or training purposes; and
- the copy of the work being performed is not an infringing copy or the person responsible for the performance must have no reasonable grounds to believe that it is an infringing copy.

Please note: this exception does not permit the *copying* of any part of an audiovisual work, even if it is necessary to copy the work in order to perform it.

(b) The Exception for Works Available through the Internet

Section 30.04 of the *Copyright Act* permits reproducing, communicating and performing in public by an educational institution or a person acting under its authority, for educational or training purposes of a Work that is made available through the Internet. This includes an audiovisual work posted to the Internet (e.g., a video posted on YouTube). There are a number of conditions that have to be met for the exception to apply: see the [Copyright Guidelines](#) for more information.

### *Effect of a Licence*

Some electronic versions of audiovisual works can only be accessed because the university has entered into a licence agreement. Some license agreements limit how these electronic versions may be copied, distributed or performed by the university (including its faculty and staff). Some licenses also require end users to agree to such limitations. These contractual limitations apply as a separate limitation from the fair dealing exception (including the Fair Dealing Requirements) and section 29.5(d). Therefore, while the *Copyright Act* may allow a certain act of copying or performance, but if an applicable license prohibits that act, the license must be complied with if you wish to use that licensed version of the Work.

### *Technological Protection Measures, aka Digital Locks*

The Fair Dealing Requirements do not permit the circumvention of digital locks to obtain access to a copyright-protected audiovisual work. For more information on digital locks see the [Copyright Guidelines](#).

Motion pictures and other audiovisual works that are published on DVDs are typically protected by a digital lock known as the Content Scrambling System (“CSS”). The Fair Dealing Requirements do not apply if it is necessary to circumvent a CSS lock in order to copy a Short Excerpt of an audiovisual work. It is however permissible to reproduce a Short Excerpt under the Fair Dealing Requirements through using a video recording device, e.g. a camcorder, to record a Short Excerpt from a computer, television screen or projection. It is also permissible to use screen capture software that enables the copying of DVD content after the content has been lawfully decrypted by a licensed computer DVD player. For further information, contact [ubc-copyright@interchange.ubc.ca](mailto:ubc-copyright@interchange.ubc.ca).

## 6. Administrative Copying

Under the [Fair Dealing Requirements](#), UBC faculty and staff may copy and distribute a [Short Excerpt](#) if the purpose of the copying is directly tied to the education of students, subject to the safeguards discussed below.

### *Safeguards*

Administrative copying that falls within the Fair Dealing Requirements must comply with the following safeguards:

- Copies of the Short Excerpt are only provided to faculty members, administrative staff and students enrolled in the university who require the copies for the educational purpose for which it was made.
- If a copy of a Short Excerpt is made available electronically on a server or other device, the server or other device must be secure (e.g. password protected) and the copy must be accessible only by the persons referred to in item 1 (note, email and posting to an LMS site dedicated to such administrative purposes, are permissible modes of distribution).

### *Examples*

An example of administrative copying that would fall within the Fair Dealing Requirements is the making of a copy of a Short Excerpt and emailing copies to members of a faculty or department committee for use in developing a course of study, unit or program to be offered at UBC.

Examples of administrative copying that would not fall within the Fair Dealing Requirements are:

- the making of a copy of the Short Excerpt for the purpose of training administrative staff; and
- copying the Short Excerpt and providing the copies to members of the board of governors or to members of a faculty or department committee for governance or general administrative purposes relating to the operation of the university.

Note, the fair dealing exception may apply to these instances of copying, but a separate fair dealing analysis must be undertaken to ensure compliance with the *Copyright Act*. If fair dealing is not available, compliance with the *Copyright Act* may be achieved by utilizing one of UBC’s electronic subscription licenses or obtaining permission from the copyright holder directly.

## 7. Copying for Course Packs

A course pack is a compilation of excerpts of different works to be used as required or supplementary readings by students enrolled in a course of instruction.

UBC may rely on the [Fair Dealing Requirements](#) to make copies of [Short Excerpts](#), and to incorporate them into course packs produced and sold by UBC on behalf of UBC Faculty, subject to complying with the Guiding Principles and Safeguards describe below.

### *Guiding Principles*

The guiding principles behind the Fair Dealing Requirements are:

- Faculty and Teaching Staff ought not copy and distribute Short Excerpts under the Fair Dealing Requirements as a substitute for the purchase of the work. In order to respect that principle, it is necessary to implement certain safeguards, described below.

- No “profit” can be made on course pack production and sale. If there is no “profit” made in the production or sale of course packs and, the other requirements of the Fair Dealing Requirements are followed, then the making and sale of course packs incorporating copies of Short Excerpts is permitted under fair dealing.
- UBC may not utilize the Fair Dealing Requirements if it opts to send course packs to a commercial copy shop for production and/or sale.

### *Safeguards*

#### **Records**

Records should be created and maintained (in paper or electronic form) that show for each course pack:

- the identity of each work included in the course packs,
- identification of the publication from which the excerpt was copied (if applicable),
- the length of each excerpt included,
- the basis upon which each excerpt was copied (e.g. fair dealing, library licence, work made available over the Internet, transactional licence),
- if the basis upon which the excerpt was copied was fair dealing, details sufficient to establish that the excerpt is a “Short Excerpt” (for example, if the excerpt is 10% or less of the work, then the record should indicate the number of pages copied and the total number of pages of the work from which the copies were made),
- where a transactional permission is used to copy an excerpt for a course pack, a copy of the transactional permission.

#### **Notification**

Each copy of a course pack that includes copies of Short Excerpts made under the Fair Dealing Requirements should include substantially the following notice printed in a prominent location on the course pack (e.g. on the front cover) in addition to any other notice that may be otherwise required.

This course pack is made in accordance with the university’s Fair Dealing Requirements for sale to and use by students enrolled in the course of study for which it was made. This course pack may also include copyright-protected material pursuant to permissions granted by the copyright holder. Any reproduction or other use of this material is prohibited, except as otherwise permitted by law.

#### **Process for Production of Course Packs**

Short excerpts that are copied under the Fair Dealing Requirements must be copied by UBC [1]. UBC may not purchase such copies from a third party. If it is necessary for UBC to contract with a third party to produce and sell course packs to the university, such copying cannot be undertaken under the Fair Dealing Requirements.

#### **Retention of Master Copy**

UBC may retain one paper or electronic copy of a course pack to be used only for the purpose of making course packs in the future. If the copy is an electronic copy, the copy should be maintained on a secure computer or device (e.g. password protected) with access restricted to those individuals responsible for course pack production.

#### **The Sale of Course Packs**

Course packs that incorporate copies of Short Excerpts made under the Fair Dealing Requirements must be sold by UBC directly to students. The course packs must not be sold to an intermediary (e.g. a student association) that sells the course packs to students.

#### **Pricing**

The amount charged by UBC for the production and sale of a course pack cannot exceed UBC’s cost to produce and sell the course pack. These may include a reasonable allocation of overhead costs incurred.

The following examples show how overhead costs could be allocated.

Example 1: Assume that in the previous year:

- the cost of the consumables required to make a photocopy (e.g. toner and paper) were 1.5 cents per page;
- the other production costs of course packs (e.g. salaries, leasing of photocopy equipment and the cost to operate the production facilities) were \$100,000; and
- the production facilities produced 10,000 course packs.

The base price (cost of goods) of a 100 page course pack would be \$11.50 (\$1.50 in consumables costs + \$10.00 in other production costs).

Example 2: Assume the costs described in Example 1 apply and the course pack is produced and sold by the UBC Bookstore:

- course packs were 5 percent of the cost of goods sold by the UBC Bookstore in the previous year; and
- the cost of operating the UBC Bookstore for the current year is \$1 million.

There is therefore \$50,000 in distribution costs that can be allocated to course packs. If the bookstore estimates that it will sell 25,000 course packs, then it could allocate \$2 of distribution costs to each course pack.

The course pack price could then include a consumables cost of \$1.50, plus other production costs of \$10.00, plus distribution costs of \$2.00. The overhead costs for each course pack are therefore \$13.50.

The overhead costs allocated to course packs should be recalculated on a periodic basis, and efforts need to be taken to ensure that no profit is earned on the sale of course packs.

### **Determination regarding the Application of the Fair Dealing Requirements**

If any person responsible for making a course pack is uncertain about the application of the Fair Dealing Requirements to the production and sale of course packs, that person should consult with the Scholarly Communication and Copyright Office for an evaluation of whether the copying would be fair dealing.

### **Including Materials Beyond Short Excerpts in a Course Pack**

If an excerpt to be included in a course pack exceeds the limitations of a Short Excerpt, other means must be used to ensure the excerpt can be included in the course pack in compliance with copyright law. For example,

- other exceptions in the *Copyright Act* may be available,
- UBC may include in course packs copies of [Works](#) for which UBC has a licence with the publisher or aggregator, as long as the terms of the licence permit the making of copies for inclusion in course packs, and
- transactional permission for making the copies may be sought from the copyright holder or from the holder's licensing agent.

[1] The individuals who produce course packs should be employees of the university or engaged by the university under a contract for services (i.e. an independent contractor) such as with a temporary employment agency. In addition, the individuals that produce course packs should be supervised by university employees.

Selected definitions:

**“LMS”** means a learning or course management system that is password protected or otherwise restricted to, and accessible only by, students in a specific course, unit or program (e.g. Connect, Vista and MEDICOL).

From the [Copyright Requirements for UBC Faculty and Staff](#):

**“Teaching Staff”** means any person who teaches at or under the auspices of UBC, including without limitation faculty members, adjunct and clinical faculty, lecturers, instructors, and teaching assistants.

**“Other Staff”** means full-time and part-time staff members of UBC and any other person who works at or under the auspices of UBC who is not Teaching Staff.

The University of British Columbia  
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