



Fair Dealing Guidelines

Toward a Review and Revision

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Adrian Sheppard
Director, Copyright Office

Structure: a “Forum”

- Set out some context and frame some issues
[Note: I don't have answers]
- Receive input and perspective on what it has been like to develop, implement and apply fair dealing guidelines
- Get a better sense of how best to approach reviewing and revising the guidelines

The AUCC Guidelines

October 9, 2012 - Association of Universities and Colleges of Canada (AUCC) issued Fair Dealing policy (defines short excerpt).

September 2013 - released nine “Fair Dealing Policy Application Documents”

Short Excerpts

A short excerpt means:

- (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 artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
- (e) an entire newspaper article or page
- (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
- (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

(from <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>)

Why have Guidelines?

- A practical tool to allow for quick and easy determinations of fairness that will cover a broad range of cases.
- Private copying/use vs. institutional copying/use
- Institutional copying – who is responsible?
Having guidelines can insulate individuals from making independent fairness determinations on behalf of the institution.
- Standardized practices (CCH)

The Proper Role of Guidelines

- Guidelines are intended as a shortcut to a determination of the fairness of dealing in a significant percentage of applicable cases
- Guidelines are not a replacement for fair dealing analysis in all cases

Fairness Remains the Standard

- Guidelines are only a tool, they do not define fairness
- Guidelines should be seen as a shield (for those individuals applying them on behalf of the institution) rather than a sword (that can be used to support unfair outcomes)
- Where application of the guidelines appear to yield an unfair result, then fairness should trump the guidelines
- Who's watching? The ever-present issue of oversight

Fairness and Guidelines



[Pixabay - CC0](#)

The Elephant in the Room

Access Copyright v. York University (Fed Ct)

“...the Court concludes that the York Fair Dealing Guidelines are not fair.” [356] (Phelan, J.)

Under appeal

Proviso

- This review and any proposed revision of the Fair Dealing Guidelines is not intended to suggest that any specific guidelines, as they are currently in use, are not “fair”.
- Presupposing a given set of guidelines is “fair”, it is still reasonable to consider how those guidelines might be improved and made easier or more efficient to apply.

Fairness and Guidelines

- Guidelines are contextual – they serve a particular range of uses for certain purposes within a timeframe.
- What is the “standard” type of institutional copying? What is normal or usual? Should be designed to cover those cases (but applied in all cases?).
- What does it mean to say a set of guidelines is “fair” or “unfair”?
- Likelihood of an unfair outcome – what should the target be?
- Fairness in terms and application

Terms and Application

- The terms of the guidelines should be fair, and the guidelines should be applied properly
- Who is applying the guidelines (and what are their concerns in applying the guidelines)?
 - Staff
 - Faculty

Balancing Act for Guidelines

- Not complicated to understand
- Not time-consuming to apply
- Yield appropriate result across a broad range of cases and large percentage of the time.

Small Questions

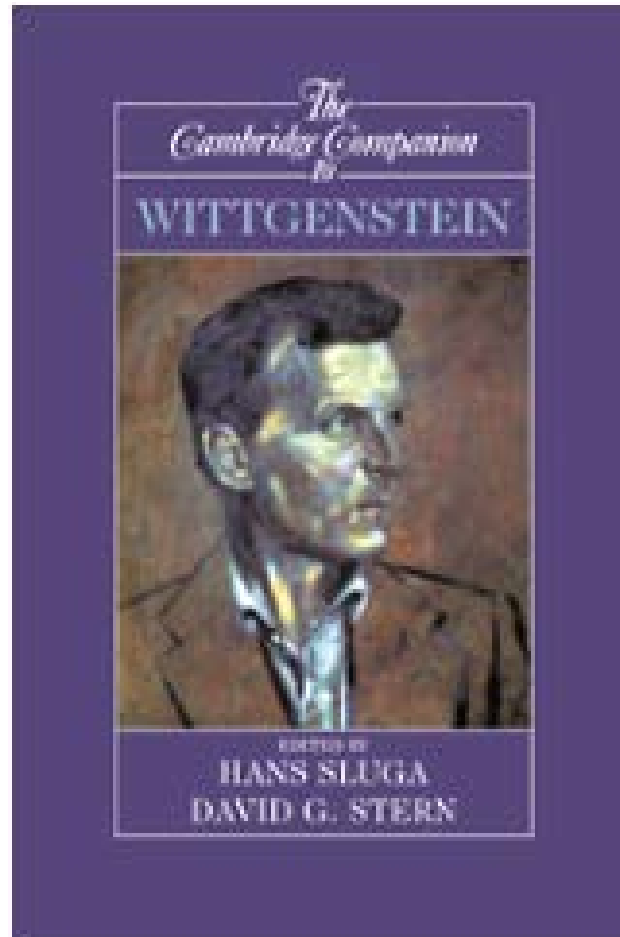
Best Practices

- Is there a role within the guidelines for encouraging better practices?
- Alternatives to the dealing - do we really need to be making copies? Are there new options available that were not there when the guidelines were developed?
- What about oversight of how guidelines are applied?

Types of Works

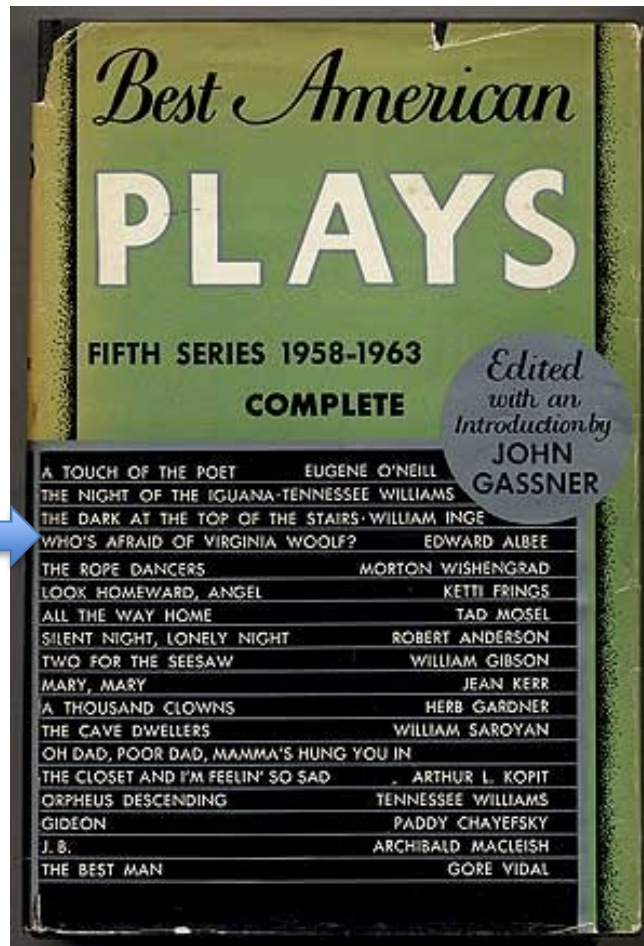
- What type of works are being used/copied most at post-secondary institutions?
- Are the categories (book, periodical, etc.) in the guidelines overbroad?

What about Anthologies?

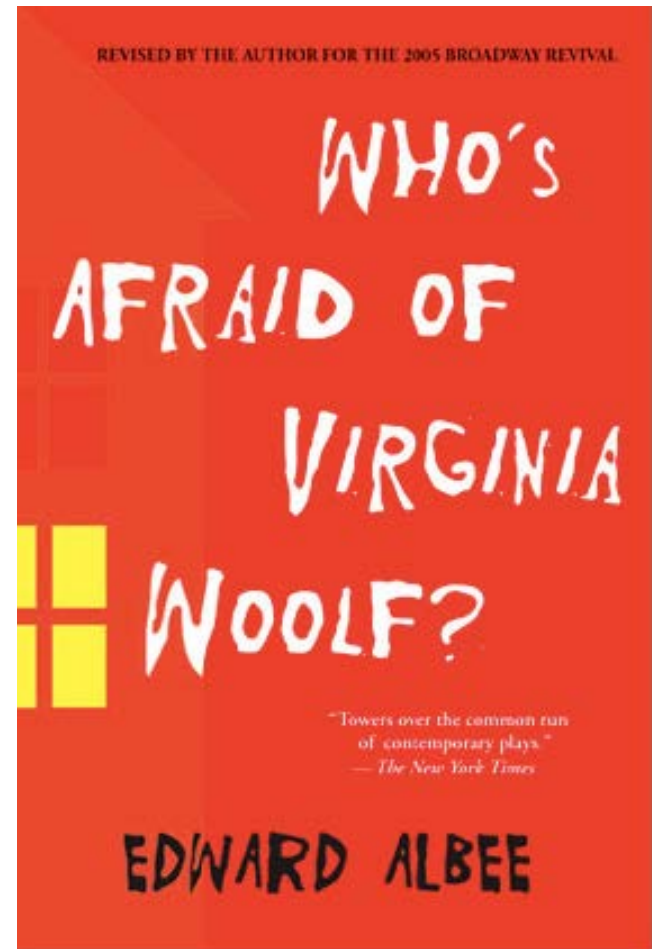


[Cambridge University Press](https://www.cambridge.org/9780521875866)

What about Anthologies?



amazon.com



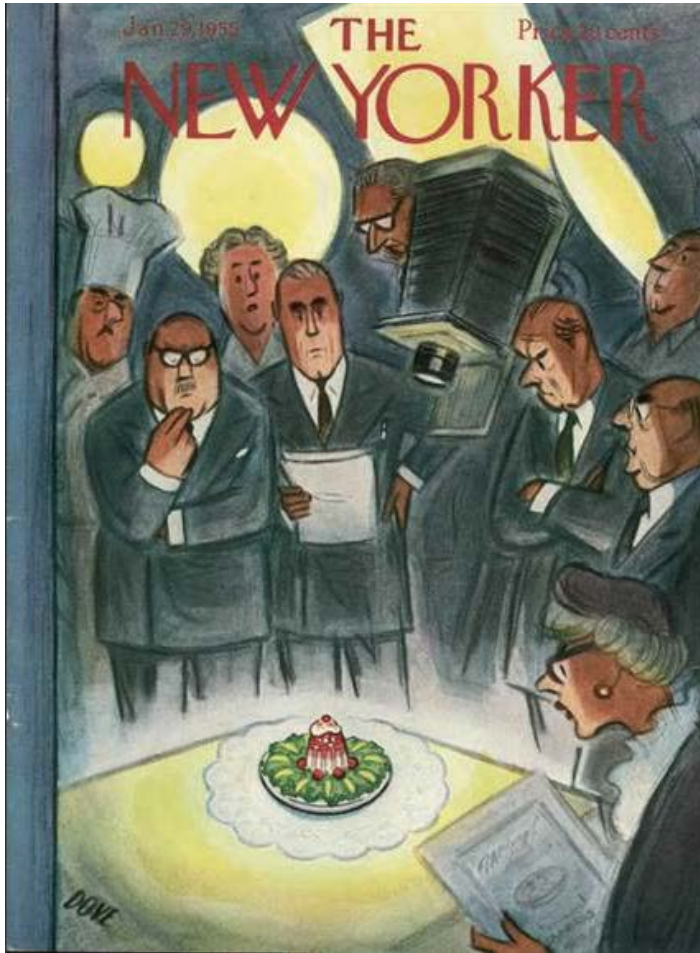
penguinrandomhouse.com

What about Anthologies?

Should it make a difference if a work that is available for purchase as a complete work is also available, in its entirety, in an anthology?

If so, who should be responsible for checking for such alternatives before making a fair dealing determination?

Single Article from a Periodical?



newyorker.com

Franny
and Zooey

J.D. Salinger

littlebrown.com

Does One Size Fit All?

Fiction vs non-fiction?

Scholarly works vs commercial works?

Artistic works (painting, print, photograph, diagram, drawing, map, chart)?

Would the benefit of refining the guidelines to draw more distinctions outweigh the hazards of additional complexity in applying the guidelines?

Big Questions

Is a formal review warranted?

- If it makes sense to review the statute after five years to see whether it is working as intended and whether new developments have impacted its operation in unanticipated ways, why would this not be equally true of such guidelines?
- Guidelines must be respectful of rights-holders and must be perceived to be respectful. Regular review of practices is an important part of taking the fairness of the guidelines seriously

Whose review should it be?

- Who should initiate/oversee the process?
- Is this a job for Universities Canada?
- Is this a job **ONLY** for Universities Canada?

How should it be conducted?

- What should such a review look like?

Who should be involved?

- Should representatives of authors and publishers be invited to comment?

When should it happen?

- Does it make sense to wait until the FCA decision in *Access v. York* before conducting such a review?
- How regularly should formal reviews take place?

Experiences, Thoughts,
Concerns?

Next Steps?

Thank you!

adrian.sheppard@ualberta.ca

ualberta.ca/copyright

