

Copying that encourages learning:

Subject to a "*customary price*" or
within copyright's "*breathing space*"?



Rumi Graham, Fair Dealing Week Panel
February 23, 2017

New Zealand, 1990

*"This is said to be a test case in which the parties seek clarification as to the extent to which **multiple copies of parts of literary and artistic works** in which copyright is held can be **made by teachers** for the purpose of compiling teaching materials **for classroom use.**"*

Longman Group v. Carrington Technical Institute, [1991] 2 NZLR 574 (HC).

*"... it was the submission on behalf of the Defendants that the fair dealing and educational copying exceptions ... showed that the protection for copyright works under the Act had to be balanced with the **public interest** in ensuring that copyright works were readily available for **genuine educational pursuits**."*

Longman Group v. Carrington Technical Institute, [1991]

*"The dealing ... with the copyright works was not for the purpose of research or private study but for the express purpose of compiling a textbook to assist in the teaching of the course. ... **Student use was incidental** to that purpose."*

*"To act as the tutor did is, in my view, the very **antithesis of fair dealing** with the copyright works."*



classroom copying:

materials copied or distributed by teachers for use by students in their class or course (e.g., coursepacks, e-reserve)



Section topics

- *infringement exceptions*
 - *licensing provisions*
 - *relevant case law*
 - *permissions*
- assessment exercise involving a test set of course readings*



How do the provisions of copyright law in Australia, Canada, New Zealand, the U.K, and the U.S. compare with each other, with respect to classroom copying?

Classroom Copying

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- *infringement exceptions*
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5 Copyright Laws

Purpose of copyright?

**Statute of Anne,
U.K., 1710**
"An Act for the
Encouragement
of Learning . . ."

**U.S.
Constitution**
"To promote the
Progress of
Science and
useful Arts . . ."

Berne Convention for the Protection of Literary and Artistic Works (1886)

Contracting Country

Date in Force

Australia

April 14, 1928

Canada

April 10, 1928

New Zealand

April 24, 1928

United Kingdom

December 5, 1887

United States

March 1, 1989

Total Contracting Countries 172



WORLD
INTELLECTUAL PROPERTY
ORGANIZATION






Selected Berne Convention Requirements

- national treatment
- automatic protection
- coverage of all works "in the literary, scientific, and artistic domain"
- exclusive economic rights for authors (e.g., reproduction)
- minimum term: life + 50 years



- optional limits on economic rights ("3-Step Test"): reproduce protected works without permission or fee payment
 - "in **certain special cases**, *provided that such reproduction*
 - **does not conflict with a normal exploitation of the work and**
 - **does not unreasonably prejudice the legitimate interests of the author.**"

Common Doctrines & Provisions

	Literary, Dramatic, Musical, Artistic work	Original expression of Ideas	Substantial part of a work	Fixation	Duration
	✓	✓	✓	✓	life + 70
	✓	✓	✓	✓	life + 50
	✓	✓	✓	✓	life + 50
	✓	✓	✓	✓	life + 70
	✓	✓	✓	✓	life + 70

 **Copyright Owners' Rights**

In relation to an original work or a substantial part:






- reproduce
- perform in public
- publish
- communicate to the public
- rent
- adapt
- authorize any of these acts



Allowable Fair Dealing/Fair Use Purposes

					
research	✓	✓	✓	✓	✓
study/scholarship	✓	✓	✓	✓	✓
criticism	✓	✓	✓	✓	✓
review/comment	✓	✓	✓	✓	✓
news reporting	✓	✓	✓	✓	✓
parody	✓	✓	✓	✓	✓
satire	✓	✓	✓	✓	✓
education/teaching	✓	✓	✓	✓	✓
giving professional advice	✓	✓	✓	✓	✓
quotation	✓	✓	✓	✓	✓
caricature	✓	✓	✓	✓	✓
pastiche	✓	✓	✓	✓	✓
illustration for instruction	✓	✓	✓	✓	✓
other possible purposes	✓	✓	✓	✓	✓

Non-Infringing Uses Of Protected Works	Using Works Fairly	Allowable Fair Uses
"acts not constituting infringements of copyright"	fair dealing	closed list of 8 purposes
"exceptions to infringement"	fair dealing	closed list of 8 purposes
"acts permitted in relation to copyright works"	fair dealing	closed list of 5 purposes
"acts permitted in relation to copyright works"	fair dealing	closed list of 10 purposes
"limitations on exclusive rights"	fair use	open-ended list of purposes

	Literary, Dramatic, Musical, Artistic work	Original expression of ideas	Substantial part of a work	Fixation	Duration
	✓	✓	✓	✓	life + 70
	✓	✓	✓	✓	life + 50
	✓	✓	✓	✓	life + 50
	✓	✓	✓	✓	life + 70
	✓	✓	✓	✓	life + 70



Copyright Owners' Rights

In relation to an original work or a substantial part:



- **reproduce**
- **perform in public**
- **publish**



- **communicate to the public**
- **rent**
- **adapt**
- **authorize any of these acts**





Non-Infringing Uses Of Protected Works

“acts not constituting
infringements of copyright”



“exceptions to infringement”



“acts permitted in relation to
copyright works”



“acts permitted in relation to
copyright works”



“limitations on exclusive
rights”

Using Works Fairly

fair dealing

fair dealing

fair dealing

fair dealing

fair use

Allowable Fair Uses

closed list of 8
purposes

closed list of 8
purposes

closed list of 5
purposes

closed list of 10
purposes

open-ended list
of purposes

Allowable Fair Dealing/Fair Use Purposes

					
→ research	✓	✓	✓	✓	✓
→ study/scholarship	✓	✓	✓	✓	✓
criticism	✓	✓	✓	✓	✓
review/comment	✓	✓	✓	✓	✓
news reporting	✓	✓	✓	✓	✓
parody	✓	✓		✓	✓
satire	✓	✓			✓
→ education/teaching		✓			✓
giving professional advice	✓				✓
quotation				✓	✓
caricature				✓	✓
pastiche				✓	✓
→ Illustration for instruction				✓	✓
<i>other possible purposes</i>					✓

Fair Dealing/Fair Use



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

ss. 28.1, 28.2 Fair dealing for the purpose of **criticism**, **review** or **news reporting** does not infringe copyright if the **behaviour** is **mentioned**, the **source** and, if given in the source, the **name of the author**.



§ 107 "the fair use of a copyrighted work... for purposes such as **criticism**, **comment**, **news reporting**, **teaching**, **including multiple copies for classroom use**, **scholarship**, or **research** is not an infringement of copyright."

§ 108



s. 17(2) "fair dealing... for the purposes of **research** for a non-commercial purpose does not infringe any copyright in the work, provided that it is accompanied by a sufficient acknowledgement."

s. 17(2) of the Copyright, Designs and Patents Act 1988



s. 40(1) "A fair dealing with a work for the purpose of **research** or **study** does not constitute an infringement of copyright."

s. 40(2) "A fair dealing with a work for the purpose of research or study does not constitute an infringement of copyright if the dealing is for the purpose of research or study."



s. 42(1) "Fair dealing with a work for the purposes of **research** or **private study** does not infringe copyright."

s. 42(2) "Fair dealing with a work for the purposes of research or private study does not constitute an infringement of copyright if the dealing is for the purpose of research or private study."

s. 42(3)



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

ss. 29.1, 29.2 Fair dealing for the purpose of *criticism*, *review* or news reporting does not infringe copyright if the following are mentioned: the source and, if given in the source, the name of the author.



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CCH v. Law Society of Upper Canada (2004 SCC 13)

- *"The fair dealing exception, like other exceptions in the Copyright Act, is a **user's right**. . . it must not be interpreted restrictively."*
- **Factors** that may be relevant to determining fairness of a dealing:
 - **purpose** of the dealing
 - **character** of the dealing
 - **amount** as a proportion of the whole work
 - **alternatives** to the dealing
 - **nature** of the work
 - **effect** of the dealing on the work.
- *"The **availability of a licence is not relevant** to deciding whether a dealing has been fair."*



Alberta (Education) v. Access Copyright (2012 SCC 37)

- At issue: *"whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing"*
- *"Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of 'instruction'; they are there to facilitate the students' research and private study. . . . The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological."*



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

ss. 29.1, 29.2 Fair dealing for the purpose of *criticism*, *review* or news reporting does not infringe copyright if the following are mentioned: the source and, if given in the source, the name of the author.



§ 107 "the fair use of a copyrighted work . . . for purposes such as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*, is not an infringement of copyright."

§ 107 To determine if a use is fair, factors to consider shall include the:

- 1) *purpose* and *character* of the use
- 2) nature of the copyrighted work
- 3) *amount* and *substantiality* of the proportion used
- 4) *effect* of the use on the work's potential market for or value of the copyrighted work.



s. 40(1) *"A fair dealing with a . . . work for the purpose of **research** or **study** does not constitute an infringement of copyright ..."*

s. 40(2) In determining whether a dealing is fair, matters to which regard shall be had include the:

- a) **purpose** and **character** of the dealing
- b) **nature** of the work
- c) **possibility of obtaining the work** within a reasonable time at an ordinary commercial price
- d) **effect** of the dealing on the potential market for or value of the work
- e) **amount** and **substantiality** of the part copied

s. 40(5) Despite subsection (2), a reproduction of not more than a reasonable portion of a work described in an **item of the table** is **taken to be a fair dealing** with the work for the purpose of research or private study. For this purpose, **reasonable portion** means the amount described in the item.

Works, adaptations and reasonable portions

Item	Work or adaptation	Amount that is reasonable portion
1	A literary, dramatic or musical work (except a computer program), or an adaptation of such a work, that is contained in a published edition of at least 10 pages	(a) 10% of the number of pages in the edition; or (b) if the work or adaptation is divided into chapters—a single chapter
2	A published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work	(a) 10% of the number of words in the work or adaptation; or (b) if the work or adaptation is divided into chapters—a single chapter



Haines v. Copyright Agency Ltd, (1982) 42 ALR 549

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At issue: School board memo directing New South Wales schools to do classroom copying under s. 40 rather than the s. 53 statutory licence scheme (introduced in 1980).

Decision: *"The purpose of s. 53B is to permit, but also to control, the making of multiple copies which modern means of reprographic reproduction have greatly facilitated."*

"Moreover, it is important to the proper working of the sections that a distinction be recognized between an institution making copies for teaching purposes and the activities of individuals concerned with research or study."



s. 40(1) *"A fair dealing with a . . . work for the purpose of **research** or **study** does not constitute an infringement of copyright ..."*

s. 40(2) In determining whether a dealing is fair, matters to which regard shall be had include the:

- a) **purpose** and **character** of the dealing
- b) **nature** of the work
- c) **possibility of obtaining the work** within a reasonable time at an ordinary commercial price
- d) **effect** of the dealing on the potential market for or value of the work
- e) **amount** and **substantiality** of the part copied

s. 40(5) Despite subsection (2), a reproduction of not more than a reasonable portion of a work described in an **item of the table** is **taken to be a fair dealing** with the work for the purpose of research or private study. For this purpose, **reasonable portion** means the amount described in the item.



(1) Fair dealing for the purposes of criticism or review does not infringe copyright if such fair dealing is accompanied by a sufficient acknowledgement.



s. 43(1) "Fair dealing with a work for the purposes of *research* or *private study* does not infringe copyright."

s. 43(3) In determining whether copying constitutes fair dealing, a court shall have regard to

- (a) the **purpose** of the copying
- (b) the **nature** of the work copied
- (c) **whether the work could have been obtained** within a reasonable time at an ordinary commercial price
- (d) the **effect** of the copying on the potential market for or value of the work
- (e) the **amount** and **substantiality** of the part copied

s. 43(4) This section **does not authorise** making more than 1 copy of the same work or the same part of a work on any one occasion.

s. 42

(1) Fair dealing for the purposes of criticism or review does not infringe copyright if such fair dealing is accompanied by a sufficient acknowledgement.



Copyright Licensing Ltd v. University of Auckland, [2002] 3 NZLR 76 (HC)

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At issue: Is it fair dealing for purposes of criticism or review if a university copies a work for inclusion in a coursepack?

Decision: "I do not accept that it would be possible for a lecturer to genuinely copy for the purposes of review or criticism *on behalf of a student* unless that *student had specifically requested* the copy."

"I proceed on the basis that because the question refers to *multiple copies*, there *can be no suggestion* that the copying has been undertaken at the *specific request of a particular student*."



s. 29(1) "*Fair dealing . . . for the purposes of **research** for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.*"

s. 29(1C) "*Fair dealing . . . for the purposes of **private study** does not infringe any copyright in the work.*"

s. 29(3) Copying by a person **other than the researcher or student** is **not fair dealing** if

(b) the copier knows the copying will result in the **same material** being provided to **more than one person** at the **same time** for the **same purpose**.

s. 32(1) Fair dealing for the sole purpose of **illustration for instruction** does not infringe copyright provided that the dealing is—

- (a) for a non-commercial purpose,
- (b) by a person giving or receiving instruction &
- (c) accompanied by sufficient attribution
(unless impossible for reasons of practicality or otherwise).



Intellectual
Property
Office



Intellectual
Property
Office

Exceptions to copyright: Education and Teaching

October 2014



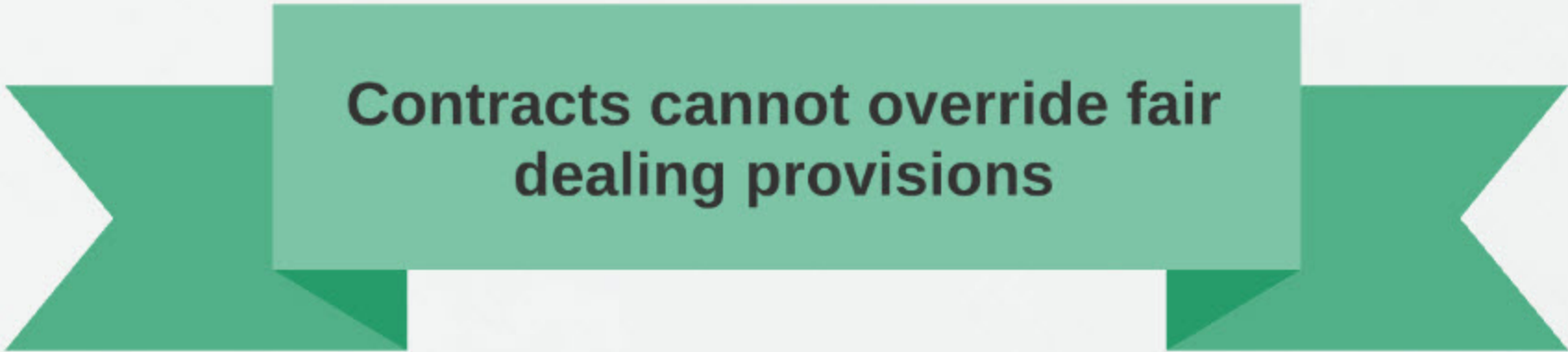
This means minor uses, such as displaying a few lines of poetry on an interactive whiteboard, are permitted, but uses which would undermine sales of teaching materials still need a licence.

FAQ

Does this mean schools/universities no longer need photocopying licences?

No, schools and universities still need to hold photocopying licences. However, where works are not available under licence, a teacher may photocopy extracts from works without worrying about copyright infringement, as long as they copy no more than 5% of the work per annum.

s. 29(4B) *"To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable."*



Contracts cannot override fair dealing provisions

Research or Private Study Purposes: Applicable to Classroom Copying?

Statutory Law (Fair dealing/use)



Case Law

✗ *Haines v. Copyright Agency Ltd* (1982) 42 ALR 549

✓ *Alberta (Education) v. Access Copyright* (2012 SCC 37)

✗ s. 43(4) “does not authorise the making of more than 1 copy of the same work, or . . . part . . . on any one occasion”

✗ s. 29(3) “not fair dealing if (b) . . . the person doing the copying knows . . . it will result in copies of substantially the same material being provided to more than one person . . . at the same time and . . . for the same purpose”

✓ § 107 “for purposes such as . . . teaching (including multiple copies for classroom use), scholarship or research”

Other Statutory Provisions?

(applicable to classroom copying)





s. 200AB

(1) Copyright in a work is not infringed if the use

(a) amounts to a special case

(b) is covered by subsection (2), (3) or (4)

(c) does not conflict with a normal exploitation of the work

(d) does not unreasonably prejudice the copyright owner's interests

(3) This subsection covers a use made by an educational institution for noncommercial educational purposes.

(6) Subsection (1) does not apply if, under another provision, the use does not infringe copyright. 

Part VB: Reproducing and communicating works by educational institutions (statutory licence)



s. 135ZJ

(1) Copyright in an **article in a printed periodical** is not infringed by making one or more reproductions by an educational institution if

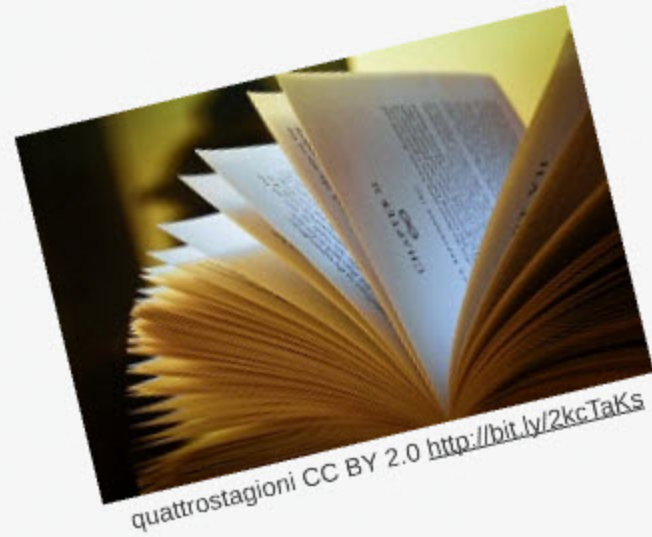
a) a remuneration notice has been given to the relevant **collecting society** and is in force,

b) the reproduction is solely for educational purposes and

c) appropriate record-keeping and reporting is maintained.

(2) This section does not apply to 2 or more articles from the same periodical issue unless the articles relate to the same subject matter.

Part VB: Reproducing and communicating works by educational institutions (statutory licence)



s. 135ZL

- (1) Copyright in a **printed work other than an article** is not infringed by making one or more reproductions by an educational institution if
- a) a remuneration notice has been given to the relevant **collecting society** and is in force,
 - b) the reproduction is solely for educational purposes and
 - c) appropriate record-keeping and reporting is maintained.
- (2) This section **does not apply to more than a reasonable portion** of a separately published work unless the body making the reproductions is satisfied that reproductions cannot be obtained within a reasonable time at an ordinary commercial price.

Hudson, E. (2013). Implementing fair use in copyright law: Lessons from Australia. *Intellectual Property Journal*, 25, 201-229.

"Despite over five and a half years having elapsed between the introduction of s. 200AB and the commencement of the fieldwork, interviewees reported that **reliance on s. 200AB was sporadic, and often related to one-off uses of old and orphaned works**. Of the 21 participating cultural institutions, ten stated that they had not relied on s. 200AB at all."





s. 200AB

(1) Copyright in a work is not infringed if the use

(a) amounts to a special case

(b) is covered by subsection (2), (3) or (4)

(c) does not conflict with a normal exploitation of the work

(d) does not unreasonably prejudice the copyright owner's interests

(3) This subsection covers a use made by an educational institution for noncommercial educational purposes.

(6) Subsection (1) does not apply if, under another provision, the use does not infringe copyright. 



s. 44 Copying for educational purposes

- (1) Copyright in a work is not infringed by copying all or part of a work if
- (a) it is done by a reprographic or other means
 - (b) it is done for use in a course of instruction
 - (c) it is done by or on behalf of someone giving a lesson
 - (d) no more than 1 copy is made on any one occasion.

3) Copyright in a work is not infringed by copying **part of a work** if

- (a) the copying is done by a reprographic or other means
- (b) the copying is done for an educational purpose
- (c) the copying is done by or on behalf of an educational institution
- (d) **1 or more copies of the part** are made on any one occasion
- (e) **no fee** is charged to the student who received the copy
- (f) the copying is **no more than 3%** or **3 pages** of the work.

(6) For copying done under subsection (3), no further copying of any part of the work under this subsection can be done by the institution within 14 days. ⚠



s. 36

(1) Copying extracts from a work by an educational institution does not infringe copyright provided that

- (a) the copy is made for purposes of non-commercial instruction
- (b) sufficient acknowledgement is provided

(5) Not more than 5% of a work may be copied under this section in any 12 month period. ⚠

(6) Acts which would otherwise be permitted by this section are not permitted if **licences are available authorising the acts in question** and the educational institution knew or ought to have been aware of that fact. ⛔

Other Statutory Provisions for Educational Copying

	Statutory Provision Other than Fair Dealing/Use	Applicable to Classroom Copying?
	s. 200AB Use by educational institutions for non-commercial purposes	Potentially <i>but only if no other provision is applicable</i>
	Part VB statutory licence for reproducing & communicating works by educational institutions	Copyright Agency Limited offers licences for classroom copying
	s. 44(3) Multiple copying of parts of a work for an educational purpose	Yes – 3% or 3 pages (or 50% for works of 3 or fewer pages); no further copying within 14 days
	s. 36(1) Multiple copying of extracts for purposes of non-commercial instruction	Yes – 5% in any 12-month period, <i>but only if no licence is available</i>
	s. 36(6) Provision not available if institution knows a licence authorizing the copying is available	Copyright Licensing Agency offers licences for classroom copying

Sources

Images

- Country flags: CIA World Factbook <http://bit.ly/1ju9ux8>
- WIPO logo: <http://www.wipo.int/portal/en/>

Statutes & Treaties

- Berne Convention <http://bit.ly/1U49TM2>
- Australian Copyright Act <http://bit.ly/2kbcHH3>
- Canadian Copyright Act <http://bit.ly/1Wu3OaE>
- New Zealand Copyright Act <http://bit.ly/1LHcltQ>
- United Kingdom Copyright, Designs & Patents Act <http://bit.ly/1bCSMbD>
- United States Title 17 of the United States Code <http://bit.ly/2i6DkzU>

Cases

- *Alberta (Education) v. Access Copyright*, 2012 SCC 37, 37
- *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 1 SCR 339
- *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 NZLR 76 (HC)
- *Haines v. Copyright Agency Ltd.*, (1982) 42 ALR 549
- *Longman Group v. Carrington Technical Institute*, [1991] 2 NZLR 574 (HC)

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