Steps to Determine Your Ability to Copy

The Ability to Copy Flowchart sets out a step-by-step process that guides you through the questions you need to answer to determine your ability to copy specific works. These questions include:

1. Is the work protected by copyright?

All original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works are protected by copyright, unless the author(s) of the work died more than 50 years ago (and note that translations or annotations of such works are also copyrighted). If in doubt, you should presume that the work is protected by copyright.

2. Is there a digital lock protecting the work?

A technology protection measure (commonly referred to as a TPM or digital lock) is any technology, device or component that controls or restricts the access to or copying of a work that is installed on the work, including technical barriers like passwords that prevent or restrict access to a work. The Copyright Act prohibits the circumvention of digital locks, unless it is done with the authority of the copyright owner. For example, if you have been provided with an authorised password or “key” to the digital lock or login, you can open or circumvent the digital lock to access the work. However, if you have obtained a password or key via unauthorised means, e.g. found the solution to breaking a digital lock published on-line, without consent from the copyright owner, then you cannot circumvent the digital lock to access the work. It is important to note that even if you may otherwise have been able to reproduce a work under one of the exceptions within the Copyright Act (including educational exceptions and fair dealing exceptions), if there is a digital lock on the work, you must not circumvent the digital lock to access the work, unless you are authorised by the copyright owner to do so.

The digital lock provisions of the Copyright Act are relatively new and subject to interpretation, so there is still room for more legislative reform and consideration by the courts to address numerous questions and issues raised by these requirements.

3. Is copying of the work permitted under the Copyright Act?

Exceptions under the Copyright Act permit certain things to be done by educational institutions, or persons acting under the authority of an educational institution, that would otherwise infringe copyright. The Fair Dealing Exception is one such exception.

A. Fair Dealing Exception

The Fair Dealing Exception allows any person to use a copyrighted work for the allowable purposes of research, private study, education, satire, parody, criticism, review, or news reporting, without the copyright holder’s permission. To qualify for the Fair Dealing Exception, two tests, in the form of questions, must be answered affirmatively.

1. Is the dealing for an allowable purpose stated in the Copyright Act? Allowable purposes are: research, private study, education, satire, parody, criticism, review, or news reporting.

2. Is the dealing “fair”? The Supreme Court of Canada has stated that deciding whether a particular instance of copying may be considered to be “fair” requires a consideration of all of the relevant factors, including the following:
   a) the purpose of the proposed copying, including whether it is for research, private study, education, satire, parody, criticism, review or news reporting
   b) the character of the proposed copying, including whether it involves single or multiple copies, and whether the copy is destroyed after it is used for its specific intended purpose
   c) the amount of the dealing from the individual user’s perspective, including the proportion of the work that is proposed to be copied and the importance of that excerpt in relation to the whole work
   d) alternatives to copying the work, including whether there is a non-copyrighted equivalent available
   e) the nature of the work, including whether it is published or unpublished; and
   f) the effect of the copying on the work, including whether the copy will compete with the commercial market of the original work
How does “fair dealing” apply to faculty and staff who want to make copies for distribution to students? Further guidance was provided in 2012 from the Supreme Court of Canada in this particular context. In its 2012 decision, the Supreme Court of Canada considered copying of short excerpts by teachers for class handouts, under the “research or private study” fair dealing purposes. The Court explicitly recognized that teachers “are there to facilitate the students’ research and private study”, that teachers cannot “be characterized as having the completely separate purpose of ‘instruction’”, and that the teachers’ purpose in providing copies to students is “to enable the students to have the material they need for the purpose of studying”. The Court characterized teachers as sharing a “symbiotic purpose with the student/user who is engaging in research or private study”. On this basis, the Court decided that the Fair Dealing Exception allows teachers to make copies of short excerpts of copyrighted works and distribute them to students as part of classroom instruction, without a prior request from a student, subject to appropriate conditions.

North Island College has developed the NIC Fair Dealing Policy in close consultation with the Association of Universities and Colleges of Canada. This document sets out the specific requirements that NIC staff and faculty members must meet before attempting to reproduce copyrighted works.

Faculty members may be allowed under the NIC Fair Dealing Policy to post copyrighted materials onto secure NIC learning management systems. For further information regarding posting materials onto NIC’s learning management systems, please see the Copyright & LEARN FAQ page.

**Important note:** Some NIC Digital Licenses that provide access to publications in electronic format may restrict the making or dissemination of copies and limit fair dealing rights. If there is a conflict between the terms of a license and the NIC Fair Dealing Policy, the terms of the license apply.

**B. Personal use exceptions**

There are also the following “personal use” fair dealing exceptions:

**Non-commercial user-generated content (aka "mash-up exception")**

An individual may, for non-commercial purposes, use a published work to create a new work provided that the individual had reasonable grounds to believe that said use of the published work did not infringe copyright, the individual mentions the source of the published work and the use of such published work does not have a substantial negative effect to the copyright holder of the published work. For example, this allows you to splice scenes from legally purchased movies or videos, for the purposes of creating a lecture.

**Reproduction for private purpose (aka ‘form-shifting exception’)**

An individual may reproduce, for a private purpose, any work, if the source copy was legally obtained and the individual does not circumvent an access digital lock (see above) in order to reproduce the work. For example, this allows you to copy a song purchased from iTunes from your computer onto a device, such as an iPod, or files from a legally purchased CD to your computer. This exception does not allow you to:

- copy songs onto a CD or mini-disc (or any other audio recording medium)
- give the reproduction away; or
- keep the reproduction if the original version is given away, rented or sold

**Fixing signals and recording programs for later listening/viewing (aka "time-shifting exception")**

An individual can fix a communication signal or copy a work, sound recording or performance being broadcast for the purpose of privately viewing it at a later time, provided that the signal is received legally, the individual does not circumvent an access digital lock in order to fix the signal or copy the work, only one recording is made and such recording is not given away. For example, this allows you to record a show on your PVR or other recording device to watch at a later time.

**Backup copies**

An individual can make a backup copy of a work to protect against the source copy being lost, damaged or otherwise rendered unusable, if the source work is legally obtained by the individual, the individual does not circumvent an access digital lock in order to back-up the work, and the backup copy is not given away.

**C. Educational exceptions**
Educational institutions and persons acting under the authority of an educational institution are also allowed to do any of the following:

**Reproduction of Canadian legislation**

- reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the reproduced materials and the reproduction is not represented as an official version

**Reproduction for display:**

- reproduce a work, or do any other necessary act, in order to display the work for education or training purposes. However, this exception is not available, except in the case of manual reproduction (e.g. onto a dry-erase board, flip chart or other surface intended for displaying handwritten material) for works that may be located with reasonable effort, are commercially available on the Canadian market within a reasonable time and for a reasonable price, in a medium appropriate for education or training purposes

**Reproduction for tests or exams:**

- reproduce, translate or perform a work in public on the premises of NIC, as required for a test or examination, provided the work is not already available in a commercial format
- communicate a work by telecommunication to the public situated on the premises of NIC, as required for a test or examination, provided the work is not already available in a commercial format

**Performances, sound recordings and telecommunication**

- carry out the following performances, if performed on NIC premises for educational or training purposes and not for profit, before an audience consisting primarily of students, faculty or any person who is directly responsible for setting a curriculum for NIC:
  - the live performance in public, primarily by NIC students, of a work
  - the performance in public of a sound recording or of a work or performer’s performance that is embodied in a sound recording
  - the performance in public of a work at the time of its communication to the public by telecommunication; and/or
  - the performance in public of a cinematographic work

- each of the above performances are only allowed if it is not based on an infringing copy of the work

**Broadcasts**

- make a single copy of a work at the time that it is communicated to the public by telecommunication; and keep the copy for up to thirty (30) days to decide whether to perform the copy for educational or training purposes

**Reproduction for lessons by telecommunication**

- communicate a lesson (including tests or exams), to the students enrolled in that specific course, by telecommunication for education or training purposes, and record such lessons. The student can also make a copy of such telecommunicated lesson to be viewed or listened to at a later time, provided that:
  - the student and the institution must destroy the recording or copy within 30 days after receipt by students of their final course evaluations
  - the institution must take reasonable measures to limit the audience to students only, and to prevent the students from fixing, reproducing or communicating such lessons except as permitted under this exception.
- The recordings cannot be sold or distributed widely (beyond the audience of students enrolled in the class)

**Work available through the Internet**
• reproduce, communicate by telecommunication and perform for an audience consisting primarily of NIC students or other persons acting under NIC’s authority, for educational or training purposes, works or other subject matter that is available through the Internet, unless:
  • the works are protected by a digital lock that restricts access to the work or other subject-matter or to the website
  • a clearly visible notice (and not merely the copyright symbol alone) prohibiting such act is posted on the website or on the work or other subject matter itself; or
  • the educational institution or person acting under its authority knows or should have known that the works were made available on the Internet without consent of the copyright owner

and the following must be mentioned in respect of the work

• the source; and
• name of author, performer, maker or broadcaster (if provided in the source)

News and commentary

• make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries, for the purposes of performing the copy for the students of NIC for educational or training purposes; and
• perform the copy in public before an audience consisting primarily of students of NIC on its premises for educational or training purposes.

Educational institutions relying on this exception no longer have to pay royalties, destroy copies of news or commentary programs after one year, or keep records of the copies made of news or commentary programs

Reproduction for persons with perceptual disabilities

• copy an entire work (other than a cinematographic work) into an alternative format including translation, adaptation and performance in public (except the making of a large-print book) for the purpose of serving students with perceptual disabilities as long as such an adaptation is not already commercially available in that format

D. Other relevant exceptions under the Copyright Act

The following are other exceptions under the Copyright Act that apply generally, but are relevant to educational institutions and persons acting under the authority of an educational institution.

Computer Programs

If you own a copy of the computer program that is authorized by the owner of the copyright, or has a license to use a copy of the computer program, you may reproduce the copy by adapting, modifying or converting it, or translating it into another computer language, if you prove that the reproduced copy:

• is essential for the compatibility of the computer program with a particular computer
• is solely for your own use; and
• was destroyed immediately after you ceased to be the owner of the copy of the computer program or to have a license to use it
• reproduce for backup purposes the copy or a reproduced copy referred to above if you prove that the reproduction for backup purposes was destroyed immediately after you ceased to be the owner of the copy of the computer program or to have a license to use it; and/or
• reproduce the copy for the sole purpose of obtaining information so you can make the program and any other computer program interoperable

Encryption research, security and temporary reproductions for technological processes

You may reproduce a work or other subject-matter for the purposes of encryption research if:

• it would not be practical to carry out the research without making the copy
• you have lawfully obtained the work or other subject-matter; and
you have informed the owner of the copyright in the work or other subject-matter

reproduce a work or other subject-matter for the sole purpose, with the consent of the owner or administrator of a computer, computer system or computer network, of assessing the vulnerability of the computer, system or network or of correcting any security flaws; and/or

make a reproduction of a work or other subject-matter if such reproduction:
  ○ forms an essential part of a technological process
  ○ has the sole purpose of facilitating a use that is not an infringement of copyright; and
  ○ exists only for the duration of the technological process

4. Does NIC have an existing license which allows you to copy the work?

NIC has obtained permission for its faculty and staff to copy the work under various license agreements between NIC and the author or copyright owner, a publisher, or a publisher’s representative. NIC has several electronic subscription licenses that give faculty and students access to thousands of copyrighted articles. Please check the Copyright Licenses Permissions Chart, which has been compiled by the NIC Library for all such licenses. If you require assistance, refer to the corresponding section of the Copyright Guide or contact the Library Coordinator, Mary Anne Guenther, at 250-334-5001 or maryanne.guenther@nic.bc.ca.

5. Do you wish to request consent directly from the copyright holder?

If the copying of a work is not permitted through any of the above means, you should consider whether another work (for which NIC already has a license) would be an acceptable alternative. If not, and if you still wish to use the work, you can refer to the corresponding section of the Copyright Guide or contact the Library Coordinator, Mary Anne Guenther, at 250-334-5001 or maryanne.guenther@nic.bc.ca.

Conclusion

This document is an overview and not a comprehensive summary of the copyright laws of Canada. Please note that there are additional exceptions available to libraries under the Copyright Act. Future court decisions and amendments to legislation will affect the scope of these exceptions. NIC may also revise and update the NIC Fair Dealing Policy and other documents posted on the Copyright Research Guide from time to time.

If, after reviewing these guidelines, you have any questions or concerns about your obligations under copyright laws or these guidelines, or wish to receive additional guidance, please refer to the corresponding section of the Copyright Guide or contact the Library Coordinator, Mary Anne Guenther, at 250-334-5001 or maryanne.guenther@nic.bc.ca.