

Application of the Fair Dealing Policy for Universities to the Production and Sale of Course Packs

Background

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

The university may rely on the Fair Dealing Policy for Universities (“Fair Dealing Policy”) and the guidelines in this document to make copies of short excerpts (as that term is defined in the Fair Dealing Policy) for use in course packs. This document provides guidance on the application of the Fair Dealing Policy to the production and sale of course packs by the university.

Guiding Principles

A guiding principle behind the Fair Dealing Policy is that copying or communicating a copyright-protected work under the Fair Dealing Policy is not to substitute for the purchase of the work that was copied or communicated. In order to respect that principle, it is necessary to implement certain safeguards for the owners of copyright in the works copied for inclusion in course packs.

A guiding principle behind the application of the Fair Dealing Policy to the production and sale of course packs is to ensure that no “profit” is 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 Policy, as elaborated in this document, are followed, then the making and sale of course packs incorporating copies of short excerpts of copyright-protected works would be permitted under fair dealing.

The policy does not permit the university to send a course pack to a commercial copy shop for the latter to reproduce copies for students.

Definition of Short Excerpt

The Fair Dealing Policy permits the communication and reproduction of a short excerpt from a copyright-protected work in the circumstances described in the Fair Dealing Policy. Section 4 of the Fair Dealing Policy defines a short excerpt as follows:

4. 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.

To give students the choice of how to access course materials, the same short excerpt may be made available to students in a course pack, a class handout, or through the university's learning management system. However, no more than a short excerpt from a work may be copied and made available to students during a specific course of instruction irrespective of the number of formats in which it is made available. Furthermore, no more than a short excerpt from across all editions of a copyright-protected work should be included in a course pack.

Including Materials Beyond Short Excerpts in a Course Pack

If an extract to be included in a course pack exceeds the limitations of a short excerpt as set out in the Fair Dealing Policy, transactional permission for making the copies should be secured from the copyright holder or from the holder's licensing agent.

In addition, the university may include in course packs copies of copyright-protected works for which the university 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. A copyright-protected work made available to the university under a licence with a publisher or aggregator that prohibits the use of extracts in course packs cannot be copied and included in a course pack. Any copying and/or distribution restrictions contained in the licence will take precedence over the Fair Dealing Policy.

Records

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

- (a) the identity of each work included in the course packs,
- (b) identification of the publication from which the excerpt was copied (if applicable),
- (c) the length of each excerpt included,
- (d) the basis upon which each excerpt was copied (e.g. fair dealing, library licence, work made available over the Internet, transactional licence),

- (e) if the basis upon which the excerpt was copied was fair dealing of an excerpt that is 10% or less of the work, the number of pages copied and the total number of pages of the work from which the copies were made, and
- (f) 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 made by the university that includes copies of short excerpts of copyright-protected works made under the Fair Dealing Policy should include the following notice printed in a prominent location on the course pack (e.g. on the front cover).

This course pack is made in accordance with the university's Fair Dealing Policy 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 strictly forbidden.

Process for Production of Course Packs

Short excerpts that are copied under the Fair Dealing Policy must be copied by the university¹. The university may not purchase such copies from a third party. If it is necessary for a university to contract with a third party to produce and sell course packs to the university, such copying cannot be undertaken under the Fair Dealing Policy².

Retention of Master Copy

The university 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 of copyright-protected works made under the Fair Dealing Policy must be sold by the university 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.

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.

² A university that has entered into the model licence agreement with Access Copyright may arrange for third parties to produce course packs in accordance with the terms of clause 16 of the agreement.

Pricing

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

The following examples show how overhead costs could be allocated. With respect to course pack production, assume that in the previous year:

- (a) the cost of the consumables required to make a photocopy (e.g. toner and paper) were 1.5 cents per page;
- (b) 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
- (c) the production facilities produced 10,000 course packs.

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

If a university sells the course pack through a bookstore that is operated by the university, in addition to the direct costs of making the course pack, a reasonable allocation of the cost of operating the bookstore may be included in the purchase price. Assume that in the previous year:

- (a) course packs were 5 percent of the cost of goods sold by the bookstore in the previous year; and
- (b) the cost of operating the 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 that had a consumables cost of \$1.50, plus other production costs of \$10.00, plus distribution costs of \$2.00 could therefore be sold by the bookstore to students for \$13.50.

The distribution costs allocated to course packs should be recalculated on a periodic basis.

Determination regarding the Application of the Fair Dealing Policy

If any person responsible for making a course pack, whether a faculty member and his or her staff, or a central course pack production staff, is uncertain about the application of the Fair Dealing Policy to the production and sale of course packs, that person should consult with the university staff responsible for administering the Fair Dealing Policy or his or her delegate for an evaluation of whether the copying would be fair dealing.

If making a copy falls outside of the Fair Dealing Policy, e.g. making cumulatively a copy of more than a short excerpt across different formats, other exceptions in the *Copyright Act* may be available, or copying permission may be secured through existing licences in favour of the university. Otherwise, the copyright holder's permission will need to be sought.