I. Overview

The following Copying Guidelines (the “Guidelines”) have been developed by Cambrian College (the “College”), in consultation with its copyright counsel. The Guidelines have been developed in accordance with the Copyright Act and relevant Supreme Court of Canada decisions, to provide assistance in decision-making about copying that occurs in the teaching and research activities of the College.

In situations of doubt, reference should be made to the underlying principles as articulates by the Supreme Court. Specialized advice should be sought. For questions regarding copyright, consult the Librarian via extension 7333. Questions specific to course packs may be directed to Ancillary Business Operations at extension 6878.

II. Considerations Before Copying

Faculty, staff and students of the College are both the authors and the users of material in which copyright exists.

The following are a series of questions that should be considered to determine whether such materials may be copied. In all cases that follow, it is presumed that the materials were not created by the person doing the copying, that is, the author.

Question 1): Is the Material Something in which there is Copyright?

If “No”, then the material may be copied
If “Yes”, then move to Question 2)

Copyright exists in “every original literary, dramatic, musical, and artistic work”, whatever may be the form of its expression (“Copyrightable Subject Matter”). The Copyright Act gives the following, non-exhaustive examples of Copyrightable Subject Matter:

- Books, newspapers, reviews, magazines, periodicals, pamphlets and other writings
- Instructions and repair manuals
- Paintings and drawings
- Maps, charts, and plans
- Photographs, engravings and sculptures
- Works of artistic craftsmanship
- Architectural works
- Lectures
- Dramatic or dramatico-musical works
- Musical compositions
- Sheet music
- Translations
- Illustrations, sketches and plastic works relative to geography, topography, architecture or science
- Any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise
- Cinematographic works
- Tables
- Computer programs.

Copyright also extends to performer’s performances, sound recordings, and certain communication signals.

Copyright does not extend to:
- Ideas
- Facts
- Data

Copyright does, however, extend to compilations of works and facts/data to the extent the compilation is the result of an original selection and/or arrangement.

Do not assume that just because material has been made publicly available, copyright in the material does not exist, or that copying it in any way, or linking to it, is permissible.

**Important Note:** In general, it is assumed that most of the material that will be sought to be copied under this policy is Copyrightable Subject Matter. Where there is any uncertainty as to whether the material is Copyrightable Subject Matter, the person copying should proceed on the basis that the material is Copyrightable Subject Matter.

**Question 2): Has Copyright Expired?**

- If “Yes”, then the material may be copied
- If “No”, then move to Question 3)

The *Copyright Act* provides for a term of protection that is, in most instances, the life of the author plus 50 years following the year of the author’s death. By way of example, if an author died January 1, 1966, copyright would expire December 31, 2016.

The term of protection may be calculated differently depending on the circumstance – for example, with respect to anonymous works posthumous works, cinematographic works, and works prepared or published by the Crown. These circumstances are set out at Sections 6.1 to 12 of the *Copyright Act*. Generally, however, the rule is that copyright protection extends 50 years from the year of a specific event identified in the *Copyright Act*. 
Once the term of copyright has expired, the work enters the “Public Domain” and may be copied in whole or in part without permission from the owner of the copyright.

Note: Although the work itself may have entered the Public Domain, it is always important to consult the source from where the work is copied, since that source itself may not be in the Public Domain. For example, William Shakespeare’s plays are in the Public Domain; however, a publisher’s 2013 edition of his plays would still be subject to copyright. Similarly, although Beethoven’s 5th Symphony is in the Public Domain, an arrangement or recording of that work made in 1990 would still be subject to copyright.

Question 3): Is There a Licence?

If “Yes”, then
a) consult the licence to determine the allowed uses
b) if licence is silent on uses, then move to Question 4)
c) if licence is not silent and prohibits the proposed copying, then, the material may not be copied

If “No”, then move to Question 4)

A licence is an agreement entered between two parties. In some instances, the College may have entered into a licence agreement with a third party, such as a publisher, that allows the copying of works by others (this is sometimes referred to at the College as a “Library License”). In other cases, such as with “creative commons” licences, the author directly licenses the user to make certain uses of the work. More information about “creative commons” licences can be found at https://creativecommons.org/ or http://creativecommons.ca.

Most websites have “terms of use” that identify how material published on that site may be used. A website’s “terms of use” may include specific language with respect to linking to and copying content from the website.

Whenever a licence addresses the scope of use, including copying, the terms of the licence should govern.

Note: Owning a physical or digital copy of a work, for example – a book, a disc containing music or a movie – does not automatically create a license to copy that work.

Question 4): Does the copied content form a “substantial part” of the underlying work?

If “No”, then the material may be copied
If “Yes”, then move to Question 5)
Copying only becomes an issue where the copy can be said to “infringe” the protected underlying work. Infringement occurs when what has been copied forms a “substantial part” of the underlying protected work. In other words, copies that comprise an insubstantial part of the work will not infringe. Therefore, no license, permission, payment, or exception is required before making insubstantial copies.

What constitutes a “substantial” or “insubstantial” part of a work is a matter of context, and will vary depending on the circumstances. The Supreme Court advocates for a “holistic” approach in determining whether a “substantial part” of a work has been copied. This requires a consideration of whether what is copied forms a substantial part of the author’s skill and judgment expressed in the work, as a whole (i.e., the expressive, original portion of the work).

It is not merely enough to consider the amount of the work copied – what is an “insubstantial” part will vary depending on the nature of the work, the nature of the copied materials, and the proportion of what is copied compared to the underlying work as a whole. For example, copying the title of a book is unlikely to constitute a “substantial part” of that book; however, copying the first paragraph of that book may very well be considered a “substantial part”, because it would contain an original/expressive portion of the book.

Question 5): Is there a specific exception that applies?

If “Yes”, then the material may be copied in accordance with the exception
If “No”, then move to Question 7)

The Copyright Act provides certain specific exceptions with respect to copyright infringement. Some of the exceptions that would apply in a classroom/educational context are discussed below. A full list of the specific exceptions may be found at Sections 29.21 to 32.2 of the Copyright Act.

a) Educational Institutions

Sections 29.4 to 30.04 of the Copyright Act set out certain specific exceptions available for “educational institutions”; the College is an “educational institution”.

These provisions set out that it is lawful for an educational institution or a person acting under its authority to do, among other things, for educational or training purposes:

- Display – Reproduce a work in order to display it on the institution’s premises, provided that the reproduction is undertaken without motive of gain (i.e., recouping more than the cost associated with making that display) and that the work is not commercially available in a medium appropriate for the purposes of display (s. 29.4)
• **Use in Examinations** — Reproduce, translate, perform in public, or communicate by telecommunication to the public situation on, the premises of the educational institution, a work as required for a test or examination *provided* that the reproduction is undertaken without motive of gain (i.e., recouping more than the cost associated with making that display) and that the work is not commercially available in a medium appropriate for the purposes of examination (s. 29.4)

• **Performance** — Perform a work on the premises of the educational institution, *provided* it is not done for profit and is before an audience consisting primarily of students of the educational institutions (s. 29.5)

• **Internet Content** — Reproduce, communicate, or perform a work or other subject matter available through the internet *provided* the following conditions are met:

  (a) the source is identified, and (if available), the name of the author (for works), the performer (for performances), the maker (for sound recordings), and the broadcaster (for communication signals; *and*)

  (b) the work is not subject to a technological protection measure that restricts access to the website or the doing of the act sought to be done, or there is a clearly visible notice prohibiting the act sought to be done, or where it is known that the work was made available through the Internet without the consent of the copyright owner (s. 30.04).

  b) **Incidental Inclusion**

  The *Copyright Act* excuses cases of incidental and non-deliberate inclusion of copyrighted works in other works. In particular, the *Act* deems it not to be an infringement to incidentally and not deliberately do the following:

  1. Include a work or other subject matter in another work/subject matter; or
  2. Do any act in relation to a work/subject matter that is incidentally and not deliberately included in another work/subjection matter.

  c) **Persons with Perceptual Disabilities**

  Although not speaking to all reproductions, the *Copyright Act* does allow the following acts to be taken with respect to a work or sound recording by a person with a perceptual disability, someone acting on that person’s request, or a non-profit organization acting for the benefit of the person with the perceptual disability, *provided* the work or sound recording is not already commercially available in a format specially designed to meet the needs of that person:

  1. Make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
2. Translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability.

3. Perform in public a literary or dramatic work, other than a cinematographic work, in sign language, live or in a format specially designed for persons with a perceptual disability.

*Note: The exception does not extend to the making of a large print book.*

d) User-Generated Content

Often called the “YouTube”, and sometimes called the “Mash-Up”, exception, Section 29.21 of the Copyright Act deems it not to be an infringement for an individual to use an existing work (or a copy of one), that has been made available to the public, in the creation of a new work.

Under this exception, the individual (or a member of their household, with the individual’s permission) may use the new work or other subject-matter or to authorize an intermediary to disseminate it if the following conditions are met:

1. The use/dissemination of the new work is done solely for non-commercial purposes;

2. If reasonable to do so, the new work identifies the source of the existing work/copy, including the name of the author, performer, maker, or broadcaster;

3. The individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

4. The use/dissemination of the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work/copy of it, or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

e) Other Specific Exceptions

Section 32.2 of the Copyright Act deems a number of specific acts not to be infringement, including the following:

1. To reproduce an architectural work in a painting, drawing engraving, photograph, or cinematographic work, *provided* the copy is not in the nature of an architectural plan;
2. To reproduce a sculpture or work of artistic craftsmanship in a painting, drawing, engraving, photograph, or cinematographic work, provided the sculpture or work of artistic craftsmanship is permanently situated in a public place or building;

3. To read or recite in public a reasonable extract from a published work;

This Section also permits the College as an “educational institution” to do the following in public for educational purposes, without infringing:

1. Perform a musical work live;

2. Perform a sound recording embodying a musical work or performer’s performance of such work;

3. Perform a communication signal carrying a live performance of a musical work, or a sound recording of a musical work or a performer’s performance of such work.

Question 6): If none of the above apply, would the copy be a “Fair Dealing”?

If “Yes”, then the material may be copied as proposed.
If “No”, then the material may not be copied without permission/license from the copyright owner.

The “fair dealing” provisions of the Copyright Act (ss. 29, 29.1 and 29.2) permit use of copyrighted works without permission from or payment to the copyright owner when the proposed dealing is considered “fair”. Determining what is a fair dealing is a two-step inquiry.

Step 1 — Does the Dealing Fall Under a Purpose Identified in the Act?

At the first step, the dealing must be found to be for one of the enumerated purposes set out in Sections 29, 29.1 or 29.2 of the Copyright Act. These categories are research, private study, education, parody, satire, criticism, review, and news reporting. For criticism, review, and news reporting, the user must also mention the source, and, if identified in the source, must also include the name of the author (for works), performer (for performances), maker (for sound recordings), or broadcaster (for communication signals). These categories are to be given a “large and liberal interpretation”. Based on the decision of the Supreme Court of Canada in Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, it appears fair to say that a large portion of activities in connection with classroom instruction and research should fall into the categories of “education”, “research”, or “private study”.
Step 2 — Is the Dealing “Fair”?

The second step requires a consideration of whether, in all the circumstances, the dealing itself can be considered “fair”. This is where the bulk of the analysis will occur. Whether something is a fair dealing will vary from case to case, which can make it difficult to determine whether a proposed dealing would be excused.

The Supreme Court in CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, confirmed the following factors are relevant considerations in assessing whether a dealing is “fair”:

1) the purpose of the dealing;
2) the character of the dealing;
3) the amount of the dealing;
4) alternatives of the dealing;
5) the nature of the work;
6) the effect of the dealing on the work.

The following chart sets out the above factors, identifying the types of circumstances that may make a dealing more or less “fair”:

<table>
<thead>
<tr>
<th>Fair Factor</th>
<th>Dealing Factor</th>
<th>Ask</th>
<th>More Fair</th>
<th>Less Fair</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Purpose</td>
<td>Why is the work used?</td>
<td>Not for profit</td>
<td>Commercial</td>
<td></td>
</tr>
<tr>
<td>2) Character</td>
<td>How is the work used?</td>
<td>Single copy; Copy destroyed after use</td>
<td>Multiple copies; Wide distribution of copies</td>
<td></td>
</tr>
<tr>
<td>3) Amount</td>
<td>How much of the work is used?</td>
<td>Short excerpt; No more than is required to effect the dealing</td>
<td>Entire work; Long excerpt; Inclusion of portions not required to effect the dealing</td>
<td></td>
</tr>
<tr>
<td>4) Alternative</td>
<td>Is there an alternative? Was the use necessary to achieve the stated purpose?</td>
<td>Copying reasonably necessary to achieve the purpose; Copies not otherwise available</td>
<td>Non-copyrighted equivalent available; Copying not necessary to achieve the purpose</td>
<td></td>
</tr>
<tr>
<td>5) Nature of the Work</td>
<td>Is the work widely available or not published?</td>
<td>Work is not published; Wider dissemination is in public interest</td>
<td>Work is confidential</td>
<td></td>
</tr>
<tr>
<td>6) Effect of the Dealing</td>
<td>Does the use compete with the market for the original work?</td>
<td>Copy unlikely to compete in the market with the original</td>
<td>Copy likely to compete with the market for the original</td>
<td></td>
</tr>
</tbody>
</table>

It is not a rule that all six factors must weigh in favour of the user for the dealing to be considered “fair”. Rather, the relevance of each factor will depend on the facts of the case. At times, certain factors may be more important than others. At other times, other factors, beyond those identified by the Court, may be relevant.

The College has developed “Cambrian College — Fair Dealing Guidelines” to help identify the types of copying activities that the College believes are likely to be considered fair dealing in most contexts.

The College acknowledges that there may be cases in which a dealing is not captured by the Fair Dealing Guidelines, but may nevertheless be “fair”. In such circumstances, additional guidance may be required from a knowledgeable expert.

### III. Additional Considerations Before Copying

#### 1) Authors versus Owners

An “author” is the creator of a work. An “owner” is the person that holds the copyright, and has the legal right to grant permission to use a work. In some cases, authors are also the owner of the work; however, in many cases, and in particular, with respect to most published works, such as books, the “owner” may be a different person.

In the event permission needs to be sought before copying materials, such permission must be sought from the “owner” of the copyright.

Note: Owning a physical or digital copy of a work, for example – of a book, music, or movie – does not make one the “owner” of copyright, nor does it automatically create a license to copy that work.

Note: Please also refer to the College’s Policy on Intellectual Property effective October 16, 2003. Employees covered by the Academic Employees Collective Agreement may also wish to refer to Article 13 of that Agreement, which sets out, inter alia, that a work commissioned by the College, or produced pursuant to the employee’s normal administrative or professional duties with the College, shall be and remain the property of the College.
2) Moral Rights

In addition to copyright, Canada protects the “moral rights” of authors in their works. These rights are set out in Section 14.1 and 14.2 of the Copyright Act. These rights last for the same amount of time as copyright, unless they are waived by the author.

Authors have the following moral rights in Canada:

1. The right of the integrity of the work (e.g., not to have the work changed);

2. The right to be associated with the work as its author by name, under a pseudonym, or the right to remain anonymous.

These rights are infringed when there is an act or omission contrary to those rights without the author’s permission.

For the most part, merely copying portions of a work will not be considered an infringement of an author’s moral rights.