

***Online Learning During the COVID-19 Pandemic
Frequently Asked Copyright Questions
Revised as of September 2020***

Copyright and Online Learning During the COVID-19 Pandemic
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Council of Ministers of Education, Canada (CMEC)*

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Available at <http://www.fairdealingdecisiontool.ca/Resources/covid19/>

*The CMEC Copyright Consortium, composed of the Ministers of Education of the provinces and territories, except Quebec, is responsible for copyright matters for CMEC.

Table of Contents

<i>Important note: There is a difference between U.S. and Canadian copyright laws.</i>	<i>3</i>
<i>Question 1 – Do copyright laws and the Fair Dealing Guidelines apply to online teaching and face-to-face learning during a pandemic?</i>	<i>3</i>
<i>Question 2 – Is Access Copyright’s Read Aloud Canadian Books Program available to teachers in elementary and secondary schools?</i>	<i>3</i>
<i>Question 3 – Can a teacher read a story to students in the evening on Facebook Live or a similar online platform to promote literacy?.....</i>	<i>3</i>
<i>Question 4 – Can a live book reading by a teacher be communicated online?.....</i>	<i>4</i>
<i>Question 5 – Can teachers record themselves reading books aloud to their students?</i>	<i>5</i>
<i>Question 6 – Can teachers transmit a recording of the book reading to their students via a password-protected website?</i>	<i>5</i>
<i>Question 7 – Can teachers record themselves reading a portion of a book and share the video on a password-protected platform such as Google Classroom or Moodle?</i>	<i>6</i>
<i>Question 8 – Can teachers include modern-day music in a video that teachers are preparing for their students?.....</i>	<i>6</i>
<i>Question 9 – Can a group of students (class or choir) meet online (via Google Meet) to practise and perform a published piece using a screen recording?</i>	<i>7</i>
<i>Question 10 – Can a school create a 'Virtual Choir' of a published work that has been purchased (the appropriate number of copies - one per person) by the school, and post it online for public viewing?.....</i>	<i>7</i>
<i>Question 11 – Can teachers post online chapters of textbooks that have been purchased for all the students but which may not be accessible to them because the books are in a closed school?</i>	<i>7</i>
<i>Question 12 – Can materials on websites such as photographs, activities, and images be copied and pasted to create activities for students? An example is building an activity library.</i>	<i>8</i>

Important note: There is a difference between U.S. and Canadian copyright laws.

American and Canadian copyright laws are not the same. Ideas found on U.S. websites may not apply in Canada.

Question 1 – Do copyright laws and the Fair Dealing Guidelines apply to online teaching and face-to-face learning during a pandemic?

Yes. See below for the link to the Fair Dealing Guidelines. Note that Guideline 5, prohibiting cumulative copying, applies. Teachers cannot copy different short excerpts, each less than 10%, from the same copyright-protected work because that would amount to copying more than 10% of the work in total. Guideline 5 states: ‘Copying or communicating multiple short excerpts from the same copyright-protected work, with the intention of copying or communicating substantially the entire work, is prohibited.’ There are no provisions in the *Copyright Act* and no judicial decisions altering the law on fair dealing in Canada in the circumstances of a pandemic.

The Fair Dealing Guidelines are reproduced below:

<http://www.fairdealingdecisiontool.ca/fdg/default.aspx>

A link to the Fair Dealing Guidelines in PDF format:

https://cmec.ca/docs/copyright/CMEC_POSTER_FDG_EN.pdf

Question 2 – Is Access Copyright’s Read Aloud Canadian Books Program available to teachers in elementary and secondary schools?

No, with the exception of elementary and secondary schools in British Columbia.

As of June 30, 2020, the Read Aloud Canadian Books Program is available only to schools that are licensed by Access Copyright. Although the Read Aloud Canadian Books Program has been extended to December 31, 2020, the program waives the copyright fee for teachers **ONLY** if their school or school board is paying the tariff. As British Columbia is currently the only province or territory paying the tariff, it is the sole Access Copyright licensee in Canada. This program, therefore, is NOT AVAILABLE to any other provincial or territorial elementary or secondary schools. Copyright permission from a book’s publisher must be obtained to make a video recording of a reading of all or part of a book for students who are learning at home.

The info site for Access Copyright’s Read Aloud Canadian Books Program can be found at

<https://www.accesscopyright.ca/read-aloud/list-of-read-aloud-canadian-books-publishers-authors/>.

Question 3 – Can a teacher read a story to students in the evening on Facebook Live or a similar online platform to promote literacy?

No. There is no provision in the *Copyright Act* that would allow for this activity without permission from the copyright owner. The users’ right in section 29.5 of the *Copyright Act* is not available in

this situation because three of the five conditions for this users' right to apply are likely not met. The five conditions in section 29.5 are set out below.

1. The performance must take place on the premises of an educational institution. (In this context the reading in an online classroom is arguably not taking place on the premises of an educational institution because it takes place outside of school hours and because it is for the purpose of promoting literacy rather than classroom instruction.)
2. It must be for educational or training purposes. (Although it can be argued that literacy is a core element of education, in this question the stated purpose is to promote literacy rather than education specifically.)
3. It must not be for profit. (This condition is most likely met in the circumstances of this question.)
4. It must take place before an audience consisting primarily of students of the educational institution, persons acting under its authority, or any person who is directly responsible for setting a curriculum for the educational institution. (In this question, the reading may not be limited to the students in the teacher's class. If the reading could be set up so that only the students in the teacher's class could view the reading, then this condition might be met.)
5. It must not involve a 'motive of gain'. Any fee charged for the performance must recover no more than the costs, including overhead costs, associated with the performance. (This condition is most likely met in the circumstances of this question.)

There may be a viable alternative. If a teacher does not have copyright permission for the reading, it may be worth searching on YouTube for audio or video recordings of a book. Many children's books (particularly for younger children) are freely available on YouTube channels that appear to be legitimate and seem to have appropriate permission. Teachers can link to these videos, or embed them in a password-protected learning management system post limited to the students in the teacher's class.

Below is a link to an example of a YouTube channel hosting online stories read aloud that appears to be legitimate: <https://www.youtube.com/user/StorylineOnline/videos>

Teachers will have to use their best judgement in determining whether a work is posted on the Internet with the permission of the copyright owner. Some factors to consider are the name of the account posting the material, the size and popularity of the channel, the commercial market for the work, the YouTube 'verified channel' checkmark, and whether the uploader has given appropriate credit to the author(s) and publisher.

Question 4 – Can a live book reading by a teacher be communicated online?

Yes. Teachers can read books aloud to students in the educational context of a class. Section 29.5(a) of the *Copyright Act* permits the live, public performance of a copyright-protected work. Five conditions must be met for section 29.5 to apply:

1. The performance must take place on the premises of an educational institution. (A reading in an online classroom for the purpose of classroom instruction arguably takes place on the premises of an educational institution.)
2. It must be for educational or training purposes. (This condition is most likely met in the circumstances of this question.)
3. It must not be for profit. (This condition is most likely met in the circumstances of this question.)
4. It must take place before an audience consisting primarily of students of the educational institution, persons acting under its authority, or any person who is directly responsible for setting a curriculum for the educational institution. ('Primarily' does not mean 'exclusively'. A liberal interpretation of section 29.5 would likely include performances by teachers for their students. The Supreme Court of Canada directed that users' rights, including this one, be given a liberal interpretation.)
5. It must not involve a 'motive of gain'. Any fee charged for the performance must recover no more than the costs, including overhead costs, associated with the performance. (This condition is most likely met in the circumstances of this question.)

Question 5 – Can teachers record themselves reading books aloud to their students?

No. Recording a book reading requires permission from the copyright owner. Copyright owners have the exclusive right to reproduce their copyright-protected literary works. Recording a book reading is a reproduction of the book. There is no users' right in the *Copyright Act* authorizing this educational use.

Question 6 – Can teachers transmit a recording of the book reading to their students via a password-protected website?

Only if the recording of the book reading was authorized by the copyright owner. Section 30.01 of the *Copyright Act* permits the communication of a lesson to students, but only if the contents of the lesson are non-infringing. In this question, making the recording would be an infringing act and the recording would be an infringing copy because permission has not been obtained. Because the lesson contains infringing content (the unauthorized recording of the book reading), the users' right in section 30.01 does not apply. A recording of a book reading made without the permission of the copyright owner cannot be transmitted to students under the users' right in section 30.01 of the *Copyright Act*.

A Suggestion

If permission cannot be obtained from a publisher, it may be worth searching on YouTube for audio or video recordings of a book. Many children's books (particularly for younger children) are freely available on YouTube channels that appear to be legitimate and seem to have appropriate permission. Teachers can link to these videos, or embed them in a learning management system post.

Below is a link to an example of a YouTube channel hosting online stories read aloud that appears to be legitimate: <https://www.youtube.com/user/StorylineOnline/videos>

Teachers will have to use their best judgement in determining whether a work is posted on the Internet with the permission of the copyright owner. Some factors to consider are the name of the account posting the material, the size and popularity of the channel, the commercial market for the work, the YouTube 'verified channel' checkmark, and whether the uploader has given appropriate credit to the author(s) and publisher.

Question 7 – Can teachers record themselves reading a portion of a book and share the video on a password-protected platform such as Google Classroom or Moodle?

Yes, provided the Fair Dealing Guidelines are followed. The following three Guidelines should be particularly noted.

1. The portion of the book being read and recorded for communication to students must be within the copying limits set out in section 3 of the Fair Dealing Guidelines.
2. In accordance with section 3(b) of the Fair Dealing Guidelines, the recording must be communicated on a password-protected website or a learning or course management system that is password-protected or restricted to students of the school.
3. The teacher must not read and record multiple portions from the same book, which is prohibited by section 5 of the Fair Dealing Guidelines.

The Fair Dealing Guidelines are reproduced below.

<http://www.fairdealingdecisiontool.ca/fdg/default.aspx>

Below is a link to the Fair Dealing Guidelines in PDF format:

https://cmec.ca/docs/copyright/CMEC_POSTER_FDG_EN.pdf

Question 8 – Can teachers include modern-day music in a video that teachers are preparing for their students?

Yes. Everyone – instructors and students included – has a right under the *Copyright Act* to use and copy a copyright-protected work, or multiple works, in the creation of a new work. This right allows, for example, the use of copyright-protected music to accompany an original video. It also allows anyone to compile multiple videos in a creative fashion to create a new video. This right further allows a person to disseminate the work. Dissemination is a broad term and would include, for example, posting the user-generated content on the Internet. This right is sometimes called the 'mash-up' provision or 'YouTube' right. These terms are derived from the source of the content and how the content is used under this users' right. A popular source of content is YouTube. Many popular television shows, movies, and music are posted on YouTube with copyright permission. A popular use of this content is mashing it up to create a new television show, video or song. This right allows YouTube users to make videos containing clips from

television shows, movies, and popular music found legally on YouTube. The scope of the right, however, is not limited to content found on YouTube.

The following four conditions apply to this right:

1. The new work must be made for non-commercial purposes only. (This condition is most likely met in the circumstances of this question.)
2. The source of any copyright-protected work(s) used must be cited where reasonable, and, if available, the name of the author or performer.
3. Any copyright-protected work used in the creation of a new work must not be from an infringing source, or the user must have no reason to believe it is from an infringing source. (Teachers will have to use their best judgement in determining whether a work is posted on the Internet with the permission of the copyright owner. Some factors to consider are the name of the account posting the material, the size and popularity of the channel, the commercial market for the work, the YouTube 'verified channel' checkmark, and whether the uploader has given appropriate credit to the author(s) and publisher.)
4. The new work must not have a 'substantial adverse effect' on the market for the copyright-protected work(s) used. The new work should not be useful as a substitute for someone who might otherwise have purchased the copyright-protected work(s) used. (This condition is most likely met in the circumstances of this question.)

Question 9 – Can a group of students (class or choir) meet online (via Google Meet) to practise and perform a published piece using a screen recording?

No. There are no users' rights in the *Copyright Act* that permit educators or students to make recordings of copyright-protected works (including musical works) or to communicate those recordings for public viewing online. Permission of the copyright owner is required to make a recording of a copyright-protected work.

Question 10 – Can a school create a 'Virtual Choir' of a published work that has been purchased (the appropriate number of copies - one per person) by the school, and post it online for public viewing?

No. There are no users' rights in the *Copyright Act* that permit educators or students to make recordings of copyright-protected works (including musical works) or to communicate those recordings for public viewing online. Permission of the copyright owner is required to make a recording of a copyright-protected work. Since a musical work is a copyright-protected work, recording it requires permission from the copyright owner.

Question 11 – Can teachers post online chapters of textbooks that have been purchased for all the students but which may not be accessible to them because the books are in a closed school?

A teacher can copy or post only one chapter per book in a single schoolyear or semester under the Fair Dealing Guidelines. If more than one chapter from the same book is to be posted or copied in a single schoolyear or semester, copyright permission must be obtained from the book's publisher. Copying or posting one chapter from a book in September, and then a second chapter from the same book in October, and so on, is not permitted under the Fair Dealing Guidelines. A teacher cannot copy or post any more than a single chapter in a single schoolyear or semester, because the amount copied or posted would exceed the limits as laid out in the Fair Dealing Guidelines. The limit is one chapter per book per schoolyear or semester. A single copy of the chapter may be provided or communicated to each student enrolled in a class or course by posting the chapter to a learning or course management system that is password-protected or otherwise restricted to only those students enrolled in the class. Owning a physical copy of a book does not give the owner the right to make a copy of any more of the book than is permitted under fair dealing.

Question 12 – Can materials on websites such as photographs, activities, and images be copied and pasted to create activities for students? An example is building an activity library.

Educators have the right to copy, communicate, and perform material that is available to the general public on the Internet for their students. This users' right in section 30.04 of the *Copyright Act* would allow an educator, for instance, to build an activity library for students using pictures, diagrams, photographs, text and other materials from a website that that is publicly available.

There are **five conditions** to meet in order to rely on this educational users' right:

1. The use must be for educational purposes.
2. Any content used must not be protected by a password, paywall, or any technological measures that restrict access to the work or the Internet site. (Having to register to use a website is not a technological measure that restricts access to the work.)
3. There must not be a clearly visible notice specifically prohibiting educational use. (A general statement such as 'all rights reserved' or a copyright symbol does not by itself prohibit educational use under this right.)
4. The material being used should either be posted legally, or the educator should have no reason to believe the material was posted illegally. A copy is posted illegally if it is posted without the copyright owner's permission. (It can sometimes be difficult to tell whether Internet material on a website has been posted illegally. Educators will have to use their best judgement in determining whether a work is posted on the Internet with the permission of the copyright owner. Some factors to consider are the name of the account posting the material; the size and popularity of the channel; the commercial market for the work; in the case of YouTube, whether there is a 'verified channel' checkmark; and whether the uploader has given appropriate credit to the author(s) and publisher.)
5. The source, and the name of the author, performer, maker or broadcaster (if given in the source) must be cited.