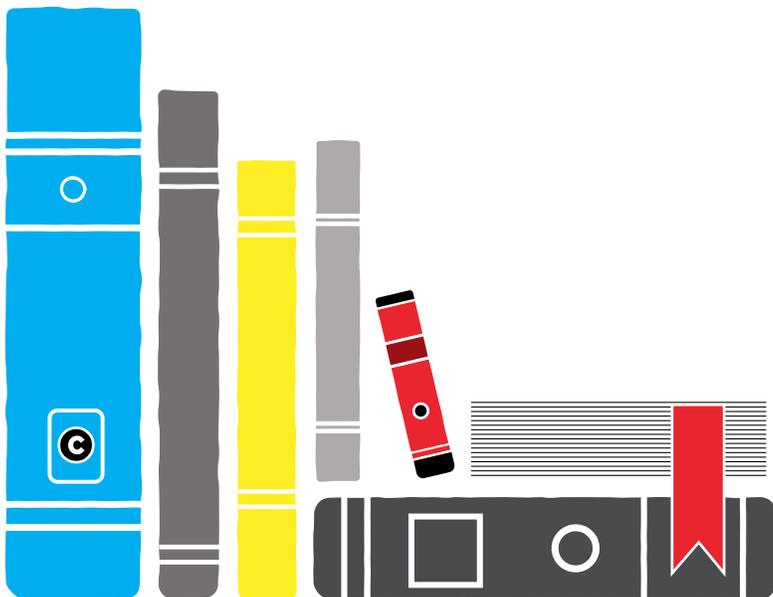


# Fair Dealing in Education:

A Firm Foundation  
Supporting Canadian  
Educational Content



CASA | ACAE

Canadian Alliance of Student Associations  
Alliance canadienne des associations étudiantes

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# Fair Dealing in Education: A Firm Foundation Supporting Canadian Educational Content

CASA believes that any academically qualified student with the desire to pursue post-secondary education (PSE) should not face a barrier – financial, social, political, physical, cultural, or otherwise – to that education. CASA further believes that post-secondary education in Canada should be innovative and of the highest quality possible. As the review of the Copyright Act approaches, CASA strongly believes that fair dealing has proven crucial to reducing barriers, improving access and enhancing innovation and quality in Canadian post-secondary education. The exceptions granted by fair dealing have permitted educators and students to access and circulate information and content more easily, using the newest technologies available. The ability to fairly use and distribute content for educational purposes is a vital component of a modern and innovative education.

Fair dealing is an exception to copyright infringement set out in the Copyright Act<sup>1</sup> which allows for use of a copyrighted work without explicit permission from the copyright owner or additional payment, in certain circumstances. In an educational context, fair dealing grants post-secondary institutions, educators and students the flexibility to fairly access and use copyrighted work without an undue burden to authors or the various agencies representing them.

To qualify for this exception, two criteria must be met: 1) Usage must be for research, private study, education, parody, satire, criticism, review or news reporting<sup>2</sup>, and 2) the dealing must be “fair”. While some argue that “fairness” is not explicitly defined in the Copyright Act, the Supreme Court of Canada (SCC) has

clearly enumerated 6 factors that determined whether or not use of a copyrighted work is legally “fair.”<sup>3</sup>

In *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, the SCC enumerated and explained 6 factors that, cumulatively, can determine fairness: 1) purpose of the dealing; 2) character of the dealing; 3) amount of the dealing; 4) alternatives to the dealing; 5) nature of the work; and 6) effect of the dealing on the work<sup>4</sup>. Taken together, these factors provide clear guidance in making an evaluation of “fairness”. In another recent case that addressed the issue of fair dealing in schools, the SCC determined that teachers making photocopies for students were doing so with the sole intention of helping their students with research or private study<sup>5</sup>.

Overall, fair dealing for the purposes of education is about the right to access information. In other words, fair dealing is not synonymous with free dealing. It does not mean the permission to steal the work of others. Rather, it permits the use of materials in a specific context (in our case, post-secondary institutions), for specific purposes (education) and in accordance with the Copyright Act and SCC rulings on fairness. The SCC stated that fair dealing is a “user’s right,” in 2012.<sup>6</sup> Educational fair dealing is a critical evolutionary step for the Copyright Act. It gives post-secondary institutions, and as a result students, the ability to choose from, use and support an ever-expanding market of educational works<sup>7</sup> while also making full use new digital technologies like online learning platforms. It does so, moreover, while balancing the needs of copyright creators and users.

1 Copyright Act, RSC 1985, c C-42 [Copyright Act], ss 29–29.2.

2 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 50-51 ss 29-29.2, [2004] 1 SCR 339 [CCH]

3 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 23, [2010] 2 SCR 345

4 *Ibid* at para 53.

5 *Ibid* at para 53.

6 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 50-51 ss 29-29.2, [2004] 1 SCR 339 [CCH]

7 Michael Geist, *Clearing Up the Copyright Confusion: Fair Dealing and Bill C-32* (Michael Geist, December 15, 2010). Accessed online: <http://www.michaelgeist.ca/2010/12/fair-dealing-and-c-32/>

# Fair Dealing in Education: Improving Access to Information for Students

Across post-secondary disciplines and programs, education depends on access to information. The more access students have to an array of ideas and information, the better equipped they are to cultivate subject matter expertise, develop and improve analytical skills, communicate complex thoughts and engage with fundamental debates. As Canada's Fundamental Science Review (2017) lays out: Indeed, learning the ideas of others and developing the skills necessary to assess, build on, or challenge those ideas is a core component of any education.

“Active and exciting research programs enhance learning at the undergraduate, graduate, doctoral, and postdoctoral levels. They give students the opportunity to learn at the frontiers of knowledge, so they are better prepared to take on any challenge, research or non-research related, in their future lives. Analyzing and synthesizing information, testing hypotheses, challenging assumptions, weighing arguments from different viewpoints, communicating effectively, solving problems, thinking critically—these products of a research-intensive education are invaluable competencies that will serve students over the course of their entire lives.”<sup>8</sup>

To state the obvious, students had access to information and knowledge prior to the Copyright Act changes in 2012. But with fair dealing in education, students now have access to much more information, and their access to this information is better facilitated through digital platforms. Fair dealing in education means that instructors are no longer limited to the course materials (e.g. textbooks, books, other works) they assign for purchase. While students continue to purchase books (as illustrated in the next section), fair dealing means they simultaneously utilize a wider array of

materials in their courses on top of what they purchase. When considered across diverse courses and potentially multiple years of study, these additional materials substantially improve the quality of each student's education.

Without fair dealing, it is likely that many readings would simply not be assigned for use in classrooms at all, due to the unsustainable financial burden it would create to require purchase of every relevant material. Indeed, the evidence suggests that without fair dealing in education, educators tend to be overly risk averse in their use of copyrighted materials. Samuel E. Trosow explains that while an instructor could have shared more information with students (for example via photocopies) under a copyright licensing agreement (e.g. Access Copyright) before fair dealing in education was introduced, they often would not do so out of an abundance of caution.<sup>9</sup> This hesitation to share learning materials out of excessive concern that it might violate copyright rules had the further effect of limiting student access to information.

When fair dealing in education was first proposed, Trosow noted that it would facilitate the fair use of educational materials on post-secondary campuses by helping address the issue of excessive risk aversion. As Trosow puts it, the proposed amendment to the Copyright Act (now law), “holds the promise of mitigating and ultimately reversing these impediments if it is taken seriously and implemented in a purposeful manner on our campuses.”<sup>10</sup>

8 *Investing in Canada's Future: Strengthening the Foundations of Canadian Research* (Canada's Fundamental Science Review, 2017), 26. Accessed online: [http://www.sciencereview.ca/eic/site/059.nsf/vwapj/ScienceReview\\_April2017-rv.pdf/\\$file/ScienceReview\\_April2017-rv.pdf](http://www.sciencereview.ca/eic/site/059.nsf/vwapj/ScienceReview_April2017-rv.pdf/$file/ScienceReview_April2017-rv.pdf)

9 See Samuel E. Trosow, “Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing,” in *From “Radical Extremism” to “Balanced Copyright”*: *Canadian Copyright and the Digital Agenda*, ed. Michael Geist (Toronto: Irwin Law, 2010), 548: “In his insightful analysis of risk aversion and rights accretion in intellectual property, James Gibson notes that “[b]ecause liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed.”

10 Trosow, “Bill C-32 and the Educational Sector,” 553.

Indeed, with fair dealing in education, post-secondary institutions have introduced expanded copyright offices and copyright policies to help instructors navigate copyright law. At the University of Toronto, for example, there has been “a significant investment in the internal management of copyright compliance through the creation and staffing of the Scholarly Communications & Copyright Office, a new unit within the library, as well as the concurrent development of an institutional policy...”<sup>11</sup> Such developments facilitate access to as much information as possible for students, while also ensuring that the law is followed. This benefits copyright creators and users alike.

Because of fair dealing in education, post-secondary students can and do access and use substantially more information than was previously possible or practical. The advancement of learning technologies, such as online course portals, further improves the accessibility of this information. It would be a significant loss in education quality for students to not be able to fully benefit from such technologies, and to not have access to the multiple layers of information that is a core component of quality in education.

*“The more access students have to an array of ideas and information, the better equipped they are to cultivate subject matter expertise, develop and improve analytical skills, communicate complex thoughts and engage with fundamental debates.”*

<sup>11</sup> Nelly Cancilla, Bobby Glushko, Stephanie Organo and Graeme Slaght, “Engaging Faculty and Reducing Costs by Leveraging Collections: A Pilot Project to Reduce Course Pack Use,” *Journal of Librarianship and Scholarly Communication* 4 (2017): 4. Accessed online: <http://jlscc-pub.org/articles/abstract/10.7710/2162-3309.2137/>

# Fair Dealing in Education: Improving Affordability for Students

The issue of affordability in education is directly connected to that of access to information. While students continue to purchase educational materials, placing too great a financial burden on students through expensive course materials ultimately means limiting their ability to access the widest breadth of information possible.

Fair dealing in education makes course material (and therefore post-secondary education) more affordable for students. It is important to emphasize that students have continued to purchase educational materials since the 2012 inclusion of education in the Copyright Act's fair dealing exceptions. Average household spending on textbooks was \$656 in 2015 for university texts and \$437 for college texts.<sup>12</sup> Statistics Canada reports that in 2014 "educational titles" were one of "the top two contributing commercial categories" in domestic book sales (worth \$366.1 million).<sup>13</sup>

At the same time that students continue to be major purchasers of copyrighted materials, fair dealing also helps students access more information while reducing associated costs. Course packs are used in many post-secondary courses to tailor reading materials specific to lesson plans in a way that a standardized text cannot. Fair dealing in education means that instructors can share fair excerpts from diverse published works with students for the benefit of their education. As the textbook sales data above illustrate, this has by no means replaced purchases of educational materials by students. The educational value of entire books cannot be displaced by short excerpts under fair dealing. However, fair dealing does expand student access to information through a greater mix of available sources.

Fair dealing reduces the cost of course packs when the excerpted materials follow fair dealing provisions:

- » **The University of British Columbia announced that the average price of course packs sold at the UBC Bookstore in 2013 had been reduced by 33%<sup>14</sup>**
- » **This reduction in price was achieved in part because of fair dealing in education**
- » **Fair dealing has facilitated cost reductions in course packs, but by no means does it mean "free" dealing**
- » **As UBC's Copyright Office explains, "The price of course packs produced by the UBC Bookstore include the costs of production, and fees paid to obtain any necessary copyright permission. Note that materials included in a course pack under the fair dealing exception or a UBC electronic resources license are included in course packs without additional copyright fees (only the production costs apply)."<sup>15</sup>**
- » **The University of Toronto ran a pilot project focused on reducing course pack costs by implementing fair dealing, as well as reducing "double payment" of materials for which the library had already purchased access.<sup>16</sup>**
- » **The pilot project in 2014-15 involved twelve courses and 877 total students**
- » **A peer-reviewed article on the pilot project reports that in 2014-15 it resulted in \$107,177.51 total savings (on average \$122.20 per student)**
- » **Total student savings had reached \$406,038.65 by Fall 2016<sup>17</sup>**

<sup>12</sup> *Survey of Household Spending in 2015* (Ottawa: Statistics Canada, June 2017).

<sup>13</sup> *Book Publishing Industry 2014* (Ottawa: Statistics Canada, 2016)." Accessed online: <http://www.statcan.gc.ca/daily-quotidien/160519/dq160519-eng.htm>

<sup>14</sup> "Course Pack prices significantly reduced in Fall 2013, Copyright at UBC," accessed April 2017, <http://copyright.ubc.ca/course-pack-prices-significantly-reduced/>

<sup>15</sup> "Student FAQ, Copyright at UBC," accessed April 2017, <http://copyright.ubc.ca/guidelines-and-resources/faq/student-faq/>

<sup>16</sup> Cancilla, Glushko, Organo and Slaght, "Engaging Faculty and Reducing Costs by Leveraging Collections," 2.

<sup>17</sup> Cancilla, Glushko, Organo and Slaght, "Engaging Faculty and Reducing Costs by Leveraging Collections," 16.

- » The project shows how fair dealing combined with modern digital capabilities (e.g. course portals and digital library reserve systems) make possible further “efficiencies and savings for students”<sup>18</sup>
- » Emphasizing the fair nature of their efforts, the pilot project organizers reported purchasing the necessary licenses for book excerpts in the course packs that did not fall within fair dealing guidelines<sup>19</sup>
- » Student savings did not result from an excessive use of fair dealing: 55% of course pack readings were materials already purchased by the library while only 38% were materials made available through fair dealing<sup>20</sup>

These examples demonstrate how fair dealing makes post-secondary education more affordable, all the while expanding access to information. This is extremely important given that majorities of students surveyed in British Columbia and Florida have reported going without a required course text due to cost.<sup>21</sup> The UBC and Toronto examples also represent a fair balance between copyright creators and users. Students benefit from paid course content, for example through purchased course pack material not covered by fair dealing and by utilizing subscription-based library resources. They also gain access to a wider array of information. The article on the University of Toronto pilot highlights this balance: “The majority of course materials made available through the project have continued to be licensed electronic resources, with a smaller but still significant number provided via the combination of U of Toronto’s Fair Dealing Guidelines and the purchase of transactional licenses.”<sup>22</sup>

*“Fair dealing makes post-secondary education more affordable, all the while expanding access to information. This is extremely important given that majorities of students surveyed in British Columbia and Florida have reported going without a required course text due to cost.”*

<sup>18</sup> Cancilla, Glushko, Organo and Slaght, “Engaging Faculty and Reducing Costs by Leveraging Collections,” 4.

<sup>19</sup> Cancilla, Glushko, Organo and Slaght, “Engaging Faculty and Reducing Costs by Leveraging Collections,” 13.

<sup>20</sup> Cancilla, Glushko, Organo and Slaght, “Engaging Faculty and Reducing Costs by Leveraging Collections,” 13.

<sup>21</sup> Rajiv Jhangiani and Surita Jhangiani, “Investigating the Perceptions, Use, and Impact of Open Textbooks: A Survey of Post-Secondary Students in British Columbia,” *International Review of Research in Open and Distributed Learning* 18, no. 4 (June 2017). Accessed online: <http://www.irrodl.org/index.php/irrodl/article/view/3012/4214>; *2016 Student Textbook and Course Materials Survey: Results and Findings* (Florida Virtual Campus, October 2016). Accessed online: [http://www.openaccess textbooks.org/pdf/2016\\_Florida\\_Student\\_Textbook\\_Survey.pdf](http://www.openaccess textbooks.org/pdf/2016_Florida_Student_Textbook_Survey.pdf)

<sup>22</sup> Cancilla, Glushko, Organo and Slaght, “Engaging Faculty and Reducing Costs by Leveraging Collections,” 16.

# Technological Change, Publishing and Educational Materials

Broader economic and technological changes, not fair dealing, explain the shifting market for published goods in Canada. Statistics Canada reported in 2009 (before the introduction of fair dealing in education) that household spending on reading materials had declined by 8.3%, while noting that “[t]echnological change continued to drive a number of long term trends in spending.”<sup>23</sup>

New technologies will undoubtedly continue to change the educational materials landscape. For example, Open Educational Resources (OERs) are learning tools (including but not limited to textbooks) developed under an open license that allows them to be used freely in the public domain. The use of OERs in British Columbia since 2012 by over 42,000 students has resulted in total savings of more than \$4 million.<sup>24</sup> OERs appear to have impacted overall spending on textbooks within the province. According to Statistics Canada, households in British Columbia spent the second lowest average annual amount on university textbooks of any province, at \$610.

For college textbooks, BC’s average household spending of \$358 was the lowest across the country. Quebec was second lowest at of \$417.<sup>25</sup> This makes sense given that four of the top five post-secondary institutions for OER use in British Columbia are colleges or polytechnics.<sup>26</sup> These statistics confirm that students continue to spend significantly on educational materials, while simultaneously benefiting from fair dealing and new technologies like OERs.

There is no doubt that new technologies, alongside other significant global market changes,<sup>27</sup> have disrupted the publishing industry in recent decades, and that they will continue to do so. While fair dealing has contributed to affordability and improved access to information, the evidence is clear that it is not the cause of challenges in the publishing industry. The negative impacts of fair dealing have been significantly overstated, while its positive effects are clear on campuses across Canada: alongside new options like OERs, fair dealing helps make post-secondary education more widely accessible and of higher quality.

*“While fair dealing has contributed to affordability and improved access to information, the evidence is clear that it is not the cause of challenges in the publishing industry.”*

23 *Spending Patterns in Canada: Analysis* (Ottawa: Statistics Canada, 2009). Accessed online: <http://www.statcan.gc.ca/pub/62-202-x/2008000/part-partie1-eng.htm>

24 *Known adoptions in B.C.*, Open Textbook Stats (BC Campus, 2012-2017). Accessed online: <https://open.bccampus.ca/open-textbook-stats/>

25 Adapted from Statistics Canada, Survey of Household Spending in 2015, Textbooks, June 2017. This does not constitute an endorsement by Statistics Canada of this product.

26 *Known adoptions in B.C.*, Open Textbook Stats (BC Campus, 2012-2017). Accessed online: <https://open.bccampus.ca/open-textbook-stats/>

27 Michael Geist, “Inside Views: Why Fair Dealing Is Not Destroying Canada Publishing,” *Intellectual Property Watch* (July 25, 2017). Accessed online: <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing/>

# The Current Status of Fair Dealing: “Access Copyright v. York University”

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While CASA continues to see educational fair dealing as an essential expression of copyright user rights, a recent judicial decision has the potential to limit its application on campus. In July 2017, the Federal Court issued a ruling in the “Access Copyright v. York University” case. The case hinged in part on an analysis of whether York’s guidelines, which permitted copying 10% of a book or a chapter from a book, constituted educational fair dealing. The court ruled against York University, stating that York University’s fair dealing guidelines did not pass the test of “fairness.”

CASA hopes that this ruling represents only a temporary setback in the legal interpretation of copyright and fair dealing. York has announced its intent to appeal, explaining that its “Fair Dealing Guidelines are intended to reflect a balance between the interests of creators, publishers and of users and function within a system that continues to include the University spending millions of dollars per year on licenses and acquisitions.”<sup>28</sup> CASA continues to believe that the current copyright legislation, and the practice of fair dealing on campuses across Canada, appropriately balance the rights of copyright holders and users while also reflecting the Supreme Court’s rulings on the subject. CASA will continue to advocate for fair dealing as an important component of access and quality in post-secondary education and for the user rights of students.

*“CASA will continue to advocate for fair dealing as an important component of access and quality in post-secondary education and for the user rights of students.”*

# Conclusion

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As this document illustrates, access to information and post-secondary education affordability are interrelated:

- » Fair dealing allows students to access a wider breadth of information, which is essential to a higher quality education
- » Fair dealing makes educational materials more affordable, which also allows students to access more information, further enhancing the quality of education

Fair dealing in education offers a fair balance between creators and users of copyrighted material.

- » Post-secondary students continue to pay for learning materials
- » Post-secondary students now have access to an even greater scope of information

# CASA's Recommendations

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- » Preserve education as a component of fair dealing under the Copyright Act
- » Preserve the existing exceptions to copyright infringement for educational institutions

# Our Members



# About CASA

Established in 1995, the Canadian Alliance of Student Associations (CASA) is a non-partisan, not-for-profit, student organization composed of 22 student associations representing 255,000 post-secondary students from coast to coast. Through its partnership with the Quebec Student Union (QSU) and its 8 members representing 79,000 students, CASA presents a national student voice to the federal government. CASA advocates for a Canadian post-secondary education system that is accessible, affordable, innovative and of the highest quality.



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