

Why Fair Dealing Is Not Destroying Canada Publishing

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By Michael Geist

For the past few years, publishers around the world have engaged in a sustained campaign to hold up Canada as proof that making fair dealing more flexible for education will hurt publishers. Those efforts rarely tell the whole story: that paid access remains the primary source of materials in Canada, that educational copyright policies in Canada are primarily a function of court decisions not copyright reform (the emphasis on fair dealing came before the 2012 reforms), that global publishers were reporting marketplace challenges that have nothing to do with copyright, that Canadian publishers that supposedly stopped publishing were still in business, that court affidavits from Canadian publishers focus on many concerns other than copyright, and that a study from one Canadian publisher association highlighted issues such as open access and used book sales. University of Ottawa law professor Michael Geist expands on the reality of Canadian publishing and copyright law.[1]

I. The Decline of Educational Publishing Revenues Are Not Due to Fair Use or Fair Dealing

There have been a wide range of claims about the decline of educational publishing in Canada in recent years. While some have been demonstrably false (for example, an Access Copyright lawyer reportedly told a conference last year that Broadview Press cannot publish anymore, a claim vigorously denied by the publisher), the reality is that educational publishing is in decline worldwide for reasons that have little to do with copyright law.

Earlier this year, Pearson PLC, the world's largest education company, warned of an unprecedented decline in the North American education publishing market. This primarily reflects US developments and highlights how Canada is not an outlier in educational publishing. Further, Ariel Katz has previously debunked claims regarding Oxford University Press.. In fact, more recent annual reports from companies such as OUP acknowledge changing market conditions around the world, with the company noting:

“the Higher Education textbook market shrank in important markets such as the UK, Canada, and the US, illustrating the contrasting array of market conditions to which OUP needed to adapt in 2014.”

Nelson Education is the largest Canadian educational publisher and its President and CEO Geoff Nordal identified the primary economic challenges in a 2015 affidavit:

In Canada, each province and territory has authority over curriculum development and education funding for the K-12 Market. Following a historic high in Canada in 2006 with respect to new curriculum development and spending, the K-12 Market contracted. The K-12 Market has been negatively affected by reduced spending on new curriculum by Canadian schools over the last five years, and in particular the spending decline in Ontario which represents the largest proportion of educational spending in Canada.

In the higher education market, Nordal focused on the following issues:

The Higher Education Market has been negatively affected by, among other things: a lack of clarity at universities with respect to ‘ancillary fees’; with certain institutions banning digital homework solutions with added fees; increased traction in the open textbook movement due in part to government funding in a number of provinces; and the use of used books, rental books and peer-to-peer sharing, impacting the demand for new textbooks at universities and colleges in Canada. The impact caused by used books and rental books is mitigated by revisions cycles and new textbook editions, the adoption of digital materials and increased use of custom and indigenous products. In addition, the Higher Education Market is in transition from traditional books to digital products, which is having a transformative effect on the business.

Nordal’s emphasis on reduced provincial spending (for K-12) and the digital shift (for higher education) is consistent with the data from other sources. The 2010 report on K-12 publishing commissioned by Canadian Heritage also pointed to the long pilot periods delaying purchasing decisions and the increased use of alternative and digital resources.

These findings are also consistent with a 2015 study that offers a far more insightful analysis on the state of book publishing than the Access Copyright commissioned work. Reading the Tea Leaves was also commissioned by the industry – it was prepared for Creative BC and the Association of Book Publishers of British Columbia – but unlike the Access Copyright-backed PWC study it features original research and interviews of publishers throughout the province. The study characterizes the challenge for educational publishing as follows:

Scholarly and educational publishers share some of the same issues as trade publishers, but they face other unique challenges. Tablet and other nonprint use will increase in the school systems here and abroad, changing how educational materials

are bought, used and updated. Scholarly publishers and trade publishers that sell into the academic market are struggling with the impact on their sales of Open Access and fair use policies, tailored subscription services such as Scribd's Edelweiss, used book sales, student piracy and increased library use for class reading lists.

Simply put, claims that the challenges facing scholarly publishers are primarily a function of copyright law is false.

II. Canadian Fair Dealing Guidelines Are Not the Result of 2012 Reforms

A consistent theme in claims about the impact of fair dealing is that there is a direct link between the addition of "education" as a fair dealing purpose in the 2012 reforms and the fair dealing practices within Canadian educational institutions. Yet the reality is that the guidelines have very little to do with the 2012 reform. Fair dealing includes multiple purposes that can be relied upon by educational institutions, including research and private study. The addition of education was always evolutionary rather than revolutionary. Indeed, the proof is in the Supreme Court of Canada's fair dealing copyright decisions, which ruled against Access Copyright without the benefit of an education fair dealing purpose.

The widely used fair dealing guidelines are based primarily on decisions from the Supreme Court of Canada, the Federal Court of Appeal, and the Copyright Board of Canada. They have provided detailed guidance the scope of fair dealing, the appropriate test, and the applicability of insubstantial copying. Current practices have been influenced by what courts and tribunals have ruled, not what the government implemented in 2012. In fact, Canadian educators could rely far more on the 2012 reforms, including the use of the Internet exception for education and the exception for non-commercial user generated content.

It is important to note that Canadian fair dealing practices are not inconsistent with many jurisdictions around the world. For example, the US fair use provision is clearly far broader than fair dealing with recent fair use decisions involving the legality of university copying, digitization practices, and use of APIs. Fair use can be found in other countries, some of which have practices that involve far more generous copying than Canada. For instance, copying 20% of a book is viewed as fair use in Israel, double the Canadian guideline. Most recently, the Australian Productivity Commission, a government-backed think-tank, recommended the adoption of fair use in that country.

In July 2017, the Federal Court of Canada rejected the legality of the fair dealing approach of one Canadian university and signaled that the fair dealing guidelines used by others may need to be revisited. The case is likely to be appealed as the trial judge's analysis of fair dealing is inconsistent with Supreme Court of Canada jurisprudence. The Supreme Court's emphasis on copyright balance, user's rights, and a large and

liberal interpretation to fair dealing, are largely missing from the ruling. In its place, the trial judge injected claims the university's purpose of copying was to boost student enrolment by reducing costs, cited aggregate copying when examining the amount of the dealing counter to higher court rulings that concluded the amount of copying should examine the proportion of the excerpted copy and the entire work, and relied on "likely" impact for the effect of the copying on the work despite other decisions that require actual evidence. None of these positions reflect Canadian copyright law as articulated in the leading decisions.

Yet even in rejecting the fair dealing guidelines, the inclusion of "education" as a fair dealing purpose played little role in this decision. In other words, expanded purposes ultimately did not impact the fairness analysis, consistent with longstanding arguments that fair dealing and fair use do not result in a free-for-all but rather still mandate a careful fairness analysis.

III. Internet-Based Alternatives are Changing Educational Access

As the B.C. study on the publishing industry notes, open access and free online alternatives do represent a business threat to the conventional publishing industry. Yet the notion that this leads to a lack of quality control is demonstrably false. First, several provinces have invested heavily in developing quality, peer-reviewed online materials that can be freely used by any school. For example, Open School BC, backed by the province, has modules in the sciences, social sciences, and languages. The B.C. Open Textbook Project has over 150 open textbooks that has saved students millions of dollars. The Ontario government recently launched the Open Textbook Library for Ontario that will feature hundreds of openly licensed, professionally created textbooks providing students with access to free digital texts in dozens of university and college courses. The open library is managed by eCampusOntario, which is working with BCcampus to make the texts available to students in the province. In fact, the provincial government is investing millions in creating new open texts in a myriad of subjects including history, finance, politics, the environment, engineering, and the sciences.

In fact, the shift to online educational resources, which offers the promise of free online materials that can be used by schools anywhere, represents a great opportunity to enhance access to Canadian-specific materials.

Second, as open access publishing grows in popularity – the European Union has announced plans to ensure that all publicly-funded scientific papers will be freely available by 2020 and Canada now has a similar open access policy in place for government-funded research – the majority of new research publications will soon be freely online and accessible to all. This too should be celebrated as it creates equality of access and better ensures that the work of researchers is made available to everyone, including teachers and students.

The emergence of open access publishing has enabled free access (as desired by the author) to millions of articles. According to a European Commission-funded report by Montreal-based Science-Metrix, more than half of all research publications in some countries and fields of study are now freely available online. The shift toward open access becoming the default form of disseminating research in many fields is a remarkable change given that conventional publishing in expensive subscription-based journals was the standard in many areas of research as recently as ten years ago. The move toward open access means that global research is far more accessible to everyone—scientists, researchers, and the general public.

IV. Schools and Libraries Continue to Spend Millions on Content Licensing

The Canadian Association of Research Libraries (CARL), which represents 31 member libraries, issued a reminder that Canadian education spends hundreds of millions of dollars every year on content licensing. Access Copyright and the publishing community have tried to paint the Canadian situation as a free-for-all, but the reality is that educational institutions, libraries, and students are still buying books and licensing content. In fact, recent U.S. data shows that textbook costs are increasing far faster than any other education cost.

A recent CARL release states:

The 31 member libraries of the Canadian Association of Research Libraries (CARL) spent \$293 million on information resources in 2014-15, demonstrating a clear commitment to accessing print and digital content legally and rewarding content owners accordingly. Universities are actively engaged in outreach to their faculty, staff, and students, educating them on their rights and responsibilities under the Copyright Act and ensuring that uses of material under copyright fall well within the provisions of the law. Where educational uses are more substantive and therefore fall outside of fair dealing, the content is either purchased to be added to licensed collections, or rights clearances are obtained and royalties are paid for these uses. Trained, knowledgeable library staff support these activities.

Some voices in the publishing community and associated lobbyists have stated in the media that the education market has evaporated as a result of users' fair dealing rights. This is inaccurate. Universities continue to buy and to license access to published works, at substantial cost, using public funds and student tuition dollars.

Higher education institutions spend millions more on their own site licences or on transactional licences that permit usage for specific works, while students still spend millions each year on books, whether paper or electronic. Although transactional licensing was long viewed as cumbersome and costly, the electronic environment has

facilitated cheaper, faster licensing mechanisms that reduce overhead costs and allow institutions to ensure that payments are made where required.

The availability of these licensed works (both paid and open access) are frequently incorporated into course materials at no additional cost to the student. In fact, institutions are paying for so many works that there is frequently a risk of double-payment. According to a Stanford University study in 2013, students were spending over \$100,000 on course materials that the university was already paying millions to license.

Like many countries, Canada is set to review its own copyright laws in the near future. While there will be claims regarding the risks of fair dealing and the recent Federal Court of Canada decision, the Canadian review must account for the changing publishing environment fueled by new technology and the Internet, the millions being paid by educational institutions for access, and the limited impact that expanded purposes of fair dealing (or a fully flexible fair use provision) have on a fairness analysis. Indeed, a fair review of the current system reveals that the problem facing copyright collectives and some publishers is not that copies are not valued, but rather that in light of new forms of access and the evolution of the law that some licences are no longer valuable.

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[1] Originally published in <http://www.michaelgeist.ca/2016/06/fictional-claims-why-kids-are-not-suffering-with-canadas-copyright-fair-dealing-rules/>; <http://www.michaelgeist.ca/2016/09/not-a-free-for-all-canadian-university-libraries-spending-hundreds-of-millions-on-licensing/>; <http://academicmatters.ca/2016/01/2279/>