

## The ACCC Copyright Policy Does Not Meet the Supreme Court's Fairness Factors

The Association of Community Colleges of Canada (ACCC) claims that its “Fair Dealing” policy eliminates the need for an Access Copyright licence. The reasoning behind this position is faulty. As a result, it’s an unhelpful approach to deciding what is fair dealing in post-secondary educational institutions.

Yes, the ACCC’s “Fair Dealing” policy appears to mirror the Access Copyright licence. But that comparison is meaningless. The proper comparison can only be between the ACCC copyright policy and the law. And the most relevant analysis is of the shortcomings of the ACCC policy. That analysis clearly points out that, just because the policy looks like the licence, it doesn’t gain the legitimacy to negate the need for the licence.

In the blogosphere there is clearly no consensus on the Supreme Court of Canada’s recent decision about the value of the Access Copyright licence in elementary and secondary schools. That decision has been interpreted in different ways. But here is how writers and artists and publishers of educational materials in Canada understand it.

In *Alberta v. Access Copyright*, which examined the copying practices in elementary and secondary schools, the Supreme Court confirmed that fair dealing remains a question of fact and a matter of impression. What does that mean?

It means that each case is to be assessed on its own facts. But the copying practices of post-secondary educational institutions have never been tested in any court in Canada. The ACCC has taken its own approach to resolve this by defining a fair dealing policy. But there are no “bright lines” to determine the matter. So, where does the ACCC policy fit within the Court’s framework? How does it fit with the law?

It doesn’t.

In order to be a “fair dealing” the copying of a work must not only fall within one of five purposes listed in the *Copyright Act*, but it must also be fair. The five purposes currently include research, private study, criticism, review and news reporting, and there will be eight purposes when Bill C-11 comes into force, as it adds education, parody and satire. In assessing whether the copying is fair, courts consider a number of factors.

We discuss these factors in a comparative table. [Take a look at the table](#) and see if you agree with our analysis of the ACCC policy against the fair dealing factors prescribed by the Court. The Court will consider all of these factors in determining fairness.