

Interpreting Fair Dealing: An Exploration of Distance Instructors' Perceptions of  
Canadian Copyright Law

by

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of the Requirements for the Degree of  
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Approval Page



The future of learning.

**Approval of Thesis**

The undersigned certify that they have read the thesis entitled

**"Interpreting Fair Dealing: An Exploration of Distance Instructors' Perceptions of Canadian Copyright Law"**

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### Abstract

Copyright law in Canada has been confusing for content users for many years. Educators and course developers need to understand these laws to ensure they take full advantage of their user rights, while not infringing on author copyright. Little is known about how Canadian post-secondary instructors interpret copyright law and the fair dealing clause. This qualitative, case study research explored interpretations of copyright law and fair dealing with instructors in a single mode Canadian distance education institution in order to discover issues that affected their use of content in course development and book authoring. Seven instructors were purposively selected to obtain a maximum variation sample and interviews were conducted. Thematic qualitative analysis of the interview transcripts revealed that the participants displayed high levels of confusion and lacked understanding of Canadian copyright law and fair dealing.

*Keywords:* Canadian Copyright Law, distance education, fair dealing, copyright pentalogy, open licensing, fair use, open education, higher education, course development, publishing

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## Chapter I

### **Introduction**

Copyright law in Canada has been changed significantly since the first Canadian Copyright Act in 1921. Prior to its introduction in the Canadian parliament, laws governing the use of copyrighted materials were derived from British law. Originally, copyright law was not created to protect the rights of content creators but instead specifically to “encourage learning” through the Statute of Queen Anne (*Copyright Act*, 1709).

The question of ownership and use has created substantial confusion over what copyright actually means. Copyright protects only the expression of ideas and not the ideas themselves, with the intention that these ideas are expanded within the public sector for further growth. Intellectual property is not to be misconstrued as physical property; copyright owners cannot govern their intellectual property in the same way as property ownership is governed (Graham, 2012). Partly due to this misconception of intellectual property ownership, interpretation of copyright law has emerged as a known area of contention.

The reformation of Canadian copyright law in 1988, 1997, and 2012 involved significant debate among law makers over who had the right to use copyright protected content and how the laws governing that use should be interpreted. The inclusion of the fair dealing clause in the *Copyright Act* assists copyright law interpretation by providing a measure that law professionals must consider when assessing the fairness of content use. Moreover, copyright laws have undergone much consideration in the Canadian court system due to debate over the intention to promote the public interest while balancing the rights of copyright owners.

Major Supreme Court of Canada decisions have helped to clarify how copyright laws should be interpreted to balance the rights of both copyright owners and users. In 2002, the courts were forced to consider the idea of balance with *Théberge v. Galerie d'Art du Petit Champlain Inc.* Two years later, in 2004, the concept of “fair dealing” was challenged through the *CCH Canadian Ltd. v. Law Society of Upper Canada* hearing. In 2012, the Supreme Court of Canada made five rulings in one day which provided further guidelines on how the *Copyright Act* and the fair dealing clause exceptions should be interpreted. Coined by Michael Geist (2012a; 2013) as the “Copyright Pentalogy,” these court rulings were considered to be among the most significant in Canadian copyright history.

While the guidelines appear to provide clarity regarding the balance of appropriate rights between copyright owners and users, there still exists much confusion in the interpretation of those guidelines. Reynolds (2013) explains that it is acknowledged that copyright decisions must be fair, not be interpreted restrictively, use large and liberal interpretations, and avoid a correctness view, but that interpretation, in itself, cannot occur without personal subjectivity. Though each case is to be considered independently, Reynolds (2013) states that “failure to apply the *Copyright Act* in a manner consistent with the purpose of copyright – as interpreted by the Supreme Court of Canada ... can lead to the Copyright Board’s decision being overturned by reviewing courts.” (p. 33)

Law makers continued to be challenged by organizations, such as Access Copyright, a licensing collective, in the interpretation of fair dealing. Access Copyright charges institutions and other organizations a fee for the use, copying, and revising of content that is supposedly in their repertoire, which is then partially distributed to the copyright holders.

In 2012, as an aid for educators, Universities Canada (formerly the Association of Universities and Colleges Canada or AUCC), an organization of 97 Canadian universities that advocates for higher education and ground-breaking research, developed new fair dealing guidelines in reaction to the “pentology” Supreme Court decisions in an attempt to ensure that universities and colleges understood their rights and what the law permitted them to do (Universities Canada, 2012). Creative Commons Canada also attempted to create a fair dealing environment for content creators by providing a process for personalizing copyright prior to distribution for public use (Creative Commons, n.d.a). However, despite these initiatives to raise awareness and clarify fair dealing for educators, a great deal of misunderstanding and erroneous beliefs remain among educators about what copyright, and particularly *fair dealing*, involves. For distance educators, where the use of other people’s content is frequently published in printed materials or delivered online, the need to understand and comply with copyright legislation and correctly interpret fair dealing guidelines is especially important.

### **Theoretical Framework**

The legal profession utilizes its own body of theory for interpreting statutes and legislation. These theories reside within two main approaches, formalist and non-formalist, and include the following: eclecticism, intentionalism, purposivism, new textualism, pragmatism, and critical theory (Fallon Jr., 2014; Pojanowski, 2014). Eclecticism, which began in the 17<sup>th</sup> century, is a non-theoretical approach to legal interpretation; intentionalism is a subjective approach that requires the reader to interpret the intended result of the law; purposivism searches for the intended legislative purpose, which may require modifications to the law, in order to enhance the purpose of the law; new textualism requires the law to be read as it was originally enacted without subjective interpretation; pragmatism explores opportunities to improve or fix

issues in the legislation in order to make the law work more efficiently for the intended purpose; and critical theory requires critical analysis of the intended purpose of the law (Mootz III, n.d.).

The research reported in this thesis borrowed from legal interpretive theory, specifically the intentionalist and purposivism theoretical approaches, as these examine the intention and purpose of law, and as such, were the most relevant for analyzing distance educators' interpretations of fair dealing.

### **Research Problem**

Research suggests that distance educators do not understand or interpret Canadian copyright law or the fair dealing clause as it is intended (Geist, 2013; Kimmons, 2014; McGreal, 2004). This lack of understanding has inhibited educators from using and/or creating copyrighted materials in their educational practice (Kimmons, 2014; Kursun, Cagiltay, & Can, 2014). Little research is available relating to copyright and educators, and none specifically explores the perspectives of Canadian distance educators or how copyright considerations have affected their practice as instructors and authors. While this issue pertains to distance educators in general, the focus of this study will be solely on distance educators employed with one Canadian distance education institution.

### **Research Questions**

This study explores the research questions listed below:

1. How do distance educators in a Canadian post-secondary institution interpret the fair dealing clause in the *Canadian Copyright Act*?

2. How does this interpretation of the fair dealing clause affect the distance education instructors' use and distribution of online materials?
3. Is there a difference in perception of what constitutes as *fair* practise for content use in accordance to the fair dealing clause between distance education instructors who develop courses and those who author books?

### **Limitations**

Limitations are “factors that may or will affect the study, but (are) *not under the control* of the researcher” (Mauch & Park, 2003, p.114). Exposing limitations in the research increases transparency and validity of the research results. For this research, participation was voluntary. Ideally, 8 to 10 distance educators would have participated in the study, but interest and availability was low, resulting in only seven distance educators participating in the interviews. Additionally, the research is a case study of a particular distance education institution and is not generalizable to other distance institutions.

### **Delimitations**

Delimitations include factors that are “controlled by the researcher” (Mauch & Park, 2003, p.114). In this research, specific participants were selected to include instructors who had also authored books. Instructional designers, library personnel, and employees in the copyright office were excluded. The sample was drawn from employees at a single distance education institution and did not extend to external institutions. Additionally, the purposive sample of seven instructors allowed for maximum variation sampling.

## Definition of Terms

**Copyright Law:** the set of laws that governs the legal monopoly to own exclusive rights over original work under the *Copyright Act*. It includes intellectual property, creative work, and art. Each country has its own legislation governing copyright law.

**Fair Dealing:** the statutory exception clause under section 29 of the *Canadian Copyright Act*. Dealings are considered fair if they are for the purpose of research, private study, education, parody, satire, criticism, or review and news reporting, and if they meet the criteria for fairness using the six-point criteria of: purpose, character, amount, alternatives, nature, and effect of the dealing.

**Fair Use:** the law governing the use of copyright dealings in the United States. Use is considered fair if it is used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research and it meets the four factor test: purpose of the use, nature of the use, amount of the use, and effect of the use.

**Universities Canada Fair Dealing Policy:** A policy position of Universities Canada - providing guidelines for interpreting the fair dealing clause for non-profit universities Canada-wide.

**Creative Commons Licence:** Non-profit, customizable, free copyright licence which works with existing copyright law to enable content creators and users a zero-cost way to publicly share, use, and expand material.

### **Summary**

Copyright law in Canada has undergone many revisions, and many educators continue to struggle with misunderstandings of the intention of the law, and particularly the fair dealing clause. Creative Commons Canada and Universities Canada have attempted to remedy this confusion by offering copyrighting tools and guidelines for use in post-secondary institutions. Libraries also create repositories of resources that have copyright agreements or are open licensed for ease-of-use (Athabasca University Library, n.d.). Limited research exists to explore the actual understandings of educators in Canada when interpreting copyright law and the fair dealing clause. Research is required to expand understanding of how educators interpret the law and how that interpretation affects the use and distribution of copyrighted materials.

## Chapter II

### Review of Literature

A literature review was conducted using Google Scholar and the Athabasca University Library databases including searches of journal databases such as the *International Review of Research in Open and Distributed Learning*, *International Journal of E-Learning and Distance Education*, and the *Harvard Law Review*. Keywords used were “copyright law in Canada,” “fair dealing,” “Geist,” “fair use,” “Copyright Pentalogy,” “copyright interpretation,” “fair dealing interpretation,” and “copyright in education.” A great deal of literature was found through these searches including many books and peer-reviewed publications discussing law history, the developments of legislation in accordance with fair dealing policy, and the relative confusion in the newly modified laws. However, regardless of the exhaustive search criteria, very few research articles were evident. The most relevant to this research was Kimmons (2014) and Kursun, Cagiltay, & Can (2014).

### Copyright Law and Fair Dealing in Canada

Copyright law in Canada has evolved over time. Since the beginning, copyright law has been interpreted more and more restrictively. Originally adopted from British law, copyright law was intended to encourage learning by protecting the expression of ideas, but not the ideas themselves (Harris, n.d.).

History shows that copyright was initially seen as a monopoly for control over information dissemination and financial gain (Falkvinge, 2011). Originally monopolized in 1535 by the Catholic Church in France, who closed all bookstores and imposed death sentences to anyone using a printing press; and then in England under Queen Mary in 1557, proceeding



further to include the term *copyright*, which was first used and granted to the London Company of Stationers to control public information as a political ploy. This copyright monopoly greatly restricted user rights. Under Queen Elizabeth I, this restriction remained standing in England and was modified slightly in the late 1600s until it was completely terminated in 1695, a condition that remained until 1710. During that time the printers and publishers lobbied for the re-enactment of the law; the lobby continued until parliament decided to allow all people -- not just the ones who could afford the to pay for books -- to access books, by creating the first library in 1850 (Falkvinge, 2011). Canada inherited British copyright law; the copyright monopoly, which at this point was country specific, carried forward into Canadian law with publisher and printer rights carrying the most weight. This situation continued until 1988, when the *Copyright Act* received its first major revision in an attempt to clarify and balance both content and user rights.

Internationally, the Berne Convention for the Protection of Literary and Artistic Works was held in 1886, and enacted minimum rights for copyright ownership to content creators and internationalized the monopolization of copyright (Falkvinge, 2014; WIPO, n.d.). By ensuring minimum rights (i.e., moral rights and rights for content creators to retain copyright protection for up to 50 years following death) on an international stage, which also included developing countries, a general understanding of what “rights” by definition occurred. In 1967, the creation of the World Intellectual Property Organization (WIPO) further built on the Berne Convention to create the WIPO Copyright Treaty of 1996. The treaty offered content owners the following: “(i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public” (WIPO, n.d., para. 2). It also expanded ownership rights to all types of copyright owners following their death, and was not only limited to library or archival works.

The exploration into who owns what rights and how to define economic versus moral rights became an increasing topic of consideration. Economic rights include the right to publish and reproduce a work; whereas, moral rights protect the integrity of the work from any modifications not approved by the content creator (CIPPIC, 2008). Moral rights are not surrendered following the loss of economic rights through sales to publishers, unless this right is explicitly waived as well.

Additionally, one does not own copyright by simply purchasing a work; purchasing the copyright to a work is the only way to gain full rights to the ownership of that work. Until that exchange is made, all rights remain with the original copyright owner. The law states that it is infringement if a person uses a copyrighted work without proper permission or ownership (*Copyright Act*, 1985). The term “stealing” does not apply in such situations, unless the copyright was taken from the rightful owner and as such fell under the crime of *theft*; on the other hand, infringement is the use of copyrighted material without permission, either from the copyright owner or through fair dealing. *Intellectual property* is not a physical thing that one can possess or steal. The act of infringement involves “violating the owner’s right to control copying of the property” (Quora, 2010, para.1). As a result of these developments in copyright law, a generalized understanding of the fair dealing exception and its intention in the *Copyright Act* has become important.

Vaidhyathan (2001) contends that copyright law was intended to be an incentive to produce and distribute materials for content creators. While this opinion is not shared by many content creators, who may also create for the purpose of education, profit, or artistic expression, Bollier (2003, as cited in McGreal, 2004) acknowledges that various industries have profited through the sharing of non-copyrighted materials such as recipes and designs.

Copyright law provides authors and the public with rules regarding the use of copyrighted material. However, in 2002, in *Théberge v Galerie d'Art*, it was argued that while modifying the artwork for the purpose of advancing personal interest may be morally wrong, if done in a legal context, it was not illegal. The particulars of the case are as follows: Galerie d'Art purchased Théberge's artwork and proceeded to reproduce the work by transferring the ink from the paper format to a canvas format in order to sell it to the general public. The court found that *Galerie d'Art* was within their right in that they were not damaging Théberge's reputation or economics, were not breaching the agreement since no new copies were made, and were exercising their property ownership rights of his artwork.

In the 2002 *Théberge v Galerie d'Art* case, Supreme Court Justice Binnie stated that copyright law needed to be harmonized in order to ensure that the interpretation of this protective measure was in line with "other like-minded jurisdictions" (Tawfik, 2013). The decision in this court initiated a change to copyright law interpretation. The court stated the following:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ... [The proper balance] lies not only in recognizing the creator's rights but in giving due weight to their limited nature. (Nair, 2013a)

In 2004, the Supreme Court of Canada heard *The Law Society of Upper Canada v. CCH Canadian Limited* in which the Great Library of Osgoode Hall in Toronto was accused of copyright infringement due to their use of photocopied materials. The Great Library would receive requests from students for photocopies of copyrighted material to be mailed out to them for a fee or would offer services for students to photocopy the articles themselves (Fogarassy,

2004). The Court ruled unanimously in favor of the Great Library, with Chief Justice McLachlin emphasizing that the copying was an act of research, which fell under the fair dealing exception (Fogarassy, 2004; Reynolds, 2013). The judge elaborated upon the purpose of the fair dealing exception, saying,

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. (*CCH, 2004*, para. 48)

Both the above cases involved interpretations of copyright infringement. As defined by the *Copyright Act*, infringement is the use of material in violation of the rules within the *Act*. Based on copyright law only, if a content user does not request permission to use the content and follow the regulations regarding the use of that content, the individual faces the risk of penalty. Prior to the Supreme Court of Canada decision in 2004, "infringement exceptions were generally treated as possible defences to allegations of infringement, not rights in themselves" (Graham, 2014). When the Supreme Court of Canada ruled for fairness and balance in the 2004 *CCH* case, it set the stage for a more user-friendly interpretation of copyright law. It was noted in the *CCH* decision that Section 27(1) of the *Copyright Act* contained the following:

It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that is by this *Act* only the owner of the copyright has the right to do. (*CCH, 2004*, para. 12)

The court also stated that the current understanding of ownership in copyright law "shifts the balance of copyright protection too far in favor of the owner's rights, and fails to allow

copyright to protect the public's interest in maximizing the production and dissemination of intellectual works." (*CCH*, 2004, para 24) The conclusion reached in the *CCH* case emphasized that the fair dealing exception in the *Copyright Act* must be acknowledged, not as a separate piece of the *Act*, but as an "integral part" of the law itself.

In 2012, the so-called Copyright Pentalogy, the term given to the five landmark Supreme Court decisions involving copyright issues, further solidified the intended use and interpretations of fair dealing for the Copyright Board, the Supreme Court of Canada, and the general public (Nair, 2013a; Nair, 2016; Graham, 2014; Reynolds, 2013; Geist, 2013). These decisions are discussed later in this chapter.

### **The 2012 Copyright Transformation**

In 2012, two major changes occurred in the copyright arena: a) Bill C-11: *Copyright Modernization Act* was enacted to revise the *Copyright Act*; and b) the Supreme Court of Canada ruled in favor of the fair dealing clause in five copyright infringement cases – The Pentalogy. Bill C-11 transformed the fair dealing exception from its original position of protecting use for "the purpose of research or private study," to additionally include "education, parody or satire" into the exception guidelines (Statutes of Canada, 2012). This amendment acknowledged the added use of copyrighted material under the two-stage test for fairness: to consider whether the work was used for the purposes under section 29 of the *Copyright Act*, and whether the dealing could be deemed "fair" through a review of a six-factor test.

The Copyright Pentalogy, included the following cases: *Entertainment Software Association v. Society of Composers; Authors and Music Publishers of Canada*, 2012 SCC 34 [*Entertainment Software*]; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 [*Rogers*]; *Alberta (Education) v. Canadian*

*Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta (Education)*]; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 [*Bell*]; and *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 [*Re:Sound*]. These five landmark cases further clarified the rights of users to utilize content for purposes deemed fair under the fair dealing exceptions, namely that the use of this content was appropriate for research, education, or public use (Farrow, 2012).

The effects of the Copyright Pentology decisions have been extensively discussed in the literature (Geist, 2013; Graham, 2014; Nair, 2016; Reynolds, 2013). Specifically, these five decisions greatly affected dealings in education and research, causing a ripple effect and transforming content use for users and creators alike. Examples can be drawn from various areas such as the enhancement of classroom materials through reproduction and distribution of copyrighted material for educational purposes and the use of copyrighted materials to aid in research and course development. Combined with the radical changes from the *CCH* ruling, which set the precedent for the consideration of research and fair dealing together, the Pentology added further precedent to the use of materials for educational purposes to be considered with the fair dealing clause (Geist, 2013). Following these rulings, the Universities Canada guidelines were drastically revised to ensure full understanding for content users as to their rights to use and distribute materials under the fair dealing clause (Universities Canada, 2012).

The year 2012 also marked the re-launch of the Creative Commons Canada network. Creative Commons (CC) was initially created in the United States in 2001 to aid in the sharing of content. Due to the differences in laws between the countries, a Canadian version of the CC licence was required to ensure adherence to Canadian-specific copyright laws (Mewhort, 2012). Creative Commons Canada was re-launched in cooperation with Athabasca University,

BCcampus, and the Samuelson Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) at the University of Ottawa. Creative Commons US and Creative Commons Canada share a philosophy that promotes openness in materials through research in addition to educating users on the various licenses available (McGreal, Anderson, & Conrad, 2015).

Originally, Creative Commons (CC) licenses were written with U.S. law as a reference; this required modifications, or “ports,” to apply to other legal jurisdictions (Peters, 2013). As of 2016, CC released the 4.0 international version of the licenses that is written generically enough to apply to most jurisdictions and does not require the addition of ports to make them applicable. While there are still CC agencies located in most countries around the world, the current 4.0 version of the licenses limits the amount of localized modifications these agencies need to do to the licensing to make them adhere to country specific copyright laws (Creative Commons, n.d.b, “What are the international (“unported”) Creative Commons licenses, and why does CC offer “ported” licenses?”, para. 1-3).

To use a CC license, a creator attaches a license to his/her work that indicates how users are permitted to utilize the work legally. There are four types of CC licenses:

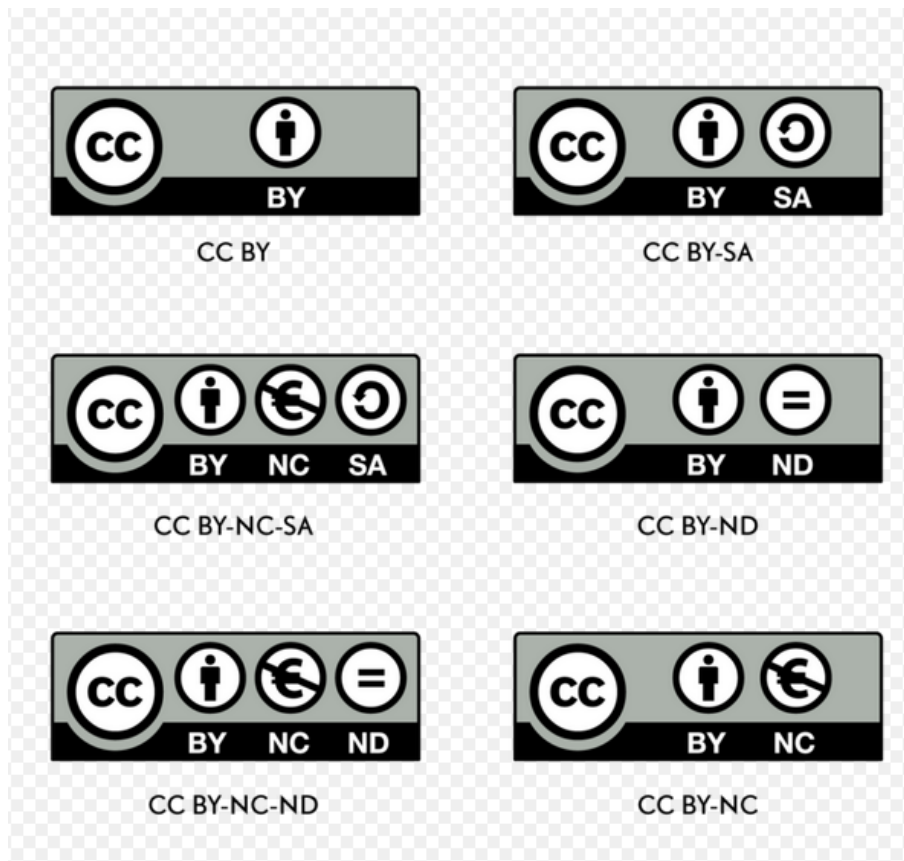
**CC BY: Attribution.** Users are permitted to edit, change, and share the content as they like, provided they give credit to the copyright owner and/or creator.

**CC ND: No derivatives.** Users may not change, edit, translate or modify the work in any way.

**CC NC: Non-commercial.** Users may not use the work for commercial purposes, such as for economic gain or monetary profit.

**CC SA: Share alike.** Users may share the content, but must relicense the material under the same licensing agreement as the original source (Anderson, 2013).

The licenses can be used independently or combined in order to create the specific licence the creator wants to associate with the work (Creative Commons, n.d.a). These combinations are outlined in Figure 1.



*Figure 1.* Creative Commons licensing combinations. Adapted from “Open Content - A Practical Guide to Using Creative Commons Licences,” by Kreutzer, n.d.

([https://meta.wikimedia.org/wiki/Open\\_Content\\_-\\_A\\_Practical\\_Guide\\_to\\_Using\\_Creative\\_Commons\\_Licences/Imprint](https://meta.wikimedia.org/wiki/Open_Content_-_A_Practical_Guide_to_Using_Creative_Commons_Licences/Imprint))

The increase in web-based document use and sharing in the online community, the ease of using the licenses, the ability to individualize, and a greater understanding of the purpose of CC licenses has resulted in an increase in their use. Many scholars today regularly use CC licenses to protect their work while safely distributing their materials to the international



community (Creative Commons, n.d.a). The Open Educational Resources (OER) movement is further fueled by the adoption of open licences, which allow content users and distributors to further pull away from monopolization of copyright through publishers and other such agencies.

### **Interpretations of Copyright Law**

Interpretation of law is subjective. Drawing from personal bias and pre-existing law decisions, law administrators are required to attempt to understand the original intent of the laws with the language provided by the originator (Holmes, 1899). Reynolds (2013) states that the reviewing court decides what is reasonable based on its interpretation of how that case aligns with the statute and the purpose of the legislation; however, interpreting the purpose of the legislation is also a subjective activity. Issues of interpretation are evident through a review of the inconsistencies within the Pentalogy cases; the Copyright Board was deemed “unreasonable on the basis that it adopted an approach to fair dealing that was inconsistent with the purpose of copyright, as interpreted by the SCC.” (Reynolds, 2013, p.16)

In the 2004 *CCH* appeal, Supreme Court Justice Linden stated that an “analytical framework” was necessary to guide court justices and the Copyright Board as to what “fair dealing” meant for copyrighted materials (McLennan Ross, 2012). The intent was to clarify how a fair dealing was to be interpreted by providing a two-stage test for law administrators to consider when deciding if the use of content was “fair dealing.” The first stage was to consider whether the work was used for the purposes deemed appropriate under section 29 of the *Copyright Act*, specifically whether it fell within the categories of research or private study. The second stage required the analysis of whether or not the dealing could be deemed “fair” through a review of six factors in the *CCH* (2004) case, which listed the criteria required to determine fairness:

1. **The Purpose of the Dealing** – the Court explained that allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.
2. **The Character of the Dealing** – one should ask whether a single copy or multiple copies were made. It may be relevant to look at industry standards.
3. **The Amount of the Dealing** – Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. The extent of the copying may be different according to the use.
4. **Alternatives to the Dealing** – Was a “non-copyrighted equivalent of the work” available?
5. **The Nature of the Work** – If a work has not been published, the dealing may be more fair, in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of Copyright Law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.
6. **Effect of the Dealing on the Work** – Will copying the work affect the market of original work? Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. (para. 53)

Comparing the evolution of the understanding of the fair dealing clause to the five stages of human growth (i.e., early childhood, childhood, adolescence, young adulthood, and adulthood), Katz (2015) explains that the law was always intended to balance the fairness, but it

was through immature interpretation that the fair dealing clause was forced to evolve through the court system. He contends that the fair dealing exception is clear and precise, should we choose to interpret it as mature adults.

### **Fair Dealing vs. Fair Use**

Confusion exists around the difference between fair use and fair dealing. Being of similar intent, it may appear that they are interchangeable, but this would be an incorrect assumption. Fair use is derived from U.S. law, governing copyright exceptions for U.S. matters only; whereas fair dealing primarily governs the copyright exceptions in Canada (Nair, 2013b).

Fair use law states the following:

. . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (Legal Information Institute, n.d., para.1)

The fair use clause provides more flexibility in what may be included as fair use of content by including “such as” prior to listing the examples of fair use, whereas fair dealing involves a set of fixed specific criteria for fair dealing considerations. Fair use utilizes four considerations to help decide whether or not the use is fair: purpose of the use, nature of the use, the amount of the use, and the effect of the use; whereas fair dealing uses a two-stage test for fairness, which also includes the six-factor test to review the purpose, character, amount, alternatives, nature, and effect (Nair, 2013b). Following the copyright pentalogy decisions, it has been argued that fair dealing in Canada is leaning more towards fair use than before the decisions, due to the “expansive analysis” of the fair dealing criteria (Geist, 2012b). This tendency can be seen with the inclusion of education and how broadly the Supreme Court of Canada took an expansive view of that definition in the *Alberta (Education)* case.

### **Copyright Reform in Education**

Canadian copyright law did not include “education” under the fair dealing exception until 2012. In 2012, the *Alberta (Education) v Access Copyright* appeal was heard in the Supreme Court of Canada (SCC) as a judicial review of the original 2010 decision made by the Copyright Board. This review resulted after K-12 teachers argued that they should be permitted to photocopy material for use in their classrooms without having to pay Access Copyright imposed tariffs (Reynolds, 2013). Similar to the result of the *CCH* case, the SCC found that the teachers were within the “research” rights of the fair dealing exception (McLennan Ross, 2012). Additionally, the SCC decision noted that the Copyright Board and Access Copyright had not

considered the changes outlined by the *CCH* case decision, and had misinterpreted the fair dealing exception as it was intended (i.e., that the use of copyrighted material for research purposes was deemed “fair.”).

Reynolds (2013) identified four issues with the Copyright Board’s decision: a) the revision of the *Copyright Act* as stated in *CCH* was completely ignored; b) the Board considered definitions of “purpose,” which had since been rejected under the *CCH* revisions; c) the interpretation was too restrictive; and d) assumptions replaced facts when evaluating fairness as defined in *CCH* (p.22). Other flaws identified by the Supreme Court Justices included that the amount of photocopied material did not exceed what was deemed “fair” based on the fairness test of proportionality. Due to these and other issues, the Supreme Court of Canada overturned the Copyright Board’s decision exemplifying that intellectual property was intended “to contribute to the development of a robust public domain” (Reynolds, 2013, p.31), and therefore, must be interpreted through a fair dealing lens. The Supreme Court Justices concluded that there was

no ulterior or commercial motive when providing copies to students. They [teachers] are there to facilitate the students’ research and private study and to enable the students to have the material they need for the purpose of studying . . . . The Copyright Board’s approach drives an artificial wedge into these unified purposes of instruction and research/private study by drawing a distinction between copies made by the teacher at the request of a student and copies made by the teacher without a prior request from the student. The word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in isolation. (*Alberta (Education)*, 2012, para 7)

While the Supreme Court justices concluded that the Copyright Board's interpretation of the *Copyright Act* was not supported by sufficient evidence and thus the decision against *Alberta (Education)* should be overturned, they continued to acknowledge that their interpretation of the *Act* was not "unreasonable" and "cannot be said to fall outside of a reasonable range of outcomes" (*Alberta (Education)*), 2012, para 15). In other words, the Supreme Court of Canada confirmed that, while they disagreed with the Copyright Board's interpretation of the *Copyright Act* and ruled in *Alberta (Education)*'s favor, they believed that the Copyright Board had provided a reasonable interpretation of the *Copyright Act* in the original ruling.

### **Universities Canada**

Universities Canada provides various levels of support for educators and students. In an attempt to clarify copyright legislation and protect non-profit universities against copyright infringement suits, Universities Canada created a fair dealing policy to address the *Copyright Act* and fair dealing clause. These guidelines, which are listed on the Universities Canada website, are listed below.

1. Teachers, instructors, professors and staff members in non-profit universities may communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire or parody.
2. Copying or communicating short excerpts from a copyright-protected work under this Fair Dealing Policy for the purpose of news reporting, criticism or review must mention the source and, if given in the source, the name of the author or creator of the work.

3. A copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course:

(a) as a class handout

(b) as a posting to a learning or course management system that is password protected or otherwise restricted to students of the university

(c) as part of a course pack

4. A short excerpt means:

(a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)

(b) one chapter from a book

(c) a single article from a periodical

(d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works

(e) an entire newspaper article or page

(f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores

(g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

5. 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.
6. Copying or communicating that exceeds the limits in this Fair Dealing Policy may be referred to a supervisor or other person designated by the university for evaluation. An evaluation of whether the proposed copying or communication is permitted under fair dealing will be made based on all relevant circumstances.
7. Any fee charged by the university for communicating or copying a short excerpt from a copyright-protected work must be intended to cover only the costs of the university, including overhead costs. (Universities Canada, 2012, para. 5)

These guidelines are also replicated at some Canadian institutions as part of their copyright policy while others do not. For example, the University of British Columbia provides staff and students with fair dealing guidelines that does not reference the Universities Canada guidelines (<http://copyright.ubc.ca/guidelines-and-resources/copyright-guidelines/>), while institutions such as Dalhousie University use the Universities Canada guidelines in their internal fair dealing guidelines (<https://libraries.dal.ca/services/copyright-office/guidelines/fair-dealing-guidelines.html>). These policy guidelines are intended to promote the understanding and use of copyright law in higher educational settings for all users and to aid in the protection of that use of content with clear guidelines and measures. However, as Knopp (2014) acknowledges, these quantifiable measures may or may not be reasonable as interpreted by the *Act* and, as such, may need to be modified in order to be constituted as “fair.” Such modifications can be seen at Athabasca University in their fair dealing procedure



([http://ous.athabascau.ca/policy/academic/fair\\_dealing\\_procedure.pdf](http://ous.athabascau.ca/policy/academic/fair_dealing_procedure.pdf)), which maps more closely to the fair dealing clause than the Universities Canada fair dealing guidelines, specifically by requiring adherence to the two-stage test instead of the 10% guideline (See 4(a) above).

### **A Law, a Ruling, or a Guideline?**

Knowing the difference between a law, a ruling, and a guideline is important to fully understand what rules must be adhered to and what are considered best practice recommendations. Merriam-Webster defines the word “law” as follows:

a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority: as

a : a command or provision enacted by a legislature — see also statute 1

b : something (as a judicial decision) authoritatively accorded binding or controlling effect in the administration of justice <that case is no longer the law of this circuit> (n.d., para. 3)

This means that the law is non-negotiable and enforceable through consequences governed by the controlling body for the law. The term “ruling” is defined as

an official or authoritative determination, decree, statement, or interpretation (as by a judge on a question of law) <followed a previous ruling on the same question>

(Merriam-Webster, n.d., para. 8).

This implies that a ruling is a decision by a judicial member on a legal topic which amends the previous ruling in some way. It sets precedence for the legal matter in any future dealings.

Finally, a guideline by definition is “a rule or instruction that shows or tells how something

should be done” (Merriam-Webster, n.d., para. 1), which provides guidance to those using the rule as a best-practices recommendation.

In copyright law and the fair dealing clause, all three terms can be seen: the copyright law and fair dealing clause are the non-negotiable laws governing content use. The legal proceedings where judicial members make rulings to modify specific cases offer precedents in these matters to modify the application of the law for future cases. And the guidelines, such as the Universities Canada fair dealing guidelines, offer advice and best practices to users of copyrighted content based on the existing laws and previous rulings. Clearly understanding the distinction between these terms and how they apply to content user and distributor rights is important for maximizing individual rights in these matters.

### **Review of Related Research**

While there is an abundance of literature regarding the changes to Canadian copyright law and fair dealing exceptions, there is little actual research in this area. Geist (2013) published a collection of essays in *The Copyright Pentalogy*, which offers a comprehensive look into the modifications to the *Copyright Act* and explores how those changes affect processes and procedures in various disciplines. Speaking to issues associated with changes to the Copyright Act, several academic scholars and law professionals have created blogs (Chaubal, 2012; Geist, 2012a, 2015; Katz, 2015; Knopp, 2014; Contact North, n.d.; Mewhort, 2012; Rife, 2008) or published articles (Bannerman, 2011; Gervis, 2009; Graham, 2014; Horava, 2008; McGreal, 2004; Nair, n.d.; Tawfik, 2013). A common purpose throughout this body of literature is to demystify the legal and practical aspects of the *Copyright Act* as well as to provide a deeper

understanding of where the laws currently reside. Several authors have also examined the confusion associated with the understanding and interpretations of copyright for both law makers and content creators/users based on anecdotal reports or reviews of the literature (Geist, 2012a, 2013; Gervais, 2009; Holmes, 1899; Horava, 2008; Kimmons, 2014; Reynolds, 2013; Rife, 2008).

Empirical research involving copyright and fair dealing is limited. While various academics consider this topic in their writings, few empirical studies have been conducted (Geist, 2013; Katz, 2015), and these are only used to provide further support to findings of other research. Only two empirical studies that address copyright law interpretation and educators were found (Kimmons, 2014; Kursun, Cagiltay, & Can, 2014), but neither was conducted from the Canadian educator perspective using Canadian law.

Kimmons (2014) conducted an analysis of K-12 teachers' use of open educational materials in the United States as well as their understanding of copyright-related matters (n = 80). He utilized a longitudinal survey design using a pre- and post-test with a 5-point Likert scale to gauge their responses, delivering a teaching institute (i.e., training program) between the tests. While the research utilized both qualitative and quantitative methodology, the qualitative process or results were not reported. One area of the survey considered the teachers' self-reported level of understanding of copyright and fair use law. Somewhat surprisingly, the findings revealed that teachers gauged themselves to have less understanding of the *Copyright Act* on the post-test than on the pre-test. Prior to the training program, teachers held "misconceptions and false confidence" (p. 85) indicating a lack of understanding and sometimes overconfidence with their knowledge of copyright law. The training program provided greater self-awareness of their lack of knowledge.

Kimmons (2014) provided the most comprehensive study in the K-12 area to date, in that he quantitatively and qualitatively explored the perceived knowledge of K-12 educators against actual knowledge during pre- and post-testing. The results provide a glimpse into the issue of misunderstanding and misinterpretation of copyright law by K-12 teachers, but further research is required with this population.

Kursun, Cagiltay, and Can (2014) conducted a quantitative study of the use of Open Educational Resources (OER) in universities in Turkey. The researchers identified that faculty had misunderstandings of copyright law and policies around OER use that greatly affected how they utilized these materials. Semi-structured interviews with 10 faculty members were conducted in order to investigate the perceived barriers, incentives, and benefits associated with instructor resource sharing. Based on these results, a survey was constructed and a pilot test with 41 faculty members was conducted. The final survey was sent to 56 Turkish OpenCourseWare consortium member universities resulting in 1,637 responses from individual faculty members. The results showed that one of the main barriers to OER use was the faculty members' anticipated issues with sharing their own documents and the use of another author's content. The researchers concluded that it was "crucial to understand the reasons for these concerns and to develop strategies to address them" (p.26), recommending further research into the faculty members' misunderstanding of intellectual property use.

Kursun, Cagiltay, and Can (2014) provide a glimpse into the lack of understanding of copyright law in academia, but as the study involved Turkish law and instructors, it does not offer much insight into Canadian practices. The research could be expanded in a Canadian study by utilizing the quantitative survey questions to add generalizability and validity to future research.

### **Statutory Interpretation Theory**

As mentioned previously, the legal profession utilizes a body of discipline-specific theory for interpreting statutes and legislation. These theories reside within two main approaches, formalist and non-formalist, and include the following: eclecticism; intentionalism; purposivism; new textualism; pragmatism; and critical theory (Fallon Jr., 2014; Pojanowski, 2014). Each is briefly described below (Mootz III, n.d.).

- Eclecticism is a non-theoretical approach to legal interpretation which began in the 17<sup>th</sup> century, drawing from various approaches to gain insight to appropriately complement the intention.
- Intentionalism is a subjective approach which requires the reader to interpret the intended result of the law;
- Purposivism searches for the intended legislative purpose which may require modifications to the law to enhance the purpose of the law;
- New Textualism requires the law to be read as it was originally enacted without subjective interpretation;
- Pragmatism explores opportunities to improve or fix issues in the legislation to make the law work efficiently for the intended purpose; and
- Critical Theory requires critical analysis of the intended purpose of the law while also following critical theory objectives to expose class and other inequalities.

While the most widely utilized theoretical approaches for legal interpretation are textualism, intentionalism, and purposivism, all require subjective interpretation in some way. Textualism is semantic and requires users of the law to read the law as it is created and observe the law literally and linguistically. Intentionalism and purposivism utilize judicial precedent, statute wording, context of the law, and the purpose behind the law for decision making (Fallon, 2014). All use a similar text and context, resulting in a similar conclusion and application of the legal case (Kelley, 2009).

Interpretation relies heavily on the meaning that the particular theoretical approach attempts to discover; however, as Fallon (2014) notes, “‘meaning’ has many possible meanings” (p.56). Moreover, ordinary language carries interpretive issues regarding meaning that transfers to the issues that law makers and users face. Armor (2014, as cited in Fallon Jr., 2015) states the following:

The meaning of an utterance depends on, but is not reducible to, semantic or literal meaning, contextual meaning as defined by expected application, contextual meaning as defined by conceptual extension, speaker’s intended meaning, reasonable meaning, and [possibly, but not necessarily] interpreted meaning. More precisely, communicative content - or meaning – is a function of all of these elements, with the function specified by the weight that a reasonable hearer or reader would assign to the various elements in a particular context.” (p. 22)

As a result, different meanings are discovered through interpretations using the different theoretical approaches (e.g., positivist, interpretivist, or critical approaches). Applied to the interpretation of legal statutes, Radin (1930, as cited in Kelley, 2009) postulates that “there can

be no single conscious legislative intent, because the legislature is not a single person” (p. 131), and that it is impossible to conclusively know the intentions of the voters when enacting a bill.

Copyright law and the fair dealing clause can be interpreted with the same theoretical underpinnings. Cohen (2007) notes that rights theorists and economic theorists disagree about how copyright law should be interpreted. Due to this disagreement over theoretical approaches to legal interpretation, Horva (2008) argues that copyright law is viewed as “an emotional topic as many have strong views on what is right or wrong with current copyright legislation” (p.2).

### **Current State of Knowledge in Interpretations of Canadian Copyright**

The previous review of existing literature and research reveals a lack of understanding around the interpretation of the *Copyright Act*. While there are misunderstandings and a lack of awareness of the laws governing intellectual property, there is also a dearth of research into why misunderstandings exist, how and why interpretations differ, and how the resultant issues may be resolved. As Kurson, Cagiltay, and Can’s (2014) research suggests, this lack of copyright law understanding may inhibit the growth of knowledge for the public interest due to instructors’ fears or reluctance to use or share copyrighted content. Even in the courtrooms, understanding and interpretations of copyright law vary, which leads to subjective responses based on precedential law and legislative interpretations. In the midst of such confusion, how can content owners and users feel sufficiently confident in their understanding of the *Copyright Act* in order to protect their intellectual property while at the same time promote the growth of educational resources for the greater good of academia?

What is important for educators, specifically distance educators, is a study into existing interpretations of copyright law and fair dealing exceptions in Canada. By exposing issues

pertaining to legal interpretation, issues affecting distance educators can be addressed so that they become well equipped with legal understandings of the *Copyright Act* and fair dealing exceptions in order to enhance the public interest with the use and distribution of educational materials and research. As well, from those results, practical solutions can be created to address misinterpretations of the law to encourage the use and distribution of educational materials, as it is intended by the non-restrictive, liberal interpretation provided by the courts in the fair dealing exception in Canadian copyright law.



### Chapter III

#### **Methodology**

This chapter discusses the methodology for the qualitative study of the interpretations of the fair dealing clause with distance educators at one Canadian university. This chapter begins with the research design, and then provides an overview of the participants and purposive sampling techniques, and the method for data analysis. The chapter concludes with an overview of the ethical considerations.

#### **Research Design**

An exploratory, case study design using qualitative methodology was selected for the thesis research study. Case study research is considered to be an appropriate strategy when "how or 'why' questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context" (Kohlbacher, 2006, para. 15). As the topic of copyright law interpretation was not something the researcher could control, the exploration into the phenomenon over a selected group of participants was able to begin to capture the overall experience of this particular group. Yin (2003) explains that while case study results are not statistically generalizable, they can result in analytical generalization through the overall themes and categories uncovered in the qualitative analysis of transcript data.

Qualitative research approaches seek to explore or explain a specific phenomenon through interpretive practices. By utilizing various tools such as notes, interviews, conversations, observations, narratives, literature, photographs, and self-reflection, the qualitative researcher is able to explore and interpret social phenomena for deeper understanding

(Creswell, 2013). Unlike empirical quantitative research, qualitative research takes a flexible, holistic, and interpretive view of the research topic by seeking to find patterns, meanings, themes, and categories. Qualitative researchers can increase the reliability of their research through triangulation, by drawing from multiple data sources, such as interviews, observations, and documentation. By ensuring that researchers are transparent with their ontology and expectations during the research process, researcher bias is decreased and the data are more accurate (Creswell, 2014).

Qualitative research methodology was considered appropriate for an exploratory study of copyright law in a distance educational context, as the topic is relatively new and under-researched (Neuman, 2011). By conducting a case study to explore distance educators' interpretations of the fair dealing clause and the implications of this interpretation, greater knowledge of this phenomenon could be obtained.

### **Participants**

A purposive sample was selected and interviewed using questions directly related to the Universities Canada fair dealing policy guidelines, the participants' institutional fair dealing policy, the *Copyright Act*, the fair dealing clause, and the six-point test for fairness. A total of seven participants were selected.

In order to obtain a maximum variation sample, a purposely selected sample group was identified, based on a deliberately broad variety of characteristics, resulting in a list of potential participants which was based on their multiplicity of roles. At a minimum, each potential participant was expected to be employed at the selected Canadian distance education institution and to be both a course developer and the author of at least one book. The participants were then

categorized by their gender, whether they taught in the Arts/Education/Social Sciences or Maths/Sciences/Business disciplines, and whether they taught undergraduate or graduate courses. As a result, a matrix of eight categories was created for a mediator to randomly select names from each category and request their participation in the study. The maximum variation sample for this study helped to ensure that a full spectrum of experiences was captured in the interviews to allow for a truer representation of the participants' experiences on this topic.

The mediator contacted the selected participants with an informed consent letter to invite their participation (Appendix 3). This letter described the purpose and conditions of their participation in the research to ensure informed consideration. The mediator forwarded the names of those who responded positively to the invitation to the researcher, who then arranged for an interview session.

### **Instrumentation**

The participants were interviewed either in a face-to-face setting or remotely using Adobe Connect™ or teleconference. Interviews were recorded to allow for transcription. Face-to-face interviews were conducted at the participants' workplace.

The interviews began with general demographic questions that assisted in categorizing the participants for further analysis purposes. Years of employment with the university and specific employment roles were queried in order to provide an overview of the individual as well as to ensure that the participant sample was diverse and that the participant was both a course developer and an author.

Fifteen interview questions (Appendix 1) were created in reference to the fair dealing clause in the *Copyright Act*. The questions in this interview were strategically crafted to ensure

that the true representation of the experience and interpretations of these distance educators was captured.

- a) (Questions 1 – 3) The first three questions provided more specific information regarding the participant's employment with the university;
- b) (Questions 4 and 5) The following two questions provided an overview of the participant's general understanding of fair dealing in education and how it applied to his or her practice as a distance educator;
- c) (Questions 6 – 12) The next six questions explored the participant's roles as a course developer and as an author. Questions 6, 7, and 8 discussed the participant's experience as an author and his/her understanding of fair dealing as an author; Questions 9, 10, and 11 requested the participant to take the perspective of a course developer to answer similar questions regarding their experience as a course developer and how well they understand fair dealing in that role;
- d) (Questions 13 – 15) The final three questions were scenario-based questions directly related to one of the two roles in which the participant was involved. The role the participant should assume (i.e., instructor/course developer or author) was clearly identified beforehand. The participant was then asked to make a decision about the situation described in the scenario. The scenario-based questions provided insights about how the participant would approach a situation of copyright either as a course developer or an author (see Appendix 1).

The questions allowed the researcher to obtain rich and thick descriptive data as well as a broad view of the phenomenon of fair dealing interpretation in distance education and the participants involved. Additional probes to accompany the questions were posed as necessary in

order to obtain data on the participants' understanding and interpretation on the use and creation of educational materials within the educational community.

### **Data Collection**

A total of seven interviews were conducted in this sample group. Interviews were approximately 30 minutes long and were recorded and transcribed by the researcher for analysis resulting in seven double-spaced pages of interview responses for analysis. Once the transcription was complete, participants were contacted to validate the results through member checking in order to ensure that the information was a true and accurate reflection of their feelings and understandings of fair dealing in education (Neuman, 2011). Any discrepancies were addressed as required, by revising the transcripts based from their comments. The participants were then labeled with research specific identifiers (e.g., P1, P2, P3) to ensure their anonymity.

### **Data Analysis**

The researcher manually coded the data using cross-case analysis to interpret common themes. Themes were determined by following the qualitative data coding process suggested by Strauss (1987 as cited in Neuman, 2011), which allowed the researcher to strategically and systematically interpret the data and uncover conceptual categories. Strauss (1987, as cited in Neuman, 2011) suggests that three stages be conducted when reviewing qualitative data to ensure for accurate themes and codes to be uncovered.

1. The first stage, open coding, involved an open review of the transcripts to look for key themes that appeared. From this first review, a preliminary list of themes was compiled.

2. The second stage, axial coding, followed open coding to further explore the transcripts for themes and codes through a deeper, more intentioned review. This stage attempted to connect some of the preliminary lists of themes and codes together, or to uncover new themes and codes that may have been missed in open coding.
3. The final stage involved selective coding of the themes and codes to categorize the data into conceptual categories with themes and codes related to those categories. These categories and subsequent themes and codes, provide a view of the raw data that can be read for statistical analysis.

The unit of analysis for this study was the entire interview transcripts.

Once transcribed and categorized into themes and codes, the results were shared with the participants for confirmation that they agreed that their experience had been accurately captured, as well as to capture any follow-up commentary they may have had. Additionally, an external auditor was utilized throughout the data analysis process to ensure ethical practice and to enhance the validity of this research (Creswell, 2014).

### **Ethical Considerations**

Ethical considerations for this research followed the Tri Council policy of ethics for appropriate code of conduct procedures in writing and research (Tri County Policy Ethics, 2014). The study was approved by the Research Ethics Board (REB) prior to contacting participants or conducting research involving participants (Appendix 4). Once approval was granted by the REB, further approvals were required. Institutional approval and approval of the Academic Vice-President, Student and Academic Services was granted before commencing the research (Appendices 5 and 6).

To control for perceived coercion and research bias, potential participants were contacted through a mediator, and provided with the informed consent letter (Appendix 3). The informed consent letter included information about the researcher, the institution, the purpose of the study, benefits of participation in the study, the amount of participation required, and any risks involved for the participant. The informed consent letter also stated that involvement was voluntary and that the participant could revoke his or her agreement to participate in the study at any time, up to the point of data analysis (Creswell, 2014).

Once the recordings were transcribed, the audio files were stored within a password-protected file for future research or for retrieval should a discrepancy be identified or follow-up be required. All identifying information in the transcribed data was removed to ensure anonymity of the participants as well as to protect their privacy and identity.

Moreover, if a participant showed an obvious misunderstanding or lack of understanding in copyright law and fair dealing, the researcher discussed ways in which the participant could gain further information on this topic.

### **Role of the Researcher**

The role of the researcher in qualitative research is an important factor to consider in order to reduce bias in the research results. By identifying these factors that may affect research, measures can be taken to limit this bias.

The researcher has been employed at the university that these faculty are affiliated with since 2013 in various capacities. From 2014 to 2016, the researcher worked in the role of an Administrator and an Advisor for a graduate program, and as a Coordinator for an online, open access journal hosted by the institution. Through these various roles, the researcher has been in

contact with many instructors and authors who may fit the inclusion criteria for this research, which may cause bias to the participation. Instructors and authors may feel pressured to participate due to the researcher's relationship with them or fear of repercussions for not participating (i.e., sabotage journal submissions). To remedy this potential concern for the participants, a mediator was used to contact the participants out of a previously compiled list of potential participants that fit the criteria, and to contact the potential participants to ensure that they do not feel pressured or persuaded to participate.

The REB reviewed the research plan to ensure that all ethical steps were considered prior to commencing with data collection. All correspondence with the REB has been included in the appendix of this report for transparency.

### **Summary**

This research utilized a case study research design involving interviews with seven participants and subsequent coding of transcriptions and qualitative analysis in order to explore the participants' understanding of fair dealing policy in distance education and how this understanding has evolved. By purposely selecting participants based on criteria, specific experiences were explored in a specific group of distance educators. Bias was controlled through the use of maximum variation techniques, a moderator, an external auditor, and through member checking the transcripts. All ethical approvals were sought out, researcher bias was disclosed, and identifiable information regarding the institution and the participants was anonymized.

By exploring the interpretation of fair dealing clause with distance educators at a Canadian distance education institution through a qualitative case study, an understanding of



issues associated with the fair dealing clause were uncovered. The following chapter explores the results of this research.

## Chapter IV

### Results

As noted in the previous chapter, this case study required participants to be interviewed regarding their knowledge of copyright and fair dealing. The interview consisted of 15 questions, which ranged from the collection of basic demographic information to scenarios that captured how they interpreted the law in relation to their roles as course developers and authors. During the interview, participants were encouraged to speak freely and candidly. As a result, a rich and thick dataset was compiled to encapsulate their personal experience as distance educators interpreting matters pertaining to Canadian copyright law and the fair dealing clause.

### Participants

The participants in this study were all faculty members at a Canadian distance education university who had both developed online courses and were published authors. Following the compilation of a purposively selected list of participants who would fit the criteria outlined, a moderator was used to contact the participants to ensure they did not feel coerced to participate. Of those that were contacted, the ones who responded favorably to the moderator were forwarded to the researcher to arrange for an interview.

Of the eight participants who agreed to participate, seven participants were included in this study. The eighth participant did not choose to continue in the study. Of the seven participants who continued with the interview, five were interviewed using Adobe Connect™ web conferencing, while the remaining three interviews were conducted in a face-to-face setting at the participant's workplace. Interviews lasted no longer than 30 minutes and were recorded

using a hand-held voice recorder device. Following the interview, the audio recording was transcribed by the researcher and sent to the participants for member checking.

All of the participants were faculty members at a Canadian distance education university. Three of the participants were relatively new employees who had worked less than five years for the institution; one had 11 years' experience with the university; three participants had been employed for 16 years or more with the institution.

All the participants identified themselves as being both an instructors and course developer. Six participants confirmed they were a published book author; the seventh participant had published articles. One participant also indicated a role as an instructional designer.

The complete compilation of this demographical information is provided in Table 1 below.

Table 1

*Demographic Information of Participants (n = 7)*

<b>Demographic Characteristics</b>	<b>Demographic categories</b>	<b>Participant results</b>
Length of employment	1-5 years	3
	6-10 years	0
	11-15 years	1
	16 + years	3
Identified Roles	Instructor/Course Developer	7
	Instructional Designer/Editor	1
	Published Book Author	6
Gender	Female	4

	Male	3
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## Qualitative Analysis

### Coding

The interviews with the seven participants provided rich and thick descriptions of their lived experiences regarding their understanding and interpretation of copyright law and the fair dealing clause. The analysis of the transcripts yielded 28 codes, which were further grouped into five themes. Table 2 shows the identified themes and codes as well as the frequency of the coded item in the transcript and the number of participants who referenced the code. Nine codes were only identified by one participant, while only three codes were identified by all participants. This variation is noteworthy because it indicates a diverse level of understanding among the participants, which will be explored in more depth later in this and the next chapter.

Table 2

#### *Themes and Codes Frequencies*

Themes	Code names	Frequency of coded items used	Number of participants referencing the code
<b>Words about copyright</b>	Stealing	1	1
	Creative Commons	2	2
	Interpretation	1	1
	Fair Use	3	2
	Exception	1	1
	Substantial	2	2
	Infringement	2	1
<b>Fair dealing exception language</b>	Critique	2	1
	Research	4	2

	Education	4	4
	Satire	2	2
<b>Rules and regulations</b>	Publisher rights	5	4
	Percentage	2	2
	10%	18	5
	Attribution to author	6	5
	Costs	4	4
	Permissions	16	7
<b>Process for use</b>	Alternatives	1	1
	Flexibility	4	4
	Avoid issues with		
	copyright	3	2
	Relevance	5	5
	Open educational		
	resources	7	3
	Open license	4	2
<b>Feelings about fair dealing</b>	Confusion	10	6
	Frustration	1	1
	Lack of knowledge	15	7
	Knowledge of copyright		
	and/or fair dealing	1	1
	Responsibility	2	1

Figure 2 provides a visual representation of the differences in frequency between the frequency of participants using a code throughout the interviews and the frequency of the code being used overall in the interviews in relation to the themes and codes.

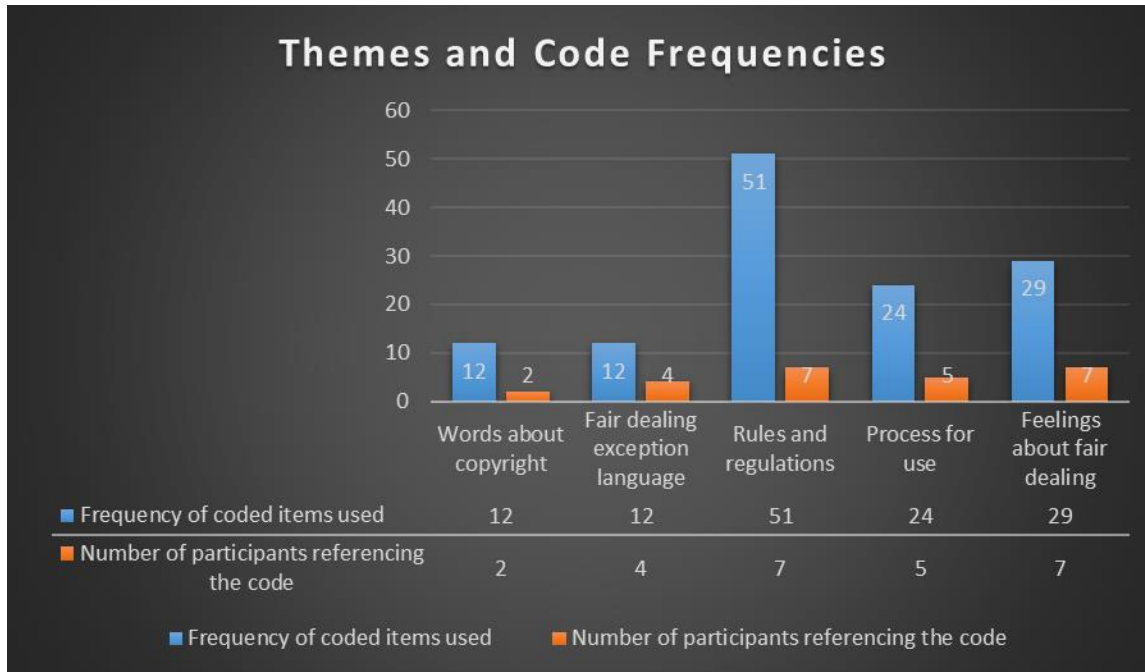


Figure 2. Themes and code frequencies.

The codes themselves were developed following the researcher’s interpretation of the data, relating specific texts (i.e., words, sentences, and paragraphs) to concepts (Glaser & Laudel, 2013). Strauss (1978, as cited in Neuman, 2011) discusses the three stages required for effective coding which are as equally important as they are difficult to conduct for qualitative researchers. This particular research drew from this coding technique by following the open coding, axial coding, and selective coding strategies.

In the open coding stage, the researcher first read the transcripts with an open mind to gain some familiarity with the content (Gibbs & Taylor, 2010). The researcher then re-read the transcripts and made notes in the margins, which resulted in a preliminary set of codes. During this stage, according to Neuman (2011), an unbiased list of codes and themes can be compiled.

The second stage of the coding process, axial coding, involved a more focused reading of the transcripts and consideration of the codes in order to solidify what codes were important and what could be ignored. Strauss (1987, as cited in Neuman, 2011) contends that the importance of this stage is to find the connections between the codes to create logical themes and concepts, but also to find new codes and themes in the data. Gibbs and Taylor (2010) explain that it is only through meaningful connections in the data that the researcher can fully comprehend the ideas and thus obtain clear explanations of the phenomenon.

The researcher conducted the axial coding process over an extended period of time to allow reflection over the ideas presented in the transcripts and the connections among them. During this process, the researcher identified any misunderstandings, missed concepts, or representative themes that had been previously overlooked and reconfirmed concepts that did exist. Through this extremely close connection with the data, the researcher began to develop a deep understanding of the story of the participants in relation to the topic of distant educator interpretations of copyright law and fair dealing. The codes and frequencies are illustrated in the word cloud in Figure 3.





fair dealing, the process to use copyrighted material, and their feelings in regards to fair dealing and copyright.

### **Theme 1 – Words about copyright**

The theme *Words about Copyright* involves the frequency of words used by participants that are unique to the general dialogue and practice when considering copyright use and the law. This theme consisted of seven codes that were only identified by one or two interview sessions. Codes such as *stealing*, *interpretation*, and *exception* were the least identified while *fair use* was the most identified in two interviews. The relevance of this theme is that it exposes the level of familiarity and comfort the participants had with the terminology related to copyright law. The incorrect use of terminology can aid in the confusion faculty may have when deciding whether they can use a work for educational means.

**Stealing.** The idea of *stealing* work was not regularly communicated in the interviews being only identified by one participant. The purpose of including this word and not absorbing it into the theme code *infringement* was because stealing is associated with the crime of *theft* while *infringement* is a copyright specific term. The researcher wanted to identify the difference in perspective between participants and the idea of theft. The participant identified that “you have to kind of know when taking a big portion of someone else’s work becomes just too much simply stealing the work from someone else...”

**Infringement.** As an alternative to the term *stealing*, the use of the term *infringement* reflects the understanding of the legal aspect to improper protocols for copyrighted material use. One participant used this term twice in the interview, discussing the challenges of using external sources in course design:

I am also currently working on an open educational resource and we cannot link to [a particular resource] because the licence, the copyright licence that we have makes us responsible for anybody outside of (Removed for Anonymity) who might use that open educational resource. And depending on how they're using it, we could be responsible for their infringement, their potential infringement of copyright. So it gets really complicated, I think more complicated than it needs to be.

Notably, the only time this term was used was not in relation to fair dealing but instead to the implied rules of the external source – a point that could be applied to the use of any external source in general. Moreover, it would be virtually impossible to oversee the legal activity of students using external or internal resources.

**Creative Commons.** The organization *Creative Commons* was mentioned twice by two interviewees. The relevance to this theme includes the fact that Creative Commons assists the use of open licensing to alleviate the confusion and limitations that copyright and fair dealing can cause content users and creators. The fact that only two interviewees identified Creative Commons suggests that there is limited understanding regarding the alternatives to gaining copyright permissions. As shown in the excerpt below, one participant's identified main goal was to utilize open source as much as possible using Creative Commons licensing.

I play it safe...when I (am) using other people's content...that is my personal goal right now...when it comes to using multimedia, video, pictures...I ought, whenever possible... (to use) Creative Commons...I have spent quite a bit of time trying to understand what it really translates to they have a whole selection of links, materials, repositories, things like that...

**Interpretation.** This code was a single mention by one participant. The significance of this code is that awareness of knowledge through *interpretation* of the law is paramount to fully understanding the reality of the boundaries of the law and fair dealing clause that these participants must adhere to. The participant used this term in relation to another organization's interpretation which makes the use even more worthy of reporting. The idea that interpretation for the current institution or the participant was not considered, only the comparison of the previous employer's practice with the participant's current employer; "...when I was with the publisher it was their interpretation of copyright was a little more flexible..."

**Fair Use.** While *fair use* is not the exception under exploration in this study, the presence of the term is important to note. Fair dealing in Canada and fair use in the U.S. are notably different, as previously discussed, but the terms are frequently used interchangeably by many users and creators potentially indicating misunderstandings of the concept. Fair use was mentioned three times in two separate interviews, which identifies that of the seven interviewed, a quarter of them made this error in some way.

**Exception.** This code is significant because the fair dealing clause is the *exception* to the section of the *Copyright Act* dealing with fairness of use. Only one participant correctly identified that the fair dealing clause provides "an exception from the copyright." This suggests a lack of understanding regarding the intention of the fair dealing clause which is intended to enhance the copyright law. A lack of understanding in the vocabulary used for fair dealing will hinder any practical understandings of how to use fair dealing to one's advantage.

**Substantial.** Given the importance of the word *substantial* in deciding whether or not a work is used in a fair dealing, the researcher identified the infrequency of this word used in the interviews as noteworthy. Of the seven interviewees, only two mentioned the term, as shown in

the following excerpts: "...if I were to use a substantial portion of some else's work, I would have to get permission..." or the participant would "... not (use) a substantial amount...", Since this is terminology used in the exception suggesting a lack of familiarity with the clause, it is important to note that the majority of the participants did not consider the idea of substantial when reflecting on fair dealing and copyright use.

### **Theme 2 – Fair dealing exception language**

The theme *Fair Dealing Exception Language* deals with the frequency of words used by participants which correlate to the fair dealing clause and the Canadian *Copyright Act* since language associated with fair dealing is unique to this section of the *Act* and the exception. To identify whether or not the participants utilized this language in their interviews was considered to reflect how familiar they were with the law and the exception in its current form. The modifications to the fair dealing clause in 2012 and the test for fairness, added education to the list of acceptable uses for copyrighted material. Therefore, it was considered important to identify if those modifications were evident in the interviews, as well as the previous fair dealing exceptions (i.e., for critique, research, and satire purposes). Analysis of the interview transcripts revealed that the term *critique* was used the least amount while *research* and *education* were the most used.

**Research.** This term was identified four times in two interviews, which shows that a quarter of the participants understood the previous fair dealing exception allowing for the use of copyrighted material for *research* purposes. Specifically, participants stated the following: "fair dealing would actually include obviously using it for purpose of research..." and "for research purposes, my understanding is relatively unlimited copying. If I am photocopying something for my own use that sits on my desk that I do research from, then there is unlimited copying."

**Education.** This new addition to the fair dealing exception was mentioned four times in four different interviews, in response to the question “What is your understanding of fair dealing in Canada as it is related to education?” In other words, more than half of the participants identified *education* as a relevant purpose for fair dealing as shown in the following excerpts:

- “would be for educational purposes sections...”
- “fair dealing permits users to...make it available for educational purposes.”
- “in educational situations you can...I think you can utilize... a greater amount?”
- “there are some cases in which you can use work as long as it’s fair...and one of the reasons is if it’s being used for education in the classroom...”

It is notable that while the question clearly identified the term *education*, three of the respondents did not include education in their description of fair dealing.

**Critique.** Only one participant identified that an acceptable use of copyrighted material was for the purpose of a critique, saying, “I guess it is also for criticism, critique and criticism, I guess, analysis of other people’s work, analysis...” This single mention exemplifies a lack of understanding of the inclusion of critique regarding the fair dealing clause in the *Copyright Act* by the majority of participants.

**Satire.** The use of copyrighted material for *satire* is also a fair dealing. Two participants identified this use twice. One participant noted that a dealing was fair when it was used “for education, for satire, for critiquing something, for research ...” while the other participant claimed that “I think you can satirize works without getting copyright permission ...” As with critique, this exemplifies a clear lack of understanding in what is listed in the fair dealing clause.

### Theme 3 – Rules and Regulations

The theme *Rules and Regulations* speaks to the ways in which copyright and fair dealing must be interpreted in order to adhere to the law or the assumptions around these rules and regulations. Through identifying codes in this theme, a glimpse into the participants' understanding of the principles for use of these rules was obtained. The application of the 10% guideline was the most frequently identified code in this theme, with five of the participants using the guideline in their responses, while in actuality, the 10% guideline is not identified in the law or exception at all. Permissions of the institutional copyright office, the publisher, and/or the author were also frequently identified guidelines for adhering to copyright laws and was identified by all seven of the participants in their interviews. The least identified code was the idea of a general percentage, with only two participants identifying this code, which is more appropriate for the proper interpretation of the fair dealing exception.

**Publisher rights.** This code was identified five times in four interviews as a consideration when selecting what materials can be used or shared by participants. When asked “When sharing your material with another institution for their course development, how do you decide what and how much they can use?” all four participants diverted that right to the publisher. One participant stated that “I don’t (decide) because that is mediated by the people who are doing the publishing” and another participant discusses that “it’s not up to me to decide, I don’t own the copyright.” As well, one participant responded to this question by stating that “you have to be very careful what your agreement with the publisher is right, and who has the rights...” When asked in the final scenario question regarding how much of the work could be taken without permission, one participant responded that “again I don’t own the copyright to this material. It is owned by the publisher; it’s not owned by me.”

**Percentage.** The idea of an undefined general *percentage* was mentioned by two participants. When asked about their understanding of fair dealing, they responded as follows:

As far as I understand fair dealing, you can utilize a certain percentage of a published work without having to go through copyright and in educational situations you can ... I think you can utilize, I don't know, a greater amount? ... without monetary compensation to the publisher or author, that's basically how I see it.

This exemplifies that of the seven participants in this survey, this participant identified that there may be a general percentage which may be dependent on the purpose of using the work which is more clearly representative of the fair dealing exception. One participant stated "I don't know the percentages" which indicates that they believe there are percentages to adhere to but they are not privy to that information, thus further exemplifying this misunderstanding of fair dealing.

**10%.** The use of the percentage *10%* was the highest code frequency overall and was used by five participants. The 10% rule is not found in either the *Copyright Act* or the fair dealing exception, but is stated in the Universities Canada guidelines and appears in some institutional policies; however, the institution that these participants are employed in does not refer to the 10% guideline in their fair dealing policy guidelines. This is a clear indication of a misunderstanding regarding fair dealing.

One participant defined fair dealing as, for educational purposes sections, limited sections, no larger than 10% of a published work could be used with citation in a course, any more than 10% would actually have to be permission-per-use and that may or may not cost money.

This participant also defined the term *substantial* as “10% of a work.” Additionally, in the scenario-based questions, it was stated that users are only permitted to use 10% of an edited book and that external users could only use 10% of their published work.

Participants stated that “fair dealing permits users to make use of up to 10% of a source to make it available for educational purposes” and defined substantial as “usually 10% of the total number of pages or amount of the item.” When asked the scenario question regarding how much of an edited book could be used without permission, one participant claimed that “I count it as just 10% of the book overall, not 10% of the particular article that I want. So usually I can get what I want...”

In their interview, one participant identified that a substantial amount of a work would be “over 10%” and when asked scenario questions regarding the use of an edited book or the external use of their published work, both were answered with a clear “10%.”

Another participant discussed that a substantial amount of a work in their previous roles was defined as 10%, but stated that “I am not really convinced that 10% was really coming from the law or some informal agreement that we had with the school board...” When asked the question about how much could be used from an edited book, the participant indicated that “... there must be a number. It’s funny because I really go by that 10% number and I am not able to put my finger on where it came from, but that’s what I would use...” Also, when asked about how much a user can use of their work, they responded that “the 10% number, doesn’t it apply to all?” This participant exemplifies that while they did not believe there is a definite 10% rule in the law, they were accustomed to falling back on it; the 10% guideline is familiar, and therefore perceived as a safe, percentage to adhere to.



One participant identified 10% as the amount a user was permitted to take under fair dealing and that a copy becomes substantial once it hits the 10% mark. They reported that when they use other people's work, they "wouldn't use more than 10%" and that when sharing their work with another institution, "if they wanted to use more than 10% I would be worried." During scenario questions, when asked how much of an edited book they could use, they answered a definitive 10% and when asked how much can be taken of their work without their permission, they responded "10% I think."

The accounts of these five participants exemplify that the 10% guideline held by some institutions has transferred into the language and understanding of other course developers and authors, regardless of whether or not the guideline applies to them.

**Attribution to author.** Giving credit to the author through citation and such was commented on regularly by the participants. Five of the seven participants identified attribution as something to consider in fair dealing. Given that attribution to the author has been a mainstay for academia, and in more recent years an option in Creative Commons licensing (CC-BY), it was not surprising that the research revealed this use. However, it should be noted that there was little mention of plagiarism as a reason for attribution to authors.

Substantial use was identified okay as long as "I reference it appropriately giving credit to the original author" and for fair dealing, it was stated that "you have to also give attribution, obviously, to the author." One participant identified that fair dealing allows the "use of other people's ideas...as long as they are attributed to the original author." As well, it was identified that the use of a Creative Commons attribution license (CC-BY) makes sharing resources easier because the consideration of substantial, and thus the need for the test for fairness in the fair

dealing exception, is no longer an issue for consideration as long as the author is given credit for the work.

**Costs.** The topic of *costs* associated with fair dealing and copyright was brought up on four occasions during four interviews. The idea that permissions for use “may or may not cost money,” or a participant “wouldn’t use more than a paragraph for something without actually buying the book and using the book,” and “you can use anything you want as long as you purchase it” shows a pattern in understanding. The belief that, at times, copyright requires the pay-per-use model for permissions and that users are accustomed to paying fees regardless whether they are rational, since “free” does not exist, appears standard in these interviews. However, one participant exhibits an alternative perspective where they “rather than pay the copyright, [I will] choose another source rather than have to pay the copyright.”

**Permissions.** The idea of *permissions* was mentioned in all seven interviews at a 16 count frequency. This shows that the participants were aware that there are such permissions which must be adhered to, regardless of their possible misunderstandings as to what permissions apply to them and their use of materials. When discussing the use of a work, respondents stated the following:

- “I cannot use items verbatim unless I get permission,”
- “we have to get permission...I would have to get permission for a substantial portion,”
- “I go to copyright,”
- “anything beyond that (a paragraph) would require copyright permissions,” and
- “what I can use goes through the copyright office, they do the deciding for me,”

The responses appear to indicate that most faculty in these roles understand the importance of permissions and err on the side of caution by contacting the university's copyright office for support. It also exemplifies that these faculty do not understand their own institutional fair dealing policy and guidelines as well as the fair dealing exception.

#### **Theme 4 – Process for use**

The theme *Process of Use* includes the frequencies of codes which describe ways to use materials and how materials are managed, chosen, handled, and shared, and as such is important to consider in this type of research. By exploring the process that participants go through when deciding what and how to use educational materials, a deeper understanding of the process can occur to highlight things faculty are doing and areas requiring improvement. To capture this process for use, the interviews explored existing strategies that worked for the participants and areas that inhibited the effective use and distribution of materials.

**Alternatives.** One participant discussed the idea of choosing *alternatives* to copyrighted works, but clearly indicated that course materials should be of good quality in the course content. This participant stated that

When it comes to research, I still like to go for anything that is an open educational resource – to look into the...alternatives to full copyright . . . The key deciding factor in the selection of my reading material is the quality of the writing, the research. As I have said before, the validity and also currency.

This quote implies that not only does the instructor explore the use of alternatives, but also prefers to do so to enhance the use and distribution of alternative sources of material that are

more favorable to open licensing. Additionally, this participant is able to find materials that are relevant and current to increase the quality of their course materials.

**Flexibility.** This concept was identified by four participants in four instances. All participants employed the term or implication when referring to their own sharing habits being *flexible*. One participant discloses that when sharing their work with another institution, they “don’t restrict them at all,” while another states that “I just am a sharer,” and another claims “I just don’t know how to say no.” In addition to openly sharing, one participant states she shares her belief that “the older it (the material) is, the more access (I allow), ...to the point of saying, by all means.” While none of the participants discuss the reciprocity of that flexibility, they all share the ideal that their material is not meant to be used restrictively.

**Avoiding copyright.** Two interviews revealed the participants’ avoidance of copyright materials due to the negative implications associated with the navigation through the copyright rules and regulations. This avoidance was evident in one participant’s experience when deciding how much of another person’s work to use:

I ask the editor and if she says no, then we don’t use it, because getting permission is a lengthy process. Not using other people’s materials means the course being developed is restricted in terms of its currency, realism, [and] connectivity ... by connectivity I mean the connection to real life for the students. It’s extremely limiting. I think that our copyright rules at [the university] go overboard; they restrict beyond what I think the copyright rules intend.

By keeping copyright issues in the forefront, this participant appeared to be giving lower priority to pedagogical matters. In a similar vein, another participant stated, “I will ...choose another source than have to pay the copyright.”

Another way to avoid copyright issues is to be *industrious*.

One participant described the ways in which she used external content in her courses, but wasn't confined to them when copyright permissions were an issue, as stated below.

You can also send the students to get the external content, where you're asking them to confirm or dispute the correctness of the materials that you're supplying. So that's where you're looking to the student to validate the content... I work in [a particular discipline area] and quite a bit of that content is generated in-house rather than external because [the area] is an American field. So in Canada we are sort of assembling it using our own sensibilities really.

Instead of trying to find relevant copyrighted material to fit the needs of the course, this participant also introduced the idea of creating in-house content to meet the pedagogical needs of the particular course.

**Relevance.** The use of material based on its *relevance* or the purpose it served was mentioned in five interviews. The consensus appeared to reside within whether to use a source and find ways to utilize it as per copyright and fair dealing depends on how pertinent the source is to the advancement of the user's product. When asked how one decides what can or cannot be used, this participant indicates

Whether it's relevant. ... One of the issues is not necessarily access because there's a lot of open access these days, for example Tony Bates' book, and many other open ones

from [the university publisher]. So I would say what determines it is the fit, the fit of the material. ... I wouldn't consider whether [the cost of using the resource] was paid or not paid, because our library has an incredible set of resources and I don't think that's a hindrance on our course development at all.

One participant discussed that the decision about how much someone could use of her material depended on the "validity and currency" and therefore the relevance the resource to the instruction.

In the book I edited I reprinted a chapter (obviously with permission of the author and the publisher of the chapter), but we were not really looking at the amount, we just used the full chapter because it is an entity. So you have to take that into consideration and not say 10% and that's it because that might not make any sense. So for me, it goes back to the idea of for what purpose. If you were trying to present that full message, and ... that full message is contained in 30 pages in ... 250 page book. ... I would just use the chapter as cited and not consider how big the chapter is.

With regard to what a substantial part of a work would be, participants indicated that "it depends on the setting" and "it depends on what you're copying." These statements further illustrated the participants' understanding that there was no cut-and-dried instance of what would or would not constitute as appropriate use of a material in all instances. Copyright law only applies when an excerpt is substantial; once it is considered substantial, then the fair dealing clause applies. However, it is worth noting that it also contradicts what the majority of participants say about the 10% guideline.

**Open educational resources.** The topic of *open educational resources* (OER) was discussed seven times in three interviews as a source for course content or as a means for expanding access to participants' own content. Participants explained how they are working towards creating OER to expand resources to her students and one participant explains that he has open resources for public use while another explains that she likes to "go for anything that is open educational resource." The understanding that OER can reduce the restrictions to copyright for public distribution of resources was shared by these three participants, however, it can be noted that many other participants hinted towards OER use through alternative means to copyrighted materials.

**Open license.** The concept of an open license was another topic raised about the process of deciding what and how to use content. There were four instances where the wording or idea of an open license was used across two interviews. The following statements show that open licensing was on the minds of these participants: "It's part of the open concept that they can use whatever they want. Depending on the copyright license, the open license" and

I don't know what the technical term is, but publicly license the material for non-profit use so ... anybody can use them at any time. They're in the public realm. As long as they are used in a non-profit type of orientation, other people cannot commercialize them, that they're used, or can be used, in any non-profit type setting.

This participant also explained that all her articles were "publicly available" through journals or conferences, which may include open licensing including the understanding that the Creative Commons attribution license was one such open license. These participants appeared to understand that use of open licensing enhanced the collegial nature of open sources and as such, the collective reservoir of materials for use. The lack of participants who understood the

Creative Commons attribution license and other such open license concepts suggests that there is much misunderstanding associated with the use of open licenses which could further hinder the understanding of fair dealing in general.

### **Theme 5 – Feelings about fair dealing**

The theme *Feelings about Fair Dealing* highlights the code frequencies of words associated with how faculty feel about fair dealing. Participants' feelings around copyright and fair dealing provide a glimpse into personal factors that may enhance or inhibit the use of educational material. Confusion and lack of knowledge were the most notable in this theme with all participants identifying a lack of knowledge in their interviews and all but one participant identifying words of confusion.

**Confusion.** The *confusion* that exists in relation to fair dealing is apparent. Over six interviews, 10 instances of confusion were apparent. Statements such as “it gets really complicated” and “I think it is over 10% show confusion in the general use of copyright and fair dealing. One participant displays that while the participants may have experience and a good knowledge of fair dealing, the use of it or explanation of it could bring up some of the confusion that still exists when trying to put it all together

Well fair dealing, so my understanding ... without having really prepared myself, so (it) is an important factor, ... fair dealing basically gives me, okay how can I say it? An exception from the copyright? ... which means that I am okay to use other author's work or portions of authors, other author's work, even my own work sorry, ... for certain purposes, and fair dealing would actually include obviously using it for purpose of research, creating materials for study, my own study obviously, I guess it is also for



criticism, critique and criticism I guess, analysis of other people's work, .... recording it in any shape or form I guess, there was something about satire I think, umm okay I hope I am not going to fail! So in terms of really, the work I'm doing, is using someone else's work for the purposes I mention and probably there is more on the list in a proper way too... for education, for satire, for critiquing something, for research you can use it for study ...I know that it's very important for what purpose you use it right and ...my understanding is also that when you use someone else's work for that purpose you also have to, depending on the type of copyright, but you have to also give attribution obviously to the author and ... give the source of the work that you are using and that's very important, ... I guess, fair dealing is not that easy to think of.

While this participant shows very clear signs of familiarity, the solid understanding which is required to use fair dealing effectively is not evident.

**Frustration.** Only one interview identified the feeling of *frustration* for participants. Specifically, they are speaking on behalf of their students' frustrations as well as their own.

(W)hen I started 20 years ago, it was like writing a text book that was simply a study guide so then there were quite a lot of citations, a lot of reference material, but over time, as we've moved to the online environment, there's been a marked decrease in part because the frustration that comes with broken links and sources that the student can't find creates frustration so the more we can use open source materials and very stable web materials the better it is, so there is less resort to text books, more to journal articles and websites.

This exemplifies the desire to use open educational resources and move away from the use of textbooks as a means to alleviate the technological strain as well as the copyright restrictions.

**Lack of knowledge.** A lack of copyright and fair dealing knowledge was evident during the interviews. All seven interviews that showed various misunderstandings and lack of knowledge. Most notably in these interviews were the scenario questions. For example, when asked how much was permitted when taking resources from an edited book, answers varied from “10%” to “anything in excess of a paragraph would be too much.”

When asked about how much of an article could be used from Creative Commons attribution (CC-BY) licensed online journal, two participants exemplified some knowledge of Creative Commons licensing, but could not identify how the attribution license could be used in this particular instance. One participant did not know the answer, and the remaining participants admitted they were guessing about the appropriate response to this scenario.

Finally, the scenario that asked about how much someone could use of their personally authored book resulted in three participants indicating that 10% could be shared, one indicating that he did not know, one responding “all or none depending on how you define the question,” and one saying “I’m more generous rather than less.” A participant discussed the flexible nature of her sharing techniques, stating the following:

The 10% number, doesn’t it apply to all? I’ve never really ... had that problem, I’ve thought to myself if someone takes a chapter, two or three, and uses it fully and cites it properly, and it depends on the purpose... As I was saying before 10%, and ... that might not make any sense. So for me, it goes back to the idea of for what purpose, and ... if you were trying to present that full message.

These interviews show that the general understanding is that the knowledge base over the concept of fair dealing and copyright is greatly misunderstood. Even when some participants come closer than others, there is uncertainty and misinformation laced within their responses.

**Knowledge of copyright and/or fair dealing.** While most participants had a general understanding of copyright and fair dealing, a few exemplified clear understanding. Two participants clearly stated that in the Creative Commons attribution license scenario has no limit with one going further to explain that as long as the use “is attributed to the original author” there is “unlimited usage.” Two other participants also answered correctly that there was unlimited use in a CC-BY licensed material but were less convicted in their responses, using “I think” and “but that’s a guess” in their responses. All other answers and responses in the remaining interviews and interview questions exhibited clear misunderstanding and confusion in their understandings.

**Responsibility.** The feeling of responsibility was apparent in one interview only. The bureaucratic nature of using certain external resources can concern some users of content as is exemplified in one participant’s response to their understanding of fair dealing in Canada as it is related to education;

I link to [external online repository] and that’s okay if I do it with my students but I am also currently working on an open educational resource and we cannot link to [external online repository] because the license, the copyright license that we have makes us responsible for anybody outside of [the university] who might use that open educational resource and depending on how they’re using it, we could be responsible for their infringement, their potential infringement of copyright...

This suggests that while this instance is complicated for this participant, other participants may find other resources that make them less responsible for any possible issues that may arise.

### **Summary**

The interview transcripts of the seven recorded interviews were analyzed for codes and themes. Once the codes and themes were identified, deep and meaningful connections were established to truly understand the experiences and understandings of these participants in relation to copyright and fair dealing. Personal definitions of fair dealing and substantial amounts of resources were discussed in addition to the application of those terms to their works as instructors/course developers and published authors. Following this discussion, three scenarios were presented to the participants to assess their understanding and process for managing specific situations that they may be faced with in their roles as content users and creators.

The following chapter discusses these findings in more detail in relation to the interpretation of copyright and fair dealing, how that interpretation affects the use and distribution of materials, and whether there were notable differences between course developers and authors.

## Chapter V

**Discussion**

The results of this research show that misinterpretations of Canadian copyright law and fair dealing exist among the educators involved in this case study. While all the participants had some form of interaction with copyright law and fair dealing as instructors, course designers, and/or authors, their understanding of their rights and how to use those rights was significantly limited. The questions in this interview were strategically crafted to ensure that the true representation of the experience and interpretations of these distance educators was captured. By comparing the results against the research questions, a deeper understanding of this phenomenon was obtained.

**How do distance educators in a Canadian post-secondary institution interpret the fair dealing clause in the Canadian *Copyright Act*?**

The results of this study show that interpretations of the fair dealing clause are extremely restrictive and limited. Few participants used terminology associated with the law and clause which exemplifies their misunderstanding of it. Interestingly, this institution also uses the terminology from the fair dealing clause in their university fair dealing policy, further exemplifying the disconnect between policy and practice. Although words such as *substantial* and *education* were used by the researcher in questioning, only two participants used the term *substantial* in their answers and four used the term *education* when talking about the fair dealing exception and copyright. The researcher purposefully used these terms to assess the participants' basic understanding but also the interview was specific to fair dealing and education. The

absence of this terminology in each interview suggests that participants could have been unfamiliar or uncomfortable with the terms.

There appeared to be a general understanding of the fair dealing clause by about half of the participants. Some participants correctly identified research, critique, education, and satire as appropriate purposes for fair dealing, but their understanding appeared to be limited to past practices and law, not to the most current version of the fair dealing clause. No participants mentioned the two-stage test or the university's fair dealing policy.

Despite some general understanding of what fair dealing could be used for, there were also significant errors in the participants' understanding. Five of the seven interviewees held the erroneous belief that 10% was the allowable amount of a work that could be used without copyright clearance. The need to seek permission for fair dealing was also an area of misunderstanding, as all seven participants identified the requirement to seek permission prior to use or sharing of materials. While the university that these faculty work at has a fair dealing policy, which does not indicate a percentage value, instructors, course designers, and authors are misinterpreting their rights and expectations as not only according to Canadian law but also their university policy and procedures. It is clear that the language and guidelines associated with Universities Canada guidelines are being considered more regularly with faculty in these interviews than their own institutional fair dealing policy guidelines.

With frequency codes as high as they are for this small sample in areas of Copyright law and fair dealing knowledge, the misinterpretation of fair dealing negatively affects the distribution of online materials significantly. The highest code frequency for this study was around the idea of 10%. The concept of 10% use of any material is permissible without permission is only relevant for universities whose policy indicates this based from the

Universities Canada fair dealing policy guidelines. This is not the law nor is it this specific institution's copyright policy. The limited understanding that use and distribution can be deemed fair if it meets the two-stage test of fair dealing is significant for this study.

The high level of confusion and lack of knowledge further exemplifies that not only the interpretation of copyright law and fair dealing is limited, but also that it is overwhelmingly puzzling for content users and creators.

### **How does this interpretation of the fair dealing clause affect the distance education instructors' use and distribution of online materials?**

The interpretation of the fair dealing exception directly affects distance education instructor use and distribution of materials. Five of the participants identified attribution to authors as an important aspect of use and distribution of educational materials; however, four participants discussed their restricted right to choose following publication due to *publisher's rights*. *Creative Commons* licensing was only referenced twice by two people, even though the question specifically identified the concept. While five participants exhibited *industriousness* in their interviews, six exhibited multiple signs of *confusion* and all seven exhibited proof of their *lack of knowledge*. Coding for lack of knowledge was the third highest code frequency with confusion as the fourth highest. **The participants are restricting their use and distribution of materials based on an incorrect assumption of the meaning of substantial.** Additionally, the second highest code being *permissions* exemplifies that instead of seeking their own interpretation of what is deemed fair, they are incorrectly relying on the expertise of an external source to give them guidelines to what they can or cannot use rather than the institutional policy and procedures.

The availability and use of Creative Commons licensing is another area where lack of understanding is inhibiting the use and sharing of materials. Only two participants identified Creative Commons and the concept of open licensing in the interviews. Additionally, open educational resources were also identified by seven of participants. This suggests a lack of understanding around the concepts of open licensing and open resources, which further limits the effective use and distribution of educational materials. **Faculty may be restricting their own sharing of resources through this misunderstanding of open licensing in addition to restricting their personal use of existing OER which may be more appropriate or relevant to their course needs.**

The result of this misinterpretation of the law and exception can greatly impact the use and distribution of materials. For example, if faculty are aware of fair dealing but are reluctant to use the test for fairness in the fair dealing exception, it can create unnecessary, self-imposed restrictions to the use and distribution of materials, which contradicts the overall intention of fair dealing. Faculty may choose to follow old interpretations regarding copyright instead of applying the Supreme Court ruling which allow for a large and liberal interpretation of “fair.” Faculty may choose proprietary resources exclusively without exploring alternatives which may be more relevant to the courses they are teaching or designing; and creators of content may not choose to share their resources in such a way that opens up their materials to the collective, collegial body, such as with open licensing but instead restrict use with limiting publishing agencies.

This institution has a repository of approved educational materials within the Library which is being drawn from but this greatly limits the freedom of using sources that are a reasonable fit for their course design. If instructors and designers have a better understanding of



how to access and utilize resources within their legal and institutional rights, more relevant resources may be included in their course development. However, it must be noted that the fair dealing exception must be interpreted correctly or there can be negative implications towards the faculty and institution. **As such, to support fair dealing practice, institutions should support the learning and familiarity of the two-stage test for fairness for faculty to ensure that this exception is utilized appropriately and effectively.**

One participant discussed relevance as a deciding factor for using a particular work in a course. Others mentioned the lengthy process associated with seeking copyright permissions and tended to avoid the use of copyright material as a result. However, none of these participants discussed the test for fairness and how they can use the fair dealing clause to their advantage in their course development. Their interpretation was reflective of past practices and policy guidelines that do not necessarily apply to them.

**Is there a difference in perception of what constitutes as fair practice for content use in accordance to the fair dealing clause between distance education instructors who develop courses and those who author books?**

While this study was conducted with participants who were both authors and course developers, the questioning was designed to provide a glimpse into the difference between these two roles when considering copyright law and fair dealing. There appeared to a clear difference in attitude and understanding of fair dealing between the two roles. The majority of participants tended to act restrictively in copyright use when acting as a course developer. They sought permissions from editors and copyright officers, adhered to the 10% guideline, and simply “played it safe.”

Authors, on the other hand, appeared to take a completely different approach to the use and distribution of their own materials. All of the participants exhibited a non-restrictive approach and attitude toward the sharing their own materials. Most claimed to be a “sharer” or that they “don’t know how to say no” while others explained that they must adhere to the rules of their publisher since they owned the rights to their work and as such, the author no longer has a say. The more liberal authors who share as they like would be restricted by publisher rights if they do not choose a publisher who is open, such as a publisher like AU Press. These authors may have the desire to share but cannot due to restrictions from their publisher and may lack the understanding that there is a choice.

The interviews suggest, however, that these authors and course developers have common values pertaining to fair academic collaboration and allocation, and as such, these values are congruent with the open licensing movements and open educational resources. However, it is also apparent that while these values appear in line with open licensing concepts and the OER movement, these authors do not possess the complete understanding of how to use these open licenses to their benefit.

## Chapter VI

### **Conclusions and Recommendations**

Copyright law in Canada and its interpretation has changed significantly over the years. The initial law, which was intended to provide more equality in user and creator rights, has moved back and forth along a continuum of fairness in ongoing attempts to find the right balance. These changes in the law have been further compounded by radical movements, such as the creation of open licensing, open educational resources, and the outcomes of the Copyright Pentalogy. The result has been confusion and misinterpretation of the law among educational content users and creators.

This study explored the interpretation of copyright law and fair dealing by distance educators who both create courses and author books. It explored their interpretation of the law, particularly the fair dealing exception, and what it means for the use and distribution of educational materials, as instructors and course designers and as published authors in their interpretation and use of materials.

This exploratory study revealed that there is confusion and misinterpretation in copyright law and fair dealing use among the distance educators at this institution. The study should be expanded and replicated to include other Canadian institutions to see whether similar results can be obtained with a wider demographic. From those results, practical solutions can be designed to address misunderstandings of the law in order to further advance the use and distribution of educational materials, as intended by the non-restrictive, liberal interpretation allotted by the courts to the fair dealing exception in Canadian copyright law.

Additionally, due to the incorrect assumptions of the meaning associated with substantial, and a lack of understanding regarding open licensing in general, it is apparent that faculty are restricting their use and distribution of personal materials and OER. To support fair dealing practice, institutions should encourage and support faculty familiarity with the two-stage test for fairness in order to assist in the adoption of this exception in an operational and appropriate way.

### **Recommendations for Further Research**

The results of this research showed that there was a lack of knowledge and numerous erroneous beliefs about fair dealing and copyright among the participants. They not only misinterpreted the law itself but also lacked understanding of which institutional policy guidelines they were required to follow. Most relied on avenues for permission to make decisions on whether or not they could include copyright materials in their courses. Further exploration into the mitigating factors that inhibit course developers in their ability to exercise their rights as academics in this institution and others is called for. Additionally, a document analysis of existing policy and guidelines to further expand on this confusion could add to the understanding of these misinterpretations.

High levels of confusion and lack of knowledge in copyright law and fair dealing were also apparent in this research. This would explain the number of participants who seek permission instead of acting on their rights or utilizing open licensing or open educational resources to their advantage. Further research in distance educators' understanding of open licensing practice and open educational resources is necessary to better understand what is misunderstood and how that misunderstanding can be overcome to promote use of open educational resources and licensing.

Authors exhibited a willingness to share their works but appeared to lack an understanding of open licensing options. Additionally, many authors give up their rights to traditional publishers but there was no evidence in these interviews as to why these authors chose commercial publishers over open licensing their work or using open access publishers. Further exploration into ways that open educational resources and open licensing can benefit content creators as well as content users is required. Additionally, research into reasons authors choose commercial publishing agencies over open licensing options is also necessary to understand this phenomenon. Educating content creators and users on these open options would be a rational next step to promote more efficient resource sharing.

Finally, none of the participants showed reasonable familiarity with the *Copyright Act* and the fair dealing exception. In addition to their lack of understanding in this area, the clear discomfort with the terminology and how that terminology is defined when discussing using and distributing materials as a course developer and author is apparent. As such, it would be beneficial to conduct studies which look into how linguistic and culture groups define language. Exploration into the common language of law makers in contrast to the common language of educators may be a catalyst in misunderstanding and misinterpretation of the law simply based on the differing linguistic cultural norms and definitions. Through an exploration of this type, any language misinterpretations can then be addressed for differing linguistic culture groups for a more common understanding going forward.

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## Appendix 1

**Interview Questions**

Thank you for participating in this semi-structured interview today. The interview consists of 14 questions beginning with personal questions regarding your employment with Athabasca University. Following this, I will ask you two general questions relating to your understanding of copyright law, and then will ask you to separate yourself from your dual role as an author and a course developer. Three questions will relate to your experience as an author while the three questions following will relate to your experience as a course developer. The final three questions will be scenarios in which you will draw from your knowledge base to answer how you would address the situations. There may also be extra questions asked to probe for additional information.

There are no right or wrong answers in this interview. Please be as thorough and honest as you can so that I can develop a clear picture of your interpretation of the fair dealing clause.

**1. Demographic Information**

- a) Can you confirm that you are employed with Athabasca University?
- b) How long have you been employed with Athabasca University?
- c) Please select the employment you currently have with AU. Select all that apply:
  - Published Author
  - Instructional Designer/Editor

- Course Developer/Instructor

## 2. **Introductory Questions**

- a) What is your understanding of fair dealing in Canada as it is related to education?
- b) Copyright law applies to copying a “substantial” part of a work. At what stage does a copy become “substantial”? (i.e., one line, one paragraph, one page, or one chapter; 1%, 5%, or 10%)

## 3. **Course Developer/Instructor**

- a) How many courses have you developed as a course developer/instructor at Athabasca University?
- b) How important is it to use external content when creating a course?
- c) When using other people’s materials in your course development, how do you decide what and how much you can use?

## 4. **Author**

- a) How many books have you written?
- b) Have you been asked to share your authored materials for use in course development?
- c) When sharing your material with another institution for their course development, how do you decide what and how much they can use?

## 5. **Scenarios**



- a) You would like to use material found in an edited book. How much are you permitted to use as per the fair dealing clause?
- b) You would like to use material found in an online journal which has been licensed under the Creative Commons attribution licence. How much are you allowed to use before it is considered copyright infringement?
- c) You have been approached to share partitions of your personally authored book. How much can be taken without your permission?

That is all the questions for today. Once the data has been analysed you will be provided with the results to confirm I have effectively captured your experience on this topic.

Thank you for your participation.

Appendix 2

**Letter of Invitation**

Hello \_\_\_\_\_,

I have volunteered to serve as the moderator for the recruitment of subjects for Serena Henderson's M.Ed. thesis research project. An invitation letter is attached. Serena is investigating AU faculty members' understanding of copyright and fair dealing. If you are interested in being interviewed for this study, please let me know and I will pass your name along to Serena.

Thank you for your consideration,

Susan

Susan D. Moisey, Ph. D.

M.Ed. Program Director and Associate Professor

Centre for Distance Education

## Appendix 3

**Informed Letter of Consent**

## Participant Consent

I, \_\_\_\_\_, understand Serena Henderson's letter of introduction about her Master's thesis. I agree to participate in the interview by arranging a date to be interviewed and answering the questions honestly. I understand that my real name and identity will be removed from the final paper; however, I understand that I will be given a chance to read the transcript of my interview and approve the transcript prior to analysis. I understand my participation is voluntary and I can withdraw consent at any time.

Date \_\_\_\_\_ Name \_\_\_\_\_

## Appendix 4

**Research Ethics Approval**

May 30, 2016

Ms. Serena Henderson  
Centre for Distance Education  
Athabasca University

File No: 22203

Expiry Date: May 29, 2017

Dear Serena Henderson,

The Centre for Distance Education Departmental Ethics Review Committee, acting under authority of the Athabasca University Research Ethics Board to provide an expedited process of review for minimal risk student researcher projects, has reviewed your project, 'Interpreting Fair Dealing: An Exploration into Distance Education Instructors' Perceptions of Copyright Law in Canada'. There is still confusion regarding the terms mediator and moderator in Section 7 - are these the same person or 2 different people? Please clarify for file purposes only.

Your application has been **Approved on ethical grounds** and this memorandum constitutes a **Certification of Ethics Approval**. It is noted that you require AU Institutional Permission to access university systems, staff or students to conduct your research project. As such, a request for this permission from the Associate Vice-President, Research has been initiated on your behalf. As per University Policy, if you are proposing to access information or assistance or recruit participants from a particular faculty or department, written support from the Dean (or designate) or Departmental Head is required. If your request spans multiple faculties/departments across the University, written support from the Associate Vice-President, Student & Academic Services (AVPSAS) must be provided. Please forward this written support once received that it may be added to your file.

Participant recruitment and/or data collection **may not proceed** until this institutional permission has been granted. You will be notified in writing of the outcome of this request for access.

AUREB approval, dated May 30, 2016, is valid for one year less a day.

As you progress with the research, all requests for changes or modifications, ethics approval renewals and serious adverse event reports must be reported to the Athabasca University Research Ethics Board via the Research Portal.

To continue your proposed research beyond May 29, 2017, you must apply for renewal by completing and submitting an Ethics Renewal Request form. Failure to apply for **annual renewal** before the expiry date of the current certification of ethics approval may result in the discontinuation of the ethics approval and formal closure of the REB ethics file. Reactivation of the project will normally require a new Application for Ethical Approval and internal and external funding administrators in the Office of Research Services will be advised that ethical approval has expired and the REB file closed.

**When your research is concluded**, you must submit a Project Completion (Final) Report to close out

REB approval monitoring efforts. Failure to submit the required final report may mean that a future application for ethical approval will not be reviewed by the Research Ethics Board until such time as the outstanding reporting has been submitted.

At any time, you can login to the Research Portal to monitor the workflow status of your application.

If you encounter any issues when working in the Research Portal, please contact the system administrator at [research\\_portal@athabascau.ca](mailto:research_portal@athabascau.ca).

If you have any questions about the REB review & approval process, please contact the AUREB Office at (780) 675-6718 or [rebsec@athabascau.ca](mailto:rebsec@athabascau.ca).

Sincerely,

Debra Hoven  
Chair, Centre for Distance Education Departmental Ethics Review Committee  
Athabasca University Research Ethics Board

## Appendix 5

**Institutional Ethics Approval**

June 14, 2016

TO: Ms. Serena Henderson  
Centre for Distance Education , Graduate Student  
Athabasca University

Dear Serena Henderson,

I have reviewed your request for Institutional Permission to access resources for research purposes. I am pleased to advise that your request to access Athabasca University staff or students (or their data under the care and control of the University) or resources to conduct your research project entitled 'Interpreting Fair Dealing: An Exploration into Distance Education Instructors' Perceptions of Copyright Law in Canada' has been approved subject to the following conditions:

1. Staff and student information is used solely for the purpose outlined in the research proposal submitted to the AUREB;
2. Approval of the Associate Vice President, Student and Academic Services to recruit staff participants across the university, is provided, and
3. You formulate a plan by the researcher for dealing with situations wherein it becomes apparent that the interviewee perhaps does not understand and/or is not adhering to copyright legislation. This may be as simple as identifying a copyright officer or librarian to whom the individual(s) will be referred. You do not need to resubmit your application but should include this information in future documentation regarding this project (i.e., thesis; dissemination activities). You should also notify your thesis supervisory committee of this recommendation.

As outlined in your approved ethics application (excerpts from Tabs 3, 4, 6 and 7 below), you are seeking assistance to access, for research purposes, AU staff (and staff data):

**Tab 3. Data Identifiers**

3.1 What identifiable information will you be collecting? "Surname and First Name|Telephone Number|Email Address"

3.6 If identifying information will be removed, describe how and when? "All identifying factors in the transcribed data will be removed to ensure anonymity of the participants and to protect the privacy and identity of those selected. The participants will be labeled with research specific

identifiers (i.e., P1, P2, P3, etc.).”

3.7 Specify what identifying information will be retained. “Once the data has been transcribed, the recorded sessions will be reserved behind a password-protected file for future research or for retrieval should a discrepancy or follow up be required.”

#### Tab 4. Data Confidentiality and Privacy

4.1 How will confidentiality of the data be maintained? “Each session will be private with the researcher. The recorded sessions will be reserved behind a password-protected file for future research or for retrieval should a discrepancy or follow up be required. Participants will be labeled with research specific identifiers such as P1, P2, P3.”

4.2 How will the principal investigator ensure that all project personnel are aware of their responsibilities concerning participants' privacy and confidentiality of their information? “I am the only principal investigator. The moderator will be provided information on the ethical practice of data collection as per Tri Council Policy Ethics. The moderators are bound by academic conduct policy being AU faculty members.”

#### Tab 6. Participant Information

6.1 Who are you studying? “At minimum, each participant will be employed at Athabasca University and will be both a course developer for the university and the author of at least one book. Active recruitment of instructors who have the following characteristics will be sought out: received awards for teaching excellence or book authoring; employed as a course developer with Athabasca University for many years; have authored multiple books; and who have various experiences outside of only course development and authorship.”

6.2 Describe the inclusion criteria. “Specific participants will be selected that include Athabasca University instructors who have also authored books. This will keep the experience and the expertise of these participants similar as I am attempting to view the experience of the content user and creator. The sample will be drawn from Athabasca University employees only . The purpose of this is to keep the participant group simple and explore one institution. The purposive sample size of 8-10 instructors for interviews allows for maximum variation sampling. This will ensure that of this group, a controlled, yet diverse, sample will be selected providing a less restricted view.”

6.5 How many participant do you hope to recruit? “8-10”

#### Tab 7. Recruitment

7.1 Describe how you will identify potential participants. “In order to compile a maximum variation sample, a purposely selected sample group based on a deliberately broad variety of characteristics, a list of potential participants will be compiled first based on their multiplicity of roles. At minimum, each participant will be employed at Athabasca University and will be both a course developer for the university and the author of at least one book. Active recruitment of instructors who have the following characteristics will be sought out: received awards for teaching excellence or book authoring; employed as a course developer with Athabasca University for many years; have authored multiple books; and who have various experiences

outside of only course development and authorship. From this list, a short list of potential participants will be constructed.”

7.2 Once you have identified a list of potentially eligible participants, indicate how the potential participants' names will be passed on to the researchers. “Moderator will then contact the selected participants with an informed consent letter to invite their participation. One of my co-supervisors will act as my mediator. Both are faculty members at AU. There is no differential power relationship between moderator and participants since they all share a peer relationship as AU faculty. The moderator will review the list to identify potential or existing conflict of interest being bound by academic conduct policy as an AU faculty member. If conflict of interest between participant and the moderator exists, that persons will be removed. The letter will contain the purpose and conditions of their participation in this research for their informed consideration. Of those who respond positively to the invitation to participate, the mediator will forward the names of the willing participants to the researcher who will then arrange for an interview session.”

I wish you every success with your research project. Please forward email approval from the AVPSAS once received that it may be appended to your file.

Dr. Donna Romyn  
Associate Vice-President Research  
Athabasca University



Appendix 6

**AVPSAS Approval**

**From:** Dr. Alain May  
**Sent:** Wednesday, June 15, 2016 9:15 AM  
**To:** Serena Henderson  
**Subject:** RE: Research Approval - Henderson

Please consider this my approval to recruit participants in the institution as outlined in your research proposal, "Interpreting Fair Dealing: An Exploration into Distance Education Instructors' Perceptions of Copyright Law in Canada." I have consulted with the VPA since you are recruiting faculty members and she concurs.

Thanks,  
Alain May  
AVP, Student and Academic Services