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# What Should Students Pay for University Course Readings? An Empirical, Economic, and Legal Analysis

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# What Should Students Pay for University Course Readings?

## An Empirical, Economic, and Legal Analysis

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### Abstract

In the context of the significant court battles that are being fought over the potential copyright infringement involved in distributing the articles and excerpts assigned to students in university courses, this study analyzes 3,391 course syllabuses (2015-2020) from nine provinces and 34 universities across Canada. It identifies the types and proportions of required readings among academic and non-academic sources. Academic readings are assigned on 26.6 percent of the syllabuses, compared to 8.3 percent of syllabuses for media articles and trade book chapters. Among the assigned readings, journal articles lead the list (with 54.3% of all readings), compared to scholarly book chapters (33.5%), media articles (6.0%), and trade book chapters (6.3%). The social sciences lead in the assignment of journal articles and the humanities in trade book chapters, while science was least likely to have assigned readings of any type. The study also found that textbooks are required on a majority of syllabuses (66.0%), with only minor differences in this proportion across science, social sciences, and humanities. The data enable a further analysis at the page level of what the average student is asked to read annually, which, at the Access Copyright current tariff of \$14.31 (approved by the Canadian Copyright Board), amounts to a \$0.021 per page. This rate is applied in a proposed new “three-step syllabus rule” that avoids double-charging students for academic materials (90.1% of readings by pages), while fairly compensating professional authors and their publishers (9.9%), with the data analyzed here suggesting a \$1.40 annual charge per student for their assigned readings.

## What Should Students Pay for University Course Readings? An Empirical, Economic, and Legal Analysis

While university textbooks represent a well-ordered publishing industry that structures the instructional design of many post-secondary courses, many instructors, particularly in the social sciences and the humanities have for decades opted instead to assign their students a ragtag collection of articles, chapters, and excerpts, drawn from original scholarly and trade sources. These collections form, as Ehren Helmut Pflugfelder colorfully puts it, “an object from the underworld, from the abyss beneath the post-historical university” (2012, p. 249). As such, they have been attracting copyright infringement suits since the proliferation of copy-shops in the 1980s that made this teaching strategy a practical reality, most notably with the early *Basic Books v. Kinko's Graphics* (1991) in the United States.

By the second decade of the twenty-first century, however, as surelock-bound paper coursepacks continued to be sold to students, scholarly publishing had largely moved to cloud-based online access through institutional licensing to university libraries, and with a small but growing proportion of open access materials. This digital transformation of scholarly publishing has only heightened distinctions between scholarly publishing – rooted in the sponsored economy of academic life – and trade publishing as a commercial enterprise (Willinsky, 2017). A prime example of this difference in historical terms is how scholarly authors are paid by universities supported, in part, by student tuition, with their scholarly publishing qualifying them for employment and advancement. In trade publishing, authors largely finance themselves through publishing by the sale of their books and the placement of their work in media outlets. What has happened in the digital era is that scholarly journals have gone online, along with many scholarly books, with libraries purchasing institutional licenses to these works that could serve a university's entire community in a way that a single copy of a journal or a book could not. In addition, a growing, if still small, proportion of journals and books are published or made available through repositories on an open access basis. This has resulted in close to a third of the research journal literature being made freely available by 2017, with a

much smaller but also growing segment of scholarly books following that trend (Piwowar et al., 2018).<sup>1</sup>

These developments introduced a financial conflict into the distribution of course readings. A 2013 study, conducted by one of the authors of this paper, for example, determined that 45.1 percent of the readings purchased by students in 110 Stanford University and Queen's University course-packs had been freely available to them from their respective libraries and through open access (Evans and Willinsky, 2013). In 2017, a study of 12 University of Toronto course pointed to the "double-charging" of students as "55 percent of the assigned readings were already licensed by the library and were fully available in electronic form" (Cancilla, Glushko, Orfano & Slaght, 2017). The students are paying a royalty fee for course readings that the library had already purchased a campus-wide license for with the student's tuition fees. Our study provides a further, large-scale update on this issue, involving 3,391 Canadian university syllabuses from 34 institutions, demonstrating the extent of the double-charging, which may apply to over 90 percent of the assigned readings. By distinguishing between academic and trade publications, the study proposes a fair resolution for all parties through a "three-step syllabus rule." In this regard, the study also intends to inform current lawsuits in Canada and the United States concerned with universities' handling of course readings.

In 2013, Access Copyright sued York University for failing to pay the Copyright Board of Canada approved tariff covering the millions of copies associated with York from 2011 to 2013.<sup>2</sup> Access Copyright is a not-for-profit collective that represents 11,000 Canadian writers, visual artists, and publishers. It strikes agreements with organizations, such as universities and provincial ministries of education, to cover royalty payments for course materials. The Copyright Board of Canada has approved an Interim Rate for an annual Access Copyright tariff of \$14.31 per university student (ACT, 2019). Yet with much unsettled in applying fair dealing to education, a quarter of Canada's 96 universities are not paying Access Copyright's tariff (Access Copyright, 2020a). In the face of the 2013 Access Copyright lawsuit, York claimed its employees followed

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<sup>1</sup> This is to leave aside a ghost library such as Sci-Hub that has illegally assembled and offers freely up a large proportion of this work (Bonhanon, 2018).

<sup>2</sup> Michael Geist: "For many years, the universities effectively funded Access Copyright's litigation and Copyright Board costs, with the collective setting aside millions to pay for legal and lobbying fees" (2014a). In the United States, a parallel case can be found in *Cambridge University Press v. Patton* which also appears to be working its way through the courts. Cambridge, SAGE, and Oxford University Press initially filed the suit against Georgia State University in 2008, holding that the library's electronic reserves of 6,700 course readings infringed their copyright, with the library offering a fair use defense of its e-reserves program (Hafner, 2008). The court decisions have gone back and forth in this case, with the latest ruling, sending it back to be heard again by the District Court for a third review in 2018.

the university's guidelines on the "fair dealing" exception in Canada's Copyright Act.<sup>3</sup> York's guidelines advise that "a single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course" ("Fair Dealing," 2012). In 2017, the federal court ruled against York, holding that "the Interim Tariff is mandatory" and "the York Fair Dealing Guidelines are not fair" for, among other reasons, its "material negative impacts on the market" (CCLA, 2017, 13, 356, 353). In 2020, the Federal Court of Appeal ruled that "the tariff is not mandatory," as the Copyright Board of Canada tariff-setting process is only intended to protect the public from excessive pricing (YU, 2020, 206). The appeal court also upheld the earlier decision that "York's Guidelines did not ensure that copying... was necessarily fair dealing" (311). At this point, the Supreme Court of Canada has agreed to hear the case.

In 2019, when Canada's Standing Committee on Industry, Science and Technology issued its Statutory Review of the Copyright Act Report, it included a recommendation that in part inspired this study, namely that the committee "resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments" (Ruimy, 2019). This study seeks to provide new and authoritative information on this area of educational fair dealing that bear on past court rulings and might inform future ones, as well as the Copyright Act. It examines how old and new distinctions between scholarly and trade publishing might reasonably figure in calculating what is owed to whom as a result of student engagement with both types of literature in their university courses.

## Method

### Sample

Using web-scraping strategies that attempted to target course syllabuses at Canadian universities, we collected 5,898 documents from nine of Canada's ten provinces (Table 1). Of these, 3,916 proved to be unique syllabuses for the period 2015-2020. We eliminated 525 of the syllabuses that referred to assigned readings but did not identify them (as they were to be found in a coursepack or on a website). This left 3,391 syllabuses, of which 2,800 listed readings and/or textbooks, and 591 of them having no required or assigned items, although these courses sometimes listed optional and recommended materials for the students.

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<sup>3</sup> In 2012, Canada amended the Copyright Act so that copying for the purpose of "education" (as well as research, private study, parody or satire, as well as criticism, review, and news) is "fair dealing" and as such, "does not infringe copyright" (Copyright Act, 2020).

These syllabuses come from 34 of Canada's 96 universities located in nine of Canada's ten provinces (minus Prince Edward Island). The distribution of syllabuses among institutions ran from a high of 386 syllabuses (11.4% of total) collected from Western University to the two (0.1%) collected from Kwantlen Polytechnic University, with a mean of 99.7 syllabuses per university. Of the 3,391 syllabuses, 86.3 percent (2,926) are in English and 13.7 percent (465) are in French. Courses in science accounted for 42.6 percent (1,443) of the syllabuses, the social sciences 37.1 percent (1,258), and the humanities 20.3 percent (690). No distinction is made between graduate and undergraduate course syllabuses as the Access Copyright tariff applies to all university students. While we were unable to locate a reliable source of information on how many courses are taught in Canada annually, if Canada's roughly 1.3 million full-time university students may be assumed to be taking 8.2 courses a year (see below fn 6) in classes averaging 25 students across the country, then this sample of 3,391 syllabuses amounts to less than 0.9 percent of the courses offered annually 2015-2020 (Postsecondary enrollments, 2018).

Table 1.

*Syllabus Sample by Assigned Items and Subject Area (N=3,391).*

<u>Documents</u>	<u>Count (%)</u>
Web-scraped documents	5,898
Unique syllabuses	3,916
Minus syllabuses w/ readings elsewhere	525
Sample of analyzable syllabuses	3,391 (100)
Syllabuses with assigned items	2,800 (82.6)
Syllabuses with no required items <sup>a</sup>	591 (17.4)
<u>Total</u>	<u>3,391 (100)</u>
Science syllabuses	1,443 (42.6)
Social Sciences syllabuses	1,258 (37.1)
Humanities syllabuses	690 (20.3)
Total	3,391 (100)

Note

<sup>a</sup> Examples of syllabus statements with regard to no required items: "Optional textbook authored by the instructor"; "aucun manuel n'est obligatoire"; "no required text for the course"; "livres de référence"; "following texts are not mandatory but may serve as useful reading material."

## Categorizing the Readings

This study involved a manual counting of the “assigned” or “required” course readings on the syllabuses (leaving aside “optional” or “supplementary” readings). A group of 17 undergraduate students, a number of whom were competent in French, were trained to categorize the assigned readings on the syllabuses (as distinct from textbooks and assigned whole books) into four types of readings (see students’ [training materials](#)):

- (a) Journal articles identified by the name of the publication and the inclusion of volume and number in the syllabus bibliography entry for it.
- (b) Academic book chapters identified by the academic nature of the book title, a list of leading academic publishers, and any university press.
- (c) Media articles identified by the non-academic publication’s title, if not already known media outlet, with a screen-full used for the “page count.”
- (d) Trade book chapters and book excerpts, which were identified by the non-academic nature of the title and publisher, in contrast to the academic publishers.

In addition, students were asked to identify textbooks, for which training was also provided. Textbooks that were assigned to students, as well as whole trade books generally, are not considered as “assigned readings” for the purposes of this study, because students purchase them separately, compensating the authors and publishers directly rather than through an Access Copyright tariff as with readings.

Before proceeding, the students had to score 80 percent or better on a test set of syllabuses, based on the lead researcher’s scoring of reading types. Once underway, students were asked to cross-check a small sample (5-20) of each others’ scored syllabuses, with discrepancies resolved by a third student (who had demonstrated relatively consistent scores in cross-checking), with the lead researcher stepping in as needed. When other scoring discrepancies were discovered, a few of the more proficient students were entrusted with re-analysis. In addition, the students recorded page counts on a sample of readings that provided page-number information (Table 2). The page counts were totaled and divided by the number of readings sampled to come up with an average pages-per-reading for each reading type.

Table 2.

*Readings Types by Average Number of Pages Per Reading, Based Readings that Provided Page Ranges.*

<u>Reading type</u>	<u>Paged readings (%)<sup>a</sup></u>	<u>Pages / reading</u>
Academic Readings		
Journal articles	831 (10.4)	18.3
Scholarly book chapters	414 (8.4)	21.7
Non-academic readings		
Media articles	226 (25.9)	10.6
Trade book chapters	390 (42.5)	20.0

Note

<sup>a</sup> Percentages for “paged readings” are for readings of that type.

## Syllabus Analysis

### Assigned Readings

A little more than a quarter of the syllabuses, at 27.2 percent (923), assigned readings to the students as part of their coursework (Table 3a). Paying for the right to use these readings is what is at issue in the court case introduced earlier. Among the four different types of readings used in this analysis, the journal article forms the largest group. There were 7,961 articles assigned on 707 syllabuses (20.8% of all syllabuses), with an average of 11.3 articles assigned on syllabuses with research articles (Table 3b). This represents a commendable pedagogical effort to engage students in the primary work of leading scholars in a fifth of the courses sampled in our study. Scholarly book chapters (4,906) appeared on just about as many syllabuses, at 702 (20.7%), as journal articles, though in smaller clusters, with 7.0 scholarly book chapters on average appearing on the syllabuses with such chapters.

Table 3.a.

*Assigned Academic and Non-academic Reading Types on Canadian Syllabuses (N=3,391), with Average Clustering of Types Per Syllabus with the Reading Type.*



<u>Reading type</u>	<u>Assigned (%)</u>	<u>Syllabuses (% total)<sup>a</sup></u>	<u>Cluster / syllabus</u>
a) Academic readings	12,867 (87.8)	902 (26.6)	14.3
b) Non-academic readings	1,791 (12.2)	281 (8.3)	6.4
All readings	14,658 (100)	923 (27.2)	15.9

Note

<sup>a</sup> Syllabuses do not add up to 100 percent because of overlap of reading types on syllabuses.

Table 3.b.

*A Further Breakdown of Assigned Reading Types Found on Canadian Syllabuses (N=3,391), with Average Clustering of Types Per Syllabus with the Reading Type.*

<u>Reading type</u>	<u>Assigned (%)</u>	<u>Syllabuses (% total)<sup>a</sup></u>	<u>Cluster / syllabus</u>
a) Academic readings			
i) Journal articles	7,961 (54.3)	707 (20.8)	11.3
ii) Scholarly book chapters	4,906 (33.5)	702 (20.7)	7.0
b) Non-academic readings			
i) Media articles	873 (6.0)	194 (5.7)	4.5
ii) Trade-book chapters	918 (6.3)	148 (4.4)	6.2
All readings	14,658 (100)	923 (27.2)	15.9

Note

<sup>a</sup> Syllabuses do not add up to 100 percent because of overlap of reading types on syllabuses.

The non-academic readings were less prevalent. The 873 media pieces, for example, appeared on 194 syllabuses (5.7% of all syllabuses) in clusters of 4.5 items on average, while 918 trade book chapters were found distributed across 148 (4.4%) the syllabuses in clusters of 6.2 chapters per syllabus with a trade book chapter. There is considerable mixing of reading types as can be seen by comparing the number of syllabuses with readings (923) to the number of syllabuses for each type, which suggest more than one reading type on the majority of the syllabuses with readings.

In terms of the distribution of reading types across the three academic areas we considered, syllabuses in the social sciences assigned the most journal articles (5,264) on more syllabuses (457; 36.3%), followed by the humanities, with 1,656 journal articles assigned on 165 syllabuses (23.9%), with than science far behind with only 1,041 such readings assigned on 86

syllabuses (5.9%) (Table 4). The social sciences also assigned a greater number of scholarly book chapters, as well as media articles than the other two areas, in relative and absolute terms. On the other hand, the humanities syllabuses lead in trade-book chapters, with 570 on 64 syllabuses (9.3%).

Table 4.

*The Distribution of Reading Types By Academic Area, Readings, Syllabuses of Which They Are Found, and Pages Per Area Syllabuses (N=3,391).*

<u>Area</u>	<u>Reading type</u>	<u>Readings</u>	<u>Syllabuses (area %)</u>
Science n=1,443 syllabuses	Journal articles	1,041	85 (5.9)
	Scholarly book chapters	329	72 (5.0)
	Media articles	46	16 (1.1)
	Trade book chapters	15	5 (0.3)
	<u>Total</u>	<u>1,431</u>	<u>113 (7.8)</u>
Social sciences n=1,258 syllabuses	Journal articles	5,264	457 (36.3)
	Scholarly book chapters	3,150	427 (33.9)
	Media articles	675	142 (11.3)
	Trade book chapters	333	79 (6.3)
	<u>Total</u>	<u>9,422</u>	<u>551 (44.0)</u>
Humanities n=690 syllabuses	Journal articles	1,656	165 (23.9)
	Scholarly book chapters	1,427	203 (29.4)
	Media articles	152	36 (5.2)
	Trade book chapters	570	64 (9.3)
	<u>Total</u>	<u>3,805</u>	<u>257 (37.2)</u>

Note

<sup>a</sup> Syllabuses in each of the three areas do not add up to 100 percent because of reading type overlap on syllabuses within the area.

The differences in the assignment of readings among the three areas have a bearing on assumptions about levying a common tariff on every student, which we will return in the

discussion. Consideration might also be given to the pedagogical implications of the relative rarity of assigning journal articles in science, in which students are not as frequently engaging directly with recent research as in the social sciences and the humanities.

### Textbooks

Although textbooks are not the focus of this analysis, it is still worth noting that the majority of courses had an assigned textbook, amounting to 66.0 percent (2,238 syllabuses) of our sample (Table 5). This is more than twice as many syllabuses as had assigned readings (923 syllabuses; 27.2%) (Table 3.a). The textbooks were assigned in relatively similar proportions across the three subject areas, 69.3 percent of the science syllabuses requiring a textbook, and 60.0 percent of the social sciences syllabuses, and with 70.0 percent of the humanities syllabuses. Given the frequency with which courses rely on textbooks, it is worth noting that the steady price increases for textbooks over the last few decades have levelled off in the last few years, some of this as a result of open textbook initiatives (e.g., Open Stax, Flatearth), which represent another of the digital transformations specific to academic publishing (Fox, 2020; Jhangiani, 2018).

Table 5.

*The Assignment of Textbooks in Canadian University Syllabuses (N=3,391).*

<u>Syllabuses</u>	<u>Assigned textbooks</u>	<u>Syllabuses w/ textbooks (%)</u>
All syllabuses	3,198	2,238 (66.0)
Science syllabuses	1,240	1,000 (69.3)
Social Science syllabuses	1,016	755 (60.0)
Humanities syllabuses	942	483 (70.0)

Note

<sup>a</sup> Percentages for “syllabuses w/ textbooks” are for all syllabuses and for the syllabuses in an area.

There is some overlap between textbooks and readings on the syllabuses, with 361 (10.6 percent of all syllabuses) asking students to purchase a textbook while also listing at least one type of required reading. Similar to a textbook, when a complete trade book (such as a novel, play, or nonfiction work) was assigned on a syllabus to students, rather than chapters or excerpts from such books, the book was not part of our calculations. This is because when

students purchase a trade book, the publishers and authors are compensated by that transaction and need not figure in tariff calculations for assigned readings.

## Calculating Costs

To arrive at a rough estimate of the costs involved for the course readings on this set of syllabuses, the average page count for each reading type was calculated (Table 6). This suggests that students were assigned 82.6 pages per syllabus on average for all of the readings.<sup>4</sup> With students taking an average of 8.2 courses a year, the 82.6 pages per syllabus amounts to 677.6 pages of assigned readings a year.<sup>5</sup> If one then takes the Access Copyright annual tariff that was approved by the Copyright Board of Canada, at \$14.31 per student, the 677.6 pages a year works out to a payment of \$0.021 per page for the assigned readings across all types.<sup>6</sup>

Table 6.  
*Reading Type by Syllabus and Pages Per Item and Per Syllabus (N=3,931).*

<u>Reading type</u>	<u>Reading / syllabus</u>	<u>Pages / item</u>	<u>Pages / syllabus (%)</u>
Academic Readings			
Journal articles	2.3	18.3	43.0 (52.1)
Scholarly book chapters	1.4	21.7	31.5 (38.1)
Non-academic readings			
Media articles	0.3	10.6	2.7 (3.3)
Trade book chapters	0.3	20.0	5.4 (6.6)
All readings <sup>a</sup>	4.3	19.0	82.6 (100)

<sup>4</sup> This averaging assumes equal class sizes, which can lead to overcounting readings, if large classes favor textbooks over readings, which seems a reasonable assumption.

<sup>5</sup> An average load of 8.2 courses is based on the StatsCan calculation of the “average time to obtain an undergraduate degree,” which is 4.49 years or 8.9 courses/year (Student pathways, 2019). With no comparable figure for graduate students, their load was treated as half that of undergrads and, using the ratio of undergraduate to graduate students, the average was 8.2 courses for Canadian university students in 2018/2019 (Postsecondary, 2020).

<sup>6</sup> The Copyright Board’s rate is based, Ariel Katz has cautioned us, on very few data points (personal correspondence, April 25, 2021). It works out to \$0.021/page, compared to Access Copyright’s posted rate of \$0.15 per page for course materials (Educators FAQ, 2020). Also note that in this paper, we are utilizing one decimal place throughout for making calculations (leading to \$0.021/page), up to the point of proposed tariff rate for students, at which point we shift to using standard financial notation of \$1.40

Note

<sup>a</sup> Weighted average used for “pages per item” for “all readings.”

A page rate of \$0.021 can be neatly distributed among authors, publishers and Access Copyright at \$0.007 per page for each of the three parties. This \$0.007 per page corresponds to what authors receive for a typical paperback sale in a bookstore.<sup>7</sup> It also matches Access Copyright’s 35 percent charge for “administrative holdback” (Publisher Distribution Guidelines, 2020). It somewhat undercuts the publishers’ more typical 60/40 split with authors under Access Copyright, although none of these calculations is above criticism (Geist, 2008).

## Discussion

In determining a fair price to charge for the use of published materials assigned in Canadian university courses, a number of considerations need to be taken into account. From our perspective, the first of these is that the journal articles and scholarly book chapters – which account for 90.1 percent of the pages assigned to students (Table 6) – form a distinctive scholarly publishing economy that has operated at a remove from that of trade publishing for centuries. We believe that distinctions between scholarly and trade publishing warrant an alternative approach to the handling of university course readings that we wish to illustrate using the data assembled here. This bears on the 2020 Federal Court of Appeal ruling on *York v. Access Copyright*, which noted that “York did not justify [its claim to ‘fair dealing’] beyond invoking education as an allowable purpose” (YU, 2020, 258). We want to provide a more thorough justification for limiting and tailoring the claims of fair dealing for university course readings based on the distinctions between the scholarly and trade publishing economies. We recognize that this will call for an agreement over conventions and standards for the assignment of reading types, based in part on distinguishing between academic and professional authorship. To that end, we are proposing a “three-step syllabus rule” for dealing fairly with the readings assigned to students in university courses.<sup>8</sup> The technical aspects of the three

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<sup>7</sup> The author rate of \$0.007/page rate was ascertained by assembling the list prices and page counts for ten current trade and mass paperbacks (fiction and nonfiction) in Canada, and applying the typical 10 percent royalty rate; see data files for this study (Burgess and De Rosa, 2017).

<sup>8</sup> This rule is a syllabus-specific variation on the 3-step test in the Berne Convention for the Protection of Literary and Artistic Works, which is defined as the following: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author” (1979, Article 9.2). The syllabus rule was first introduced by Willinsky in a SLAW.ca column (2020).

proposed steps are described in the appendix, with a summary here:

1. *Check library holdings and open access.* A university's syllabuses would be analyzed by an artificial intelligence system to determine which assigned readings are accessible to students through institutional licenses and open access. The materials the university does not yet license would be treated as acquisition recommendations. The continuing consideration given to acquiring assigned academic resources valued by instructors leads to the second step. The non-academic readings for which the university does not hold an institutional license would go to the third step for processing.
2. *Limit fair dealing:* The second step applies to the scholarly readings that are not (yet) available to students through Step 1. For these materials, an innovative and limited appeal is made to the fair dealing exception of the Copyright Act.<sup>9</sup> What makes this use of scholarly materials fair is that any "substantial adverse effect" experienced by publishers is neutralized by the authors' substantial reputational benefits of having their work assigned in university classes. This highly desirable "exploitation" for authors cumulatively leads to "financial" gains in career development, outweighing any royalty payments, leading to further sales for the publishers.<sup>10</sup> Even if, as is likely, authors have given up their copyright in the work, the Copyright Act still recognizes their moral rights, which relate, in a highly relevant way in this case, to the protection of their "honour or reputation" (28.2, 1).<sup>11</sup> This appeal to fair dealing, which only applies to the academic readings not covered in the first step of this approach, is further strengthened by the final step.

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<sup>9</sup> Among the factors that help determine fair dealing is "the effect of the dealing on the work," to cite the influential 2004 Supreme Court judgement *CCH v. Law Society* on this matter, with that effect not leading to "a substantial adverse effect, financial or otherwise, on the exploitation... of the existing work" to use the language of the Copyright Act of Canada (29.21, 1.d): "The following factors help determine whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work." *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339.

<sup>10</sup> In 2013, the Canadian Association of University Teachers set aside concerns with royalties to join with Canadian Federation of Students in objecting to the Access Copyright Post-Secondary Educational Institution Tariff, 2014-2016 (CAUT, 2013).

<sup>11</sup> "An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights" (Copyright Act, 14.1(3)).

3. *Deal fairly with professional writers*: The third step applies to media articles and trade book chapters (including poetry) that are not licensed by the institution. These are largely the work of professional writers and their publishers, and to whom, we hold, royalties should be paid. After all, university faculty assign these works because they are essential to achieving their own and their institution's instructional goals. If academic authors benefit from the reputational gain, then professional authors are not less deserving of recognition, rather than being subject to a fair-dealing blanket exception for this million-student market in Canada (with more on the financial and existential "substantial adverse effect" below).

Following this three-step approach to paying royalties, we recommend that Access Copyright's approved tariff of \$14.31 per student be applied on a prorated basis to cover only the media articles and trade book chapters of professional writers (as per step #3 above). The professional writings assigned to students amounts to 15.4 pages per syllabus on average (Table 7). At the current Access Copyright rate of \$0.021 per page, this works out to \$0.171 a syllabus for students' use of professional writings in media pieces and trade book chapters. With students carrying an average load of 8.2 courses a year, this \$0.171 per syllabus amounts to an annual charge of \$1.40 per student, based on our sample of 3,391 syllabuses (2015 to 2020).

Table 7.  
*Average Non-academic Reading Costs for all Syllabuses at \$0.021/page (N=3,391).*

<u>Reading type</u>	<u>Reading / syllabus</u>	<u>Pages / item</u>	<u>Cost / syllabus</u>
Media articles	0.3	10.6	\$0.057
<u>Trade book chapters</u>	<u>0.3</u>	<u>20.0</u>	<u>\$0.114</u>
Total non-academic readings <sup>a</sup>	0.5	15.4	\$0.171

Note

<sup>a</sup> The total "non-academic readings" per syllabus include an overlap of media articles and trade book chapters, while the "pages/item" for "non-academic readings" is an average of the two types.

This will provide the professional writers with a return on their writings in university classes that is comparable to the rate that they earn from bookstores sales.<sup>12</sup> A case can be

<sup>12</sup> See fn 8.

made for charging a higher fee to social sciences and humanities majors, whose courses assign far more media pieces and trade book chapters than science courses, as well as for billing students by the readings assigned in the courses they take. At this point, however, what is at issue is a general tariff payable to Access Copyright among all students, for which \$1.40 a student appears warranted by our syllabus analysis, while avoiding the risk of double-charging students for access to academic works. In total, Canada's roughly 1.2 million full-time university students or their institutions will be asked, under this scheme, to pay \$1,769,888 annually to Access Copyright for the readings assigned to them.<sup>13</sup>

If it seems that such amounts are *de minimis* in a legal sense, and thus not worth pursuing, we side with the “many poets” in Eli MacLaren’s study of Canadian poet’s income (which found royalty payments amounted to two percent of their income) who nonetheless “described the validation that even a little money brings with it” (2017, p. 20). Our three-step syllabus rule provides for validation of poets, as well as the recognition of academics.<sup>14</sup> While there is room for this annual fee of \$1.40 per student to grow over time, it stands in contrast to the \$26.00 per student that Access Copyright is currently requesting, as we write, from the Canadian Copyright Board (Copyright Board, 2017).

### Conclusion

This analysis of Canadian university syllabuses reveals the proportion of assigned readings that fall into different publication types, with those from academic sources dominating the syllabuses. While the analysis of the syllabuses does not, by any means, dictate the policy terms of a fair and reasonable strategy for compensating the producers of the materials used in these courses, the analysis does provide a means of assessing a policy’s outcomes, which is what we have done here with our proposed three-step syllabus rule. The rule would eliminate the double-charging of students for materials already available to them, in the first instance, while recognizing the differences in economies between scholarly and trade publishing in the university context. The preponderance of scholarly readings assigned in these courses adds

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<sup>13</sup> This amount can be compared, for example, to \$14.7 million distributed through the Public Lending Right to close to 20,000 Canadian authors in 2019-2020. (Public Lending Right, 2020).

<sup>14</sup> While MacLaren rightly holds that state sponsorship, such as the Canada Council, is key to “the economics of poetry,” the validation signalling offered by the three-step syllabus rule’s royalty payments to professional writers and their publishers should not undermine that poetic economy (2017, p. 10). Nor should as large a share of the rule’s royalty payments end up going to the United States as has been the case in other Access Copyright agreements (Geist, 2014b). This is because the proportion of Canadian professional writers, including poets, can be expected to be much higher than when the research literature is included in the agreement, very little of which is published in Canada.



weight to the making of this distinction in arriving at what is fair for students, authors, and publishers.

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### **Conflict of Interest**

John Willinsky has received royalty payments from Access Copyright over the last two decades. Catherin Baron has no conflicts.

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## Appendix

### **How the Open Syllabus Project Makes the Proposed Three-Step Syllabus Rule Feasible**

To determine the royalty costs for readings assigned in university courses under what we are proposing as a “three-step syllabus rule” (3SSR), the institution would establish an account with [Open Syllabus](#) (OS) and submit to OS the coming semester’s syllabuses.<sup>15</sup> OS uses artificial intelligence and external databases to identify the works assigned to students on the institution’s course syllabuses, including textbooks, monographs, and scholarly articles, as well as non-traditional teaching materials such as newspaper and magazine pieces, blogs, television programs, and YouTube videos. By following the three steps set out below, OS provides an automated and increasingly accurate approach to avoiding double-charging students for items already licensed, as well as for open access items, while providing faculty and administrators with legal assurances in their use of materials, as well as a list of hyperlinks to appropriate copies.

#### **Step 1**

- (a) Instructors would make their syllabuses available to their institution’s OS account through a URL, PDF, Word or Google document, or a course management system.
- (b) OS would sort through assigned readings in syllabuses and...
  - (i) Send academic publications (journal articles or scholarly publishers book chapters) to Step 1(c);
  - (ii) Send media items and trade book chapters to Step 3;
  - (iii) Send problematic syllabus items back to instructors for clarification (which would be used to update OS).
- (c) For academic publications, OS would...
  - (i) Check library’s catalogue for a digital edition with an institutional license;
  - (ii) Check for an open access version through [Unpaywall](#), [DOAJ](#), [DOAB](#), etc.
- (d) OS would then...
  - (i) Produce for instructors a list of links for items found in Step 1(c);
  - (ii) Send to Step 2 those academic items that are not (yet) found in Step 1(b).

#### **Step 2**

- (a) OS turns the academic items not found in Step 1(c) into a list of purchase recommendations for the library (with frequency of appearance and repeated use).
- (b) These items can be used under “fair dealing” in Canada (or “fair use” in the U.S.; see [preprint](#)), the list can be monitored to establish that the library is acting in good faith.

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<sup>15</sup> The Open Syllabus Explorer has collected 355,032 syllabuses from Canadian colleges and universities for the years 2013 to 2017, for which it reports the most popular readings but does not make the underlying syllabuses available (Karaganis and McClure, 2016).

**Step 3**

- (a) OS calculates royalty payments for media items and trade book chapters based on approved rates.
- (b) OS generates and submits invoices on behalf of collective management organization whether at the level of (i) institution, (ii) division, or (iii) syllabus.