

Copyright Policy as an Academic Workplace Issue

presented by

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Copyright policies in the post-secondary educational sector are in a state of flux and are increasingly becoming academic workplace issues, gaining the attention of faculty associations and campus management alike.

Over the next year, several decisions will be made that will have long-lasting implications on the ability of academic staff to maintain broad and equitable access to knowledge resources and which may also affect privacy and academic freedom concerns.

While many of these decisions will be made in Parliament, the courts, and at the Copyright Board, others will be made at the local campus level.

Why is copyright policy important for the educational community

- Teachers, librarians and students are constantly utilizing works in which copyright subsists, often in ways that could be technically infringing
- Library patrons rely on public information services for access to the works of others, both as general entertainment, recreation, life-long education, but also as part of continuing process of creating new works
- as users *and* creators of copyrighted works teachers, students, and librarians and their patrons need balanced CR laws
- upcoming changes to CR Act could have profound implications for educational institutions and libraries, but so do local practices and policies

General Outline of Presentation:

- Some copyright basics
- Centrality of fair dealing as an academic policy issue
- 4 venues of Copyright Policy
 - 1)** In the parliament: Bill C-32 and Bill C- xx
 - 2)** In the Courts: Review in the SCC
 - 3)** At the Copyright Board (and other agencies?)
 - 4)** On your local campus

Centrality of Fair Dealing as Policy Issue

Fair dealing before and after CCH

Ongoing significance of categories

What is research, private study, criticism, review, education?

Interaction between fair dealing and Access Copyright license/
proposed tariff/campus guidelines

Fair dealing in parliament, in the courts, at the Copyright Board
and on your campus

Fair Dealing is the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners.

CAUT Fair Dealing Advisory (Dec 2008)

Bill C-32 and It's Possible Successor

In June the government tabled proposed amendments to the Canadian Copyright Act. Following a long consultation process, the bill is in some respects a reasonable compromise, and is widely recognized by as much better than its predecessor Bill C-61.

While the bill was flawed because of the predominance of its digital locks provisions, there were other beneficial provisions.

After passing first and second reading, and after extensive parliamentary hearings, the Bill died on the order paper when the government was dissolved.

Given the outcome of the election, it is currently a matter of some speculation as to whether a new bill will be identical to C-32, somewhat revised, or substantially revised.

Bill C-32 education-related amendments

- ... Adding “education” to fair dealing (sec 29)
- ... Amendments to special exemptions (sec 29.4 etc)
- ... Additional exemption for Lessons (sec 30.01)
- ... Publicly Available Internet Material (sec 30.04)

See “Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing” in M. Geist (ed) *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*

Review in the Supreme Court of Canada

The Supreme Court of Canada has now granted review in two cases where the scope of fair dealing is a significant issue.

. . . . SOCAN previews case.

. . . . Access Copyright Tariff (K-12) case

Proposed Access Copyright Tariff

**Background & Status
Problems with the Tariff**

General Problems with Proposed Tariff

- Overbroad definitions (“copy” and “course collection”)
- Lack of exclusion for fair dealing
- Excessive and unjustified FTE assessment
- Limitations re TPMs
- Burdensome and invasive reporting/survey/audit provisions

Overbroad definition of “copy”

“*Copy*” means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

- (a) reproducing by a reprographic process, including reproduction by photocopying and xerography;
- (b) scanning a paper copy to make a Digital Copy;
- (c) printing a Digital Copy;
- (d) transmission by electronic mail;
- (e) transmission by facsimile;
- (f) storage of a Digital Copy on a local storage device or medium;
- (g) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;
- (h) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;
- (i) projecting an image using a computer or other device;
- (j) displaying a Digital Copy on a computer or other device; and
- (k) posting a link or hyperlink to a Digital Copy.

Overbroad definition of “course collection”

“*Course Collection*” means, for use by an Authorized Person as part of a Course of Study, and whether for required or recommended reading for the Course of Study or otherwise:

- (a) assembled paper Copies of Published Works; or
- (b) Digital Copies of Published Works that are emailed, linked or hyperlinked to, or posted, uploaded to, or stored, on a Secure Network.

Lack of Exclusion for Fair Dealing

The (expired) Access Copyright license contained an explicit exclusion for fair dealing....

The proposed tariff does not contain a corresponding provision

Proposed Access Copyright Tariff

Excessive and unjustified FTE assessment

Section 7. (1) The Educational Institution shall pay an annual royalty to Access Copyright calculated by multiplying the number of its Full-time-equivalent Students by the royalty rate of

(a) \$45.00 CAD for Universities; or

(b) \$35.00 CAD for all other Educational Institutions.

Limitations for TPMs

Section 5(5): Nothing in this tariff authorizes any person to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate, impair, or otherwise circumvent a technological measure that restricts or controls access to, copying of, retention of, distribution, or transmission of a Repertoire Work

Burdensome and invasive reporting provisions . .

6. (1) For each Course Collection made or made available under this tariff, the Educational Institution shall compile a record in a form set out by Access Copyright of

(a) Course of Study name;

(b) Course of Study code;

(c) Term start and end date;

(d) Number of Authorized Persons for the Course of Study;

(e) ISBN/ISSN for each Published Work;

(f) Title of each Published Work, article and chapter (if applicable);

(g) Publication Year or Volume Number for each Published Work (if applicable);

(h) Author(s) of Book/Chapter/Article (as applicable) for each Published Work;

(i) Publisher name;

(j) Start and end page Copied from each Published Work;

(k) Total number of pages Copied from each Published Work; . . .

Proposed Access Copyright Tariff

. . . go beyond scope of accounting for FTEs

6. (1) For each **Course Collection** made or made available under this tariff, the Educational Institution shall compile a record in a form set out by Access Copyright of

* * *

(j) Start and end page Copied from each Published Work;

(k) Total number of pages Copied from each Published Work;

(l) Electronic address where a Published Work is being stored or can be accessed (if applicable);

(m) Direct licence from [publisher/aggregator name] (if applicable);

(n) Subcontractor making a Course Collection or making a Course Collection available (if applicable);
and

(o) New Published Works added to the Course Collection in the reporting month.

With respect to emails, the Educational Institution shall only be required to compile the above records for Digital Copies emailed by or on behalf of a Staff Member.

Within 30 days after the end of each month, the Educational Institution shall forward the record in section 6(1) to Access Copyright..

Proposed Access Copyright Tariff

Burdensome and invasive survey requirements (scope goes beyond FTE count)

Surveys

13. (1) Once every Academic Year, Access Copyright may advise the Educational Institution of Access Copyright's intention to conduct a bibliographic and volume survey of the uses permitted hereunder. Upon request by Access Copyright, the Educational Institution will participate in the survey and will **ensure that all Authorized Persons cooperate fully** with the requirements of Access Copyright.

(2) The Educational Institution shall give Access Copyright, on reasonable notice, **right of access throughout the Educational Institution's premises, including full access to the Secure Network and all Course Collections**, at any reasonable times, to administer the survey. Such access may be subject to reasonable arrangements for supervision as required by the Educational Institution to ensure the security of its premises, including its computer systems and networks, and to maintain the confidentiality of personal or other confidential data.

(3) If an Educational Institution unreasonably refuses to participate in the survey or otherwise does not comply with this section, the **licences in sections 3 and 10 will cease** to be in effect on written notice from Access Copyright until Access Copyright provides further notice that the deficiency has been remedied.

Burdensome and invasive audit requirement

Royalty and Compliance Audits

14. (1) The Educational Institution shall keep and preserve, for a period of **six (6) Years** after the end of the Academic Year to which they relate, records from which the royalties and reports due to Access Copyright under this tariff can be readily ascertained.

Issues arising during Board proceedings

Time consuming /burdensome interrogatories

Publisher referrals back to AC / AC refusals to issue transactional licenses

Pending request for order re transactional licenses

Interaction with other Board/agencies (Privacy Commissioners, Competition Bureau)

Copyright Policy at local level

Review AUCC and CAUT Copying Guidelines (basic difference in approach)

What is the status of the guidelines on your campus? / What is the status of your ongoing relationship with AC?

Why do guidelines matter? (custom and practice)

Discipline threat??? (See UA Board resolution on Copyright Policy). . . .

Note limited scope of Competition Act exclusion...

Copyright Act section 70.5:

(2) Where a collective society concludes an agreement to grant a licence authorizing a person to do an act mentioned in section 3, 15, 18 or 21, as the case may be, the collective society or the person may file a copy of the agreement with the Board within fifteen days after it is concluded.

(3) Section 45 of the Competition Act does not apply in respect of any royalties or related terms and conditions arising under an agreement filed in accordance with subsection (2).

. . . .Grounds for discipline?

As unauthorized use of copyright works is contrary to law and subject to legal recourse, it is the responsibility of each member at the University to exercise care in ensuring proper authorization has been obtained for their particular use. In addition to the entitlement of a copyright owner or their **licensing agent** to hold the University or its members accountable for **infringement**, the University takes breaches of policy seriously.

Deans, Directors, Chairs and Unit heads are responsible for taking reasonable steps to implement the policy and ensure the necessary supports are in place to facilitate ongoing compliance. Non-compliance with this policy constitutes misconduct and may be pursued under the applicable collective agreements, University policy, or law.

See commentary at

<http://whithertheuofa.blogspot.com/2011/02/use-of-copyright-materials-policy-how.html> (with link to Board document)



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