

GSA Membership Update on Access Copyright at Carleton

Background on Access Copyright

Access Copyright is a licensing agency that has rights to and administers copyright licenses for a repertoire of copyrighted works. It sells licenses to post-secondary institutions as a form of 'advance permission to reproduce'.

Under the terms of prior licenses that expired 31 December 2010, universities paid Access Copyright \$3.38 per student and ten cents per page of photocopied material in a course-pack. Access Copyright would also vet course-packs and other educational material to ensure the university was protected under the Copyright Act, and indemnified¹ universities should the university be subject to litigation for copyright infringement originating with works outside of the repertoire of Access Copyright. It should be noted that Access Copyright will not divulge its repertoire and many believe it is relatively small, particularly with regards to digital materials.

In 2010, Access Copyright proposed a new tariff and licensing regime to the Copyright Board of Canada. This new scheme would increase the per student cost to \$45.00 for universities and \$35.00 for other educational institutions. No justification for this increase has been provided. Given the increasing use of open access content, material publicly available over the internet, and direct licensing arrangements between universities and publishers such as the Canadian Research Knowledge Network, it would seem reasonable to expect the tariff to *decrease*.

In addition to proposing increased tariffs, Access Copyright has proposed a range of changes to licensing agreements that are unfeasible, unwarranted, and often not within the scope of Access Copyright's authority. Some examples of Access Copyright's proposed changes include:

- The imposition of campus wide monitoring and reporting systems that are technically impractical and believed to be in violation of privacy legislation.
- Reducing user rights to fair dealing as established under the *Copyright Act* by, for instance, attempting to redefine the term 'copy' to include digitally projecting images or posting hyperlinks to copyrighted works.
- Prohibiting the extension of license benefits to the wider public, such that members of the public or visiting scholars would not have legitimate access to university libraries.
- Requirements to delete authorized copies of copyrighted material from hard drives after use. In essence, this would turn authorized, legal copies into *leased* copies.
- Seeking to prohibit the circumvention of technological protection measures ('digital locks') which is currently legal in Canada.

On 23 December 2010 the Copyright Board certified an interim tariff that maintains the previous licensing fees for post-secondary institutions that intend to re-license with Access Copyright. The Copyright Board may not make a decision on the final tariff and Access Copyright's other proposals before the end of 2011. Universities that do renew their licenses with Access Copyright will be required to pay the retroactive tariff as decided by the Copyright Board. As such, renewal is accompanied by financial uncertainty.

¹ Indemnifying means insuring against liability in the case of copyright infringement.

A number of organizations have filed objections to the proposals, including a joint objection submitted by the Canadian Federation of Students (CFS) and the Canadian Association of University Teachers (CAUT).² Critical elements to the joint CFS and CAUT objection are the extent to which Access Copyright's proposals infringe on privacy rights and will burden universities and students with tens of millions of dollars in new fees each year.

Carleton University Context

As of 1 January 2011, Carleton University is no longer licensed with Access Copyright following a decision by its senior administration to not seek renewal. It should be noted that Carleton University has until 28 February 2011 to reconsider its decision. If Carleton University pays Access Copyright by this date, then the university will be covered by the Access Copyright license for the period of January to April 2011.

Faculty members at Carleton received multiple email notifications of this decision on January 11, 2011. These notifications informed the recipients that new regulations were being implemented regarding the use of copyrighted materials for teaching and research purposes. These announcements took faculty by surprise and resulted both in confusion and the impression that Carleton University does not have a comprehensive plan for addressing the new copyright environment. It has been reported that contract instructors and students did not receive notification directly from the University, although some did receive information through their faculty and/or departments.

The Academic Research Committee of Carleton University approved a Fair Dealing Policy on 15 December 2010, which was subsequently amended on 10 January 2011. This policy is modelled on guidelines developed by the Association of Universities and Colleges Canada (AUCC). As such, the policy recognizes fair dealing as the right to make single copies of copyrighted works for the purposes of research, private study, review or criticism. Other interpretations of fair dealing include the use copyrighted works in some online and classroom settings.³

The new regulations at Carleton University appear to be reflective of a risk adverse approach to fair dealing. For instance, if explicit permission has not been given by the copyright holder, scans or copies of copyrighted material cannot be posted on WebCT or course websites and cannot be placed on reserve at the library. Faculty are required to provide proof of permission to use copyrighted works and copyright clearance and permissions for course-packs are no longer obtained by Access Copyright but by Graphic Services. The extent to which Graphic Services has the capacity to perform this role is unclear. The degree to which responsibility for ensuring compliance is being downloaded onto faculty and contract instructors, and whether this is consistent with applicable collective agreements, are also unclear.

Options Moving Forward

Carleton University's current decision to not renew with Access Copyright should be supported. Access Copyright has no shortage of critics. Its apparent attempt to leverage more money from universities and students, extend the scope of copyright under its licenses, and decrease its own

² See www.cfs-fcee.ca/html/english/campaigns/CAUT-CFS_Objection_to_Access%20Copyright_Tariff-2010-08-11.pdf.

³ See, for instance, www.caut.ca/uploads/IP-Advisory3-en.pdf or www.michaelgeist.ca/content/view/5519/125/.

liability should be concerning to anyone interested in maintaining a strong public education system and fair access to teaching and research resources.

Four options that should be explored and that could be pursued concurrently include the following:

1. University resources that were previously being paid to Access Copyright could be redirected towards the creation of an on-campus, in-house licensing office. Such an office could advise the Carleton community on copyright issues and perform important services such as vetting course-packs for copyrighted content. In cases where material is copyrighted and the use falls outside of fair dealing, then the office would be responsible for seeking the appropriate permissions and for paying any necessary royalties.

The establishment of such an office could play a leading role in ensuring that information on copyright and changes in copyright are communicated to all members of the Carleton community. It could also play a role in seeking feedback from the community on issues pertinent to copyright. These functions would assist in avoiding situations in which community members feel that clear guidance is either lacking or not sufficiently communicated.

It is highly probable that this option would save on costs or be revenue neutral. A rough estimate based on current tariffs and enrolment would suggest that Carleton currently pays \$70,000-80,000 to Access Copyright. Students pay an additional \$0.10 per photocopy for course-packs. If Access Copyright is successful in increasing the tariff, the fees paid by Carleton would be in the range of one million dollars. Other universities, such as Memorial University of Newfoundland, have pursued the in-house option.⁴ In the future, universities may choose to pool resources and establish joint offices to manage copyright.

If the in-house option is adopted, such an office must be strictly limited to managing and administering copyright permissions and licenses. The creation of such an office should not be used as an opportunity to create or expand links with private commercial interests. For example, faculty use of a copyright office for licensing course material should not be accompanied by a requirement that course material be ordered through the privately owned Carleton University Bookstore. Prior attempts by the university to increase its commissions from the Bookstore by requiring course material to be ordered through it were met with an overwhelmingly negative response by the campus community. Faculty and contract instructors must retain their right to secure providers of course materials independently from the University. It is in students' best interest to avoid the high costs associated with campus monopolies. Students' right to choose to purchase course material from businesses such as CUSA's Haven Books should be respected, particularly given that Haven Books is owned and operated by students and revenue is reinvested into student activities.

⁴ See www.mun.ca/copyright/copyright_clearance.php.

2. Carleton University could expand open access repositories for documents, pictures, diagrams and other course materials that are either in the public domain, have been published in open access journals, or are covered by less restrictive copyright licenses. This could be an online repository where material is shared and vetted by the Carleton community, including the library and an in-house copyright office.
3. Carleton University could examine its recently enacted policy on Fair Dealing to determine whether it is overly restrictive. As previously noted, other organizations and some legal interpretations would suggest a less restrictive approach is warranted. At St. Francis Xavier, for example, articles and book chapters may be placed on course reserves, and online links to articles are permitted without violating the university's understanding of fair dealing.
4. Carleton University could join with other organizations in calling on the federal government to ensure that new copyright legislation reflects the interests of the Carleton community. The House of Commons is currently debating Bill C-32, the *Copyright Modernization Act*. Many organizations have launched campaigns around this legislation and have provided both tools and encouragement for their members to get involved. Of particular note are efforts to ensure that the inclusion of education under fair dealing is maintained within the proposed legislation. In order to ensure the meaningful inclusion of education and to protect user rights, many organizations are challenging the inclusion of new digital lock protection rules that would circumvent the application of fair dealing for many electronic resources.

More information on copyright reform is widely available:

Canadian Federation of Students
www.cfs-fcee.ca/html/english/campaigns/copyright.php

Professor Michael Geist, Canada Research Chair in Internet and E-commerce Law
www.michaelgeist.ca

Canadian Association of Research Libraries
www.carl-abrc.ca/projects/copyright/copyright-e.html

Canadian Association of University Teachers
www.caut.ca/uploads/2009_CopyrightConsultation.pdf