

Access Copyright -- the Debate

As you probably know, there is a great deal of interest and concern regarding what is happening with the AUCC/Access Copyright Agreement. We have compiled some of the concerns as articulated by the CAUT, the responses to the concerns from the University of Calgary, and the follow-up response from the CAUT to the University of Calgary's comments.

A note on formatting – we have grouped the positions and responses by issue and colour coded the comments as follows: CAUT Position is in black, the response from the Office of the Provost is in red, and the follow-up response from the CAUT is in blue.

If you wish to see the positions in their entirety, the CAUT position can be found on their [website](#).

Similarly, the response from the University of Calgary can be found on the Provost's [website](#).

10 Problems with the AUCC/Access Copyright Agreement – from CAUT

1. Fees

CAUT's Comments

The model agreement levies a \$26 flat rate charge against each full time student or equivalent. The existing flat rate was \$3.75. Students would traditionally pay an additional amount in per page fees for course packs that bumped the average total to approximately \$17. Given that this existing levy was rendered overpriced by the decline in course pack use and the rise of fair dealing, open access and site licensing, there is no justification for an increase in fees. In fact fees should have been significantly reduced.

University of Calgary Response Regarding Fees

The \$26 fee under the Access Copyright (AC) model licence agreement is based on a similar license fee charged in Quebec and on the acceptance of a \$27.50 fee by the University of Toronto and the University of Western Ontario. The University of Calgary understands Access Copyright's rationale for increasing the fee from the average \$17 that was paid under the former licence in that it encompasses digital materials and the associated environmental and practical benefits. Further, we believe that should we decide to join other universities in signing on to a known and justified fee for the next three-and-a-half-years it would provide some protection, budgeting certainty and peace of mind for our faculty and students in a changing and complex copyright environment.

CAUT's Follow-up Response

The \$26 rate has no rational basis, a point that will be developed further below. Prior to considering the per student fee, however, it is important to understand what Access Copyright does with the funds provided to it by the education sector. In addition to disbursing monies to publishers and a lesser degree authors, Access spends substantial amounts of it campaigning in the media and before Parliament against the copyright interests of the educational community. The organization may also utilize payments from the University of Calgary community to finance legal action against other universities. Paying an unjustified \$26 fee is financially wrong. Paying it in the knowledge that it will be used against our sector's political interests and could be used to fund legal action against other institutions (including UBC, Athabasca and Winnipeg) is not upholding Calgary's "responsibilities as part of a community of universities across Canada."

With respect to the actual amount, the existing average \$17 per student Access Copyright fee developed when universities had a limited understanding of, or access to, methods of clearing copyright other than Access Copyright. In the last decade the rise of fair dealing and open access publishing and the increasing use of site licenses have

sharply diminished the value of Access's product. Even accounting for Access's uncertain claims to an expansive digital repertoire, a fee payment of \$3 to \$5 for the substantive product offered by the license would be generous. In this context the \$27.50 fee agreed to by the University of Toronto and Western University is an arbitrary amount and reflects only the poor negotiating skills of those institutions. The \$26 fee charged by Copibec is also an arbitrary amount but it arises from the unique cultural environment of that province, in which post secondary institutions are grudgingly willing to subsidize Quebecois authors and publishers. There is no tradition or willingness in English Canada to subsidize large commercial (often international) media conglomerates through a payment to Access Copyright.

What then is the purpose of the \$26 fee? As noted above, the University of Calgary's administration believes the payment provides "some protection" and "peace of mind" to the institution. This reflects CAUT's understanding from discussions with stakeholders across Canada that the main reason institutions are acquiescing to Access's demands is because they are afraid of being subject to legal action for copyright infringement. In our view the actual legal risk from Access Copyright has not been properly assessed by AUCC and the continued payment of ever-rising sums of money to acquire protection from an unknown threat is not justified. Canada is a country governed by the rule of law in which the judicial system has made an exemplary effort to find balance in the complex world of copyright. In this context there is reason to believe that the courts will not award ruinous amounts against universities who have made good faith efforts to abide by the law.

2. Definition of Copying

CAUT's Comments

The model license creates new rights to the benefit of Access Copyright that do not exist in copyright law, specifically by defining copying to include "posting a link or hyperlink to a digital copy." Given the Supreme Court of Canada's ruling (*Crookes v. Newton*) that hyperlinks do not constitute the communication or publishing of content, this concession by AUCC is inexplicable. AUCC draws inappropriate comfort from a sub-clause in the model license that states the parties do not agree linking constitutes copying, when in fact section 1(k) of the license does exactly that.

University of Calgary Response Regarding Definition of Copying:

The general terms of the licence make clear that its terms only apply to copying by an institution that goes beyond fair dealing; therefore, any act done by an institution that is clearly fair dealing (such as linking, as set out in the *Crooks v. Newton* case) is not a breach of the license. We are comfortable that Access Copyright would have no legitimate right to try to enforce an improperly restrictive term in the licence.

Additionally, based on the historical relationship between Access Copyright and Canadian universities, there is no evidence of Access Copyright taking unreasonably strict or impractical measures in its enforcement.

CAUT's Follow-up Response

The license defines linking as copying. On its face, the license fee is a payment for copying. Therefore, the fee pays for the right to link - there is no other reason for its inclusion in the license. Given that such payment is completely unnecessary at law, mention of linking in the license underlines the extent to which AUCC's negotiators acceded to Access's unsupportable demands. There is no reason for Calgary to duplicate this mistake.

With respect to there being "...no evidence of Access Copyright taking unreasonably strict or impractical measures in its enforcement", this statement is at odds with the earlier administration assertion that the license buys "protection" and "peace of mind".

If Access can be expected to act reasonably with respect to legal action, there is no need for the license. Indeed, the last time Canadian publishing companies, apparently with the support of Access Copyright, sued users for exercising basic statutory rights the publishers suffered an historic defeat at the Supreme Court of Canada (*CCH v. LSUC*). In

the United States the recent Georgia State University decision underlines the extent to which courts view skeptically the claims of publishers and generously interpret the rights of the education community.

Given that the only real value offered by the license is its indemnity clause which provides protection from hypothetical legal action, and the administration acknowledges that there is "...no evidence of Access Copyright taking unreasonably strict or impractical measures in its enforcement", the prudent and responsible thing to do is to reject the model license.

3. Paying for Existing Rights

CAUT's Comments

Under the Copyright Act members of the academic community enjoy broad rights to copy works without permission or payment (fair dealing) and specific exceptions allowing, *inter alia*, the reproduction of works for archival purposes, classroom display, and the creation of alternate formats to assist the visually impaired. Institutions also purchase site licenses that provide the right to use, copy and transmit materials. The model license agrees to pay Access Copyright to re-secure these exact rights.

University of Calgary Response Regarding Paying for Existing Rights

Like other universities, the University of Calgary purchases some licences to copyright through its library and it is fair to note that the agreement may provide duplicate protection. However, it cannot be known with certainty exactly where the limits of fair dealing will be found. It is therefore our opinion that if the university were to sign the licence, the cost associated would be the cost of having certainty that any rights covered by the Access Copyright repertoire will be legitimate.

CAUT's Follow-up Response

Underlying the opposition to the AUCC model license is the understanding that universities now have multiple legal means to utilize copyrighted material for educational and research purposes. In the past, when fewer options were available, it may have been a justifiable expenditure of money to purchase the certainty the Access license offered. Now that alternatives are available, at the very least the license should reflect this reality and be priced in the \$3 to \$5 range. The more responsible action is to reject Access Copyright. The alternative, paying the organization ever greater sums of money to obtain protection from an uncertain risk of legal action is not prudent management.

4. Surveillance

CAUT's Comments

Section 11 of the license mandates the creation of survey instruments to monitor the particular works utilized on campus and the volume of that use. Because the license defines copying to include transmission by electronic mail and storing, posting, displaying, uploading and linking to digital files, the survey instruments will require intrusive monitoring of professors, librarians, researchers and students. In response to the criticism of the Toronto/Western agreements the model license contains language suggesting that the survey will respect privacy policies and academic freedom. That is not possible if academic staff and student emails are to be monitored by the university, which is not disallowed by the agreement.

University of Calgary Response Regarding Surveillance

The nature and extent of the survey process is left to be determined by a joint committee of university representatives and Access Copyright. The committee has reviewed the potential risks and advantages of all possible scenarios and is therefore appropriately positioned to find a balance between such risks and benefits as external surveillance, academic freedom, security, peace of mind, and practicality. Because the licence provides no alternative should the

joint committee reach a stalemate, we believe Access Copyright is intrinsically motivated to negotiate a fair, practical, and collaborative outcome.

CAUT's Follow-up Response

The model license contains a provision requiring a survey of the usage (titles and volume) of copyrighted works on campus. The purpose of the survey is to allow Access Copyright to disburse its fees to publishers. The difficulty is that by including activities such as emailing, linking and digital distribution generally under the definition of copying, the survey instrument will by necessity be intrusive, presenting a threat to academic freedom and privacy. Moreover, given that academic staff communications through any mechanism are not in the custody and control of the administration, the administration has no legal right to survey such communications let alone pass their contents along to third parties.

5. Restraint on Scholarly Communication

CAUT's Comments

Section 4(a) of the license limits the personal transmission of copies to students and staff members within an institution. This appears to mean that even though the Agreement allows one to copy a journal article, it cannot be shared with a colleague from another institution, even if that colleague is a co-author.

6. Restraint on Usage of Scholarly Material

CAUT's Comments

Section 4(c) of the license prohibits the storage or indexing of copies of articles and other material, an activity fundamental to scholarly work.

7. Restraint on Routine Use of Modern Technology

CAUT's Comments

Section 5(a) and (b) state that copies shall not be transmitted to, posted or uploaded to, or stored on any computer network other than one operated or controlled by the university – meaning that storage of copies of material on personal or other networks and cloud computing services is now prohibited.

University of Calgary Response Regarding Restraint on Scholarly Communication/ Usage of Scholarly Material/ Routine Use of Modern Technology

It is not a breach of the licence if use in the above circumstances is clearly fair dealing. However, there remains some uncertainty in our analysis over the issue of linking to external sources. The upcoming Supreme Court of Canada copyright decisions, if favourable to an expanded scope of fair dealing, may provide greater peace of mind against circumstances of unintentional breach.

CAUT's Follow-up Response

The model license contains a series of onerous restrictions on the use of materials, restrictions that are in indefensible defiance of fair dealing and basic traditions of scholarly work.

8. Coercion to Remain under License

CAUT's Comments

Section 5(d) provides that if the institution does not renew the license it must prevent access to all copies made while the license was in place.

University of Calgary Response Regarding Ongoing Licence Obligation

This provision would have the effect of coercing renewal, if an institution does not have the ability to effect the removal of non-fair dealing copies. However, institutions can presumably establish practices and systems now that can reduce this concern. For example, we could establish a system of tagging all digital copies on course management systems so that they can be more easily searched and deleted if necessary. The Copyright Committee will be exploring options for managing the university's copyright system over the next several months.

CAUT's Follow-up Response

It is encouraging to see that the administration anticipating eventual withdrawal from the model license but the broader question remains as to why it would enter into an agreement with such onerous terms in the first place.

9. Bad Timing

CAUT's Comments

Canada's Parliament is about to pass Bill C-11 – an amendment to the Copyright Act. The legislation contains copyright provisions beneficial to educational institutions. Similarly, copyright decisions are pending from the Supreme Court of Canada which may further expand fair dealing rights. It was simply bad judgment to have proceeded with an agreement prior to the conclusion of these legislative and judicial proceedings.

University of Calgary Response Regarding Timing

The current climate in copyright law makes it difficult to judge whether the timing is good or bad. The Supreme Court of Canada decisions might not favour universities, and no one knows at this point what additional rights may be available under a new "educational fair dealing" right as contemplated in Bill C-11. Even in the event of favourable Supreme Court of Canada decisions and the passage of Bill C-11, there will not be certainty about the legitimacy of all university copying, meaning the risk of litigation by Access Copyright could remain. Institutions have the option to delay entering the licence for a certain amount of time, if they do wish to "wait and see." The implication is that they forego the retroactive discount if they don't indicate the intent to sign the licence on May 15.

Note: The letter of intent does not bind the University of Calgary to sign a licence by June 30. It is meant to secure the opportunity for the university to take advantage of the best discounts Access Copyright is prepared to offer for a licence covering the "retroactive period" from January 1, 2011 to April 30, 2012.

CAUT's Follow-up Response

The passage of Bill C-11 and the release of a series of important Supreme Court of Canada decisions are expected in the next few months. These events will add considerable clarity to the copyright situation in Canada. Bill C-11 in particular is expected to substantially boost the rights of the educational community. In this context AUCC was wrong to rush into a bad agreement with Access. The administration of the University of Calgary should not compound the mistake.

With respect to the comment that even with C-11 and the court decisions "there will not be certainty about the legitimacy of all university copying, meaning the risk of litigation by Access Copyright could remain" this is true but astoundingly trite. There is always the possibility of litigation, the question is how realistic is the risk and to what extent should fear be the only consideration in determining institutional behaviour. The administration's passivity in the face of copyright is not in keeping with its "responsibilities as part of a community of universities." At institutions across Canada copyright officers, librarians, bookstore staff, professors and students have made extraordinary strides in confronting copyright uncertainty and establishing mechanisms to clear rights in accordance with the law. If Calgary agrees to the model license it is a strong message that this effort has been a waste of time.

The administration's passivity is further underlined by the comment above that "no one knows at this point what additional rights may be available under a new "educational fair dealing" right as contemplated in Bill C-11". The rights under educational fair dealing are not going to magically fall from the sky. They will, as held by the Supreme Court in the CCH decision, be determined in part by the practice of the academic community. The University of Calgary should be gearing up to aggressively assert its fair dealing rights under the new law, not abdicating an active role in the world by signing bad agreements with Access Copyright.

10. Interaction with Copyright Board Proceedings

CAUT's Comments

Many universities have chosen to end their relationships with Access Copyright or contest Access's demands at the Copyright Board. The announcement of the model license presents serious challenges to both these options. The creation of the model license does not conclude the proceedings at the Board but allows them to continue, albeit with the university side considerably weakened. Instead of a serious challenge, disunited university administrations are now unlikely to be able to present a coherent legal strategy. Access Copyright must be acknowledged as having leveraged an initially poor hand against AUCC into a credible bid to coerce universities back into unfair arrangements with it.

University of Calgary Response Regarding Interaction with Copyright Board Proceedings

Attempting to continue the tariff opposition with a new representative of "opt-out" universities, may end up being just as expensive as signing the licence, with no reduction of the risk of Access Copyright commencing claims against opt-out parties.

CAUT's Follow-up Response

This sums up the core difference of opinion on the issue - is it acceptable to endlessly and passively pay money to Access Copyright in exchange for protection against possible legal action or is it better to actively assert a presence in the world and define the appropriate use of copyrighted material on our own terms.

The former option does provide certainty - that millions and millions of dollars will be transferred from the university sector to Access Copyright and Access Copyright will use a substantial portion of that money to advocate (and possibly litigate) against us. The latter option, continuing to build a new and better system of copyright clearance, does offer some uncertainty but on balance is the prudent thing to do.