

Why Universities Should Not Sign the Access Copyright - AUCC Model Licence

Michael Geist www.michaelgeist.ca

Thu May 24 2012, 4:19am ET

Copyright has emerged as a hot issue on Canadian university campuses in recent weeks as schools consider whether to sign the Access Copyright model licence negotiated with the AUCC. Several schools, including UBC, Athabasca, Windsor, and Winnipeg have already indicated that they will not sign the licence, while others such as Queen's, Victoria and Calgary have reluctantly signed the letter of intent. Many groups have voiced their strong objection to the licence, including the CAUT, APLA, BCLA, MLA, CFS, and CASA. These groups represent faculty, students, and librarians - the three groups within education most affected by the model licence.

Last week, I was asked by the Association of Professors Ottawa, the University of Ottawa faculty union, for my views. I opened my remarks by emphasizing a key misconception often fueled by Access Copyright and its supporters. The question being faced by the universities is not whether to pay for copyright works. Universities, faculty and students currently spend millions of dollars every year on copyright materials and will continue to do so. The only question is whether - in addition to existing expenditures on books, licences, and in support of open access - they should also pay the \$26 per student fee to Access Copyright.

I believe the answer is no for the following six key reasons:

1. The Licence is Unnecessary

As many have pointed out, the universities already pay for access to a wide range of materials that likely cover the majority of copyrighted materials used on campus. Campus wide electronic database licences offer access to thousands of journals and electronic books that can be incorporated directly into electronic coursepacks. Universities pay millions of dollars for these licences with the money flowing to database companies, publishers, and authors. For example, last year the Canadian Research Knowledge Network alone spent over \$96 million in content licences that offer access to millions of articles to 900,000 students and researchers at 75 universities across the country.

Moreover, open access licensing, where research publications are freely available online, constitutes a growing percentage of published research (some estimate it at 30 percent of all scholarly research), with thousands of open access journals and hundreds of thousands of articles posted directly by the researchers themselves. As Cory Doctorow might say, there will never be less work available under open access than there is today.

Add public domain works, fair dealing, hundreds of millions spent on textbooks, and pay-per-use licences for the remaining works and an Access Copyright licence simply becomes unnecessary.

2. The Licence Does Not Adequately Account for Bill C-11

One of the primary concerns with the Access Copyright model licence is the failure to account for forthcoming changes to Canadian copyright law under Bill C-11. The bill seems likely to become law by the summer and it includes several important provisions for Canadian education institutions.

First, the expansion of fair dealing to include a new category of education expands the scope of permitted copying without the need for permission or compensation. While the new education category will not mean that all copying on university campuses is covered by fair dealing (as some in the publishing community have misleadingly claimed), it will obviously include some educational copying that may not have been covered by research or private study.

Second, the inclusion of an exception for publicly available materials on the Internet covers the content found on millions of websites that can now be communicated and reproduced by educational institutions without the need for permission or compensation. The provision states:

30.04 (1) Subject to subsections (2) to (5), it is not an infringement of copyright for an educational institution, or a person acting under the authority of one, to do any of the following acts for educational or training purposes in respect of a work or other subject-matter that is available through the Internet:

(a) reproduce it;

(b) communicate it to the public by telecommunication, if that public primarily consists of students of the educational institution or other persons acting under its authority;

(c) perform it in public, if that public primarily consists of students of the educational institution or other persons acting under its authority; or

(d) do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) to (c).

The subsections that follow create several conditions, including attribution, the absence of a digital lock, and the absence of a clear opt-out notification (that is more than just a copyright notice). As I noted in an earlier post, this provision is certainly applicable to linking to online content and will also cover many other online materials used in the classroom.

Third, the non-commercial user generated content provision may also prove relevant for some electronic casebooks that incorporate materials to create a new work for non-commercial purposes. The UGC provision (Section 29.21) includes four conditions including an analysis of "substantial adverse effect", but the provision may allow for the development of new materials where the evidence suggests that the new works do not substantially adversely affect the original works.

Fourth, the bill establishes a technology-neutral approach for the reproduction of materials for display purposes. The current law is limited to manual reproduction or on an overhead projector. With Bill C-11, the provision applies to any display technology:

It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.

There are limits to this exception (it applies where the work is not commercially available in a medium that is appropriate for the purpose referred to in the exception), but it still may cover uses that Access Copyright would prefer to licence. For example, concerns about the inclusion of copyright-materials in powerpoint presentations may be covered by the new display provision.

Fifth, the digital inter-library loans provision, while restrictive, will open the door to digital transmission of materials on an inter-library basis, increasing access to materials that have been acquired by university libraries.

Sixth, the bill features changes to the statutory damages provision that decrease the risk of significant liability for educational institutions. Those changes are discussed further below.

All of these provisions represent significant changes in the law that provide new rights for education, yet the model licence seemingly acts as if they do not exist.

3. The Legal Risk of Not Signing is Limited

The University of Victoria notes in its announcement that it is reluctantly signing the model licence stating "the decision to opt into the license was taken reluctantly as a strategy to mitigate the risk of litigation by Access Copyright in the immediate future." Yet the legal risk is already very limited. First, the Supreme Court of Canada's CCH decision, still the leading decision on fair dealing, speaks of the need for a "large and liberal" interpretation to fair dealing categories such as research "to ensure that users rights are not unduly constrained." Fair dealing certainly provides considerable latitude for copying at Canadian universities and would be the first line of defence against a claim of infringement. Indeed, the recent Georgia State University fair use case in the United States demonstrates how user rights/copyright exceptions can be used as an effective defense against many claims of infringement (Ariel Katz argues that Canadian defences would be even stronger than those in the U.S.).

Second, there remain considerable doubts about the Access Copyright repertoire, both with respect to its scope and the need for evidence of copyright ownership or rights in specific works. Access Copyright is viewed by many as

vulnerable on both of these fronts, creating significant legal risk for the collective should it choose to pursue litigation against a university operating outside the model licence.

Third, Bill C-11's statutory damages reforms limit the potential liability for non-commercial infringement. The bill will establish a cap of \$5,000 maximum for all infringements involved "if the infringements are for non-commercial purposes." Given the non-commercial status of educational institutions and the absence of any profit motive in these cases, the new statutory damages cap may be applicable. While Access Copyright could seek actual damages, the Georgia State University case demonstrates that actual damages may be even lower in many cases.

Fourth, concerns that universities will offload copyright liability onto faculty are unfounded. Universities rightly advise faculty to follow appropriate copyright guidelines to ensure that their policies are consistent with the law. However, should a faculty member overreach with their copying practices, it is incredibly unlikely that they will face a lawsuit (and even if they did, litigation insurance would cover the costs). The copying involved would be so small that there simply are insufficient damages to justify a lawsuit. Consider a faculty member that makes 50 or 100 copies of an article for their students. Leaving aside all the available exceptions, the damages from the copying would be tiny (capped at \$5000 but likely to be much, much less). Given the legal costs and risks associated with losing such a suit (imagine a court ruling that education under fair dealing covered those classroom copies), these are lawsuits that will not happen.

While none of this suggests that universities can simply copy what they like without addressing the issue of permissions (they clearly cannot), assuming a university has developed an appropriate copyright policy as well as invested in site licences and the necessary copyright clearances, the risk of liability should Access Copyright sue is limited.

4. The Licence is Inequitable

The Access Copyright decision to blend two separate fees into one creates significant inequalities among students. At the moment, all students pay \$3.38 annually to cover general copying on campus (the interim tariff) and an additional 10 cents per page for coursepacks. The new licence establishes a single fee of \$26 per student. This creates a huge jump in costs for the majority of students. The majority of faculties - sciences, law, health, medicine, dentistry, and engineering - make very little use of the Access Copyright licence for coursepacks since their materials are typically either texts, available under open access, or can be accessed through alternative licensed databases (as is the case in law).

For those students, the only fee they currently pay is the \$3.38 per year. If their university signs the model licence, they will be paying \$26 next year for next to nothing. The incidental or general copying is almost certainly covered by fair dealing and these students don't use coursepacks with materials necessitating an Access Copyright licence. It is inequitable to compel these students to pay additional fees with no value in return, particularly as some of these students already pay the highest student fees on campus.

5. The Licence is Harmful

Some institutions may believe signing the agreement is the best way to limit their legal risk, yet the reality is that the licence is not neutral in the sense that it simply results in higher fees for students (or costs for the institution) in return for reduced legal liability. The model licence is harmful in two important respects. First, as CAUT has pointed out, the licence contains very problematic language that raises the prospect of surveillance as well as restraints on scholarly communication, use of scholarly materials, and use of modern technologies.

Second, providing Access Copyright with millions in additional funds that may not be necessary will serve to undermine educational concerns in current and future copyright reform. During the Bill C-32/C-11 debate, Access Copyright was the leading opponent of educational interests, opposing virtually all educational exceptions in the bill. In fact, Access Copyright spent millions last year (over 30% of its licensing revenues) on Copyright Board applications and professional fees, including lobbying on Bill C-11. When universities provide a windfall of millions to Access Copyright, much of that money is funneled toward advocacy opposing education concerns.

6. The Licence Hurts Long Term Education

As I discussed in a column last week, the emerging education model flips the current approach of expensive textbooks, closed research, and limited access to classroom-based learning on its head, instead featuring open course materials, open access to scholarly research, and Internet-based courses that can simultaneously accommodate thousands of students. Over the past year, dozens of universities have spent thousands of dollars in shifting toward a more open approach by investing in open access and open educational resources.

The University of Victoria claims that it will continue that effort so that it can adopt an open access approach in 2015. Yet many universities signing the Access Copyright model licence will simply write-off the recent investments, particularly given the huge increase in costs they will face. The long-term impact on those schools will be significant. Rather than focusing on open materials and greater flexibility for faculty and students, they will lock into the Access Copyright model of high fees and limited rights to use course materials. As a model for the future, the model licence is a major step backward.