

## Toronto and Western sign licensing agreement with Access Copyright

Tuesday, 31 January 2012

In a surprise move, two of Canada's major research universities have entered into a voluntary licensing agreement with Access Copyright. The agreement was announced Monday evening by Access Copyright, the University of Toronto and the University of Western Ontario (my employer). Agreeing to set the annual fee at \$27.50 per Full Time Equivalent student (FTE), and carrying over many of the other features of the proposed tariff, U of T and Western have essentially capitulated to Access Copyright.

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With the expiration of the licensing agreements that had been in effect for many years, Access Copyright filed a proposed tariff for copying by post-secondary educational institutions with the Copyright Board back in 2010.Â The proposal drew strong opposition from the educational community and the proceedings at the Board are ongoing [for a detailed analysis of the problems with the proposed tariff, see my presentation "Another Look at Bill C-32 and the Access Copyright Tariff: Still Double Trouble for Higher Education].

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In this unexpected development, the two universities have broken ranks from the other institutions and have signed a "voluntary" agreement with Access Copyright.Â Under the terms of the agreement, the annual rate will be set at \$27.50 per FTE student. The three-year agreement is back-dated to commence January 1, 2011 and will run until the end of 2013. Under the old licenses the annual rate for U of T and Western students was \$3.58/FTE and Access Copyright is seeking an increase to \$45.00/FTE at the Copyright Board. In addition to the drastic increase in fees, the proposed tariff contained many other objectionable and controversial provisionsÂ including an over-broad definition of copying (to include, for example, linking), privacy destructive monitoring and compliance requirements, and a negation of fair-dealing. Unfortunately, many of these other objectionable provisions have re-appeared in the new agreement.Â

And the timing of this agreement couldn't be worse.

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First, with Parliament reconvening this week, attention will refocus on the status of Bill C-11, the pending amendments to the Copyright Act. Despite its significant flaws, the bill would add the word "education" to the list of fair dealing purposes, a proposal that has been supported by the library, education and research communities but vehemently opposed by Access Copyright and the content industries.Â And despite the effectiveness of the recent SOPA/PIPA protestsÂ the threat of even more draconian copyright legislation is still looming.Â This move undercuts the importance of the proposed statutory change and gives a level of comfort to content industry lobbyists who are determined to thwart the inclusion of "education" within fair dealing.Â It is also puzzling why any bargaining-savvy university would consider such a fair-dealing-destructive agreement while such a potentially helpful amendment is pending.

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Second, and perhaps even more directly, the UWO/UofT abandonment of the opposition to the tariff could substantially undermine ongoing efforts of other institutions and educational groups who are objecting to the proposed tariff at the Copyright Board. A growing recognition that Access Copyright no longer provides useful and cost effective services had led many Canadian institutions to "opt-out" of further dealings with the tariff.Â Others have stayed in but are actively fighting the proposed tariff through the ongoing proceedings at the Board.Â Toronto and UWOÂ were among the latter, being only a handful of large research universities not to opt-out.Â This is a very welcome move for Access Copyright as it now sets somewhat of a baseline around which they hope the ultimate figure will land, at least for those many institutions that do not opt-out.

It was not a goodÂ time for two such important educational institutions to show such a sign of weakness. One only needs to read the gleeful release from Access Copyright to appreciate this point; AC has made it clear that they want this move to be followed by other institutions.Â

In a posting entitledÂ U. of T. and Western Capitulate to Access Copyright, Howard Knopf provides some useful insights into the issue and he raises 8 very good questions. Here are some preliminary answers to these questions:

1) Why would two such prestigious and financially able institutions not stand up to fight against a proposed tariff that is so problematic and expensive?

It's hard to guess what would motivate such a mis-step from a broader institutional perspective, one rooted in concern for teaching, learning and the welfare of all members of the university community. But from the narrower perspective of pure administrative convenience, risk aversion and uncertainty avoidance, the need to make difficult decisions has been sidestepped in favour of a solution that simply involves throwing cash (the students' cash that is) at the problem. Western and U of T admin have obviously made an assessment that they did not want to continue dealing with Access Copyright in an antagonistic manner. A U of T administrative memo to the students makes this point explicitly.

The proposed tariff, and its corresponding provisions in the new agreement are indeed "problematic and expensive." Here, the problems have been shifted from the admin to the academic staff and the expenses have been shifted directly to the students. It's a very clean solution if you are an administrator.

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2) Why did they not wait to hear what the Supreme Court of Canada had to say about fair dealing?

It's hard to imagine they did not know about these pending cases. At least at UWO I can personally attest to having conversations with leading admin figures about them. They also would have known about the pending court cases if for no other reason than their communications with AUCC. But whether they appreciated the importance of the issues pending before the Supreme Court of Canada, and their relevance to their local practices is another question. I don't think they did. University administrators are not primarily interested in copyright policy as such, they are more interested in administrative expediency from a narrow managerial point of view. And given their past practices, it is not at all clear that they have ever really comprehended fair dealing as an important educational issue. Again, a bargaining-saavy administration would not be making agreements with such a potentially helpful decision pending.

3) Why not wait for Bill C11, which Access Copyright proclaims will enhance the educators'™ position with the explicit inclusion of "education" in "fair dealing"?

Along the same lines, they apparently do not appreciate the finer points of copyright policy and the degree to which the fair dealing amendment has been so controversial in parliament. They have neglected fair dealing considerations for so long that it is unlikely that they are going to start paying attention to it now. (for a more detailed critique of how fair dealing has been neglected by risk-adverse university administrators, see my article "Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing.")

4) What are the all-important terms and conditions that have been agreed to? For example, did the universities acknowledge that absurd provision purporting to entitle payment to Access Copyright for mere linking? Or the outrageous and privacy invasive demand to monitor professors'™ email accounts? Or the completely arbitrary quantitative limits in the proposed tariff?

The text of the Access Copyright-UT agreement was just posted online this evening (and we can presume that the UWO version is identical). While more in-depth analysis is underway, it does appear from an initial reading of the contract that many of the problems in the proposed tariff have been carried forward into the license agreement. For example the over-broad definitions of copy and course collection are retained in the license. So essentially UT and Western have agreed that providing a hyperlink is a copyright-relevant event. It's not a position that a copyright-saavy educational institution would want to take. The problematic references to instructors' e-mail are also retained, and unlike the previous licenses, there is no explicit exclusion for fair dealing (more analysis of the text of the agreement will follow). The parties have also agreed to conduct a subsequent volume study in order to assess the level of copying, the terms are to be agreed upon later. The problem here relates back to the overbroad definitions of course collections and copying which will likely inform the scope of the study.

5) What effect will this have on the future of current post-secondary case at the Copyright Board?

Access Copyright will no doubt use these agreements as baselines for justification for their proposed tariff. Their press release asks the question: How does the signing of these two licences affect the Tariff process? to which they respond:

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No doubt Access Copyright is hoping for a domino-effect, that other institutions will similarly abandon their opposition and sign a similar license.

6) Will that case proceed and set a tariff that will be effectively "mandatory"? Were the other universities "which had reportedly budgeted two million dollars for this fight and then mostly "opted out" of any dealing with Access Copyright "aware of this development and, if not, how will they react? How can the publicly "agreed" upon and arguably much too high high rate of \$27.50 NOT affect the outcome at the Copyright Board for everyone else?

Western and UT's capitulation notwithstanding, there is an ongoing opposition to the proposed tariff at the Copyright Board. It is hard to imagine that the other universities would have known about the development as it so against their interests. And the U of T memo does concede that their negotiations with AC were undertaken in secret. It will be interesting to see how the other universities react. Hopefully they will respond with strength and restate their ongoing opposition to the tariff, or better yet to opting-out. While there is no doubt that the agreement to the sum of \$27.50 will be a powerful bit of evidence in the tariff proceeding, AC will still have to demonstrate how this figure is justified beyond its endorsement by Western and UT. More to the point, the opponents will still have the opportunity to argue for offsets from the tariff figure on account of non-compensable copying, (i.e under fair-dealing).

7) Was the AUCC "which was coordinating the universities' fight at the Copyright Board "involved with or even aware of this development?

I wouldn't be privy to this info, but I certainly hope not. AUCC has gone to great expense and effort to mount an opposition thus far. It would be hard to imagine they would be a party to such a direct undermining of their own efforts and those of their members.

8) Of immediate concern, when will these agreements be made public? These agreements surely should be made public because tens of thousands of professors and students are now bound by them, whether or not they wish to be. And tens of millions of taxpayers' dollars per year are now at stake if these agreements become the new normal in Canada.

This has already been done, at least insofar as the UT version has been posted. But even if the documents are made public, there remains the question of why they would undertake such negotiations in the first place in secret. The UT memo readily admits the negotiations had been going on in secret for two months and that in itself is disturbing.

To these 8 questions I'll add another:

What is leadership in the educational sector and why is it important?

As major research universities, the University of Toronto and the University of Western Ontario have a responsibility to show leadership in the educational sector with respect to changing copyright policies. At a time of rapid technological change it is essential that these leading institutions demonstrate a sensitivity to the relationships between emerging instructional technologies, their educational missions and their effects on their students and staff. By capitulating to Access Copyright through signing this highly flawed license agreement thereby shifting the burdens to their students, they have failed badly in this regard.

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No amount of re-branding can make up for that.

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