

Access Copyright & Technology: Legal and Policy Issues in Education

Lisa Di Valentino / March 8, 2013 / [CC-BY-SA](#)

What is Copyright?

Copyright in Canada is a legal concept of intellectual property. It affords to individuals or organizations certain exclusive rights, such as reproduction and communication, of artistic and intellectual works. Its purpose is instrumental — to encourage the creation of these works for the betterment of society.

Copyright law comes primarily from two sources: the *Copyright Act*, which was amended last year, and from Supreme Court decisions interpreting the *Act*. The two most important for our purposes are *CCH v LSUC* [2004], and *Alberta (Education) v Access Copyright* [2012], which I will refer to again later on.

The Copyright Board is a government agency that sets tariffs for royalty payments. Copyright can also be regulated by contracts, in the form of licenses negotiated between two parties.

I'd like to say a bit more about the *Copyright Act*. In addition to granting rights to copyright owners, the act contains provisions limiting the scope of these rights. These provisions are usually called “exceptions”. “Fair dealing”, for example, is a provision describing certain uses of copyrighted materials that are not considered infringement, and so do not require permission from copyright owners nor payment.

The test for whether or not a given dealing is “fair” was set out in the Supreme Court decision *CCH v Law Society of Upper Canada*. It involves considering various factors such as the purpose, nature, and amount of the dealing, and whether the dealing would negatively impact a copyright owner's market for the work. However, the weight given to each factor depends on the circumstances of the situation.

It was also in this decision that the Supreme Court called for a broad interpretation of what are called “exceptions”; in fact, they are considered a user's right. This is because the ultimate goal of copyright law is to maintain the proper balance between rewarding authors and allowing the public to make use of works.

Who are Access Copyright?

I'm going to talk a little bit about Access Copyright, which is a name you might have heard or read over the past couple of years.

Access Copyright are a collective organization representing the interests of copyright owners. (Note that an author or creator of a work may or may not be the owner of the copyright.) Access Copyright act on behalf of copyright owners in entering into license agreements, and they collect royalties and distribute payments to copyright owners.

Until December 2010, Canadian universities had license agreements with Access Copyright permitting certain limited uses of works in the organization's repertoire. (Not all copyrighted works are in the repertoire.) These permissions are granted in exchange for a yearly fee, which is paid by students.

But, over the past year, many universities have opted out of further agreements with Access Copyright.

What has changed?

So, what has changed? Quite a bit, both in the field of technology and in the legal sphere.

Technologically, there has been a dramatic increase in number of digital works, both born digital or digitized, and here I'm thinking of mass digitization projects such as Google Books and Hathi Trust. Similarly, Internet technologies present unprecedented ease of access, reproduction, and distribution of knowledge. Copyrighted works can be electronically copied and pasted into other documents, e-mailed, and shared in the cloud using technologies such as course management websites. These uses were not envisioned when copyright law was originally developed, so the regulatory schemes that were sufficient or ideal for previous uses of copyrighted works are not ideal today.

That brings us to the recent changes in the law.

In July 2012, Supreme Court issues what's known as the Copyright Pentology, five cases all relating to copyright. One of these decisions, *Alberta (Education) v Access Copyright*, specifically had to do with fair dealing in the educational context. In this decision, the Court reaffirmed that fair dealing is a "user's right" and that the provision is to be interpreted broadly. So anyone who was unsure about fair dealing before can be more confident making use of it now.

Then in November 2012, the provisions of *Bill C-11* come into force, amending the *Copyright Act*. Among the amendments are: education, parody, and satire are added to the list of fair dealing purposes, teachers are allowed to make use of material freely available on the Internet, unless there is a specific prohibition by the copyright owner, there is a new provision allowing non-commercial user-generated content that

incorporates other materials (such as mashups), and instructors are permitted to reproduce works for display purposes.

Implications for universities

So what do these changes mean for universities who use educational technology? Well, at the end of 2010, university licenses with Access Copyright expired. Earlier in the year Access copyright had applied to the Copyright Board for tariff certification (which is like a license agreement, only not negotiated by all parties).

The expired agreements had not accounted for digital uses of works. Some universities signed new agreements with the collective that did account for digital uses of works in its repertoire, among other changes, and fees went up. In 2012 Western and U of T signed a license with Access Copyright that saw fees increase from \$3.75 to \$27.50 per year (paid by the students).

The Western / U of T agreement was criticized on several grounds. For one, the agreement contained an over-broad definition of “copying”. Acts that were considered to be copying included posting a hyperlink to a copyrighted work or displaying a work on a projector screen (note that the latter of which is inconsistent with s. 29.4 of the *Copyright Act* which I mentioned above). The agreements also granted rights to Access Copyright to audit records, and a “right of access through the whole or any part of the premises of the Licensee.” The “premises” include the school’s “secure network”, which itself is defined so vaguely that it could include office computers, or even student and faculty personal laptops if they were connected to the school’s password-protected wi-fi. So basically it suggests that Access Copyright could go rifling through your laptop looking for copyrighted works that you might have impermissibly copied. On top of all that, the license requires royalties for uses that would likely fall under fair dealing anyway, such as copying an entire article from a periodical for non-commercial, educational purposes.

On the other hand, some universities, such as UBC and UPEI, have declined to re-sign a license agreement with Access Copyright. Instead, they plan to rely on fair dealing and other user’s rights afforded by the *Copyright Act*. In addition, they will seek out public domain, publicly licensed (Creative Commons), and open access resources. They can link to online materials rather than re-host them on course management websites. And they can make use of licenses with individual publishers. In order to accomplish this, universities are beginning to put together copyright advisory offices, and awareness initiatives for students and staff. They are also creating of institutional copyright and fair dealing policies

to guide instructors on how to choose reading material for their courses, and how to make these materials available to the students.

Access Copyright and MOOCs

Another development that implicates copyright, and specifically existing copyright licenses, is the emergence of massively open online courses (MOOCs) (Prof. Trosow will speak further about this). These courses are available to anyone with Internet access, and there's no tuition or fees. Courses are offered by partnering schools, instructed by faculty of those schools. The University of Toronto currently administers several courses through Coursera.

So this brings up a question: if a Coursera student wishes to make a copy of a repertoire work in support of her study, is this use covered under the Access Copyright license? The first thing we would want to do is look at the terms of the license itself. In the first section, the term "student" refers to "a person registered or engaged in a Course of Study", which itself is defined as a "course, etc., administered or hosted by the Licensee [which is U of T]". So it seems as if this student's uses are covered, or at least it's not clear that they aren't. But the student does not pay an Access Copyright fee like the other students do. Will fees increase to account for these additional uses of copyrighted material in the repertoire? Will schools operating under an Access Copyright license require MOOC students to pay their share of the fees? These questions are difficult to answer.

Conclusion

Clearly there have been dramatic changes in the way education is delivered, and more such changes are expected. Copyright law and policy must account for these changes in a way that will allow it to continue to balance the rights of copyright owners, and authors, and those of users.