Michael Geist
Canada Research Chair in Internet and E-commerce Law
University of Ottawa, Faculty of Law
May 2011

Access Copyright Stops Pay-Per-Use Digital Licensing
May 25, 2011

Earlier this year, Access Copyright won a Copyright Board decision that granted a new interim tariff for post-secondary education institutions. This is the first of three posts that examine the aftermath of that decision, the current economics behind Access Copyright, and the challenges the copyright collective faces over the long haul. The interim licence, which effectively sought to maintain the status quo as the copyright collective and educational institutions sort through the Access Copyright demand for a massive increase in its current tariff structure, provided the collective with a potential continued revenue stream and delayed what appeared to be a near-universal decision among Canadian universities to drop the Access Copyright licence altogether.

While some were surprised that the educational institutions did not seek judicial review of the Copyright Board decision, I suspect that many institutions came around to the view that the interim tariff was helpful in the short-term. Many institutions were facing faculty not ready to shift away from the Access Copyright licence in January 2011. The interim tariff bought them time to complete the transition. That transition now appears to begin as soon as September 2011 as universities prepare for an alternate approach based on five key sources of materials:

- textbooks purchased by faculty and students remains a common practice and will continue to be used (whether electronic or paper) for the foreseeable future.
- university and college site licences to databases of books and articles provides broad, compensated access to materials that can be incorporated into electronic coursepacks. For example, the Canadian Knowledge Research Network covers 75 universities with 75 national licenses that provide research content across all disciplines. The value of these licenses is over $100 million per year.
- the growth of open access and public domain materials means that many journals and other materials in professional disciplines such as law, engineering, and medicine are often freely accessible.
- fair dealing (with or without statutory reforms) must be interpreted in a broad and liberal manner and allows for many uses in appropriate circumstances. The CAUT guidelines provide a helpful look at the rights for teachers to use materials.
- pay-per-use transactional licences can be purchased for materials not otherwise available through site licences, open access, or fair dealing. The pay-per-use approach offers more direct compensation to the author than a collective license approach.

The availability of these alternatives played a key role in the Copyright Board's interim tariff decision. The Board's reasons for issuing the interim tariff included:

to confirm that institutions that do not require a licence from Access Copyright are not required to deal with it, whether pursuant to the interim tariff or otherwise.

At paragraph 30, the Board expanded:

An interim decision will allow Institutions to continue to avail themselves of the existing licensing scheme if they so wish. It will provide certainty until the Board certifies a final tariff. It will not impose a single licensing solution; instead, it will add a tool Institutions can use to comply with their copyright obligations. Since Access secures rights on a non-exclusive basis,
Institutions remain free to seek licences from others, even for their uses of the Access repertoire. As always, Institutions that do not make protected uses of that repertoire are not targeted by the decision in any event.

Further, at paragraph 50, it noted:

the interim tariff we adopt in this matter is not mandatory. An Institution can avoid its application by purchasing the work, negotiating a licence to copy the work with Access or its affiliates, not using any work in the repertoire of Access or engaging only in conduct exempt from liability.

While the Board was proceeding under the assumption that institutions could obtain licences from others, it appears that Access Copyright and the publishers are actively working to shut down some alternative licensing avenues. Recent reports indicate that attempts to obtain pay-per-use digital licences have been denied by Access Copyright, which is insisting on an all-or-nothing approach that forces to universities to adopt the full licence or not use some digital materials. Several universities advise that requests for digital licences from publishers have been referred to Access Copyright, who respond with the following:

We are very pleased to advise you that the Copyright Board of Canada has issued an interim tariff that applies to post-secondary educational institutions across Canada (excluding Quebec) titled the Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013. As a result of this interim tariff, post-secondary educational institutions may make copies from portions of published works in the repertoire of Access Copyright on the same terms as the institutions' previous licence agreements with Access Copyright.

Additionally, the interim tariff provides institutions such as yours with an option to elect to use the tariff to make digital copies of portions of published works in Access Copyright's repertoire. This comprehensive digital option provides post-secondary institutions with a convenient and legal way to use content in digital format for such uses as posting material to course websites, e-reserves or emailing material to students.

Once an institution elects the digital option, it provides immediate, advanced, legal *authorization for faculty to scan material and post to course websites. This provides significant time and cost savings compared to contacting rightsholders of Access Copyright directly to get permission to copy specific works case-by-case.*

As a result of the Board's decision, Access Copyright is no longer offering transactional licences to make digital copies of published works when the amount copied falls under the terms of the interim tariff. Your institution can elect to licence digital copies pursuant to Schedule G of the interim tariff by contacting us in writing. If you wish to elect to licence digital copies under the interim tariff, please have your school's administrator contact our Licensing Services staff at tariffs@accesscopyright.ca.

In case you didn't see it, the interim tariff has been amended as of April 7, 2011 and, if your school does opt in to Schedule G, there are currently no reporting requirements for digital copies which fall under the terms of the tariff.

Access Copyright, the publishers, and authors are obviously entitled to license their works in the manner they see fit, though it is curious that Access Copyright did not disclose its intent to stop pay-per-use digital licensing to the Copyright Board. The policy does raise the question of whether authors are truly supportive a policy that leaves money on the table in the hope of pressuring universities into signing a larger deal to benefit others. As for why Access Copyright is doing this, their recently released annual report provides a clue - the collective spends more on itself than it does in distributions to Canadian authors. More on the economics of Access Copyright in tomorrow's post.

The Economics Behind Access Copyright
May 26, 2011

Yesterday's post highlighted the recent Access Copyright decision to refuse pay-per-use transactional digital licences (late in the day I received a note that AC appears to have had a change of heart). As I noted in the conclusion, the copyright collective faces an increasingly problematic balance sheet. According to its 2010 annual report, it spent more on itself in the form of administrative costs (including legal fees and board compensation) that it actually dispensed to Canadian authors from its 2010 licensing revenues. Admittedly, these numbers are not easy to find. Indeed, for an organization devoted to collecting licensing revenue and distributing it collective members, the annual report is incredibly vague about providing clear numbers about precisely what gets distributed to Canadian authors.

Despite the obfuscation, the numbers can be teased out from the 2010 annual report with a bit of digging. [Update: Some comments note that the annual report includes a specific distribution number as page 19 states that the distribution for 2010 was $23.3 million. Unfortunately, that figure does not disclose how much of the 2010 revenues were distributed. The 2010 distribution drew from both 2010 provision for royalties for distribution ($24 million) and the balance entering the year, which stood at $29.5 million. The analysis below makes it clear that the majority of the 2010 distribution came from the prior balance, not from the 2010 revenues]

Start with the revenue - licensing revenues, including interest income, came in at $33.7 million, a drop of $1 million from the prior year.

The first obvious deduction are the administrative fees, which include salaries, lawyer fees, Copyright Board applications, and director costs. These totalled $8.7 million, an increase of $500,000 from the prior year. Administrative costs therefore comprise one out of every four dollars earned by Access Copyright. By comparison, Copibec, AC's Quebec counterpart, had an administrative ratio roughly half that at 13 percent last year. AC's board of director costs are particularly striking since sources say Access Copyright's 18 directors receive as much as $10,000 per year in director compensation. If true, this is surprising amount for a non-profit (I should be so lucky - my board work on CanLII and CANARIE is strictly voluntary). In any event, after deducting administrative expenses, Access Copyright is left with $25 million to distribute.

Yet the deductions for Canadian authors don't end there. First, according to information in the Friedland Report, roughly 20 percent of Access Copyright revenues are distributed to foreign reproduction rights organizations (RROs). Access Copyright faces a significant imbalance in this regard - about 5 percent of its revenues come from foreign RROs (for the use of Canadian works elsewhere) but it pays out about 20 percent of its revenues to those same RROs (60 percent of that goes to the U.S.). For last year, that appears to work out to $6.7 million in foreign payouts.

Second, the ongoing legal fight over revenues from K-12 schools means that those licensing revenues above the previous licence are booked as deferred revenue and not distributed. Last year, that deferred revenue was just over $10 million. While the money may eventually be distributed (Access Copyright acknowledges it could be reduced depending on the outcome of the case), the Supreme Court of Canada's decision to grant leave to appeal means that the legal case is unlikely to conclude until late 2012. Assuming it does conclude with a sizable payment (potentially over $60 million), the vast majority of that sum will go to publishers rather than authors. As discussed further below, publishers already receive about 60 percent of Access Copyright distributions. That number is likely far higher for K-12 copying, the majority of which involves copying portions of textbooks. Since most publishers have the copyright in textbooks (not the original authors), they will receive the bulk of the distribution.

Third, Access Copyright allocates as much as 1.5% of gross licensing revenues toward the Access Copyright Foundation. The Foundation was established in 2009 due to the collective's own orphan works problem - revenues targeted for unlocatable copyright owners. Last year, $491,000 was allocated to the foundation.

After these three deductions, Access Copyright was left with approximately $7.8 million to distribute last year, less than the $8.7 million it spent on administrative expenses. Note, however, that this covers distributions to both publishers and creators. The Friedland Report estimated in 2007 that there is a 60/40 split - 60 percent to publishers and 40 percent to authors. Assuming the split has remained roughly the same - there is little reason to believe there has been significant change - that leaves Canadian authors with $3.1 million in distributions from the 2010 revenue. The 2010 annual report indicates that there are 9,778 Canadian creator affiliates. Based on these numbers, the average distribution (before income tax) last year for Canadian authors was just $319. In comparison, the average Canadian author earned $566 from the public lending right last year. Moreover, far more authors generate revenue from the public lending right (17,487) than Access Copyright.

In fact, the numbers are likely even worse for the majority of Access Copyright authors. Last year it shifted to a Payback model which apparently resulted in baseline repertoire payment of $175 per author. Reports indicate that approximately 80 percent of creators received less last year than the year before due to the change in approach.

As noted yesterday, this is not to say that authors are receiving less in aggregate from educational institutions. The growth of site licensing in particular means that far more is being paid by academic institutions to pay for access to content. The difference is that the payments that may ultimately go to authors are going through a different intermediary - database companies - rather than Access Copyright. For example, last year Canadian universities paid three times as much in site licenses through CKRN alone ($100 million) as Access Copyright generated in licensing revenue. More on why the situation is likely to get worse for the collective and what it should consider doing in tomorrow's post.

Why The Situation Is Likely to Get Worse for Access Copyright (But Not Necessarily for Authors)
May 27, 2011

My first two posts on Access Copyright this week focused on its decision to stop pay-per-use digital licensing in the wake of the Copyright Board's interim tariff and the economics behind the copyright collective. This post explains why the situation is going to get worse and offers (admittedly unsolicited) advice about what to do about it (all three posts available as a single PDF).

The Access Copyright's Board response to the Friedland Report is one of the few public sources that breaks down its revenue and distribution (though it is no longer posted online). In 2005, its licensing revenue came from the following sources:

Universities and Colleges	46 percent
K - 12 Schools	31 percent
Government	14 percent
Foreign Reproduction Rights Organizations (RROs)	5 percent
Corporate	4 percent

The percentages may have changed slightly, but there is every reason to believe they are fairly similar today. In the Access Copyright application for an interim tariff, it told the Board that "almost 50 percent" of its licensing revenue comes from universities and colleges.

The obvious problem is that Access Copyright is dependent on education for roughly 75 percent of its revenues. In the years ahead, much of this is likely to disappear. I've already argued that universities and colleges will increasingly walk away from Access Copyright as they pursue other licensing approaches for their materials (universities are spending over $100 million a year on site licenses via CKRN alone).

My guess is that the K-12 sector will start to do the same once the current legal dispute before the Supreme Court of Canada is resolved. The K-12 sector may cut a $60 million cheque when the case is done, but that will serve as a wake-up call for the significant costs associated with current system (in the same way that the Access Copyright demand for a $45 per student tariff woke up Canadian universities). As the popularity of Open Educational Resources grow (and students make greater use of laptops and tablets in class), Canadian schools will shift their spending to open materials that can be used and adapted without annual per student charges. Note that Canadian creators will benefit from this course development spending in a manner that today they do not.

The Access Copyright problem involves more than just dependence on the education sector, however. The problem is exacerbated by the fact that its repertoire is available from other sources. Consider the distribution by genre data it provided in the Friedland Report. In 2006, the top five genres were as follows:

Text (education)	33.39 percent
Trade	33.11 percent
Journals	17.03 percent
Magazines	5.46 percent
Newspapers	5.01 percent

To understand the Access Copyright problem is to recognize that the bottom three genres, which in 2006 constituted 27.5 percent of its distributions, will fall to a few percentage points sooner rather than later. Virtually every Canadian university and college already subscribes to electronic access to most journals, magazines, and newspapers (in fact, many of the journals are now open access). In other words, these works are still being licensed by universities and colleges, but not through Access Copyright. This represents a significant decrease in the value of the Access Copyright repertoire to these institutions, since they get the same materials in a more flexible, accessible, and economic manner from other sources. The same is often true for corporate clients who access these materials through commercial databases.

The educational text category is also likely to decline in the coming years as universities and colleges move toward electronic casebooks that do not rely on the Access Copyright licence and K-12 schools begin to develop open educational resources to serve their needs. Note that colleges will also move toward OERs, particularly given the U.S. investment of $2 billion over the next four years in new free and open materials for colleges.

What should Access Copyright do? I'd propose four steps.

First, it must become much more efficient as its administrative costs are far higher than other similarly placed collectives. When other collectives are able to run at half the administrative burden, there is surely much that can be done.

Second, the Access Copyright board, with 18 members (nine representing publishers and nine representing creators) is far too big for an organization of its size. The Friedland Report recommending cutting back to 13 (four publisher, four creator, four independent, and the executive director). That recommendation was rejected by the board. I think that even 13 is too big. Nine board members is fine - three publisher, three creator, and three independent. A crucial element is the need for independent directors as it is stunning to see a board of this size comprised exclusively of directly interested parties. Moreover, board compensation should be slashed - a $500 honorarium for each board meeting is plenty for a non-profit, not the current rates that may run as high as $10,000 annually per board member.

Third, rather than rejecting pay-per-use licensing for education (it is still unclear what approach AC is taking), it should be shifting toward it. Its distribution model has long been a source of controversy since much of it relies on membership, not actual copying. Payback starts to change that in terms of distributions, but at a significant cost to the majority of Access Copyright members. Moreover, as discussed above, its repertoire offers less and less to its most important customer segment. Pay-per-use transactions offer a potential competitive advantage (publisher and education relationships, economies of scale that a publisher or author alone won't have) and the chance to shift more of its business to the corporate world. This would move the organization toward the U.S. Copyright Clearance Center model, which does not rely on domestic education licensing for a significant portion of its revenues.

Fourth, it must become more transparent. Transparency was the top issue raised by the Friedland Report, yet a review of the most recent annual report shows that the organization still does not plainly disclose who gets what. In fact, compare the Access Copyright approach with the Public Lending Right Commission release, which opens its report with specific reference to how much was collected, how many authors received money, and the average distribution. Its website then delves into further detail on its financial distributions.

Access Copyright's annual report runs 31 pages and never discloses this information in a clear, transparent manner. For example, some have noted that the annual report includes a specific distribution number as page 19 states that the distribution for 2010 was $23.3 million. Unfortunately, that figure does not disclose how much of the 2010 revenues were distributed. The 2010 distribution drew from both 2010 provision for royalties for distribution ($24 million) and the balance entering the year, which stood at $29.5 million. The analysis in yesterday's post makes it clear that the majority of the 2010 distribution came from the prior balance, not from the 2010 revenues. Clear disclosure is surely in the interests of all associated with the collective.

I conclude by noting that Access Copyright's problems are not necessarily an author problem. Authors will still be paid to create OERs (that is what the $2 billion is for in the U.S.) and receive growing licensing revenues from electronic access subscriptions on campuses. In other instances, their work will be freely available consistent with their open access licensing choices. Moreover, the U.S. experience demonstrates there are significant licensing opportunities in the corporate market. The reality is that this is an Access Copyright problem as it spends far too much relative to what it earns, has failed to address persistent transparency concerns, and it effectively faces a more competitive market with other intermediaries who are offering a more compelling product to its most important customers.