

An Unofficial FAQ on Canadian Universities Opting-Out of Access Copyright

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With many Canadian universities opting-out of the Access Copyright interim tariff, I have been receiving a growing number of questions and emails from faculty members at schools across the country inquiring about the implications of the opt-out. All universities should be updating their faculty and students on the copyright changes including why the changes are occurring and what they will mean for research and teaching. In the meantime, however, posted below is a very unofficial FAQ that provides my answers to some of the questions I've received:

My university has operated under an Access Copyright licence for years. What has changed?

The shift away from Access Copyright marks the culmination of years of technological change within Canadian education that has resulted in new ways for professors to disseminate research and educational materials as well as greater reliance by students on the Internet, electronic materials, and portable computers. Ten years ago, photocopy licences made sense since physical copies were the primary mechanism to distribute materials. The availability of a wide array of materials from alternative sources, many discussed below, allows educational institutions to reconsider the Access Copyright approach.

Moreover, just as technology was facilitating alternative ways to access course materials, Access Copyright upped its licensing demands. In 2010, it filed a proposal for a new \$45 fee per full-time university student. For universities accustomed to far lower costs, the demands threatened to add millions to already tight budgets. This year it forced universities to engage in costly reviews of all licensing arrangements, which took weeks for many institutions to complete. The overall effect of these demands has led universities to reconsider whether spending millions on the Access Copyright licence is necessary and whether the same money might be better spent increasing the size of their collections or adding new site licences to more electronic materials.

Will this have an effect on my research?

It should not have a significant impact on research activities. Copying for research purposes is likely covered by a combination of fair dealing or licensing from site licences and open access.

I require students to purchase a textbook (or two) from an academic publisher for my course. Will this have an effect on me?

No. The Access Copyright interim tariff has no effect on purchased texts. It should be noted, however, that some publishers are resisting offering pay-per-use licenses to universities. This is particularly surprising given that universities are seeking to pay for the use of materials and the publishers are rejecting the requests from their biggest customers. Faculty members and universities should consider whether they wish to continue to support publishers that adopt this position.

I teach law, sciences, engineering, or medicine. Will this affect my course materials?

It might, but the impact in these disciplines should be fairly limited. The majority of materials in these disciplines is either in the public domain, open access (very strong in the sciences) or licensed by universities. All materials available through these sources do not require a further licence.

I teach in the social sciences and humanities and I often make use of customized coursepack? Will this affect me?

Yes. Custom coursepacks will require review to ensure that the materials are covered by alternate licenses, part of the public domain, or otherwise outside the Access Copyright interim tariff. In the event they are not, they require pay-per-use licences or suitable replacements should be found.

What materials fall outside the Access Copyright tariff?

The Access Copyright tariff only applies to situations where a licence is required. Any uses covered by alternative licences or permitted by fair dealing under the Copyright Act do not require a separate licence and effectively fall outside the tariff. This includes:

- Site Licences. University libraries have gradually shifted much of their spending to electronic materials. For example, more than 70 universities participate in the Canadian Research Knowledge Network, which provides access to thousands of journals for over 900,000 researchers and students. The network spends tens of millions of dollars annually on site licences, which in turn enables universities to provide full access to the database content without the need for further compensation.
- Open Access. A growing body of research is also now freely available under open access licensing, as researchers make their work openly available on the Internet. More than 20 percent of all medical research is available under open access licences, while the Directory of Open Access Journals lists over 6,500 open access journals worldwide.
- Open Educational Resources. Interest in open educational materials has been mounting steadily in recent years as educators and funders seek to leverage the millions of articles that are freely available under open access licences and to develop flexible materials that can be used on any platform and updated or amended without running into publisher or copyright barriers. Some Canadian universities have already jumped on the bandwagon: Athabasca University in Alberta is aiming to replace many of its course materials with open educational resources, while the BC campus initiative brings together 25 post-secondary institutions to contribute and share open educational resources. In the U.S., the Departments of Labor and Education have committed US\$2 billion toward a new program to create free online teaching and course materials for post-secondary programs of two years or less.
- Fair Dealing. Canadian copyright law currently includes a fair dealing exception as well as specific exceptions for certain classes of works and certain users. These include exceptions for research, private study, news reporting, criticism, and review. Until fairly recently, the Canadian fair dealing provisions were generally viewed as quite restrictive, both with regard to the limited number of categories that statutorily qualify for fair dealing as well as in the way that the Canadian courts interpreted the provision. That changed in 2004, when a unanimous Supreme Court strongly affirmed its support for a balanced approach to copyright law and in the process breathed new life into the Copyright Act's fair dealing provision in a case called *Law Society of Upper Canada v. CCH Canadian*. In reviewing copying practices in the law library of the Law Society of Upper Canada, the court stated "the fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."
- Linking to materials. Course materials increasingly make use of content posted online, often by the authors themselves. Linking to such content in electronic course materials typically does not raise licensing concerns.

How do I determine if a particular use qualifies as fair dealing?

In determining whether a particular use (or dealing) meets the fair dealing standard, the Supreme Court established a two-part test. First, the use must qualify for one of the fair dealing categories such as research, private study, news reporting, criticism or review. Second, assuming it does qualify under one of the categories, the court identified six factors to consider to gauge the fairness of the dealing:

- The Purpose of the Dealing - the Court explained that allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights.

- The Character of the Dealing - one should ask whether there was a single copy or were multiple copies made. It may be relevant to look at industry standards.

- The Amount of the Dealing - Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. The extent of the copying may be different according to the use.

- Alternatives to the Dealing - Was a "non-copyrighted equivalent of the work" available?

- The Nature of the Work – "If a work has not been published, the dealing may be more fair, in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair."

- Effect of the Dealing on the Work - Will copying the work affect the market of original work? "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair".

There are several guidelines that have been developed to assist on this issue. Both the AUCC and CAUT have published fair dealing guidelines and many universities have either endorsed one of them or published their own variation. Many universities also employ copyright officers who assist with fair dealing and copyright license issues.

What if I want to use an article or materials not currently under license by my university? Should professors want to include additional materials not otherwise covered in alternate sources, the universities can seek pay-per-use licences directly from the copyright owner or from a copyright collective. Ironically, Access Copyright is resisting pay-per-use licences for education, leaving some schools to license the same materials from the U.S. Copyright Clearance Center or approach the copyright owner directly.

Are all universities opting-out of the Access Copyright interim tariff?

Not yet, but it is moving in that direction. Earlier this year a handful of universities, including Acadia, New Brunswick, Windsor, Mount Saint Vincent, and the University of PEI, announced they would no longer operate under the Access Copyright licence. Most have found the transition relatively painless, as they have established new campus copying guidelines and worked with faculty to obtain individual licences where needed. In recent weeks, many other universities have announced plans to follow the same path with Waterloo, Queen's, Calgary, Saskatchewan, York and Athabasca University all notifying professors and students that are opting-out of the Access Copyright licence. At this stage, it appears the majority of universities will opt-out either this year or by September 2012.

What are the benefits of opting-out of the Access Copyright interim tariff?

Opting-out of the Access Copyright interim tariff will likely generate some growing pains, but represents a major step toward better leveraging technology within the education system. It moves universities toward more flexible arrangements that will increase reliance on electronic course content and freely available materials that can be used without restriction. Moreover, long-term cost savings should allow universities to increase access by expanding site licences and investing in open access and open educational resources.

Are creators still paid for the use of their works if my university opts-out of the tariff?

Opting-out of the Access Copyright tariff should not result in a significant reduction in overall payments by universities related to copyright and copyrighted works. While copying covered by fair dealing does not yield additional payments, the use of site licences involves multi-million dollar investments by Canadian universities. For example, the University of Calgary alone spends approximately eight million dollars on electronic materials. With hundreds of millions spent each year on electronic resources, the revenues from these licences ultimately flows to publishers and authors. Opting-out of the Access Copyright tariff may free up some funds for use for additional electronic materials or new book acquisitions, effectively changing where the money is paid, not whether it is paid. Where the works are available under open access licences, the authors have chosen to make their works available at no cost.

Moreover, there are doubts about the payments Access Copyright makes to authors. For example, the Writers' Union of Canada recently passed a motion recognizing the lack of control over how licensing revenue is managed and the inability of Access Copyright to represent creator interests.

As a result, the TWUC plans to investigate operational separation of creators' and publishers' interests in collective licensing. That motion has been endorsed by the League of Canadian Poets.

What else can be done by universities and faculty members to ease the transition?

The easiest way to address licensing concerns is to adopt open access licences that remove any doubt about use and re-use of materials as research is posted online with an open licence. In recent years, many countries have implemented legislative mandates that require researchers who accept public grants to make their published research results freely available online within a reasonable time period. While Canada has lagged, a growing number of funding agencies, including the Canadian Institutes of Health Research, the Canadian Cancer Society, and Genome Canada have adopted open access policies. For faculty members, publishing under open access (either by publishing in an open access journal or by posting a pre or post print online) ensures their work is widely available, consistent with funder mandates, and open to use for course materials. Universities can do their part by removing their works from the Access Copyright repertoire and making them available under open access. For example, placing their works under a Creative Commons licence sends the message that works under university copyright can be freely used for other purposes.

How does the Canadian situation compare to that found in the U.S.?

Canadian universities pay far more to Access Copyright than U.S. universities pay to the U.S. Copyright Clearance Center, the U.S. equivalent. While Access Copyright is seeking \$45 per full-time student, U.S. blanket license rates are less than 1/10th that amount.

The 2007 Friedland Report, which identified serious governance problems within Access Copyright, noted the dramatic difference between Canada and the U.S.: the various post-

secondary educational licenses amount to about \$18-20 million per year out of over \$160 million collected “about 12% of the total received [for the U.S. Copyright Clearance Center]. This can be contrasted with the situation for Access Copyright where, according to the publishers’ recent submission to me” close to 75% of Access revenue comes from educational licenses.

I’ll be happy to add to this FAQ as new developments arise.

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