

# BACKGROUNDER:

## University of Western Ontario and University of Toronto Agreements with Access Copyright

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### Introduction

On January 30, 2012, after secret negotiations, the University of Western Ontario and the University of Toronto reached agreements with Access Copyright, a copyright licensing agency. The agreements are harmful to Western and Toronto. They contain unjustified fee increases, restrictions on the use of materials, and mandate electronic surveillance of the academic community. More broadly, the deals undermine efforts underway at universities and colleges all across Canada to develop fair new models of scholarly communication and to reach principled copyright arrangements with authors and publishers.

Worse than simply being bad deals, the agreements themselves are unnecessary. New forms of scholarly communication and important legal developments are rendering Access Copyright obsolete. Instead of looking to the future, the University of Western Ontario and the University of Toronto have traded away professors' rights and students' money to stay locked in the past.

### Access Copyright - Context

For many years, under the auspices of the Association of Universities and Colleges of Canada (AUCC) and the Association of Community Colleges of Canada (ACCC), money was transferred from post-secondary institutions to Access Copyright. In return, Access Copyright provided a license to the institutions to reproduce copyrighted works. This met the needs of AUCC and ACCC who appreciated the convenience and protection the payments provided. The private publishing companies that Access Copyright disbursed the money to (less expenses) also welcomed the arrangement. At the university and college operational level, the regime was not as well received. Academic staff, students and institutional copyright officers began to develop objections to the administrative burden and surveillance that came with Access Copyright's presence on campus as well as its perceived aggressive behaviour. Access Copyright's active lobbying for restrictive copyright legislation compounded this concern, as did its characterization of the education sector as disrespectful of copyright, despite the sector's billion dollar plus annual expenditures on copyright material.

### Alternatives Arise

#### **1. Fair Dealing**

As concerns about Access Copyright grew, so too did the alternatives for using copyright material on campus. The first alternative was **fair dealing**, the right to copy material without permission or payment when it is fair to do so. As recognition of fair dealing as a fundamental and robust right gained traction, a reappraisal of the fees paid to Access Copyright also occurred.

#### **2. Open access publishing**

The expansion of **open access publishing** -- the placement by authors of scholarly material online and available to the reader with minimal financial barriers -- has also diminished the need to pay license fees.

## **BACKGROUNDER:**

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#### **3. Site licenses**

The third advancement has been the proliferation of **site licenses**. These are direct agreements that institutions reach with content providers that permit on-line access by the university or college community to scholarly material. By facilitating direct dealing with publishers, site-licensing negates the need for content brokers such as Access Copyright.

#### **Universities Rebel Against New Access Proposal**

When the existing license between the post-secondary education sector and Access Copyright expired, the parties turned to the Copyright Board of Canada to adjudicate a new arrangement. At the Board, Access Copyright proposed a significant fee increase, an expanded definition of copying to include electronic linking to digital material and, to enforce the new structure, an extensive surveillance system over campus electronic communications.

Access Copyright's proposal reflected a significant misjudgement of the mood at universities and colleges. In the face of anger from professors, librarians, students and their own copyright officers, many institutions withdrew from agreements with Access Copyright. Those that remained chose to vigorously pursue their legal options at the Copyright Board. These developments would have been unthinkable even a few years ago.

#### **Current Situation: Alternatives Gain Strength**

Over the last year academic institutions have united in opposition to Access Copyright. Among academic staff and students the level of awareness and activism around copyright has expanded exponentially. The overwhelmingly negative response to Access Copyright's proposal has seriously compromised the organization. Licensing opt-outs have reduced its cash flow. The rejection of its hegemony over institutional copyright policy has damaged its credibility.

Underlying this, the new alternatives to accessing knowledge (increased reliance on fair dealing, open access, site licenses) continue to strengthen. Legislation (Bill C-11 – *An Act to Amend the Copyright Act*) is before Parliament that expands fair dealing explicitly to include education and adds additional rights for educators to use copyrighted material. As well, a series of copyright decisions are also pending from the Supreme Court of Canada, decisions that will at least clarify the educational use of material and at best strengthen the rights of teachers, librarians and students.

#### **The Western and Toronto Agreements**

In this context, with Access Copyright on its heels, the administrations at the University of Western Ontario and the University of Toronto on January 30, 2012 signed a deal with Access Copyright for a new licensing arrangement that capitulated to Access Copyright's unjustified and harmful demands:

**Fees** - The agreements levy a \$27.50 flat rate charge against each full time student or equivalent. The existing flat rate was \$3.75. Students would traditionally pay an additional amount in per page fees for course packs, a levy that is being rendered increasingly irrelevant by fair dealing, open access

## BACKGROUNDER:

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and site licensing. In this context of increased rights to use copyrighted material, there is absolutely no justification for an increase in fees.

**Definition of Copying** - The agreements create new rights to the benefit of Access Copyright that do not exist in copyright law, specifically by defining copying to include “posting a link or hyperlink to a digital copy.” Given the Supreme Court of Canada’s recent ruling (*Crookes v. Newton*) that hyperlinks do not constitute the communication or publishing of content, this concession is, again, inexplicable and unacceptable.

**Duplication of Existing Rights** - Under the *Copyright Act* members of the academic community enjoy broad rights to copy works without permission or payment (fair dealing) and specific exceptions allowing, *inter alia*, the reproduction of works for archival purposes, classroom display and the creation of alternate formats of works to assist the visually impaired. On top of this, institutions also purchase site licenses that provide the right to use, copy and transmit materials. Astoundingly, the agreements reached by Western and Toronto require payment to re-secure these exact rights.

**Surveillance** - The agreements mandate the creation of survey instruments to monitor the particular works utilized on campus and the volume of that use. Because the agreements define copying to include transmission by electronic mail and storing, posting, displaying, uploading and linking to digital files, the survey instruments will require intrusive monitoring of professors, librarians, researchers and students that will violate academic freedom and privacy. The proviso in the agreements that the survey will respect privacy policies and academic freedom is risible.

**Content aside, the timing of the agreements is terrible.** As noted above Bill C-11, *An Act to Amend the Copyright Act*, will be passed by Parliament in the next several months. The legislation contains provisions directly relevant to the use of copyright at educational institutions, provisions that will strengthen the bargaining power of our sector with organizations such as Access Copyright. Similarly a series of copyright decisions are also pending from the Supreme Court of Canada. To have proceeded with an agreement prior to the conclusion of these legislative and judicial proceedings is beyond belief.

**The agreements are unnecessary.** Many institutions have wisely chosen to end their relationships with Access Copyright and pursue modern options for creating and distributing knowledge (fair dealing, open access, site licenses). Others have elected to continue the fight at the Copyright Board, seeking a just determination of the issues through a legitimate judicial process. In contrast, the administrations at Western and Toronto have “solved” their concerns by simply capitulating to Access Copyright, even in the face of manifestly better alternatives.

**The agreements undermine solidarity between academic institutions.** Across Canada a new culture of scholarly communication is being developed by the academic community, one reliant on innovative ways to create and access copyrighted works. This effort combines the ingenuity, determination and dedication of students, researchers, librarians and professors as well as administrative, technical and managerial personnel. In signing their agreements with Access Copyright, the University of Western Ontario and the University of Toronto have turned away from this collective effort, fearfully retreated to the past and undermined progress towards a better future for education in Canada.