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## FAIR ACCESS: Strikes the right balance on education and copyright



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### Emerging forms of access to copyrighted works is undermining the value of Access Copyright, argues Professor Michael Geist.

The role of copyright within the Canadian education system was once an issue of interest to a relatively small number of scholars, librarians, authors, and publishers. With limited means to copy and distribute educational materials, the primary battle was over payments for photocopies of works that were distributed to

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students. While there were always disputes over the amount of compensation and the scope of fair dealing, educational institutions ultimately paid Access Copyright (formerly Cancopy) millions of dollars.

Driven primarily by technology and the Internet, the landscape for copying and distributing educational materials has changed dramatically over the past 15 years. New technologies have enabled the creation of massive databases of electronic materials, with institutions gradually shifting much of their budgets to electronic subscriptions to enable access to a far larger collection of materials than many libraries could purchase on an individual basis. The emergence of open access publishing, which allows researchers to make their research openly and freely available on the Internet, has become the standard in many disciplines. Copyright law has also undergone a significant shift as the Supreme Court of Canada has emphasized the importance of users' rights and the need for a broad and liberal interpretation of fair dealing.

For Access Copyright, the changing landscape has caused both the copyright collective and its customers to rethink the value of its licences. Access Copyright's initial response was to adapt its photocopying licences to the digital world with new offerings that could better account for digital distribution. However, those proposed licences failed to recognize the alternative mechanisms available to educational institutions to ensure legal access to works. Rather than accounting for the diminishing value of the Access Copyright repertoire, the collective sought to dramatically

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increase the costs of the licence. Those early demands, which would have required educational institutions to shift millions of dollars from new acquisitions and database subscriptions to collective licensing fees, led to a re-evaluation of the necessity of Access Copyright throughout the Canadian educational community.

#### New forms of access

In light of alternative forms of access, the strong endorsement of fair dealing by the Supreme Court of Canada, and the Government of Canada's 2012 reforms that removed any lingering doubts about the application of fair dealing to all educational activities, the higher education community shifted en masse away from Access Copyright. The emerging alternative model provides access in several ways.

First, educational institutions continue to pay millions of dollars every year to publishers and authors for access to their works. For example, the Canadian Research Knowledge Network (CRKN), a partnership of 75 Canadian universities representing 1.2 million researchers and students, has entered into thousands of agreements with publishers to offer access to their members. Last year, CRKN spent over \$100 million in licensing fees for electronic content. Those licences provide access to an incredible array of electronic journals and primary source content in both the sciences and social sciences and humanities.

Second, higher education institutions spend millions more on their own site licences or on transactional licences that permit usage for specific works, while students still spend millions each year on books, whether paper or electronic. Although transactional licensing was long viewed as cumbersome and costly, the electronic environment has facilitated cheaper, faster licensing mechanisms that reduce overhead costs and allow institutions to ensure that payments are made where required.

Third, the emergence of open access publishing has enabled free access (as desired by the author) to millions of articles. According to a European Commission-funded report by Montreal-based Science-Metrix, more than half of all research publications in some countries and fields of study are now freely available online. The company found that countries such as the United States, Switzerland, Israel, and the Netherlands have all passed the 50 per cent mark for open access publication. Canada is on the verge of joining those countries, falling just shy at 49 per cent.

The shift toward open access becoming the default form of disseminating research in many fields is a remarkable change

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given that conventional publishing in expensive subscription-based journals was the standard in many areas of research as recently as ten years ago. The move toward open access means that global research is far more accessible to everyone—scientists, researchers, and the general public.

The availability of these licensed works (both paid and open access) are frequently incorporated into course materials at no additional cost to the student. In fact, institutions are paying for so many works that there is frequently a risk of double-payment. According to a Stanford University study in 2013, students were spending over \$100,000 on course materials that the university was already paying millions to license.

#### New copyright rules

Access Copyright and its supporters argue that in addition to the millions being spent on access to materials, Canadian educational institutions should pay millions more for an Access Copyright licence to compensate for copying that falls outside of these new forms of access. Canadian educational institutions would undoubtedly acknowledge that there are works being used that fall outside these new forms of paid access. The issue, however, is whether the usage qualifies as either insubstantial (a small amount that the law says falls outside copyright) or as fair dealing. If either apply, the copying is permitted by the law and no further compensation is required.

With the Supreme Court having issued several important fair dealing decisions, the government having enacted fair dealing reforms that expands its scope, and the Copyright Board of Canada having issued a clear endorsement of a broad approach to fair dealing in the context of copying by provincial government employees, there is no dispute that the value of an Access Copyright licence has declined in light of the law. Indeed, Access Copyright has acknowledged as much by reducing its rates to account for “market uncertainty around fair dealing in education.”

Where Access Copyright and the education community differ is in how much the law has changed. The Copyright Board of Canada, long a reliable ally of copyright collectives, ruled in 2015 that insubstantial copying constituted one to two pages of a work, not exceeding more than 2.5 per cent of the entire publication. In other words, where two pages are copied from a work of 80 pages or more, or one page is copied from a work of 40 pages or more, the copying is insubstantial and not compensable.

Fair dealing, which the educational community reasonably argues may cover up to 10 per cent of a work, lies on top of that. The

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Copyright Board rejected all of Access Copyright's key claims with regard to the applicability of fair dealing, painstakingly reviewing copy after copy to ensure that they were all fairly compensated. In fact, the Copyright Board even expressed reservations about the Access Copyright repertoire, noting that it may be claiming to represent works for which it does not have representative rights.

What comes next?

In light of the technological, marketplace, and legal changes, Access Copyright has endeavoured to update its public face. A refreshed website, a revamped governance structure, and revised licences are all intended to present a "new" Access Copyright. While the copyright collective speaks of a new era of partnership, it continues to rely on litigation and lobbying as the primary mechanisms to restore the relevance of its licence.

Despite resounding losses at the Supreme Court of Canada and before the Copyright Board, Access Copyright is pursuing litigation against York University over its copyright practices and seeking review of the Copyright Board's recent ruling. This continues a longstanding trend dating back to 2004 of dismissing the relevance of seminal high court decisions.

While Access Copyright battles in the courts, it can also be expected to increase its lobbying efforts to create new restrictions and limitations on fair dealing. The collective recently commissioned a study from PricewaterhouseCoopers (PwC) that supposedly confirms its claims about lost revenues in the publishing sector. Yet PwC acknowledged that it does not verify the information provided to it and disclaimed that "we provide no opinion, attestation or other form of assurance with the respect to the results of this Assessment." In fact, the report makes no reference to the 2012 Supreme Court of Canada *Alberta vs. Access Copyright* decision nor to users' rights, which now forms part of the foundation of Canadian copyright law.

Moreover, University of Toronto law professor Ariel Katz has comprehensively rebutted many of the economic claims upon which PwC relies. For example, notwithstanding claims of economic hardship from Oxford University Press, Katz notes that the publisher reports a tenfold increase in digital revenues and a string of new titles to help buoy sales.

The PwC "study", alongside more aggressive lobbying efforts, is likely aimed at entrenching the copyright term extension requirement found in the Trans Pacific Partnership agreement (that some estimate will cost Canadians billions of dollars), and placing fair dealing reform at the head of

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the line for the 2017 Canadian copyright review.

However, any review must account for the millions being paid by educational institutions for access and the modest interpretations of fair dealing law in Canada, which have resulted in copying guidelines that are still more restrictive than those found in some other countries. Indeed, a fair review of the current system reveals that the problem facing Access Copyright is not that copies are not valued, but rather that in light of new forms of access and the evolution of the law, its licence is no longer valuable.

Michael Geist holds the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, Faculty of Law. He can be reached at [mgeist@uottawa.ca](mailto:mgeist@uottawa.ca) or online at [www.michaelgeist.ca](http://www.michaelgeist.ca).

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