

Brief on the Copyright Review

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This is a personal brief and does not reflect the views of my employer.

One of my biggest concerns over many years is that the way reprographic copyright collectives (ie Access Copyright and Copibec) have been set up over the years puts Canadian education at a significant disadvantage compared to educational institutions in the United States.

There seems to be significant confusion in the way that the licences of reprographic collectives differ from the licences from publishers or aggregators. One example of this confusion comes from this quote from John Degen, Executive Director of the The Writer's Union of Canada:

You've recently heard from educational representatives that they continue to pay copyright licences. To be clear, they continue to pay some licences, mostly for expensive foreign journal content, but they are not paying the reasonable and affordable collective licences of Canada's commercial authors and publishers. Each year in Canada over 600 million pages of published work are copied for use in educational course packs, both print and digital, and the education sector is essentially claiming all of that work for free. That is the real world result of education's copying policies. (Standing Committee on Industry, Science and Technology, 2018)

Access Copyright is a reprographic collective. Its licence provides the right to photocopy (and in some cases digitally copy) books and journals. Access Copyright has reciprocal agreements with Quebec (Copibec), Hong Kong and with national collectives in 28 different countries. Access Copyright is a Canadian non-profit owned by 16 publisher & 18 author organizations. The collective makes disbursements to Canadian creators, to Canadian based publishers (both Canadian publishers and Canadian subsidiaries of foreign publishers) and to the other reprographic collectives with which Access Copyright has reciprocal agreements.

The Access Copyright licence allows an organization and individuals belonging to that organization to make copies of copyrighted works that are in AC's repertoire and to include copies (within the terms of the licence) in course packs. Access Copyright doesn't provide copies of those works. Unlike licences from large international publishers and aggregators, those works need to be purchased separately.

To understand Access Copyright fully I think that we need to go back to when it was a successful, money making operation. Creators (authors, illustrators, others) felt that publishers were getting too much of Access Copyright's income. Martin Friedland was commissioned to study the issue and came out with his report in 2007. (Friedland, 2007) The Friedland Report appears to be the only serious public attempt to explain how Access Copyright receives and distributes its money.

Before 2012, Access Copyright was earning significantly more money than the Copyright Clearance Centre (the US equivalent collective) from educational institutions. It was earning more because educational institutions were required to spend more in Canada. This put

Canadian educational institutions at a significant disadvantage compared to American educational institutions before 2012.

The [blacked out], informed me that the organization does not operate in the K-12 area, and that 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. This can be contrasted with the situation for Access Copyright 25 where, according to the publishers' recent submission to me 'close to 75% of Access revenue comes from educational licenses.' The difference in the percentages in the two organizations is because of the educational exemption in the United States. (Friedland, 2007) pp 24-5.

To take education away from fair dealing and to require Canadian education to pay significantly more for uses that would be covered by fair use in the US puts Canadian schools and educators at a significant disadvantage compared to US school and educators. In the not so distant past 75% of Access Copyright's revenue came from education compared to the 12% that the Copyright Clearance Center earned from education in the US.

Another issue with Access Copyright is that it was not a comprehensive licence and is not a comprehensive tariff. Unlike many European collectives, Canadian publishers and authors can opt out of coverage by Access Copyright. Foreign publishers and authors can opt out as well. Even though most publishers and authors from 28 countries are included, it isn't a comprehensive tariff. In theory, a teacher or a professor should check every single time that they use something to ensure the work is covered. If for example a scholar is teaching about Africa, the Middle East or Latin America, there is almost no coverage of publishers from those parts of the world. If educational fair dealing is narrowed and an Access Copyright licence does not cover large parts of the world, what can instructors rely on?

Access Copyright sends one fifth of its distributions to other collectives. Back in 2007, 60% of the one fifth went to the US Copyright Clearance Centre. None of that money would come back to Canada because when US educators use Canadian material they rely on fair use. According to (Friedland, 2007) p9

...Canadian subsidiaries of American firms send an even larger amount than Access Copyright sends to the Copyright Clearance Center to their US parent companies and its authors from the Access Copyright amounts the subsidiaries receive.

Because the whole arrangement is so opaque, we have no idea from either back in 2007 or now how much money (we only know that it appears to be significant) that Canadian subsidiaries were sending to their US parent companies? Nor whether other foreign publisher subsidiaries were doing the same? Establishing a mandatory Access Copyright licence or tariff will mean that significant amounts of money will leave Canada for other countries. If we want to support Canadian creators, surely there must be a way to do that does not have all the leakage of payments to foreign entities in the way that payment to Access Copyright does.

Another issue is that *Publishers do not provide any data to Access Copyright on what they pass on to creators. So, in the end, we cannot say with any certainty what the overall split is.* (Friedland, 2007) p12. If support to creators is the main issue, even Access Copyright doesn't know how contracts between creators and publishers affect revenue sharing. Members of INDU Committee repeatedly tried to find out how creators get paid. Those arrangements are hidden by non-disclosure agreements in contracts.

When Roanie Levy was testifying before the Heritage Committee about creator compensation, she made the following statement:

"International licensing exists for STMs and that they are not subject to Access Copyright licensing" (Copyright Brief: Canadian heritage committee steps into the ring for copyright review, 2018)

Just because Canadian universities pay lots of money to subscribe to publications from the big international STM publishers does not mean that Access Copyright does not also pay them. To use one large STM publisher as an example, Elsevier's parent company is jointly headquartered in both the Netherlands and the United Kingdom. Many of the Elsevier's largest journals are based from an editorial point of view in the United States. Access Copyright has reciprocal agreements with the national collectives in the Netherlands, the United Kingdom and the United States. Typically the terms and conditions negotiated in an Elsevier licence are at least as flexible as in an Access Copyright licence, but that doesn't mean that AC wouldn't end up paying Elsevier a second time if one of Access Copyright's surveys shows usage of an Elsevier journal.

Below is a screen shot from Access Copyright's Title Search & Permissions database showing that Access Copyright can sell rights to both the print and digital version of the Elsevier journal *Thermochimica Acta*:

Type

(1)

scholarly) (1)

Country

(1)

is (1)

(1)

(1)

)

Search
Advanced Search

Can't find the Publication you are looking for?

Viewing 1-2 of 2

Sort results by: Relevance ▼ Results per page

Thermochimica acta

1872762X Permissions

1970 | Netherlands | Elsevier Science | Journal (Scholarly) | Digital Format | In Print

Thermochimica acta

00406031 Permissions

Amsterdam | Elsevier | Magazine | Print Format | In Print
Science

Double payment for digital subscriptions can happen repeatedly because Access Copyright doesn't know the subscriptions; or the terms and conditions of digital subscriptions of universities. So foreign publishers and even domestic publishers can receive second payments from Access Copyright even when a digital subscription with appropriate rights has already been negotiated and paid.

An area where small academic publishers cannot keep up is in the digital realm. Willam Harnum (Standing Committee on Industry, Science and Technology, 2018) p 7 from the Canadian Copyright Institute testified that the demand for digital is flat:

The trend for going digital in the area that I know, certainly in my business, which is small scholarly publishers and the small university press and others, is definitely flat. We're not seeing an increase. Certainly, other people who have more experience in trade publishing than I do now can I think affirm that: we're looking at between 15% and 20%. That's been pretty much stable for the last several years, I would say.

That is simply not true. The demand for digital is growing steadily. Small academic publishers still have difficulty switching from print to digital. This is not a uniquely Canadian problem. That said maybe more work is required to find ways to financially assist small Canadian publishers in making the transition.

Making it more difficult for Canadian educators to use fair dealing in an educational setting will make Canada and Canadian schools, colleges and universities less competitive vis a vis the United States. This is not the time to reduce our competitiveness versus the Americans. Access Copyright is a very opaque organization. There are many problems with how its payments are structured and whether or not publishers (especially large international publishers) receive

double payment when an educational institution has already purchased a publisher specific licence that provides the necessary terms and conditions. If Canadian creators and small Canadian publishers need extra help at this time, there needs to be a better solution than pushing more money to Access Copyright.

Works Cited

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