Western University
Scholarship@Western

FIMS Presentations | Information & Media Studies (FIMS)

7-14-2010

Bill C-32 and the Access Copyright Tariff: Double Trouble for Educators and Students

Samuel E. Trosow
The University of Western Ontario, strosow@uwo.ca

Follow this and additional works at: http://ir.lib.uwo.ca/fimspres

Part of the Communication Commons, and the Library and Information Science Commons

Citation of this paper:
Trosow, Samuel E., "Bill C-32 and the Access Copyright Tariff: Double Trouble for Educators and Students" (2010). *FIMS Presentations.* Paper 4.
http://ir.lib.uwo.ca/fimspres/4

Bill C-32 and the Access Copyright Tariff:

Double Trouble for Educators and Students

presented by

Samuel E. Trosow,

Associate Professor, University of Western Ontario
Faculty of Information and Media Studies / Faculty of Law

strosow@uwo.ca http://samtrosow.ca

Presentation for Faculty of Information & Media Studies

July 14, 2010

In June the government tabled Bill C-32, proposed amendments to the Copyright Act. Following a consultation process, the Bill is widely recognized as more reasonable than its predecessor, Bill C-61.

However, the bill is still fundamentally flawed because of the predominance of it digital locks provisions. These provisions, based on the US Digital Millennium Copyright Act (DMCA), override many existing and proposed users rights.

Also this year, Access Copyright has filed a proposed tariff for the post-secondary education sector with the Copyright Board. This proposal includes not only a drastic increase in costs; but onerous new reporting requirements which will be burdensome and invasive for academic staff.

The digital locks provisions in the new Copyright bill together with the Access Copyright proposal spell ***double trouble*** for students and academic staff alike. This presentation will discuss some of the interrelated provisions of these measures and their implications for teaching, learning and research.

Problems with the Proposed Access Copyright Tariff

http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/2009-06-11-1.pdf

General Problems with Proposed Tariff

- Overbroad definitions (“copy” and “course collection”)
- Lack of exclusion for fair dealing
- Excessive and unjustified FTE assessment
- Limitations re TPMs
- Burdensome and invasive reporting/survey/audit provisions

Some Copyright Basics

For a more detailed presentation on Canadian Copyright law, see:

The Copyright Debate: Finding the Right Balance for Teaching Research and Cultural Expression (November 19, 2009)

Section 3: Owners exclusive rights in a work- includes the sole right. . .

- to reproduce the work (or any substantial part of it) in any material form,
- to publicly perform the work (or any substantial part of it)
- to communicate the work to the public by telecommunication,
- [various others sole exclusive rights in the work]
- and to authorize any of these exclusive rights

Overbroad definition of "copy"

"*Copy*" means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

(*a*) reproducing by a reprographic process, including reproduction by photocopying and xerography;

(*b*) scanning a paper copy to make a Digital Copy;

(*c*) printing a Digital Copy;

(*d*) transmission by electronic mail;

(*e*) transmission by facsimile;

(*f*) storage of a Digital Copy on a local storage device or medium;

(*g*) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;

(*h*) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;

(*i*) projecting an image using a computer or other device;

(*j*) displaying a Digital Copy on a computer or other device; and

(*k*) posting a link or hyperlink to a Digital Copy.

Overbroad definition of "copy"

"*Copy*" means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

(*a*) reproducing by a reprographic process, including reproduction by photocopying and xerography;

(*b*) scanning a paper copy to make a Digital Copy;

(*c*) printing a Digital Copy;

(*d*) transmission by electronic mail;

(*e*) transmission by facsimile;

(*f*) storage of a Digital Copy on a local storage device or medium;

(*g*) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;

(*h*) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;

(*i*) projecting an image using a computer or other device;

(*j*) displaying a Digital Copy on a computer or other device; and

(*k*) posting a link or hyperlink to a Digital Copy.

Overbroad definition of "copy"

"*Copy*" means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

(*a*) reproducing by a reprographic process, including reproduction by photocopying and xerography;

(*b*) scanning a paper copy to make a Digital Copy;

(*c*) printing a Digital Copy;

(*d*) transmission by electronic mail;

(*e*) transmission by facsimile;

(*f*) storage of a Digital Copy on a local storage device or medium;

(*g*) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;

(*h*) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;

(*i*) projecting an image using a computer or other device;

(*j*) displaying a Digital Copy on a computer or other device; and

(*k*) posting a link or hyperlink to a Digital Copy.

Overbroad definition of "course collection"

"*Course Collection*" means, for use by an Authorized Person as part of a Course of Study, and whether for required or recommended reading for the Course of Study or otherwise:

(*a*) assembled paper Copies of Published Works; or

(*b*) Digital Copies of Published Works that are emailed, linked or hyperlinked to, or posted, uploaded to, or stored, on a Secure Network.

Current Access Copyright Agreement

- online at <http://www.lib.uwo.ca/copyright/access/>
- 3 year agreement was to expire August 31, 2007
- Extended through August 31, 2010
- payments made in two parts
- first part is based on FTE for unidentified copying
- current annual rate is $3.38 per FTE
- second part is for identified copies in course packs
- current royalty rate is 10 cents /page
- Course packs defined narrowly as physical assembly of readings

CCH v LSUC broadens fair dealing. . .

". . . the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. . .

User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation." *paragraph 48*

"research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained.

paragraph 51

Current Canadian Fair-Dealing provisions

29. Fair dealing for the purpose of **research** or **private study** does not infringe copyright.

29.1 Fair dealing for the purpose of **criticism or review** does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of **news reporting** does not infringe copyright if the following are mentioned: (same as 29.1)

General Problems with Proposed Tariff

- Overbroad definitions (“copy” and “course collection”)
- Lack of exclusion for fair dealing
- Excessive and unjustified FTE assessment
- Limitations re TPMs
- Burdensome and invasive reporting/survey/audit provisions

Consent vitiates infringement.

Section 27. (1) It is an infringement of copyright for any person to do, without the **consent** of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Note: If the Library has already obtained a license to use materials directly with from the publisher or aggregator, then there is already **consent** and the further protection of the Access Copyright license is not necessary.

Check to see if publication is available through library catalogue – if so it should be excluded from course pack fee

Excessive and unjustified FTE assessment

Section 7. (1) The Educational Institution shall pay an annual royalty to Access Copyright calculated by multiplying the number of its Full-time-equivalent Students by the royalty rate of

(*a*) $45.00 CAD for Universities; or

(*b*) $35.00 CAD for all other Educational Institutions.

Overbroad definition of "course collection"

"*Course Collection*" means, for use by an Authorized Person as part of a Course of Study, and whether for **required or recommended** reading for the Course of Study or otherwise:

(*a*) assembled paper Copies of Published Works; or

(*b*) Digital Copies of Published Works that are emailed, linked or hyperlinked to, or posted, uploaded to, or stored, on a Secure Network.

Note that while there is not going to be a separate 10 cent a page royalty fee for the copies in these "course collections" . . . the reporting requirements will still apply

Overbroad definition of "course collection"

"*Course Collection*" means, for use by an Authorized Person as part of a Course of Study, and whether for **required or recommended** reading for the Course of Study or otherwise:

(*a*) assembled paper Copies of Published Works; or

(*b*) Digital Copies of Published Works that are emailed, linked or hyperlinked to, or posted, uploaded to, or stored, on a Secure Network.

Note that while there is not going to be a separate 10 cent a page royalty fee for the copies in these "course collections" . . . the reporting requirements will still apply

Lack of Exclusion for Fair Dealing

The current Access Copyright license contains an explicit exclusion for fair dealing....

3. This Agreement does not cover:

* * *

(c) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary;

and paragraph 4 adds:

4. By entering into this Agreement neither party is agreeing or representing in any way, either directly or indirectly, that the making of a single copy of all or a portion of a periodical article of a scientific, technical or scholarly nature and a single copy of a portion of any other Published Work, without the permission of the owner of copyright therein, is or is not an infringement of copyright.

The proposed tariff does not contain a corresponding provision

What is Copyright Infringement?

Section 27. (1) It is an infringement of copyright for any person to do, without the **consent** of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

- Refers back to the specific exclusive rights in section 3 (i.e. reproduction, public performance, authorization etc)
- Note that compliance with the terms of the Access Copyright license operates as **consent** within the meaning of sec 27(1)

Copyright FAQ | University of Waterloo - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://www.lib.uwaterloo.ca/copyright/

Most Visited Sun Java System LII - Canadian Le... Free Translation Online cPanel X GRAND

Copyright FAQ | University of Waterl...

University of Waterloo

uwaterloo.ca Search

University of Waterloo

Waterloo Copyright FAQ

Copyright

Waterloo Copyright FAQ

"In order to determine whether what you want to do is permissible, you therefore need to check that you comply **both** with the Copyright Act and with any agreements or licences covering that the work in question."

but were afraid to ask! The links
Canadian *Copyright Act* and how it

covers, how long it lasts, how you
terial and how it works

ple's copyright material in your

and UW-ACE and how to avoid

brary Loan & Photocopying)
want to photocopy something,
es or get an article through

ther printed courseware.

Who's available to help you with copyright issues at UW and other useful resources.

1. *Copyright Basics*

What are the laws and rules relating to using copyright at UW?

What does copyright cover?

Can I copy something not covered by Access Copyright?

* If you want to make copies of materials not covered by the Access Copyright licence and the material is not in the public domain, then permission must be obtained from the copyright owner before copying can be done .

York University , Copyright & You
<http://www.yorku.ca/univsec/documents/copyright/faculty.html>

Limitations for TPMs

Section 5(5): Nothing in this tariff authorizes any person to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate, impair, or otherwise circumvent a technological measure that restricts or controls access to, copying of, retention of, distribution, or transmission of a Repertoire Work.

Bill C-32: “flawed but fixable”

- major improvement over Bill C-61 -- contains clear improvements over current law (i.e. Fair dealing expansion)

- contains other reasonable compromises (notice and notice, statutory damage limitations)

- fundamental flaw is digital locks provisions --- virtually unchanged from Bill C-61

“*flawed but fixable*” Michael Geist

Section 41: definitions of TPMs

"technological protection measure" means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

"circumvent" means,

(a) in respect of a technological protection measure within the meaning of paragraph (a). . . to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless done with the authority of the copyright owner; and

(b) in respect of a technological protection measure within the meaning of paragraph (b) . . . to avoid, bypass, remove, deactivate or impair the technological measure.

Section 29 – Expansion of fair dealing

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

- falls short of the "such as" addition urged by many individuals and organizations – but still an important addition
- will be a main target of counterattack as the bill proceeds
- does not incorporate factors

Sections 29.21 - 29.24

29.21 (non-commercial user generated content)

29.22 (reproduction for private purposes)

29.23 (reproduction for later listening or viewing)

29.24 (back-up copies)

note various counter-limitations and counter-exceptions

- are these activities already permitted under fair dealing?
- implications of including counter-limitations in sec. 29?

Special Exceptions for Educational Institutions

30.01 (lessons)

30.02 (digital copies)

30.03 (royalty payments)

30.04 (Publicly available materials on the Internet)

note various counter-limitations and counter-exceptions

- are these activities already permitted under fair dealing?
- implications of including counter-limitations in sec. 29?

Section 30.04: the internet educational exemption

Same as provision in Bill C-61 previously supported by AUCC/CMEC/CARL/CFT and opposed by CAUT, CFS, CFHSS

Questions regarding need for section and potential problems are unchanged from Bill C-61

- Questions re consent
- TPM trumps any benefit
- Easy opt-out further weakens section
- Disparate treatment outside of institutional settings
- What is gained by section if educational fair dealing is added to Act?
- CMEC early indication of “support” for bill undermined opposition ?

Section 30.04: the internet educational exemption

Section (1): not a copyright infringement for educational institution to reproduce, communicate to public and perform in public (where public is primarily students) subject matter available on Internet

However, this exception is subject to several limitations

- (3) inapplicable if access to work or site TPM protected
- (4)(a) inapplicable to any use restricted by a tpm
- (4)(b) owner can easily opt out even w/o TPM by posting visible notice prohibiting act on the work or at internet site (no fishing sign need not be at pond)

CCH adopts fair dealing criteria

SCC adopts list of 6 factors. . .

- purpose of the dealing
- character of the dealing
- amount of the dealing
- alternatives to the dealing
- nature of the work
- effect of the dealing on the work

"*…a useful analytical framework to govern determinations of fairness in future cases*" (para 53)

Burdensome and invasive reporting provisions

6. (1) For each Course Collection made or made available under this tariff, the Educational Institution shall compile a record in a form set out by Access Copyright of

(*a*) Course of Study name;

(*b*) Course of Study code;

(*c*) Term start and end date;

(*d*) Number of Authorized Persons for the Course of Study;

(*e*) ISBN/ISSN for each Published Work;

(*f*) Title of each Published Work, article and chapter (if applicable);

(*g*) Publication Year or Volume Number for each Published Work (if applicable);

(*h*) Author(s) of Book/Chapter/Article (as applicable) for each Published Work;

(*i*) Publisher name;

(*j*) Start and end page Copied from each Published Work;

(*k*) Total number of pages Copied from each Published Work;
(*j*) Start and end page Copied from each Published Work;
(*k*) Total number of pages Copied from each Published Work; . . . [cont'd]

Burdensome and invasive reporting provisions

* * *

(*l*) Electronic address where a Published Work is being stored or can be accessed (if applicable);

(*m*) Direct licence from [publisher/aggregator name] (if applicable);

(*n*) Subcontractor making a Course Collection or making a Course Collection available (if applicable); and

(*o*) New Published Works added to the Course Collection in the reporting month.

With respect to emails, the Educational Institution shall only be required to compile the above records for Digital Copies emailed by or on behalf of a Staff Member.

Within 30 days after the end of each month, the Educational Institution shall forward the record in section 6(1) to Access Copyright..

Burdensome and invasive reporting provisions

* * *

(*l*) Electronic address where a Published Work is being stored or can be accessed (if applicable);

(*m*) Direct licence from [publisher/aggregator name] (if applicable);

(*n*) Subcontractor making a Course Collection or making a Course Collection available (if applicable); and

(*o*) New Published Works added to the Course Collection in the reporting month.

With respect to emails, the Educational Institution shall only be required to compile the above records for Digital Copies emailed by or on behalf of a Staff Member.

Within 30 days after the end of each month, the Educational Institution shall forward the record in section 6(1) to Access Copyright..

Burdensome and invasive survey requirements

Surveys

13. (1) Once every Academic Year, Access Copyright may advise the Educational Institution of Access Copyright's intention to conduct a bibliographic and volume survey of the uses permitted hereunder. Upon request by Access Copyright, **the Educational Institution will participate in the survey and will ensure that all Authorized Persons cooperate fully with the requirements of Access Copyright.**

(2) The Educational Institution shall give Access Copyright, on reasonable notice, right of access throughout the Educational Institution's premises, including full access to the Secure Network and all Course Collections, at any reasonable times, to administer the survey. Such access may be subject to reasonable arrangements for supervision as required by the Educational Institution to ensure the security of its premises, including its computer systems and networks, and to maintain the confidentiality of personal or other confidential data.

(3) If an Educational Institution unreasonably refuses to participate in the survey or otherwise does not comply with this section, the licences in sections 3 and 10 will cease to be in effect on written notice from Access Copyright until Access Copyright provides further notice that the deficiency has been remedied.

Burdensome and invasive audit requirement

Royalty and Compliance Audits

14. (1) The Educational Institution shall keep and preserve, for a period of six (6) Years after the end of the Academic Year to which they relate, records from which the royalties and reports due to Access Copyright under this tariff can be readily ascertained.

Section 30.02 - digital reproductions

- Allows digital reproduction and communication of a paper form of the same work
- applies only to educational institutions that have a reprographic license with a collective
- only applies to digital copies “of a paper form”
- limitations are substantial
  - (3)(a)pay royalty and comply with license terms
  - (3)(b) pay take measures to prevent the digital reproduction from being communicated to any persons who are not acting under authority of ed inst.
  - (3)(c) take measures to prevent person from printing >1 copy
  - (3)(d) take other measures prescribed by regulations
  - (4) owner can “opt-out”

Section 30.03 - royalties for digital reproductions

- provides for overage and underage in case of later license or tariff
- important [implicit] issue here is the massive record keeping requirement
- While this section seems innocuous on its face, it assumes a certain model of payment that may not be consistent with educational fair dealing

When you look at the relationship between what is in the Proposed Tariff and what is in the Bill, these are being carefully orchestrated.

Which is why I call it . . .

Double Trouble for Educators and Students

Some Rights Reserved
This presentation is licensed under a Creative Commons License, although certain works referenced herein may be separately licensed.

http://creativecommons.org/licenses/by/2.5/ca/