A brief history of Access Copyright

Collective licensing is as deserving of a place in modern markets as any other business model but our current situation is troubling.

Access Copyright describes its purpose as "to protect the value of intellectual property" owned by authors and publishers "by ensuring fair compensation when their works are copied". Value is an interesting concept – value can increase by market-demand. Value can also be artificially elevated by restricting supply. What concerns me is that Access Copyright is able to control both axes. How did we get into this mess?

The situation now is almost surreal. How did a single organization manage to monopolize both their supply chain (the authors and publishers who produce the works) and an entire market (the educational community of English Canada).[1] An answer to this question doesn't make the situation more palatable, but there's comfort in knowledge.

What we are seeing today is an outcome of a series of events that began prior to the formation of Access Copyright. Canada did not always have the robust presence of copyright collectives that exist today. The practice of collective licensing was very modest in the early 20th century; the profusion of collectives came after 1988 via some government prodding.

To encourage collective formation to manage the selling and enforcement of intellectual property, the Government of Canada offered an incentive – the 1988 amendments to the *Copyright Act* included an exemption for collectives, from the *Combines Investigation Act* (Wilkinson et al, p.4; Friedland 2007; p.17). This was legislation that endeavored to keep market places competitive and free from the manipulation that can occur when industry players band together. Since then the *Combines Investigation Act* has been replaced by the *Competition Act* (which still frowns upon collusion.)

With the 1988 changes came the enhanced role of the Copyright Board. The Board is a semi-judicial economic regulatory body. Margaret Ann Wilkinson has pointed out that, despite the increasing importance of the Board, there is very little literature about it (Wilkinson 2011, p.513). The board provides a comfort zone for collectives; if collectives are not satisfied with the outcome of negotiations with licensees, the collective can approach the Board and propose a tariff. The Copyright Board will adjudicate as to what royalties should be paid when copyrighted works are licensed by collective societies.[2]

With such governmental support, under the former name of Cancopy, the collective was born. Their first licensing revenue came in 1992 in the form of $2 million from a license to the Ontario Ministry of Education. Almost immediately, the problem of costs loomed large – simply trying to estimate what was being copied ran to 50% of the licensing revenue. But a greater problem soon arose – the demand by publishers that they be

[1] The province of Quebec operates with a different collective, Copibec.
[2] Laura Murray and Sam Trosow have indicated that the outcome may be not be precisely what the collective requested but tends in that direction.

excused from the distribution obligations set by Cancopy. At the outset Cancopy had proposed a split of royalties for 50/50 between writers and educational publishers, and 65/35 favouring writers for all other genres. The publishers threatened to walk away, if they were not permitted to set their own distribution arrangements with their writers. The Cancopy board "caved in to this pressure (Friedland 2007, p.18-20)."

After these tumultuous early years, the outlook improved considerably. Howard Knopf has written about these events and describes the role that government contracts played in setting Cancopy on its feet. But Cancopy's real clout, on the post-secondary landscape, came in 1997 through copyright amendments that were also known as Bill-C32:

> … many of these changes were drafted by Cancopy, or with Cancopy in mind, and reflect an extraordinarily successful effort at lobbying and regulatory capture of a very willing and uncritical bureaucracy (Knopf 1999, p.116).

This was the time when specific exceptions for nonprofit educational institutions came into being.[3] But the long-term gain for Cancopy was that some exceptions were only available to educational institutions if they participated in a collective licensing agreement. One such exemption related to immunity in the use of freestanding photocopiers. Another had to do with limiting the statutory damages that could arise from copyright infringement. It was a brilliant effort on the part of Cancopy – to lobby for a law that encouraged institutions to sign up for the only collective licensing agency available.

And, the post-secondary community received a comfortable deal. Cancopy offered what was an easy-to-administer contract – an inexpensive flat fee per fulltime student where no accounting of copying was needed plus a page charge for coursepacks (which are easier to track). The fact that no accounting was needed for that flat-fee could have raised the question of: how will Cancopy know whom to give the money to? But that was not a concern to the postsecondary community; a fee per student is easy to offload onto students.

And the final lure to the post-secondary community was the appearance of broad-based safety. Cancopy did not license material outside of its own repertoire but offered indemnity to institutions should outside material end up being copied. In such a situation, Cancopy would send the payment to that copyright holder and take the risk for the institution. However, "since Access Copyright has no control over the actions of rights holders who are not members or not affiliated with it in any way, it could not prevent such rights holders from bringing action … (Wilkinson, 2011, p.520 n43)."[4]

Access Copyright's capture of the market is now somewhat explicable: the encouragement by way of the 1997 amendments, the illusion that safety could be bought, and an-easy-to-administer deal. Over the years, rates would increase and reporting

[3] Including the memorable right to copy material onto white boards …
[4] See also Friedland, 2007, p.9.

become more onerous but little resistance was offered from the post-secondary community.

In terms of the supply chain; Access Copyright had already appeased the publishing community – publishers could set their own contractual overrides with their writers and still benefit by Access Copyright's broader reach over the post-secondary market.

And what about the writers? Were they wanted? I expect so – expanding the inventory of licensable material is part of the business model. I would also like to believe that the principals involved in Access Copyright had some genuine desire to help writers. But, it is hard not to be cynical given that writers have served as a valuable political shield for the publishing sector for 300 years. In 1710, the Statute of Anne marked the introduction of copyright as we know it. It was an early step to open the book publishing market in England; to set some boundaries against the monopoly practices of the establishment. But those publishing houses that saw their control of the market diluted made concerted efforts to modify the effects of the law, and, apply their own interpretation of what copyright actually was. An effective prop for their agenda was the starving writer. And writers supported the lobbying efforts – this is not surprising – it was a means of trying to achieve better remuneration for them.

Add to that, the Canadian situation. Copyright has been wrapped in the maple leaf for a very long time. The political argument is that without strong copyright, our writers, musicians and artists will be insolvent. They will not practice their talents, meaning they won't articulate our culture and hence our very identity is at stake. In this atmosphere, anyone who argues for moderate copyright, or a liberal interpretation of exceptions, is at best unpatriotic, at worst, an extremist.

Yet for all the arguing that copyright is the salvation of the arts, it remains that copyright only serves people if their work has appeal in a market. This is an uncomfortable reality. Strictly speaking, if writers join Access Copyright and their work is not copied, the writers would not receive financial remuneration. However, Access Copyright offered every writer a yearly cheque of $500, regardless of the size and known use of the repertoire.[5] That practice bought Access Copyright much loyalty among writers and some measure of forgiveness.

And the forgiveness was needed. Writers are aware that Access Copyright represents publishers and writers, and that the two parties have competing objectives. Tensions with the writers' community became pronounced in 2005; a few writers' groups informed Access Copyright that: "If creators are to continue to support Access Copyright then the

[5] "All the funds allocated to creators that cannot be specifically identified by full reporting or sampling go into the creators' repertoire fund. The sum is then divided equally amongst all of the creator affiliates – each person receiving about $500 a year. There is no distinction between affiliates in different genres. There is also no distinction between persons who have a large repertoire available for photocopying and those with a very small repertoire. Similarly, no distinction is made between those whose work frequently shows up in full reporting or sampling and persons whose work never shows up. Each affiliate receives exactly the same amount (Friedland 2007, p.11)."

licensing agency must distribute revenues in a fair and equitable way (The Writers Union of Canada et al, cited in Friedland 2007, p.2)."

In response to these concerns the Access Copyright Board of the day undertook a review of their distribution policy and methodology. This culminated in the Friedland Report which was presented to the board in 2007 and made publicly available a year later.

In the report Martin Friedland, professor emeritus from the law faculty of the University of Toronto, identified himself as a Board member. That did not impede his review; he was very critical of operations at Access Copyright, in part because it was not clear even to the staff as to what was going on. He wrote:

> The present distribution scheme is extremely complicated and I found it surprisingly difficult to understand how the system worked. I have undertaken a number of other public policy studies over the years, including such reasonably complex topics as pension reform, securities regulation, and national security, and have never encountered anything quite as complex as the Access Copyright distribution system. It is far from transparent (Friedland 2007, p.5)

Greater transparency was the first of twenty recommendations made by Professor Friedland. Some recommendations have been acted upon.[6] And in 2010 Access Copyright addressed the challenge of the uniform payment to all writers. While this pleased some writers, invariably others were annoyed.[7]

However, the writers are not just concerned about money. This year, at the Annual General Meeting of The Writers Union of Canada, a motion was passed recognizing:

> … that collective licensing of copyright is a vital interest of the creator community, but that creators receive an inadequate share of the revenues of Access Copyright and *are unable to control how the copyright income raised in their name is managed* (emphasis mine).

It is not at all evident that Access Copyright is fulfilling its own mandate.

If Access Copyright was entirely a private sector operation then it would be well within its purview to tell us all to get lost – that they will succeed or fail by their own decisions and the will of the market. Fair enough. But Access Copyright is not entirely a private sector operation. Its very existence required a safe-haven clause from Parliament. And, Access Copyright has not subjected itself to the will

[6] In the officially released copy of the Friedland report, Access Copyright sought to explain how the Board has responded to Prof. Friedland's findings/recommendations. It appears that four recommendations were formally supported; and the Board indicated further study was forthcoming for a number of others. Yet, no further reviews appear to have been carried out; it is unclear if matters have significantly improved. See also *Creators Access Copyright* <http://creatorsac.blogspot.com/.>

[7] "Previously, repertoire payments were shared equally between all eligible creators whether you published one short story or wrote dozens of novels. In 2010, Payback replaced the old Creator Repertoire payment. Payments under Payback vary depending on how much you have contributed to the repertoire of works that are licensed by Access Copyright (Doreen Pendgracs cited in AC Annual Report 2010, p.9)."

of the market. Instead it has worked diligently to have the educational market expanded and reserved in its interests.

As existing license agreements with the post-secondary community were nearing expiration, in March 2010 Access Copyright filed a proposal with the Copyright Board of Canada requesting a change in the ambit of licenses and rate of royalty fees, to take effect January 2011. Their proposal raised some concerns; three in particular:

1) The fee and its structure. Access Copyright requested a fee of $45 per full-time university student ($35 for colleges). In return, institutions are permitted some copying of repertoire (set by quantity) in both paper and digital form. This is markedly different from the previous arrangement which was composed of a rate of $3.38 per fulltime student plus a ten cent per page surcharge for materials assembled in coursepacks.

The $3.38 base charge was set in 2006-2007 and continually extended. An increase commensurate with inflation would not have been unreasonable. But Access Copyright's rationale appears to be that digital copies are more valuable than paper. (This is an overt generalization – value is a contested word.) But doing away with per-page fees serves Access Copyright well; under this proposal, payment is collected on all students, whether or not coursepacks are actually used.

It is questionable as to whether coursepacks are used uniformly across all disciplines.[8] Even if that was the case, circumstances have changed. Consider the proliferation of open access journals and creative commons material. Or the ease of accessing works whose copyright term has expired. And the practice of the journalism industry to publish material on publicly available websites. There is every reason to believe that the post-secondary community has less need for Access copyright licenses, which in a true market operation might have lead to a price decrease.

2) The second concern was the degree of surveillance that would be imposed upon educational faculty and staff. Emails in relation to course activity could be reported to Access Copyright; and post secondary institutions must provide Access Copyright with an annual right of access to university secured network systems.

3) And finally, the proposal contained an astounding attempt to redefine copyright without the involvement of Parliament. The definition of "copy" was deemed to include: "Posting a link or hyperlink to a digital copy." Since its inception, copyright has been firmly rooted upon acts of reproduction. It is quite literally the right to copy. Posting a link does not involve copying the material.

Why is all of this happening? It's no secret that since the fall of 2009, the Government of Canada has been planning amendment of the Copyright Act. And since the Supreme Court *CCH Canadian decision* of 2004, there have been calls that the Act should emulate the position taken by the Court. Access Copyright no doubt wanted to lock up the next few years of licensing fees before this happened, and the post-secondary community saw

[8] "$16 textbook," *Fair Duty*

advantage to waiting. This is somewhat mystifying; if the *Copyright Act* were to follow the lead of the Supreme Court, the Act will never sanction rampant copying nor should it. Making fair dealing slightly more amenable to the educational community does not in and of itself turn campuses into copyright-free zones. But, educational institutions could be forgiven for this erroneous interpretation, since this message has been loudly trumpeted by none other than Access Copyright itself. Since 2004, through the public consultation, and after Bill C-32 was announced, Access Copyright has consistently sought to undermine the *CCH Canadian* decision declaring that any effort to broaden fair dealing seriously threatens the wellbeing of writers.

References

Access Copyright. *Annual Report 2010*.

Access Copyright Annotated Friedland Report (2008) <http://www.accesscopyright.ca/media/1795/FriedlandReport.pdf>

Access Copyright. *Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire* (2010).

Copyright Board of Canada. *Annual Report 2009-2010.*

Creators Access Copyright <http://creatorsac.blogspot.com/>

Friedland, Martin L. *Report to Access Copyright on the distribution of royalties* (2007). <http://www.accesscopyright.ca/media/8359/access_copyright_report_--_february_15_2007.pdf>

Knopf, Howard. "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?" (1999) 14 Intell. Prop. J. 109.

Murray, Laura and Sam Trosow. *Canadian Copyright – A Citizen's Guide*..(Toronto: Between the Lines Press, 2007)

Wilkinson, Margaret Ann. "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries," in *In the Public Interest: the Future of Canadian Copyright Law* ed. Michael Geist. (Toronto: Irwin Law, 2005)

-------- "Copyright, Collectives and Contracts: New Math for Educational Institutions and Libraries," in *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda,* ed. Michael Geist (Toronto: Irwin Law, 2010).

Wilkinson, Margaret Ann; Dalton, Joan and Victoria Owen. (2011). *Collective Rights Management of Copyright in Canada* presented at Ontario Libraries Association SuperConference: 4 February 2011.