UPDATE ON ACCESS COPYRIGHT

FOR INFORMATION

At the time of the last meeting of P&F, the Committee was advised that administration was involved in discussions with the University of Toronto and Access Copyright to reach agreement on a license that would remove Western (and U of T) from the current proceedings before the Copyright Board of Canada, in which AUCC, on behalf of Canadian universities, is contesting a proposed tariff, in which the Copyright Board would essentially impose licence terms based on evidence presented as to the nature and extent of copying in the post-secondary sector.

On January 30, 2012 Western and U of T reached agreement with Access Copyright and a licensing agreement covering the period from January 1, 2011 to December 31, 2013 was signed. The essential terms of the agreement are as follows:

Commencing May 1, 2012, Western will pay Access Copyright a licensing fee of $27.50 per FTE (of which $25.00 will be passed on to students) for the rights to copy (both in print and digitally) works that are part of the Access Copyright repertoire in accordance the express terms set out in the Agreement;

For the period from January 31, 2011 to April 30, 2012, Western will pay only the amount it was required to pay under the Interim Tariff imposed by the Board, and will not be subject to any retroactive payment under this agreement, or any retroactive assessment by the Copyright Board;

Access Copyright agrees that it will not require Western to participate in the survey of copying that is to be ordered by the Copyright Board as part of the ongoing proceedings involving AUCC;

Access Copyright, U of T and Western will form a working group to develop a survey methodology sufficient to allow Access Copyright to determine how to distribute royalties amongst its members, and to allow an assessment of the extent to which we are using materials that are subject to the licence.

The Agreement (and more specifically the survey) is to be administered in a manner that respects principles of privacy and academic freedom.

It was deemed appropriate to enter into this agreement for the following reasons:

The litigation before the Copyright Board would likely have dragged on for another 3-4 years, leaving Western exposed to increased litigation costs, risks associated with retroactive payments, and participation in a survey process that was likely to be intrusive and time consuming;

Recent interim decisions of the Copyright Board suggested that there were certain risks associated with “opting out” of the Access Copyright regime altogether, which was an alternate strategy being considered;

Experience of some other universities that have chosen the “opt-out” alternative indicates that it is a much more expensive process than anticipated, and still carries a risk of retroactive assessment;

The agreement is short term – we can terminate it effective December 31, 2013 in the event that there are developments (e.g. changes in copyright law, new information regarding usage) that would affect its value;

While it represents an increase in the fees being paid to Access Copyright (approximately $18.00 per FTE under the previous arrangement), it also grants additional rights in the area of digital copying and is consistent with licences and tariffs in similar jurisdictions. In Quebec, universities currently pay approximately $25 per FTE for a licence that has fewer rights in the area of digital copying. In the K-12 sector, the recent tariff imposed by the Copyright Board represented a doubling of fees paid under the previous arrangement.

Initial reaction to the Agreement by CAUT and others raised concerns on the part of some faculty that we would be conducting “surveillance” of faculty e-mails as part of the survey process, and that we had inappropriately conceded that certain practices (e.g. hyperlinking) were subject to licensing fees. The Agreement specifically provides that the survey is subject to the principles of privacy and academic

freedom, and will be undertaken using methodology that has been mutually agreed to. Also, the Provost has expressly stated that there will be no e-mail surveillance as part of the survey process. While hyperlinking and other practices are included in the definition of copying under the Agreement, there is also a provision that expressly states that we do not agree that those practices are subject to licensing fees. Concerns have also been raised about secrecy during the negotiation of the Agreement and lack of consultation. Confidentiality was essential during negotiations because of the ongoing litigation.

The following steps have been taken to implement the Agreement:

We have met with and responded to concerns raised by UWOFA, the USC and SOGS;

We have refunded the appropriate portion of the contingent $30 fee that had been collected to cover the potential of a retroactive assessment;

We have begun discussions with Access Copyright regarding the survey;

We have formed an implementation group, consisting of representatives of Faculty Relations, the Libraries, the Book Store, ITS and the Teaching Support Centre to deal with any issues that might arise during the course of implementing the Agreement;

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SOCIETY OF GRADUATE STUDENTS
THE UNIVERSITY OF WESTERN ONTARIO

UNIVERSITY SECRETARIAT
MAR - 7 2012
U.W.O.

February 15, 2012

To: Western University Board of Governors

This letter is intended to express the collective dissatisfaction of the graduate students at Western University with the Licence Agreement that the University has signed with Access Copyright.

While the University has a duty to ensure that copyright law is respected and that authors and publishers are fairly compensated for materials used in the course of educating students, the university also has a corresponding duty to the users of educational resources to ensure that their rights are protected as well. The agreement fails to achieve this balancing, as it is a very one-sided concession to Access Copyright, which fails to take into account the rights and interests of faculty, staff and students at this University.

The agreement imposes an undue burden on students. In addition to the arbitrary selection of $27.50 for the per/FTE fee, the agreement expands the definition of "copy" well beyond what is currently recognized by the Canadian Copyright Act, and it also raises substantial concerns about the scope of the ultimate audit/survey. By including hyperlinks and e-mails within the definition of "copy," the concerns, that the agreement is potentially privacy-invasive and destructive of intellectual freedom, are substantial and real.

By working in secret with Access Copyright to come to the terms reflected in this agreement, the University has violated our confidence and trust. Sadly, the agreement has been signed at a time when significant and highly relevant issues are before the Supreme Court of Canada which will shed light on many of the uncertainties surrounding fair dealing in Canada. As well, the federal government is moving quickly to enact a revised Copyright Act, which is also likely to include revised provisions concerning fair dealing for the purpose of education. Given these upcoming events, there was good reason to wait rather than execute an agreement that effectively marginalizes students' fair dealing rights.

As the University is well aware, based on the comments made by student groups at the provost-initiated Access Copyright Working Group, this agreement is against the express wishes of both undergraduate and graduate students. Despite the fact that Universities across Canada have been working together to resist the Access Copyright's onerous tariff application at the Copyright Board, Western University, along with the University of Toronto, has chosen to break this solidarity. This will have a significant and detrimental effect on the other institutions that are continuing to defend the legitimate right of educators and students to teach and learn without the imposition of onerous copyright-related restrictions. By its actions, the University is also compromising the integrity of the teacher-student relationship which SOGS members are particularly sensitive to since we act in both capacities.

The University needs to appreciate the harm that will be caused by this licence agreement and to reconsider its relationship with Access Copyright.

Regards,

Saidur R. Chowdhury, President
On behalf of SOGS Council
2011/2012