

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2011-04-07

Citation File: Reprographic Reproduction 2011-2013

Regime Collective Administration in relation to rights under sections 3, 15, 18 and 21
Copyright Act, ss. 66.51 and 70.15(1)

Members Mr. Justice William J. Vancise
Mr. Claude Majeau
Mrs. Jacinthe Th  berge

Proposed Tariffs Considered Post-Secondary Educational Institutions – 2011-2013

Interim Statement of Royalties to be collected by access copyright for the reprographic reproduction, in Canada, of works in its repertoire

Reasons for decision

[1] In the December 23, 2010 decision issued in the above-referenced matter, parties were invited to suggest changes to the interim tariff that may prove useful or necessary. The following provides a short explanation of how we deal with the changes so proposed. We do not address some of the issues already disposed of in the reasons for the December 23 decision.

I. INSTITUTIONS TARGETED IN THE INTERIM TARIFF

[2] Some Objectors proposed that the interim tariff target only not for profit educational institutions. To so limit the tariff would be ill-advised. Other institutions are targeted by the proposed tariff; they need an interim tariff just as much as do members of the Association of Canadian Community Colleges (ACCC) and the Association of Universities and Colleges of Canada (AUCC).

II. THE INTERPLAY BETWEEN AGREEMENTS AND THE INTERIM TARIFF

[3] Access asked that agreements between parties override the interim tariff on administrative matters. The Objectors agreed in part. ACCC and AUCC stated that unless agreements are in

writing and made after the date the interim tariff came into force, it will be difficult for the associations to advise their members on those matters. Access replied the proposed limitation would create problems, as some institutions already operate under unwritten alternate arrangements. Athabasca asked that the tariff expressly allow for transactional licences.

[4] We have added to the interim tariff a section 30 that states what ought to be obvious. In the general regime, agreements trump tariffs. Though Access suggested an amendment limited to administrative matters, we have formulated the provision in more general terms so as to reflect the principle we just outlined. This makes it unnecessary to deal specifically with a number of other matters that the parties wish to be governed by agreements between Access and Institutions where possible or helpful.

[5] The associations' fears of having to explain or keep track of numerous side deals are not relevant. A tariff is designed for the benefit of users, not the associations representing them.

III. DEFINITION OF FTE

[6] Access asked that the definition of full-time equivalent (FTE) be amended to allow for individual agreements and to ensure that the language of paragraph (B) track the language of paragraph (A). We make the second change. The first change becomes unnecessary with the addition of section 30.

IV. PRINT MUSIC

[7] Access proposed changes to account for the fact that the interim tariff does not allow Institutions to copy music. Deleting paragraph 2(c) from Schedules C and D is necessary. Reinstating paragraph 3(o) of the model licence, which excludes certain types of print music, is not necessary since paragraph 1(k) plainly excludes musical works from the definition of published work.

V. ALTERNATE FORMAT COPIES AND MICROFICHES

[8] ACCC and AUCC asked that the Board clarify whether Institutions can make alternate format copies and microfiches. According to them, the deletion of provisions setting the royalties payable for those copies has created uncertainty. Access restated that it does not wish to receive payment for those copies, adding that it was willing to remove the associated reporting requirements.

[9] The interim tariff authorizes alternate format copies and microfiches and sets no price for those uses. Nothing could be clearer. Section 12 is amended to remove the reporting requirements for those copies as proposed by Access. The record-keeping requirements remain for the reasons that no one opposed them and that this will allow the Board ultimately to decide whether sufficient such copies are made to justify keeping track of them.

VI. COMMUNICATIONS WITH STAFF AND STUDENTS

[10] Some Objectors asked that section 10, which requires an Institution to keep Access informed of communications that mention Access, be removed. Access does not object. The section is deleted.

VII. POSTER

[11] Section 10.1 provides that failing an agreement on the issue, an Institution is to affix near copying devices the information poster most recently used pursuant to a licence. ACCC and AUCC argue that these posters do not reflect the content of the interim tariff and ask that the content be either agreed upon by the parties or, in the absence of an agreement, decided by the Copyright Board on application. Access does not object. The provision is so amended.

VIII. ACADEMIC VS CALENDAR YEAR

[12] ACCC and AUCC alluded to possible difficulties in dovetailing a tariff that must be set for one or more calendar years with the parties' intent to tie royalty calculations to the academic year. We agree with Access that, for the time being, the only way to reflect the reality of the environment in which Institutions are operating is for Access to invoice them according to the academic schedule and that section 15.1 already accomplishes this. The addition of section 30 will serve to confirm that in these matters as in others, agreements will prevail over the terms of the tariff, making it unnecessary to further address the issue at this time.

IX. LIMITS ON COPYING

[13] Access asked that the interim tariff be amended to reflect that its proposed tariff increases the amount of a work that users can copy in coursepacks from 15 to 20 per cent. ACCC and AUCC objected to this. They argue that a deviation from the *status quo* would require reeducating Institutions on new limits, causing confusion, especially since Access has already forwarded an email to Institutions informing them that the interim tariff allows them to operate under the same guidelines as before. We disagree with the Objectors. Increasing the limits does not mean that Institutions must take advantage of the added flexibility. As for the information on copying limits already circulated by Access, it will no doubt be corrected in due course.

[14] As Access requested, Schedule D is amended by substituting "20" to "15" in the introductory paragraph of section 2 and by deleting section 8. Paragraph 2(f) also is deleted, since the increase in the copying limit makes it redundant.

X. SAMPLING SURVEY

[15] AUCC argued that the interim tariff should not allow sampling surveys since none was ever conducted. Access conceded the point but maintained that, given the time it might take to certify

a final tariff in this matter, the ability to conduct a survey may be critical to its ability to distribute royalties. We agree with Access. The relevant provisions will remain the same.

XI. EXCLUSIONS LIST AND REPERTOIRE LOOKUP TOOL

[16] The interim tariff allows Institutions to make analog copies of any work, whether or not in the repertoire of Access, unless that work is identified in an exclusions list. Access submits that the list is outdated and does not always easily allow a user to determine in a timely manner whether a work is covered by the tariff. Access is developing an online lookup tool. It asks that it be allowed to select one or the other tool.

[17] The Objectors challenged this position on two fronts. First, they argued that the optional digital licence offered in Schedule G is of no use without access to a complete, up to date list of the repertoire which can be copied under that schedule, especially since the indemnity clause does not apply to the optional licence. According to them, the proposed lookup tool is impractical. It is more convenient and workable to consult a repertoire list. Second, they asked that the exclusions list be maintained, if only because it is a tool familiar to the targeted users.

[18] Access replied that the responsibility to determine whether a licence is needed and who can issue it is the Institution's, not the collective's, even if a list or lookup tool is provided. Furthermore, providing every professor, librarian and administrator with a PDF copy of an exclusions list is not more convenient or practical than providing a link to a searchable web-based tool. Finally, posting a list of the licensable repertoire is not the only way for Schedule G or any other part of the tariff to function. The repertoire is dynamic, making it impossible to provide a definitive list of what is in it.

[19] We agree on the whole with Access. Providing a complete, up to date list of the repertoire's content is impossible. In the end, it is always up to users to take the necessary steps to obtain the permissions they need. Tools that are made available to facilitate the users' decisions should not bind the collective, subject to the following.

[20] The exclusions list and a repertoire list or lookup tool do not serve the same purpose. The first is needed where an indemnity is offered. A lookup tool is helpful when the opposite is true. When both scenarios arise, one cannot replace the other.

[21] Copies made otherwise than pursuant to Schedule G benefit from an indemnity clause. That clause cannot operate without an exclusions list, whatever form it may take. What is not mentioned in that list can be copied pursuant to the tariff. For those purposes, the tariff provisions concerning the exclusions list should remain as they are.

[22] The indemnity clause does not apply to Schedule G copies. For those copies, the exclusions list is of limited utility. However, we see no need to require Access to provide a lookup tool or

repertoire list for Schedule G copies at this stage, in part because it is up to users to determine the uses for which they need a licence, and in part given that the Objectors were so insistent that they did not need the digital licence in the first place. However, we do encourage the parties to cooperate in developing tools that will be of assistance to the Institutions in determining what Access can licence pursuant to Schedule G.

[23] Athabasca asked that all open access resources (also referred to as open educational resources) be removed from any list. For the reasons given by Access and already stated, this is impossible.

[24] ACCC requested that Access be ordered to have available online whatever tool may be used to determine what is in its repertoire by February 28, 2011. We agree with Access that imposing such arbitrary deadline is counterproductive.

XII. DIGITAL COPYING (SCHEDULE G)

[25] Section 29 of the interim tariff offers Institutions an option to licence the making of digital copies pursuant to Schedule G. The parties proposed a number of changes to the schedule most of which we make. Section 1 is amended to limit the ambit of the schedule to copies of published works in the repertoire. Subsection 3(3) is amended to clarify the forms of public access that are not allowed pursuant to the schedule. All payments and reporting requirements for digital copies are removed (the Note to readers preceding the tariff is modified to reflect this). Several amendments are made to clarify the interface between the schedule and the main tariff.

[26] Section 5 of the tariff, which deals with the exclusions list, was not mentioned by Access as part of the provisions that should not apply to digital copies made pursuant to Schedule G. Since the list does not apply to these copies, we added the provision to the list of exclusions.

[27] Section 29 of the tariff sets dates by which an Institution must elect whether or not to licence digital copies pursuant to Schedule G. Access proposed that the provision allow for elections at other dates if Access and an Institution so agree. Such a proviso becomes unnecessary with the addition of section 30.

A. DECISION

[28] The applications to vary the *Access Copyright Interim Post-Secondary Educational Institutions Tariff, 2011-2013* are granted in part. The interim tariff is amended as follows.

[29] The second paragraph of the Note to readers is replaced by the following:

Section 29 gives every institution the option to licence digital copies pursuant to this tariff if it so wishes. The conditions for such a licence are set out in Schedule G. Digital copies made pursuant to this Schedule ~~section 2(a)~~ attract no additional royalties for the time being; ~~the~~

~~FTE rate remains the same as before. The current rates and terms for coursepacks, licensed pursuant to section 2(b), will also apply to their digital equivalent known as “course collections”.~~

[30] Paragraph 1(e)(B) is replaced by the following:

(B) if this information is unavailable or does not exist, any full-time equivalent student for the ~~current~~ academic year immediately preceding the academic year in which payment is made as reported to Access Copyright by the Institution.

[31] Section 10 is repealed.

[32] Section 10.1 is replaced by the following:

10.1 The Institution shall affix Access Copyright posters giving information about the terms and conditions of copying permitted under this Tariff within the immediate vicinity of each machine or device used for making Copies in a place and manner that is readily visible and legible to persons using such machine or device. The content of such posters shall be ~~either~~ that on which Access Copyright and the Institution agree or in absence of an agreement, that specified by the Copyright Board on application that of the most recent poster affixed by the Institution on or before December 24, 2010. Posters shall be provided to the Institution by Access Copyright and at Access Copyright’s cost.

[33] The last sentence of section 12 is repealed.

[34] Paragraph 17(b) is amended by substituting “fail” to “fall” in the first line.

[35] The following section is added after section 29:

30. For greater certainty, any agreement between Access Copyright and an Institution prevails over the terms of this tariff to the extent that it varies the terms of this Tariff.

[36] Paragraph 2(c) of Schedule C is repealed.

[37] The introductory paragraph of section 2 of Schedule D is amended by substituting “20” to “15”.

[38] Paragraphs 2(c) and 2(f) and section 8 of Schedule D are repealed.

[39] Section 1 of Schedule G is replaced by the following:

1. This Schedule applies to Digital Copies of Published Works in the Repertoire made pursuant to this Tariff. It does not apply to copies (or uses ~~therefore thereof~~) of ~~Repertoire Published~~ Published Works for which an Institution does not require a licence from Access Copyright.

[40] Subsections 3(1) to (4) of Schedule G are replaced by the following:

3. (1) Digital Copies made pursuant to this ~~Tariff~~ Schedule shall not be transmitted to, made available from, posted or uploaded to, or stored on, any computer network other than a Secure Network.

(2) Digital Copies made pursuant to this ~~Tariff~~ Schedule stored on Secure Networks shall be segregated by individual Course of Study and made available and accessible only to Licensees.

(3) Digital Copies made pursuant to this ~~Tariff~~ Schedule shall not be transmitted to, made available from, posted or uploaded to, or stored, on any device or medium, computer or computer network in such a manner that makes them publicly available or accessible including available to, or accessible by, the public over the Internet or other public network.

(4) Where the Institution is no longer ~~covered by this interim tariff~~ licensed pursuant to this Schedule, the Institution and all Licensees shall immediately cease to use all Digital Copies made pursuant to this ~~Tariff~~ Schedule, delete from their hard drives, servers and networks, and make reasonable efforts to delete from any other device or medium capable of storing Digital Copies, those Digital Copies and upon written request from Access Copyright shall certify that it has done so.

[41] Section 4 of Schedule G is replaced by the following:

4. (1) Sections 1(c)(v)(b.), 1(c.1), 2.1, 2.2, 2.3(b), 5, 13, 13.1, 14(b), 23 to 26, section 1 of Schedule C and sections 1 and 5.1 of Schedule D of this Tariff do not apply to Digital Copies licensed pursuant to this Schedule.

(2) Subject to the provisions of this Schedule, all other provisions of this tariff and its other Schedules ~~applicable to Coursepacks, including section 14(b) of this Tariff~~, are applicable, with such modifications as necessary, to Digital Copies made for the purposes of Course Collections.



Gilles McDougall
Secretary General