

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2011-06-28

**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**

**I. INTRODUCTION**

[1] On December 23, 2010, the Board certified the *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013*. The tariff was amended on April 7, 2011.

[2] Paragraph 14(a) of the interim tariff provides that:

14. An Institution shall pay to Access Copyright:

(a) For all copies made pursuant to section 2(a) of this Tariff, an annual royalty calculated by multiplying the FTE by \$3.58 for Institutions that signed the Proprietary College Licence, and by \$3.38 for all other Institutions;

[3] The concept of FTE, or full-time equivalent student, is inherently linked to the academic year, from September 1 of one year to August 31 of the following year. The *Copyright Act*, on the other hand, provides that proposed tariffs must be filed for one or more calendar years.<sup>1</sup>

[4] The Association of Universities and Colleges of Canada (AUCC), an objector to this tariff, has informed its members that, in its view, liability under the interim tariff is based on the academic year. Put another way, AUCC maintains that an institution can “opt out” of the tariff for an academic year by ensuring that it makes no copy requiring an Access licence during that period. Access maintains that the same is true, but for a calendar year.

[5] The interim tariff does not address the issue. It says nothing about whether liability is triggered on a daily, monthly or annual basis. The fact that it sets an “annual royalty” implicitly means that liability is engaged for a year,<sup>2</sup> but it does not specify whether the academic year or calendar year should be used. Under the licences that governed the parties’ business relations until the interim tariff came into effect, no ambiguity existed because the duration of the licence was linked to the academic year. The tariff, on the other hand, is based on the calendar year.

[6] On January 21, 2011, both AUCC and the Association of Canadian Community Colleges (ACCC) asked the Board to deal with the issue. In its April 7 decision modifying the interim tariff, the Board, having noted the ambiguity, agreed 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.”<sup>3</sup>

[7] Access was not content with this decision. On May 17, 2011, it requested that the Board clarify that both the interim tariff and the royalties payable pursuant to it are linked to the calendar year and direct AUCC and ACCC to advise their members accordingly.

[8] Access argues that since the tariff must be certified for one or more calendar years, the determination of whether an institution is “in” or “out” should also be made for the calendar year. The objectors maintain that while proposed tariffs must be filed for one or more calendar years, final tariffs need not be aligned to the calendar year. There is no need to deal with these submissions by reason that what is relevant is not whether tariff liability must be for one or more calendar years but whether the liability under the tariff must be linked to the calendar year. Tariff liability is not necessarily linked to the calendar year, for example, tariff liability for the use of

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<sup>1</sup> In this case, *Copyright Act*, R.S.C. 1985, c. C-42, ss. 70.14, 67.1(3).

<sup>2</sup> In some respects but not all: paragraph 14(b) sets royalties for paper coursepacks that are an amount in pennies per page copied.

<sup>3</sup> *Interim Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire (Post-Secondary Educational Institutions – 2011-2013)*, [Copyright Board Decision \(April 7, 2011\)](#) at para. 12.

music is linked to a variety of individual events (a reception or concert, the sale of a permanent download or blank CD) or time periods (a day for adult entertainment bars, a month for commercial radio and Internet streams). Indeed, the very tariff we are asked to amend provides that the digital licence option is exercised on a basis other than the calendar year. If Access was right, this would not be possible.

[9] Furthermore, Access' argument is relevant only if liability period and royalty calculations are necessarily linked and they are not. For example, royalty calculations for paper coursepacks are events based (the making of the copy). In the matter at hand, the tariff could provide that an institution is liable for a whole calendar year if it makes any use of the repertoire during that year, but that the royalties are calculated according to a formula that blends the FTE for both academic years within the calendar year (i.e.  $\frac{2}{3}$  of the rate  $\times$  the January-August FTE +  $\frac{1}{3}$  of the rate  $\times$  the September-December FTE).

[10] Access also argues that if liability is assessed based on the academic year, then the proposed tariff it filed for the years 2011 to 2013 must end on August 31, 2013 and Access must re-file in March, 2012 for a tariff starting September 1, 2013. We disagree. Again, even if a certified tariff must be valid for one or more calendar years, the payment formula and dates for opting in or out can be anything the Board decides.

[11] We considered all the arguments and submissions advanced by the objectors and in the end the only one relevant and applicable to the current application is that the *status quo* is maintained by aligning the interim tariff to the academic year.

[12] We agree that the existing ambiguity should be addressed. In our opinion, the most efficient way to do so is to amend the interim tariff; any clarification short of an amendment will not provide the certainty the parties are seeking.

[13] The solution to the ambiguity should be informed by the principle that the interim tariff should reflect as much as possible the most recent agreements between the parties. These agreements applied for a full academic year. Therefore, for the purposes of the interim tariff, both liability and the amount of royalties should be determined on the basis of the academic year. To dovetail this approach with the application period of the interim tariff probably requires providing that for the periods from January 1 to August 31, 2011 and from September 1 to December 31, 2013, royalties payable are only a corresponding fraction of what is otherwise payable for a full year. This can be addressed through proper wording.

[14] We will amend the interim tariff to reflect the principles set out in the preceding paragraph starting January 1, 2011. However, rather than dictating the wording of the required amendments, we prefer that the General Counsel of the Board and the parties attempt to agree on such wording. The General Counsel of the Board shall report back to us no later than on **Friday**,

**August 5, 2011.** We will remain seized of the matter until the wording of the required amendments is finalized.

[15] There is no need to require that AUCC or ACCC advise their members accordingly at this stage.

[16] Some could argue that some institutions may be tempted to “game” the interim tariff, for example by making all copies they need for an academic year during the preceding Summer. We feel no need to address the issue now, but wish to make two comments. First, the interim tariff does not definitely settle issues such as liability, what triggers it or for how long it is triggered. Access put it well and succinctly by stating that “interpreting the Interim Tariff today as establishing an academic year-based royalty scheme is no guarantee that the Board will ultimately certify the final tariff based on an academic year.”<sup>4</sup> The interim tariff *cannot* settle these issues once and for all: this would be unfair to the parties (who have yet to file their evidence and argument) and would illegally fetter the discretion of the panel that will be asked to set the final tariff. Second, attempts at “gaming” the interim tariff might be a relevant factor in setting a final tariff that is fair to both users and rights holders.



Gilles McDougall  
Secretary General

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<sup>4</sup> Access Copyright Letter to the Board, June 10, 2011 at p. 3.