

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2011-09-23

**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  
Application to Vary: Transactional Licence

**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] 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 and June 28, 2011. It provides, among other things, that a post-secondary educational institution (“institution”) needing a licence from Access Copyright (Access) pays a set sum of money per academic year per full-time equivalent student (“FTE”) for copies made pursuant to section 2(a) (the “FTE licence”) as well as 10 or 11 cents per page copied pursuant to section 2(b) (the “coursepack licence”). The interim tariff closely tracks agreements that governed the relationship between Access and the institutions until the tariff took over on January 1, 2011.

[2] On June 8, 2011, the Association of Universities and Colleges of Canada (AUCC) asked the Board to amend the tariff. It wants to force Access to licence the single use of a single work (“transactional licence”) by institutions that do not avail themselves of the FTE licence. In support of its application, AUCC relies on the following arguments. The purpose of the interim tariff is to maintain the *status quo*. Access is breaching the *status quo* by systematically denying applications for digital and paper transactional licences, in an effort to force institutions to operate under the tariff and to use the optional digital licence included in the tariff. Access has

encouraged its publisher affiliates to cease granting transactional licences; many have heeded that encouragement. The refusal to negotiate transactional licences shows bad faith that amounts to misconduct. Access is abusing its monopoly power.

[3] Professor Katz supports AUCC's diagnosis but maintains that the remedy requested would only serve the interests of Access to the detriment of the institutions. He continues to argue that the tariff is in effect mandatory<sup>1</sup> and interferes with an institution's ability to obtain licences covering all its needs on competitive terms. He maintains that Access abuses the situation by offering no option but the full tariff, avoids providing meaningful information about the scope of its repertoire and creates confusion as to its extent. This, he says, Access does in an attempt to enshrine itself as the source for all licences, the terms of which will be determined by regulation instead of through competitive processes. He proposes that the Board force Access' publisher affiliates to offer transactional licences by prohibiting Access from acting as an exclusive agent of its affiliates and from granting any transactional licence, and by requiring that affiliates license their works on reasonable terms.

[4] The Association of Canadian Community Colleges (ACCC) essentially supports AUCC. Mr. Maguire agrees that something ought to be done but leaves it up to the Board to select the appropriate remedy.

[5] The response of Access can be outlined as follows.

[6] Past offerings of transactional licences were more limited than the objectors pretend. As a rule, Access offers transactional licences only in markets where few or no comprehensive or blanket licences have been issued. In the post-secondary education market, Access granted transactional licences only to institutions that bought the FTE licence. Paper transactional licences were granted only for uses that were not allowed by the FTE or coursepack licences. A digital transactional licence was offered because AUCC and ACCC refused to deal with digital copies in their model licences. Now that the interim tariff offers a digital licence option at no immediate cost to the institutions, Access sees no need to offer digital transactional licences.

[7] Access has acted and continues to act in good faith. The Board has already stated that the transparent exercise of a clear right is not a sign of bad faith. By conducting its business according to the interim tariff, Access is not showing bad faith. Access administers rights on a

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<sup>1</sup> Considerable confusion exists concerning what is mandatory and what is not. If an institution does not need a licence from Access, it is not required to comply with the interim tariff. What is available from sources other than Access is such that institutions are quite capable to function without a licence from Access and therefore, to ignore the tariff (at least, according to the objectors). However, if an institution chooses to use the repertoire of Access and cannot clear the rights directly with the publisher, it is required to comply with the tariff.

non-exclusive basis; users are free to approach affiliates directly.<sup>2</sup> Access has informed its affiliates of the potential consequences of issuing transactional licences in the current context,<sup>3</sup> but has not tried to dictate their conduct, and could not do so. It has even informed them that they retain the option to licence institutions directly; according to the objectors' own evidence, many continue to do so.

[8] Transactional licences are ill-suited to digital uses in a post-secondary setting, where the use of protected works is widespread, dispersed and decentralized. In this instance, there is considerable dispute as to which uses require a licence; since transactional licencing regimes are dependent on users concluding that they need the licence, such disputes create confusion which can only result in increased non-compliance. In the current environment, the compliance problems associated with a transactional business model are considerable.

[9] As an alternative, Access argues that if the Board is inclined to make any change to the interim tariff with respect to digital licensing in response to AUCC's application, given the uncertainty and number of unsettled issues surrounding digital copying, the Board should remove the digital option altogether, leaving parties to address the issues fully at the hearing of the tariff, when the Board will have the benefit of a complete evidentiary record. Professor Katz agrees.

[10] The applications of AUCC and of professor Katz are denied, for the following reasons.

[11] First, AUCC and ACCC earlier asked that any interim tariff reflect pre-existing licences while allowing institutions to deal directly with copyright owners.<sup>4</sup> The interim tariff currently does precisely this.

[12] The interim tariff seeks to reflect the *status quo* to the extent possible and reasonable. The agreements the tariff replaced were "take it or leave it" licences. Therefore, the "take it or leave it" nature of Access' dealings cannot of itself justify changing the *status quo* by adding a transactional licence where none existed.

[13] The Board's reasons of March 16, 2011 contain the following statement:

[...] users whose consumption patterns justify different rates remain free to secure, from Access or from others, transactional or other licences that will trump the tariff. The fact that the interim tariff can be modified at any time ensures that Access will display good faith in

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<sup>2</sup> In turn, affiliates are free to deal with users, to decline issuing a licence or to ask them to deal with Access.

<sup>3</sup> See below, para. 19

<sup>4</sup> AUCC, December 16, 2010 letter at p. 6; ACCC, December 17, 2010 letter at p. 3.

such negotiations. Any misconduct on its part would necessarily be reported to the Board, which would take it into account in any further consideration of this matter.<sup>5</sup> [our underling]

[14] Relying on this statement, objectors argue that the refusal of Access to deal with institutions on a transactional basis constitutes misconduct warranting an intervention on the part of the Board. We disagree. To state that a user is free to approach Access for a licence does not mean that Access must accede to the request. Whether the refusal of Access is reasonable must be assessed according to all the relevant circumstances. In this instance, Access is *prima facie* justified to rely on the interim tariff and let the regulatory process run its course: see below, paragraph 16.

[15] Second, AUCC asks for something institutions either never had or rarely used. Based on the record, we conclude that, at least since 2004, Access has granted digital or paper transactional licences only to institutions that bought the FTE licence, and only for uses that were not allowed by the FTE or coursepack licences. Furthermore, the use of digital transactional licences was minimal. In 2010, permission was sought for 1,160 titles. Less than two per cent of institutions regularly purchased digital transactional licences, and less than 10 per cent made at least one application. Royalties paid pursuant to those licences totaled less than one per cent of what Access collected pursuant to the FTE and coursepack licences.

[16] Third, we agree that once a tariff is in place, a collective should be entitled to rely on it. Arguably, when a collective opts for a tariff, it is in part to avoid the costs associated with transactional dealings. Such a course of conduct is rational and *prima facie* fair: see below, paragraph 25. Therefore, a collective's refusal to deal with users outside of the tariff does not constitute misconduct warranting an intervention on the part of the Board absent exceptional circumstances which have not been demonstrated in this instance.

[17] Earlier pleadings of Access contain statements that AUCC interprets as an invitation to ask for transactional licences. According to AUCC, Access is now withdrawing that invitation to the prejudice of the institutions. This interpretation, while reasonable, is not the only possible one. Another is that Access is willing to negotiate individual blanket licences. Such licences would trump any future tariff in all respects for the concerned institutions, thereby creating certainty for all concerned: Access, its affiliates and the institutions. What AUCC proposes does not provide such certainty: see below, paragraph 30.

[18] Fourth, to the extent this is relevant, the evidence available leads us to conclude that Access and its affiliates have not colluded with each other. According to the objectors' own evidence, only some Access affiliates refuse to source licence their works. Source licensing remains

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<sup>5</sup> *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013* (March 16, 2011) Copyright Board Decision at para. 45. [[Interim Tariff](#)]

possible: Lethbridge College and the University of Guelph had no problems dealing directly with all approached publishers but one.<sup>6</sup> Furthermore, the refusal to issue direct digital transactional licences seems part of a trend, quite independent from the current proceedings, whereby publishers have their digital licensing handled by third party clearinghouses, due to lack of in-house staff to handle case by case permissions.<sup>7</sup> In any event, while the general regime under which Access operates constrains the discretion of Access in dealing with users, it does not impose such constraints on its affiliates.

[19] Access did inform its affiliates of one possible consequence of issuing direct licences while these proceedings are under way.<sup>8</sup> Copies of works in the repertoire of Access that are licensed directly with an affiliate will be removed from any royalty calculation. Once a tariff is certified, an institution will be free to copy the same work pursuant to the tariff at no additional cost if, as Access has requested, the coursepack licence is abandoned and only the FTE licence is certified, since the work is part of the repertoire of Access.<sup>9</sup> Informing affiliates of such facts is common sense and does not amount to conspiracy.

[20] Fifth, claims that Access exercises monopoly power remain unproven. Access is not a statutory monopoly; at most it is a natural monopoly which exercises market power based on its ability to offer copyright owners and users economies of scale. AUCC weakens its own argument about market power by stating that Access competes with its affiliates and other publishers or authors. The presence of this competition fetters the ability of Access to extract economic rents.

[21] Sixth, we agree with Access that transactional licences inherently raise monitoring issues, especially in such a decentralized setting as the institutions. These issues are compounded with digital copying. Yet rather than suggesting reporting and monitoring mechanisms that might provide some comfort on compliance control, objectors propose the transactional licence be exempt from all of the provisions of the tariff, including those relating to reporting and monitoring.

[22] Reporting, monitoring and audit provisions are key to most licensing regimes: if rights holders are entitled to expect that users will seek licences without being prompted,<sup>10</sup> they are also entitled to expect that users will either propose or accept mechanisms that allow the efficient

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<sup>6</sup> ACCC, June 16, 2011 submissions, Appendix D at paras. 4, 14.

<sup>7</sup> AUCC, July 19, 2011 reply, Appendix B at p. 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> Professor Katz points out that affiliates may seek to influence the outcome of the survey the parties are likely to conduct in these proceedings by issuing less direct licences than they otherwise would. The risk is as great, or more, that institutions will seek to influence the outcome of the survey by source-licensing more than in the past or by encouraging professors, employees and students to make the copies they need outside the survey period.

<sup>10</sup> *Interim Tariff*, *supra* note 5 at paras. 40, 41.

monitoring of compliance with the licence. A transactional licensing regime without such provisions is an invitation to copyright violation and unthinkable. Yet objectors propose that they be taken at their word. Who would decide that permission is or not needed? How would that determination be made? How would one calculate the number of copies triggering royalties? Would each download be counted? What of multiple downloads by the same person? A digital transactional licence may well require giving the collective full access to teachers' course management systems: how can this be reconciled with the objectors' claims that existing reporting requirements already engage privacy issues? Based on the information available, in this market and for the time being, a digital transactional business model does not ensure that rights holders get paid for the uses of their works.<sup>11</sup>

[23] Though the reporting difficulties associated with digital transactional copying in institutions may not be as formidable as Access paints them, they are nonetheless significant. Earlier in these proceedings, AUCC admitted that the value of a digital licence can be “undermined by onerous record keeping provisions that, in a university setting, are impractical or impossible to meet.”<sup>12</sup> [our underlining]

[24] What we know of the institutions' dealings in digital transactional licences brings us no comfort. According to the objectors, the need for such licences from Access is so great that the Board should impose this model in the interim tariff. Yet in 2010, such licences generated royalties that are barely more than one thousandth of what “open access” licences negotiated through the Canadian Research Knowledge Network cost that same year. Either the institutions can do without any Access digital transactional licence, or the parsimony they displayed in applying for such licences raises serious enforcement issues. Either way, this weighs heavily against granting the objectors' application.

[25] Seventh, we agree with Access that the administration of transactional licences tends to be cost intensive. Efficient per-transaction licensing is sometimes possible even for uses that generate low royalties per transaction, as seems to be the case in the online music services market. In this instance, however, nothing would lead us to conclude at this time that transaction costs are anything but relatively high. The fact, already mentioned in paragraph 18, that publishers are hiving off their digital transactional business to clearinghouses serves to confirm this impression. So is the fact that the open access licences filed with us are blanket licences.

[26] Eighth, the documents objectors have filed to date contain so many explicit or implicit contradictions that it has become difficult to lend credence to their statements.

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<sup>11</sup> *Ibid.* at para. 36.

<sup>12</sup> AUCC, January 21, 2011 letter at p. 5.

[27] Thus, the institutions' ability to make digital copies of works in the repertoire of Access cannot at the same time be of such marginal value as not to require a tariff and be of such crucial importance as to require either generous access to transactional licences (as requested by AUCC) or remedies in the nature of an injunction against third parties who are not even involved in these proceedings (as proposed by Professor Katz).

[28] Also, if the digital repertoire of Access is either insignificant or non-existent, as Professor Katz maintains, then the inability to determine what the repertoire contains cannot seriously impede an institution's actions, and an affiliate's refusal to issue a digital transactional licence either has nothing to do with Access if Access does not own the rights or can only be a minor annoyance that is best ignored if it does. And if the institutions' switch to digital copies has been as significant as claimed, and if they manage to source clear digital rights to the extent said, the marginal use they may make of the repertoire of Access and for which they do not succeed in getting a source licence is so insignificant as to be of little impact on their ability to fulfill their mandate.

[29] Furthermore, if more competitive and vibrant models for lawfully accessing works are thriving and growing, then all the institutions have to do is to avail themselves of these models and ignore the Access repertoire altogether.

[30] Ninth, allowing transactional licences pursuant to the interim tariff could lure institutions into a false sense of security. A transactional licence issued pursuant to the interim tariff could not provide closure. If the final tariff provides only for a FTE licence, as Access requested, then the institution that availed itself of an interim transactional licence will be liable for the full FTE price unless the final tariff provides otherwise.

[31] Finally, the balance of convenience continues to favour Access.<sup>13</sup> Amounts in issue are *prima facie* significant for Access, far less so for the institutions. It is conceivable that not collecting royalties may create operational difficulties at Access; it is unlikely that any amount of royalties the Board may set in the end will have any significant effect on the institutions concerned.

[32] A passing mention should be made of Professor Katz' reasoning with respect to digital copies. Contrary to what he states, the operational provisions of the tariff do not extend its ambit so as to include all published works. Subsection 4(1) of Appendix G of the interim tariff clearly states that the indemnity clause does not apply to digital copies; therefore, the digital licence does not allow institutions to copy what is not in the repertoire. Neither does section 38.2 of the *Copyright Act* necessarily cap damages payable for digital copies to a copyright owner whose

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<sup>13</sup> *Interim Tariff*, *supra* note 5 at para. 32.

works are not in the repertoire of Access. An institution probably must avail itself of the option provided for in section 29 of the tariff since the cap pertains only to “copying of that general nature and extent”<sup>14</sup> as covered in the tariff.

[33] There is no need to address arguments concerning the Board’s jurisdiction to provide the remedy requested by AUCC. The Board’s power to vary a tariff is so wide as to allow it to substitute a completely novel formula to that which a collective proposed, as long as the tariff remains a tariff. Even though Access applied for a tariff that offers only the FTE licence, it will be open to the Board in its final decision to set royalties according to any reasonable formula it chooses, including one based on the number of copies made.

[34] On the other hand, the remedy Professor Katz proposes is not within the Board’s powers to grant. Once a collective has applied for a tariff pursuant to the general regime, the Board cannot force it to deal outside the tariff with users that are subject to the tariff.<sup>15</sup> Neither can the Board, under any circumstances, force those who have asked the collective to act on their behalf to deal directly with users, on a transactional basis or otherwise. On this issue, Professor Katz confuses the power to regulate a collective’s dealings with users (which the Board has) with the power to regulate the dealings of a collective’s rights holders with those same users (which the Board does not have).

[35] The Board may have the power to prohibit Access from issuing transactional licences. Since Access already refuses to issue such licences, little would be accomplished by doing this and there is no need to further address the issue.

[36] We do not feel the need to address the numerous competition issues raised by the objectors. The extent that these are relevant, they are better left to later, when the Board has a full record on which to decide.

[37] Neither do we feel the need to address the alternative remedy proposed by Access and endorsed by Professor Katz.



Gilles McDougall  
Secretary General

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<sup>14</sup> *Copyright Act*, s. 38.2(3).

<sup>15</sup> On the other hand, once a tariff provides for a business model, users can demand that collective deal with them on that basis.