



March 7, 2014

File: Access Copyright – Post-Secondary Educational Institutions Tariff (2011-2013)

RULING OF THE BOARD

On February 10, 2014, Access Copyright (Access) sought leave from the Board to file supplementary evidence:

- Exhibit AC-15: Supplementary Witness Statement of Roanie Levy, Kerrie Duncan and Jennifer Lamantia;
- Exhibit AC-11: Revised – *Pricewaterhouse Coopers LLP, Access Copyright; Market Impact of Fair Dealings and Appendices*;
- Exhibit AC-1: Revised – Statement of Case.

While part of the supplementary evidence consists of an update of information that was filed as part of Access' case on September 13, 2013, and thus does not raise any issue, the other part consists of new evidence, namely:

- Information about a coursepack in use during the Fall of 2013 at Langara College, a member of the ACCC (Exhibit AC-15, para. 11 to 16). The new evidence includes a copy of the coursepack and a repertoire and compensability analysis conducted by Access. Access contends that Langara College, who was no longer operating under the interim tariff at the time the coursepack was purchased, neither reported nor paid Access for the copies of works in the repertoire of Access that were included on the coursepack;
- Information about a notice sent in October of 2013 by Simon Fraser University whereby the University informs its staff of changes regarding the practice of scanning and placing on a server material to be viewed online (Exhibit AC-15, para. 18-19); and
- Assertions that works in Access' repertoire that were included in a study on course management systems conducted by the ACCC and filed with the Board on August 7, 2013 (the study data) exceed the limits set by the ACCC fair dealing policy and the proposed tariff (Exhibit AC-15, para. 20-33).

Mr. Maguire did not object to the filing of the supplementary evidence. However, while he did not raise any concern with respect to either the coursepack used at Langara College or the Simon Fraser University notice, he did express concerns with respect to para. 20 to 33 of proposed Exhibit AC-15 pertaining to the study data.

With respect to the latter, Mr. Maguire contends that the study data were in the possession of Access approximately one month before Access' case was filed on September 13, 2013. Had Access wanted to use the data as part of its case, it could have chosen to do so at that time. Mr. Maguire also asserts that Access is making serious allegations in proposed Exhibit AC-15 to the effect that some reproductions made by unidentified ACCC member institutions exceed the limits of the ACCC fair dealing policy and the limits of the proposed tariff. Given the foregoing, he suggests that the ACCC be made aware of those allegations and be afforded an opportunity to respond to Access' use of the study data, and more particularly to the allegations contained at para. 20 to 33.

Finally, Mr. Maguire made the following requests: that the Board grant him one week to respond to the supplementary evidence and that he be provided with the opportunity to respond to Access reply statement of case, an opportunity that he contends would normally have been provided to him during an oral hearing.

Access replied to Mr. Maguire's response in the following way:

Given that the ACCC was still an objector when it filed the study data, and was scheduled to file its case on December 20, 2013, it was reasonable for Access not to have raised the issue in its statement of case but rather to have waited until the filing of ACCC's responding case before making submissions on the study data.

Further, contrary to Mr. Maguire's statement, Access is not using the study data. The statements made by Access in proposed Exhibit AC-15 are simply statements of fact based on the study data which are easily ascertainable by the Board from the material filed by the ACCC.

Access therefore sees no reason for the Board to allow the ACCC, a non-party, to make submissions about material that it has itself filed. That being said, Access takes no position on this matter since the Board is master of its own procedures.

Finally, Access has no objection to Mr. Maguire being afforded a period of time to respond to the supplementary evidence, with a corresponding right to reply for Access; it does, however, object to Mr. Maguire being given a right to reply to Access' reply statement of case. In Access' view, Mr. Maguire appears to base his request on an assumption that there will be no oral hearing. The Board has not decided that a hearing will not be held. Moreover, the Board's process does not envisage a reply to a reply.

Access' application of February 10, 2013 to file supplementary evidence is granted for the following reasons. First, Access' supplementary evidence ensures that the Board benefits from the most comprehensive evidence available. This is all the more important since the Board has limited evidence as a result of the withdrawals of ACCC and AUCC from the proceeding. While the Board is deprived of the institutions' input with respect to copying in educational institutions, it must nonetheless certify a fair and equitable tariff. In the circumstances, any input that may assist the Board is necessarily welcome. Second, the filing of the supplementary evidence does not prejudice Mr. Maguire.

By the same token, the Board accepts Mr. Maguire's suggestion that the ACCC be afforded an opportunity to comment Access' evidence as it pertains to the study data. While it is rather

unusual for the Board to seek comments from a non-party, this is not an ordinary proceeding. The Board is of the view that any input from the ACCC could likely prove useful. Moreover, contrary to what Access contends, para. 20 to 33 are not simply “statements of fact based on the study data [that] are easily ascertainable by the Board from the material filed by the ACCC”. Rather, Access makes several assertions that go beyond simple factual observations into the realm of analysis.

Although Mr. Maguire did not express any concern with respect to Access’ evidence as it pertains to the coursepack purchased at Langara College and the notice issued by Simon Fraser University, the Board is of the view that the reasoning set out above applies and that those institutions should also be afforded an opportunity to comment Access’ evidence to the extent it applies to them.

Consequently, the Board will forward a copy of this ruling to the ACCC, to Langara College and to Simon Fraser University, along with the new evidence. Those institutions who may wish to comment on Access’ evidence may do so no later than **Friday, April 4, 2014**. Access may reply no later than **Monday, April 14, 2014**.

Although Mr. Maguire expressed concerns about the late filing of the evidence, he did not request that Access’ application be dismissed as a result of such late filing. Had he done so however, the Board would not have taken issue with the date the application was filed. As Access pointed out, it was reasonable for Access to have intended to address the study data at the stage of its reply case on the assumption that the ACCC would have presented the study data as part of its responding case, due on December 20, 2013.

Mr. Maguire’s request to be allowed one week to respond to Access supplementary evidence is granted. Mr. Maguire may respond to the new evidence no later than **Friday, March 14, 2014**. Access may reply no later than **Friday, March 21, 2014**.

Mr. Maguire’s request of being allowed the right to reply to Access’ reply statement of case, based on the assumption that there will be no hearing, is premature. The Board has not yet decided whether there will be a hearing or not. Should a hearing not be held, Mr. Maguire may address his request at a later time if he so wishes.



Gilles McDougall
Secretary General