

## Tariffs, Contracts, Bold Institutions & Price Discovery

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as part of a debate in the joint pre-conference  
workshop with Rob Tiessin in Ottawa for the  
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## Part VII of the Copyright Act (1997)

- Collective societies for the performance of music and sound recordings (e.g. SOCAN) MUST file Tariffs before the Copyright Board
  - Copyright Act, s.67.1 – old provision, modified in 1997
- On the other hand, collective societies such as Access Copyright
  - MAY file Tariffs before the Board (s.70.12 (a)) OR
  - MAY enter into agreements with users (s.70.12(b))
    - s.70.12 a new provision 1997
- Now Access Copyright is *simultaneously* seeking a Tariff for post-secondary institutions AND entering into agreements... unprecedented

## Pro Contract, Alternative, & Tariff Opposition

- **70.17** ... no proceedings may be brought for the infringement of a right referred to in section 3... against a person who has paid or offered to pay the royalties specified in an approved tariff.

## Tariff for Post secondary institutions proposed at \$45 FTE

- Unless Tariff is withdrawn by Access Copyright, there will be a hearing and there will be a “fair price” ordered by the Board
- Various bodies have been given standing before the Board to participate in the Tariff proceedings and oppose Access Copyright’s proposed Tariff – both the \$\$ value and the license terms proposed
- Regardless, the Board will make an order as long as Access Copyright does not withdraw....

Institutions who do not use the rights which Access Copyright markets do not have to pay

- “Bold” post- secondary institutions, since the Tariff has been filed by Access Copyright, have chosen not to use the “product” Access Copyright is selling
- If an institution does NOT make use of works in ways covered by the rights Access Copyright sells, or buys only from rights holders not represented by Access Copyright, then the institution is outside the Tariff, does not have to pay it, or pay into Access Copyright through any other agreement

## BOLD institutions could be at risk

- If an institution decides not to “buy” from Access Copyright, it must be certain that it does not use the rights Access Copyright sells or it will leave itself open to a lawsuit for infringement by Access Copyright...
- If an institution is highly distributed and therefore for that reason, or any other, cannot be certain its employees won't infringe Access Copyright's rights, it may well wish to pay the Tariff or enter into agreement with Access Copyright otherwise...

## Access Copyright appears to have undermined its own Tariff process

- How can Access Copyright expect the Copyright Board to accept its evidence that the Tariff it seeks of \$45 per FTE is appropriate if it enters into contracts with institutions for lesser amounts?
- Under s.70.12, it is the collective, Access Copyright, not the user institutions, which controls the choice of proceeding by way of Tariff or by way of agreement.

## Access Copyright moves from Tariff to Agreements...

- June 12, 2010, Access Copyright applies to the Copyright Board for the post-secondary tariff (\$45 FTE, 2011-2013)
  - Still pending before the Board
- End of January 2012, Access Copyright signs license agreements with Western University and University of Toronto (\$27.50 FTE)
  - Legally binding between the parties for the period January 1, 2011 to December 31, 2013 (there is a clause that now gives them \$26 since AUCC model agreement created)...
- Access Copyright, with AUCC, develops a “model license” for universities to consider (\$26 FTE)
  - Not binding but a basis for a legal agreement which a university (other than Western or Toronto) may seek with Access Copyright to cover January 1, 2011 to December 31, 2015
  - further negotiation between each university and Access Copyright (other than Western and Toronto) before signing a legal agreement may be possible...



Yesterday, Tuesday, May 29, 2012

- ACCC announces a model agreement with Access Copyright for \$10 FTE

Until January 2012, Access Copyright had left Post-secondary institutions with 2 choices:

1. Expect to pay the Tariff, OR
2. Arrange the institution so that the rights Access Copyright is selling are not used

NOW Access Copyright has created 3 options for Post-secondary institutions:

1. Expect to pay the Tariff, OR
2. Negotiate a license (presumably along the lines of the AUCC and ACCC models), OR
3. Arrange the institution so that the rights Access Copyright is selling are not used

## What might motivate Access Copyright to undermine its own Tariff application by opening itself up to contract negotiation?

It is afraid the order of the Board will be much less than the \$45 FTE it seeks

- On the evidence of value it is able to muster before the Board,
- Because the fair dealing decision pending in the Supreme Court under its Tariff proceedings involving the Ministers of Education for the K-12 tariff 2005-2009 may go against Access Copyright
  - If multiple copies for classroom use is part of fair dealing, as the teachers claim, this will decrease the value of the product Access Copyright sells, and
- Because changes pending in Bill C-11 will reduce the value of the product it can sell to post-secondary institutions – especially if “education” is fair dealing

Why go for a contract, when made available, rather than being a “Bold” institution and not using the rights marketed by Access Copyright?

1. Being “bold” may make more sense if the Supreme Court decides multiple copies for classroom use is fair dealing
  - But no post-secondary institution can guess the Supreme Court’s mind any more than Access Copyright can
2. Being “bold” may make more sense if Bill C-11 includes “education” as fair dealing and the courts support it as a serious extension of fair dealing even in light of the Supreme Court’s tests added in interpreting the categories of fair dealing in the Law Society case
  - But no post-secondary institution can be certain of Parliament and the courts in the regard any more than Access Copyright can be
3. Institutions may know that they cannot organize themselves to be certain not to infringe rights administered by Access Copyright

Why go for a contract, when made available, rather than continuing to wait for the Board to determine Access Copyright's Tariff application?

Again, the institution does not know either

1. The outcome of the Supreme Court case involving whether multiple copies for classroom use is fair dealing OR
2. Whether Bill C-11 will add "education" as fair dealing and the courts will support it as a serious extension of fair dealing even in light of the Supreme Court's tests added in interpreting the categories of fair dealing in the Law Society case AND

Also

3. S. 13 of the model agreement (and Western's and Toronto's) is a return to the INDEMNIFICATION which was in the old Access Copyright – post-secondary contracts and cannot be a part of the Tariff since the Board does not have the power to order it.

Why would an institution wait for the Tariff rather than negotiating a contract (now made available by Access Copyright) or being bold and going without uses?

- The institution cannot guarantee that it will not infringe rights Access Copyright sells AND
- The institution believes that the Board's order will be less than the \$26 FTE rate Access Copyright is now making available by contract (or \$10 to colleges)...
  - The evidence will show the value to be less than \$26 (or \$10)
  - The Supreme Court will make multiple copies for classroom use fair dealing and the Board will correspondingly much reduce the Tariff
  - Bill C-11 will pass with “education” as fair dealing and the Board will correspondingly much reduce the Tariff

## No one knows the future...

- If an institution can successfully operate without the rights marketed by Access Copyright
  - It saves itself money AND
  - It reduces the market value of Access Copyright's product overall, which benefits all post-secondary institutions (and other institutions)
- By negotiating licenses with Access Copyright in the face of Access Copyright's Tariff application, Toronto and Western helped open up a 3<sup>rd</sup> option for post-secondary institutions – a return to licensing
- By staying the course and opposing the Tariff application, post-secondary institutions help to ensure that the Board hears all sides of the valuation question and that the resulting tariff ordered is less than the \$45 FTE sought and, perhaps even less than the \$26 FTE (or \$10) negotiated in the model license s

## Who has created the current predicament for post-secondary institutions?

- ACCESS COPYRIGHT
- Not any one post-secondary institution or any one group of post-secondary institutions
- All 3 groups of post-secondary institutions (“bold”, “contracting” and “Tariff-opposing”) are contributing positively to the overall opposition to the potential over-valuing of rights being marketed by Access Copyright



All post-secondary institutions are playing valuable roles in the process:

- ACCESS COPYRIGHT is the prime mover all the way through this current situation:
  - Access Copyright proposed the Tariff in the first place
  - Access Copyright is the one with the right to either move by way of Tariff or agreement under s.70.12
  - Access Copyright is the party threatening litigation for infringement should “bold” institutions be found to be infringing
- ALL post-secondary institutions are participating in, and contributing to, opposition to the proposed \$45 FTE tariff, in different ways

## All post-secondary institutions are incurring risks in their decisions:

- Whether or not Access Copyright withdraws the Tariff, the new contract bottom line contract to negotiate is \$10 FTE...
- If the Tariff proceeding continues,
  - And the Tariff is ordered at \$8 FTE, Access Copyright will have won, temporarily, over those institutions who have signed the \$27.50 and \$26 contracts or even \$10 ones – but the lower Tariff will influence the next round of license negotiation, if Access Copyright continues to leave the contract door open
  - If the Tariff is ordered at \$30 FTE, those institutions which did not enter into contracts will have lost, temporarily, but the lower priced contracts will not be re-offered to anyone anyway (even if Access Copyright keeps the contract option available)
- If a “bold” institution is successfully sued for infringement, it may have to pay damages – but will these damages outweigh the moneys saved by not paying the Tariff or a contract?

“Price discovery” is a natural new product positioning process ---

- If libraries and librarians do not support each other in the face of uncertainty, it seems certain that their mutual adversary, Access Copyright, is the beneficiary of the dissention.
- All three groups of post-secondary institutions are engaged in the exercise of “price discovery” and are making valid contributions to that process.
- In the face of uncertainty, and without a crystal ball, it is ridiculous to oppose ANY serious effort at price discovery.