

Appendix: Evidence and Comments to be placed on the Record – Ariel Katz

[1] In the sections below, I will offer some observations directing the Board’s attention to several issues that it might consider useful.

[2] In particular, I wish to draw the Board’s attention to the interrogatories concerning the scope of its repertoire. I believe that this is a crucial issue, because under *Copyright Act*, Access Copyright can only ask the Board to certify a licensing scheme applicable to the works within its repertoire, and its repertoire can only include works if the copyright owners of those works authorized Access Copyright to administer their reproduction rights on their behalf.² Further, a proposed tariff may pertain to any licensing scheme applicable in relation to a repertoire of works of more than one author.³ In principle, then, the scope of Access Copyright’s repertoire may range between being limited to the works of two authors or to the works of all authors; what may be reasonable for a repertoire consisting of all works will not be reasonable for a repertoire consisting of a few works.

[3] As the Federal Court of Appeal held in *SOCAN v. Bell Canada*,⁴ the Board’s mandate is “to approve and certify a fair and reasonable tariff”.⁵ The Court recognized that under some circumstances it would be unreasonable for the Board to certify a tariff. This may happen, for example, “in the absence of the necessary probative evidence, on mere guesses, speculations and approximations” and especially if the tariff were to have a retroactive effect.⁶

[4] Clearly, establishing fair and reasonable tariff cannot take into account (a) reproduction of works that are not within Access Copyright’s repertoire; (b) reproductions of works that are within its repertoire but have been licensed separately; and (c) reproductions that constitute fair dealing or are otherwise permitted by law.

[5] Therefore, in order to allow the Board to approve a tariff that is fair and reasonable, the Board it must have a clear sense not only of the size and scope of Access Copyright’s repertoire, but also the proportion of reproductions of works in this repertoire that are compensable, and such clear sense must be based on probative evidence, and not on mere guesses, speculations, and approximations.

² *Copyright Act*, s. 2 (definition of “collective society”).

³ *Copyright Act*, s. 70.1.

⁴ 2010 FCA 139 (CanLII), <http://canlii.ca/t/29z9n>

⁵ *Ibid*, para 25.

⁶ *Ibid*, para 26.

[6] It follows that, even if we assume *arguendo* that none of the uses by educational institutions constitute fair dealing, Access Copyright, as the applicant asking the Board to certify its Proposed Tariff, must: (a) establish the scope of its repertoire; and (b) establish the proportion of uses of works in this repertoire that have not been licensed separately, before the Board can even turn to determine what would be fair and reasonable royalties for those compensable reproductions. All of this should be done on the basis of probative evidence, and not on mere guesses, speculations, and approximations.

[7] Based on the evidence that Access Copyright has filed and based on its responses to my interrogatories, I would conclude that the Board must not certify the Proposed Tariff, because there is no probative evidence before the Board that would allow it to set a fair and reasonable royalty for it, if only because there is no probative evidence with respect to the size and scope of Access Copyright's compensable repertoire. What Access Copyright has provided does not even amount to "mere guesses, speculations and approximations"; it is only a false, misleading, improbable, baseless and vacuous assertion. I trust that the Board would reach the same conclusion, and I hope that the evidence presented herein would be of assistance.

I. Access Copyright's assertions about its repertoire

[8] In Exhibit AC-2, para. 17, Access Copyright, through three of its top executives (including its Executive Director Ms. Roanie Levy), AC asserts that

At this time, the works that are in Access Copyright's repertoire ("Repertoire") include:

- Any published work in print form or that has a print equivalent (a "Print Work"), that has been issued to the public with the consent or acquiescence of a rightsholder that is either resident or domiciled in or a citizen of or incorporated in Canada and/or in a jurisdiction with which Access Copyright has a bilateral agreement in place, that has not been excluded by the rightsholder; and
- Any published work that has been issued to the public in digital-only form (a "Born Digital Work") with the consent or acquiescence of a rightsholder that is either resident or domiciled in or a citizen of or incorporated in Canada, and/or in a jurisdiction with which Access Copyright has a bilateral agreement in place, that has been expressly included by the rightsholder.

[9] Access Copyright has made similar representations in para. 8 of its Statement of Case, and elsewhere, such as in the various recent Model Licenses.⁷

⁷ See e.g., Exhibit AC-2BB, AUCC Model License Final Version, definition of the term Repertoire Work ("Repertoire Work" means a Published Work in which Access Copyright collectively administers the rights, For clarity, Repertoire Works consist of Published Works that have a print equivalent and are not on the Exclusions list and Published Works in born-digital format that are identified on the Inclusions list"). The term Published Work is defined as "a literary, dramatic or artistic work protected by copyright in Canada, of which copie have been made available to the public with the consent or acquiescence of the copyright owner but excludes a Musical Work."

[10] Access Copyright most recent Exclusion List⁸ consists of approximately 10,000 item-lines, and according to para. 6 of its Statement of Case, Access Copyright has entered into bilateral agreements with other RRO, purportedly representing copyright owners in 29 foreign jurisdictions.

[11] Therefore, Access Copyright represents that except for the works that appear on the exclusion list, its repertoire consists of every other copyright work that has even been published in Canada, or in any of the other 29 foreign countries (which includes the United Kingdom, the United States, Australia, most other English-speaking countries, as well as France, Spain, Germany and others).

[12] This representation is undoubtedly false and misleading for the simple reason that it claims the impossible. As a matter of law, only works the copyright owners of which have authorized it to administer on their behalf can be part of Access Copyright's repertoire.⁹ Therefore, Access Copyright represents that the copyright owner of every work that has ever been published in Canada and elsewhere has authorized it to administer its reproduction rights in Canada on its behalf, unless that owner has formally requested to be put on the exclusion list.

[13] A simple observation is sufficient to demonstrate the impossibility of this fantastic claim: As a specialized copyright tribunal, (as well as by virtue of its powers under s. 77 of the *Copyright Act*), the Board can take judicial notice of the phenomenon of orphan works, and the various attempts by policy-makers and courts in many countries to address it.¹⁰ Nevertheless, Access Copyright's represents to the Board—including in a written but not sworn declaration of its Executive Director—that it has been able to obtain authorization from every copyright owner, for every published work that has been published in Canada or in any of the other 29 foreign jurisdiction, whether in print or out of print, and whether its owner is known or not, except if the work has been formally placed on the exclusion list by the owner of its copyright. If this claim is even close to being truthful, it is nothing less than a miracle. I believe that the Board can also take judicial notice that—at least in the domain of judicial or administrative fact-finding—miracles do not exist.

[14] Access Copyright had ample opportunity to furnish evidence to support its miraculous claim, but its Statement of Case is devoid of any such evidence. The Board should draw a negative inference against it. Surely a collective has some onus upon it to prove this essential element of its case beyond mere guesses, speculations and approximations.

⁸ Access Copyright most recent Exclusion List can be found on its website at http://www.accesscopyright.ca/media/1771/access_copyright_exclusions_list.pdf

⁹ *Copyright Act*, s. 2 (definition of “collective society”), and s. 70.1.

¹⁰ See generally, Ariel Katz, “The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem”, (2012) 27 Berkeley Tech. L.J. 1285.

[15] Moreover, the notion that Access Copyright is entitled to authorize the reproduction of any published work unless its copyright owner has formally requested to be put on the exclusions list offends against domestic and international law. Parliament has not created Extended Collective Licensing under the “general regime”, and therefore a person, like Access Copyright, who grants or purports to grant to a third person the right to do an act which only the copyright owner has the right to do infringes that copyright owners’ copyright.¹¹ Under the Berne Convention, a copyright owner need not resort to any formalities to protect his or her exclusive right.¹²

[16] In addition, Access Copyright’s replies to my interrogatories further reveal the falsity of Access Copyright’s claims about the scope of its repertoire, as I explain below.

[17] My interrogatories and Access Copyright’s replies can be found in **Exhibit AK1**, and Access Copyright’s supplementary replies can be found in **Exhibit AK2**.

II. Interrogatory #1

[18] Interrogatory #1 asked Access Copyright to provide, with respect to each Repertoire Work, the following information:

- a. The title of the work;
- b. Whether the work is literary, dramatic or artistic;
- c. The name of the author(s);
- d. The date of death of the author(s), if known;
- e. Any information, if known, relevant to the subsistence of copyright in Canada with respect to the work in accordance with the requirements of s. 5 of the *Copyright Act*;
- f. The title of the volume in which it was published (if different from the title of the work);
- g. The name of the periodical in the case of a work that was published in a periodical, including the volume, issue and page number;
- h. The name of the publisher;
- i. Year of first publication;
- j. ISBN/ISSN;
- k. The name(s) of the copyright owner(s);

¹¹ *Falcon v. Famous Players Film Co.* [1926] 2 KB 474 (CA), at 499.

¹² Berne Convention for the Protection of Literary and Artistic Works (Paris Text, 1971), Article 5(2).

l. Specify whether Access Copyright administers the copyright in the work by assignment, grant of exclusive licence, non-exclusive license, appointment of Access Copyright as the copyright owner's agent or otherwise. If otherwise, please specify.

m. Specify which rights and/or uses can Access Copyright authorize for each Repertoire Work, including whether it can authorize its digital use.

n. If the publisher is a subsidiary of another publisher or publishing group, or if the publisher (or the copyright owner) has authorized another publisher or publishing group to license the work on its behalf, please specify the name of that publisher or publishing group.

[19] Access Copyright replied that “Access Copyright does not have the information sought for all of the works in its repertoire” and added several evasive and vague statements, in its initial and supplementary replies. The Board ordered Access Copyright to provide “what it has, in the form it exists”, including the data the populates its RMS database and its Repertoire Lookup Tool. The Board ruled that Access Copyright need not explain what is missing from the databases or why, unless existing documents provide such explanation, and ordered Access Copyright to supply any documentation linked to the databases.¹³

[20] Eventually, Access Copyright provided three excel files purporting to include the data that populates its databases:

- A file named KATZ1-RMS_Excerpts_2011-Nov.csv contains 54,939 titles;¹⁴
- A file named KATZ1-RMS_Works_2011-Nov.csv contains 748,810 titles;¹⁵
- A file named KATZ1-RMS_Works2_2011-Nov.csv contains 540,443 titles.¹⁶

[21] Access Copyright provided a few other documents purporting to be lists of works received from publishers (although some of those lists appear to be lists of excluded works).¹⁷

[22] Access Copyright did not provide any documentation showing any chain of title to any of those titles.

[23] Overall, then, “what [Access Copyright] has in the form that it has it” is a database listing 1,344,192 titles. Even among these, some titles are works are in the public domain. For example, the largest file contains close to 50,000 titles published between 1848-1923, most of which would clearly be in the public domain. Even if all of these listed works are indeed in Access Copyright's repertoire—and Access Copyright stated that it has no other documentation to support such an assumption—it is clear that this list constitutes only a fraction of what Access Copyright purports to be in its repertoire, namely, the universe of all published work subject to

¹³ Exhibit AK2.

¹⁴ Exhibit AK3.

¹⁵ Exhibit AK4.

¹⁶ Exhibit AK5.

¹⁷ Exhibit AK6.

copyright in Canada minus those on the exclusion list. To illustrate, Google has already scanned more than 20 millions books as part of its Google Books Project,¹⁸ and the University of Toronto library system houses more than 11.5 million books, and subscribes to approximately 240,000 serials, such as journals, each containing several other works.¹⁹

[24] There is no need to belabor this point, because Access Copyright itself emphasizes that the data that it provided lacks any probative value.²⁰ The problem, however, is that this is the *only* information that Access Copyright has provided and it denied having any other relevant information. In its response to Interrogatory #1 Access Copyright stated that “Access Copyright has no other information or documentation responsive to this interrogatory”, and that “There is no other ‘documentation linked to the databases’ responsive to this interrogatory.” It also noted that “As in other tariff proceedings, Access Copyright expects to present evidence on the proportion of its repertoire at issue in this matter as part of its case through evidence gained by way of interrogatory responses and/or a survey(s)”,²¹ but Contrary to its expectation, it did not present any such evidence.

[25] Thus, the fact that this is the *only* information that Access Copyright has provided and admits having is highly probative of the fact that its claims about the scope of its repertoire are false, misleading, and utterly baseless.

[26] As far as Born Digital Works are concerned, Access Copyright purports to administer them on an “inclusion basis”, but it did not file any such list; it did not provide such a list in its response to my interrogatories; nor such a list is available on its website or elsewhere.²² Therefore, I suppose that the only reasonable inference that can be drawn from this evidence is that its repertoire of Born Digital Works is nil.

[27] Access Copyright’s responses to additional interrogatories strengthen the conclusion that ought to be drawn about the (non)scope of its repertoire.

III. Interrogatory #2

[28] In this interrogatory I asked the following question:

Q: Provide information about the size of Access Copyright’s repertoire relative to the universe of published literary, dramatic and artistic works that are subject to copyright in

¹⁸ Authors Guild, Inc. v. Google Inc., --- F.Supp.2d ---- (S.D.N.Y. 2013), 2013 WL 6017130, at *1.

¹⁹ University of Toronto Libraries, Annual Library Statistics, May 1, 2011 to April 30, 2012, Tables 2C & 5A, online: <http://onereach.library.utoronto.ca/annual-statistics/2011-2012>

²⁰ Exhibit AK2.

²¹ Exhibit AK1, at p. 3.

²² The Board is invited to use Access Copyright’s Look-up tool and decide whether it provides any useful information. The tool is available at <https://rms.accesscopyright.ca/rplookup/repertoire/RepertoireLookup.aspx>

Canada, as well as any documentation that supports or can aid in making such determination.

Access Copyright's reply was:

R: Access Copyright has no information that is responsive to this interrogatory. The universe of published literary, dramatic and artistic works that are subject to copyright in Canada is unknown.²³

[29] It follows that Access Copyright, which claims to that all published works (minus the small number of works on the Exclusion List) are part of its repertoire, has no information about the scope of this repertoire, not even an estimate. Not even "mere guesses, speculations and approximations", but nothing. Let me restate Access Copyright's reply: it purports to have been authorized to license the entire universe of published works in Canada (minus the 10,000 titles on the exclusion list), but it admits that what this repertoire consists of is unknown, and that it has no information about that. The Board should take Access Copyright's word for it; it need not rely on mine.

IV. Interrogatory #3

[30] In this interrogatory I asked the following question:

Q: Provide information and supporting documentation that establishes or may help to determine the scope of works used by Canadian Academic institutions that is within the repertoire of Access Copyright, compared to the use of works that are not within its repertoire during each of the last five years.

Access Copyright's reply was:

R: Access Copyright does not have any information that is responsive to this interrogatory. Under both the interim tariff and the prior licences between the post-secondary educational institutions and Access Copyright, post-secondary institutions are only required to report works copied that are within Access Copyright's repertoire and for which the institution needs a licence.²⁴

[31] What follows is that even though Access Copyright claims that any non-excluded and published work used by educational institution is within its repertoire, not only it does not any information about which works are in its repertoire, it also does not have any information that can help determine the proportion between the repertoire and non-repertoire works.

V. Interrogatory #4

[32] In this interrogatory I asked the following question:

²³ Exhibit AK1.

²⁴ Exhibit AK1.

Q: Provide copies of all agreements between Access Copyright and Copibec and other Reproduction Rights Organizations (RROs) in other countries. If such agreements are subject to rules, decisions or recommendations promulgated by the International Federation of Reproduction Rights Organisations (or a similar organization) please provide copies of such documents.²⁵

[33] One of the purposes of this question is to see whether its agreements with other RRO may shed light on the scope of Access Copyright's repertoire.

[34] Access Copyright provided a folder with 42 documents, most of which it designated as confidential.²⁶ Not only these documents fail to support Access Copyright's claims about the breadth of its repertoire, they actually reveal that is considerably narrower. Recall that Access Copyright claims that any work first published by a resident in each of these countries is within its repertoire. This is certainly untrue. For example, in Schedule L of the Agreement between Access Copyright and the Copyright Clearance Center from the United States (CCC),²⁷ Consistent with its current assertions about the scope of its repertoire, Access Copyright purports to grant CCC an authorization to "all works published in Canada by Canadian publishers and/or Canadian authors, except [if excluded]". The CCC, on the other hand, only grants Access Copyright an inclusion-based license pertaining to a specific list of 225 included entities.²⁸

[35] It follows that with respect to works published in the United States—presumably the single largest source of works in the English language that are used by many Canadian post-secondary institutions (or at least one of the largest sources), Access Copyright's repertoire is unquestionably narrower than what it purports it to be.

VI. Interrogatory #8

[36] In this interrogatory I asked the following question:

Q: Provide any available documentation concerning Access Copyright's "indemnification" scheme including the basis for its existence in the past and the reason why it is not being currently proposed, as well as any claims that may have been made pursuant to it.²⁹

[37] One of the purposes of this question is to see whether its agreements Access Copyright's internal discussions regarding indemnification for the use of works that are actually not in its repertoire shed light on the scope of Access Copyright's true repertoire.

²⁵ Exhibit AK1.

²⁶ Exhibit AK7.

²⁷ Exhibit AK8 – Confidential.

²⁸ Exhibit AK8 – Confidential.

²⁹ Exhibit AK1.

[38] As the Board may recall, Access Copyright provided heavily redacted documents. Following the Board's ruling from January 25, 2012, it provided the same documents with fewer redactions, but unfortunately the redactions appear to conceal precisely the parts that provide useful information.³⁰ Despite the redactions, the fact that Access Copyright has chosen to conceal all the useful information regarding its indemnification scheme, despite being ordered twice to reveal it, is an additional clear indicator that there is a serious gap between what Access Copyright purports to license and what it is legally authorized to do. Indeed, one of the documents which had been initially redacted, a paper from 2002 presented by Access Copyright legal counsel, explains how the indemnification contributed to Access Copyright success because "Under Access Copyright's standard comprehensive license, an indemnity is offered to licensed users, when acting within the terms and conditions of the licence, for any copyright infringement claims which might be brought by rights holders who are not affiliates of Access Copyright."³¹ In other words, without a promise to indemnify users for the use of works that are not part of Access Copyright's lawful repertoire, Access Copyright would not have achieved its success.

VII. Interrogatory #9

[39] In this interrogatory I asked the following question:

Q: Provide any available documentation concerning Access Copyright's decision to include digital uses in the Proposed Tariff, including the reasons why digital uses were not included in the previous licenses between Access Copyright and academic institutions and the reasons for including it in the Proposed Tariff.

[40] I anticipated that Access Copyright's responses might reveal that its digital repertoire is even more limited than its reprographic repertoire. These documents clearly do that, and many of them discuss the gap between Access Copyright's lawful reprographic repertoire and its lawful digital repertoire, **as well as the unwillingness of many publishers, including the major ones, to authorize Access Copyright to license digital uses.**³²

[41] Lastly, Access Copyright asserts that it also "represents the works of rightsholders who have, by implied agency, authorized Access Copyright to act on their behalf." According to Access Copyright, when it pays "publishers for whom Access Copyright has evidence or reporting indicating that their works were copied by licensees ("Non-Affiliated Rightsholders"), ... When such Non-Affiliated Rightsholder cashes the cheque or accepts the payment, Access Copyright acts as that rightsholder's agent. The acceptance by the rightsholder of the payment from Access Copyright ratifies the transaction retroactive to the date on which Access Copyright

³⁰ These confidential documents are stored in the folder named Exhibit AK9 Docs re indemnity. Note that Access Copyright marked the less-redacted documents as KATZ9, even though they respond to interrogatory #8..

³¹ Exhibit AK10, at p. 28.

³² E.g., Exhibit AK12 - Confidential.

licensed the work. Access Copyright's policy has always been to represent all rightsholders and to compensate all rightsholders for the reproduction of their works.”³³

[42] This argument is another component in Access Copyright’s obfuscation strategy. Even though the Board has previously endorsed this “agency by ratification” theory, and even if an the acceptance of payment from Access Copyright may amount to retroactive ratification, it does not mean that the work has become part of Access Copyright’s repertoire. At most, it could mean that by accepting the payment the copyright owner might be estopped from bringing an action against Access Copyright for infringing its right by authorizing the specific reproduction that had been made, identified, and paid for. It does not mean that the copyright owner is equally estopped from suing the person who made the reproduction for infringing the owner’s reproduction right; it does not mean that the copyright owner, by accepting that payment has retroactively authorized all previous grants of licenses by Access Copyright, and it certainly does not mean that the work has become part of Access Copyright’s repertoire for future transactions.

[43] Moreover, the facts asserted in para. 16 of Exhibit AC-2, even if accepted as true, are meaningless. For example, Access Copyright asserts that in 2012 it distributed money to 1250 Non-Affiliated Rightsholders. This might have been indicative of something relevant to the issue at hand if other than those 1250 copyright owners, all other copyright owners of published works were formally affiliated with Access Copyright. There is no evidence before the Board that would allow it to make such improbable inference.

[44] Furthermore, Access Copyright’s statement about the so-called “implied agency” constitutes an unequivocal admission that (a) it has *not* been lawfully authorized to grant licenses on behalf of all copyright owners on behalf of which it purports to grant licenses; and (b) that it actually grants licenses and collects license fees on behalf of copyright owners who have never authorized it to do so. The only factual inference that the Board may reasonably draw from this admission is that Access Copyright has *not* been lawfully authorized to grant licenses for the works that it purports to be in its repertoire, and that therefore the scope of its repertoire is not as broad as it misleadingly represents it to be.

[45] In sum, while I have chosen not to make any further submissions at or as the actual hearing approaches, I believe that this information may be of assistance to the Board, and that the only reasonable conclusion that can be drawn from it is that there is no probative evidence before the Board, not about the scope of Access Copyright’s repertoire, let alone the scope of its *compensable* repertoire, that would allow it to certify the Proposed Tariff. What Access Copyright has provided in this regard does not even amount to “mere guesses, speculations and approximations”; it is only a false, misleading, improbable and baseless vacuous assertion.

³³ Exhibit AC – 2, para. 15.