



July 19, 2017

Mr. Gilles McDougall
Acting Secretary General
The Copyright Board of Canada
56 Sparks Street, Suite 800
Ottawa, Ontario, K1A 0C9
gilles.mcdougall@cb-cda.gc.ca

Dear Mr. McDougall,

Re: Post-Secondary Educational Institutions 2018-2020 - Proposed Statement of Royalties to Be Collected by Access Copyright for the Reproduction, Communication to the Public by Telecommunication, Making Available to the Public, and Authorization of Such Acts in Canada, of Works in its Repertoire

The Canadian Association of Research Libraries (“CARL”) represents 29 university library members and two federal government libraries. CARL provides leadership on behalf of Canada’s research libraries and enhances capacity to advance research and higher education. It promotes effective and sustainable knowledge creation, dissemination, and preservation; and public policy that enables broad access to scholarly information.

CARL objects to Access Copyright’s *Proposed Tariff* for Post-Secondary Institutions for the years 2018 to 2020 in accordance with section 67.1 of the *Copyright Act* (the “Act”) for the reasons noted below.

Since the fundamentals of this *Proposed Tariff* are similar to the 2011-2013 and 2014-2017 *Proposed Tariffs* submitted by Access Copyright, many of the objections in this letter have been raised in previous objections, including in letters submitted by the Canadian Library Association, the Association of Universities and Colleges in Canada (now Universities Canada), and the Canadian Federation of Students/Canadian Association of University Teachers. To the extent that such previous objections are still applicable and not inconsistent with the following objections, CARL hereby adopts them and incorporates them by reference herein.

Preliminary Procedural and Jurisdictional Points

CARL notes that the Copyright Board has still not rendered a decision on Access Copyright’s Proposed Tariffs for 2011-2013 and 2014-2017. CARL also notes that the Federal Court has just rendered a clearly relevant and very controversial decision on July 12, 2017 in the case *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 (CanLII),

<http://canlii.ca/t/h4s07>, which may be appealed and even stayed pending appeal. There is also a pending decision in the Federal Court of Appeal involving Access Copyright and Provincial Governments¹, which was heard on June 20, 2016, that could clearly have an impact on the above proceedings. It clearly makes no sense and would be manifestly contrary to procedural fairness to require objectors in the current proceedings to incur major expenses, intrusive and burdensome interrogatories and to proceed in any other way until all of these matters are finally resolved, including any judicial review from the pending Board decision and any appeals and stay proceedings in the recent and forthcoming court decisions. Indeed, it would be unfair and illogical even to set a schedule until there is sufficient clarity and finality on the underlying issues of fair dealing and whether a Copyright Board tariff can be mandatory. CARL specifically denies that the Board has jurisdiction to impose an interim tariff in this proceeding and it would be a fundamental failure of procedural fairness to even begin to do so.

CARL asserts as a preliminary and threshold issue that nothing in this letter indicates that we concede that this tariff or any interim tariff could be mandatory for our member institutions. At the risk of oversimplification, CARL's position is that the Board may certify a tariff that is mandatory for Access Copyright but voluntary for users. That is because users may choose to clear their copyright obligations in other ways, including direct licensing and reliance on users' fair dealing rights and other users' rights in the Act. This is not merely a theory but is the explicit ruling of the Supreme Court of Canada in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> (paras 101-133) which, we submit, applies *a fortiori* to interim tariffs or any final tariffs that may be certified in this proceeding. Many of our member institutions have expertise and processes in place to ensure that, in cases where an exception or a license does not apply, transactional licences are purchased. These institutions would therefore not require blanket licenses or blanket tariffs to ensure proper payment for the use of copyrighted works. The Board should invite or, if necessary, order Access Copyright to propose transactional tariffs that, under the right circumstances, could be useful and attractive to post-secondary institutions.

Objections

1. This tariff should not license activities that fall outside the exclusive rights of a copyright holder. The *Act* includes a number of users' rights - including fair dealing and other limitations and exceptions - that allow for copyright works to be used without the permission or payment of any kind, much less a tariff. This should be clearly stated in both the definitions and applications section of any interim or final tariff.
2. The definition of "copy" in the *Proposed Tariff* purports to include a number of activities that are simply not covered by section 3(1) of the *Act* or otherwise. These include linking, emailing, displaying, projecting and activity included in s. 2.4(1)(b) of the Act. Any activity that does not constitute an exclusive right of a copyright owner whose works are proven to be in Access Copyright's repertoire should be excluded from any interim tariff or tariff.
3. The *Proposed Tariff* royalty rate for universities is \$26 per FTE student for Universities and \$10 for other Educational Institutions. These rates are excessive and exorbitant. The terms are unfair and inequitable. They do not reflect the current market pricing for reproduction rights licenses in higher education in Canada or the USA through the

¹ THE CANADIAN COPYRIGHT LICENSING AGENCY v. HMQ OF ALBERTA ET AL, A-293-15

Copyright Clearance Centre. They do not even reflect Access Copyright's own offerings, which are still very excessive for any value they may provide. For example, Access Copyright currently offers a licence for Canadian universities with a royalty rate of \$18 per FTE, or \$15 per FTE if the University signs on for three years. This license, which includes both digital and print copying and allows for copying up to 20 percent of a work also provides indemnity to institutions for any copies made within the license limits.² The rate in the *Proposed Tariff* is also significantly higher than the rate of \$13.50 per FTE recently agreed upon by Copibec and universities in Quebec for the term of May 31, 2017 to May 31, 2021, a licence that is similar in scope to the *Proposed Tariff*.³ In addition, the latest royalty rates for other Access Copyright tariffs were set by the Copyright Board at much lower rates. For example, the K-12 school sector is set at \$2.46 per student for the years 2010 to 2012 and \$2.41 for the year 2013 to 2015⁴ and the rate for provincial and territorial governments is set at 11.56 cents for 2005-2009 and 49.71 cents for 2010-2014.⁵ Therefore, we believe the \$26 per FTE student tariff rate is significantly inflated and both unsupported and unsupportable by any facts or evidence.

4. The record keeping, reporting, attribution, surveying and auditing and other administrative requirements in the *Proposed Tariff* are extensive, burdensome, costly and unworkable to institutions, and untenable because the prescribed reporting would not respect the privacy and academic freedom of faculty. They are unnecessary to achieve any legitimate purpose of Access Copyright. They may indeed be contrary to the federal PIPEDA legislation and other privacy legislation and with serious implication on freedom of expression and other rights guaranteed by the *Charter of Rights and Freedoms*. Furthermore, since the royalty rate for this tariff is applied on the basis of FTE enrolment and not by the amounts copied, we believe the only item that should be subject to an audit is the current FTE enrolment number for each institution. Any other record keeping, surveying and auditing that is designed to determine the content and amounts of what is being copied should be left out of the final tariff.
5. Competitive and vibrant markets for works in digital form are thriving and growing, to the benefit of authors, publishers, readers, students, scholars and Canadians as a whole. The Proposed Tariff will create severe anti-competitive effects on those markets without any redeeming value for Canadians, and contrary to the express policies of the *Copyright Act* and the *Competition Act*.
6. Access Copyright has a very limited repertoire in which it holds sufficient rights to offer any license - particularly digital rights. Access Copyright must adequately prove an actual factually and legally sufficient chain of title to each and every work in its repertoire and

² "Access Copyright New Offerings Brochure," accessed July 7, 2017, <http://accesscopyright.ca/media/84266/ac-newofferingsbrochure-final.pdf>.

³ "Renewal of Licensing Agreement with Copibec," *McGill University Board of Governors*, accessed July 7, 2017, https://www.mcgill.ca/boardofgovernors/files/boardofgovernors/gd16-60_copibec_renewal_memo.pdf.

⁴ "Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in Its Repertoire: Elementary and Secondary Schools (2010-2015)," Decision of the Board (Copyright Board Canada, February 20, 2016), <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2016/TAR-2016-02-20.pdf>.

⁵ "Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in Its Repertoire: Provincial and Territorial Governments – 2005-2014," Decision of the Board (Copyright Board Canada, May 22, 2015), <http://www.cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>. 126.

provide a functional and current online free database of such repertoire with sufficient information for potential users.

7. Certifying the Proposed Tariff would aid the effective mass infringement of copyright by Access Copyright, which illegally authorizes the copying of works in which it has no rights.
8. Certifying the Proposed Tariff would further assist Access Copyright effectively to create an extended collective licensing regime without approval of Parliament, and contrary to principles of the *Copyright Act*.
9. The Proposed Tariff lacks recognition for the use of works that have already been paid for or otherwise licensed (under agreements that most Universities already have with the major academic publishers), and its certification will force Canadian Post-Secondary Educational Institutions to pay twice or more for such works.
10. The Proposed Tariff purports to limit users from posting any copies of any work in Access Copyright's repertoire outside of a secure network or in a manner accessible over the internet. This is a blatant overreach if such activity is licensed, entails fair dealing or is not substantial.
11. In the absence of an indemnity for the use of works which Access Copyright is not legally permitted to license, the value of a license from Access Copyright is at most a fraction of what is sought - and the offering of an indemnity would be illegal because it may be an infringing act and Access Copyright is not a licensed insurance or indemnity company and does not meet the statutory requirements for being one.
12. The imposition by the Board of any interim or final tariff that purports to be or is effectively mandatory would be contrary to the rule of law and an unconstitutional tax contrary to ss. 53, 54 and 125 of the *Constitution Act, 1867* and an unconstitutional intrusion upon the exclusive rights of the Provinces with respect to education pursuant to s. 93 of the *Constitution Act, 1867*.
13. CARL expressly reserves its right to add other grounds for objection or modify or expand the existing ones in accordance with the Copyright Board's procedure.

Conclusion

For the reasons listed above, CARL fundamentally objects to the *Proposed Tariff* for Post-Secondary Institutions for the years 2018 to 2020 in accordance with section 67.1 of the *Act*.

Yours sincerely,



Susan Haigh

Executive Director / Directrice générale

Canadian Association of Research Libraries / Association des bibliothèques de recherche du Canada

309 rue Cooper Street, Suite 203

Ottawa Ontario K2P 0G5

T [613.482.9344 x 101](tel:613.482.9344)

E susan.haigh@carl-abrc.ca

www.carl-abrc.ca