



December 9, 2019

Ms. Lara Taylor

Secretary General

Copyright Board of Canada

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Ms. Taylor,

Re: Post-Secondary Educational Institutions 2021-2023 - Statement of Royalties to Be Collected by the Canadian Copyright Licensing Agency (Access Copyright)

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* (the “*Proposed Tariff*”) for the years 2021 to 2023 in accordance with section 68.3(1) of the *Copyright Act* (the “*Act*”) for the reasons noted below.¹

Preliminary Jurisdictional and Procedural Points

Copyright Board Tariffs Cannot be Mandatory for Users

CARL asserts as a preliminary and threshold issue that nothing in this letter indicates that we concede that this tariff could be mandatory for our member institutions. At the risk of oversimplification, CARL’s position is that the Copyright Board (“the Board”) may certify a tariff that is mandatory for Access Copyright but voluntary for users. That is because:

¹ Since the fundamentals of the Proposed Tariff are similar to those proposed by Access Copyright in 2011-2013, 2014-2017 and 2018-2020, this letter is a modified version of our objection to the 2018-2020 proposed tariff, building on the points that continue to be relevant and including new points and issues. In addition, many of these points were raised in objections to earlier tariffs, 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.

- Member institutions 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 in the 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 the *Proposed Tariff* that may be certified in this proceeding.
- Member institutions typically 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 tariffs to ensure proper payment for the use of copyrighted works. The Board should require Access Copyright to provide appropriate transactional licensing tariffs that could be useful and attractive to post-secondary institutions as an alternative to or a supplemental compliance option.

Retroactivity Issue

The period of coverage of the *Proposed Tariff* is, at this time, in the future. However, there is clear risk (based on historical precedent) that this tariff may only be approved well after the timeframe has passed. We believe that any tariff should be approved before the date it is to come into effect; and we believe that the Board does not have the jurisdiction to impose retroactive tariffs, or alternatively, such tariffs can be retroactive no more so than to the extent of a "practical necessity."²

Procedural Fairness Concerns

CARL notes that the Copyright Board released decisions on Access Copyright's Proposed Tariffs for 2011-2013, 2014-2017 on Saturday, December 7th, 2019, just prior to the close of the 30-day objection period deadline of December 9th 2019. This does not allow sufficient time for CARL and other objectors to fully consider such decisions in their objections. In addition, the decision on Access Copyright's Proposed Tariff for 2018-2020 is still outstanding. CARL also notes that we await a decision from the Federal Court of Appeal in the case of *Canadian Copyright Licensing Agency v. York University*, which will inevitably deal with crucial issues such as whether tariffs are mandatory, and the use of fair dealing by post-secondary institutions. It would be contrary to procedural fairness to require objectors in the current proceedings to incur any significant expenses, or undergo intrusive and burdensome interrogatories, until all of these matters are finally resolved, including any judicial review from the pending Board decisions and any appeals and stay proceedings in the recent and forthcoming court decisions.

² *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624 at 634. ("Maple Leaf v. CAPAC"). See also *CBC v. SODRAC*, *supra* note 1 at paras. 109-111 and FN 2.

Objections

Tariff Terms and Definitions

1. The *Proposed Tariff* should not include activities that fall outside the exclusive rights of a copyright holder. The *Act* includes users' rights – such as fair dealing and other limitations and exceptions – that allow for copyright works to be used without permission or payment. This should be clearly stated in both the definitions and applications section of the *Proposed 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. CARL was pleased to see that “linking or hyperlinking to a digital copy” was not included in the *Proposed Tariff* as it had been in previous proposed tariffs. Unfortunately, other problematic definitions have been retained, notably, (i) the projecting and (j) the displaying of a work using a medium or device. 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 the *Proposed Tariff*.
3. The definitions also suggest that activities such as emailing, texting, posting, uploading and copying onto or storing on a Secure Network, each represent the making of an individual copy. Such a definition would undermine the concept of technological neutrality and may artificially inflate the number of copies that would appear in a survey or audit, as multiple “copies” (as defined) would be required to make one copy of a work available to students.³
4. 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 neither necessary nor acceptable if such activity is licensed, is covered by fair dealing or other exceptions in the *Act* or is not substantial. The *Proposed Tariff* purports, without any apparent or established legal basis, to justify unspecified “royalties” on the basis, *inter alia*, of the following rights:
 - a. Communication
 - b. Authorization
 - c. Making Available, the interpretation and effect of which remain to be determined in still pending decisions in the Federal Court of Appeal⁴

³ For example, a chapter of a print book being provided to a student in a course of study could be scanned, copied and stored on a local storage device or medium, posted or stored onto a Secure Network, and then displayed on a computer, tablet or other mobile device before a student would be able to read the chapter.

⁴ Following judicial review applications of the Copyright Board's decision of August 25, 2017 (revised September 22, 2017) re SCOPE OF SECTION 2.4(1.1) OF THE COPYRIGHT ACT– MAKING AVAILABLE

Royalty Rates and the Value of the Proposed Tariff

5. The *Proposed Tariff* rate exceeds the value it provides to member institutions, particularly considering significant structural changes to the market for works. In the past, university library holdings were predominantly in print and the university had no separate reproduction rights in those materials. Access Copyright does not provide any access to materials, but can provide (limited) reproduction rights in the works in its repertoire. When these reproduction rights were not otherwise readily available, the service they offered may have provided value to universities. However, university libraries now license not only scholarly journals but increasing numbers of electronic books, via agreements directly with publishers and vendors in which both access and reproduction rights are negotiated. Such licenses, coupled with appropriate applications of fair dealing and use of transactional licenses as needed, allow universities to remain copyright compliant outside of an Access Copyright institutional license or tariff. The *Proposed Tariff* does not recognize the significant number of licensed works already acquired by university libraries, and its certification will require Canadian Post-Secondary Educational Institutions, in essence to pay twice or more for works.
6. The *Proposed Tariff* rates do not reflect the current, or indeed any, market pricing for reproduction rights licenses in higher education in Canada or the USA through the Copyright Clearance Centre. They do not even reflect Access Copyright's previous offerings.⁵ In addition, the latest rates for other Access Copyright tariffs were set by the Copyright Board at much lower amounts. 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 2015⁶ and the rate for provincial and territorial governments is set at 11.56 cents for 2005-2009 and 49.71 cents for 2010-2014.⁷ Therefore, we believe the \$26.00 per FTE student tariff rate is significantly inflated and both unsupported and unsupportable by any facts or evidence.

⁵Access Copyright did offer a blanket licences to Canadian universities even in 2015 with a rate of \$18 per FTE, or \$15 per FTE if the University signed on for three years. These were known as "Premium" & "Choice". These licenses, which covered both digital and print copying and allowed for copying up to 20 percent of a work also provided indemnity to institutions for any copies made within the license limits. Information about this license was removed from Access Copyright's website in 2017, but was located at: <http://accesscopyright.ca/media/84266/acnewofferingsbrochure-final.pdf>.

⁶ "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>.

⁷ "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.

Reporting Requirements and Survey and Audit Provisions

7. The record keeping, reporting, attribution, surveying and auditing and other administrative requirements in the *Proposed Tariff* are extensive, burdensome, costly and unworkable to institutions. Above all these are unnecessary – especially for an FTE based tariff. They may also be contrary to provincial privacy legislation. Furthermore, since the rate for this tariff is applied on the basis of FTE enrolment and not by the amount copied, the only item that should be subject to an audit for the purpose of ascertaining royalties is the current FTE enrolment number for each institution. Regardless of whether Access Copyright has some rationale for collecting this information, the specific monthly reporting, survey and auditing provisions, and the remedy provisions, are simply inappropriate.
8. Reporting requirements in this *Proposed Tariff* include “digital course-packs or Published Works in the Repertoire posted, uploaded, or stored on a Secure Network”. This is untenable and would have significant implications for post-secondary educational institutions, as it would compound issues surrounding the administrative requirements of the tariff. In the draft Post-Secondary Educational Institution Tariffs (2011-2014 and 2015-2017) released by the Copyright Board on February 6th, 2019, reporting requirements were limited to print course collections. Reporting on digital copies posted, uploaded, or stored on a secure network, particularly considering the expanded definition of “copy” in the proposed tariff, would be a costly and resource intensive task for universities.

Access Copyright’s Repertoire

9. Access Copyright has a limited repertoire for which a proposed tariff would be applicable. This repertoire is likely to be even more limited for digital rights.⁸ Access Copyright must adequately prove a factually and legally sufficient chain of title to each and every work in its repertoire and provide a functional and current online free database of such repertoire with sufficient information for potential users.⁹ Such a list should include essential bibliographic information

⁸ “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>, at Para 165 and 170.

⁹ This point was made in the Copyright Board decision on the Access Copyright Provincial and Territorial Governments 2005-2015 Tariff (online: Copyright Board of Canada <<https://cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>>). The board stated that since Access Copyright “does not provide a list of affiliate copyright owners to licensees [...] a user cannot know with certainty whether Access Copyright actually has the authority to license the copying of that work or not” (para. 139). Furthermore, the Board found that Access Copyright did not have the authorization to allow digital copies without a clause mandating their deletion after a period of time (para. 165). This type of clause is not included in the *Proposed Tariff*.

concerning the author and publisher, ISBN or ISSN identifiers for works that it purports to license, as well as distinctions between Access Copyright's right to authorize paper and digital copies.

10. Certifying the *Proposed Tariff* would further assist Access Copyright in effectively creating an extended collective licensing regime without approval of Parliament, and contrary to the principles of the *Copyright Act*.

Conclusion

The Statutory Review of the Copyright Act Report published in June 2019 recommends "that the government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus toward the future of educational fair dealing in Canada".¹⁰ Proposing a tariff that includes excessive terms and rates that inhibits the work of students, staff and faculty is a step backwards from the goal of building consensus and mutual understanding of educational fair dealing on campuses in Canada.¹¹

For the reasons listed above, CARL fundamentally objects to the *Proposed Tariff* for Post-Secondary Institutions for the years 2021 to 2023 in accordance with section 68.3(1) of the Act. 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.

Yours sincerely,



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¹⁰ Canada. Parliament. House of Commons. *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*. 42nd Parliament, 1st Session. June 2019. <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>. p. 65.

¹¹ Canadian Alliance of Student Associations. *Copyright Board's Proposed Tariffs Continue to Leave Students in the Dark*" (Canadian Alliance of Student Associations, November 19, 2019), https://www.casa-acae.com/copyright_board_proposed_tariffs_leave_students_in_the_dark.