



November 26, 2013

VIA Email

Copyright Board of Canada
800 – 56 Sparks Street
Ottawa, ON, K1A 0C9

Attention: Gilles McDougall
Secretary General

Dear Mr. McDougall:

Re: Access Copyright Post-Secondary Educational Institution Tariff (2011-2013)

The Canadian Association of University Teachers (“CAUT”) and the Canadian Federation of University Students (“CFS”) write in response to Access Copyright’s request of November 18, 2013, to consolidate proceedings in respect of its proposed tariff filed March 28, 2013 (the “2014-2017 Proposed Tariff”), with proceedings in respect of its proposed tariff filed March 31, 2010 (the “2011-2013 Proposed Tariff”) (the 2014-2017 Proposed Tariff and the 2011-2013 Proposed Tariff together shall be referred to as the “Proposed Tariffs”).

CAUT and CFS have grave concerns about the viability of the present process given the absence of any institutional objectors from proceedings. CAUT and CFS remain the sole organizational interveners in the proceedings in respect of both Proposed Tariffs. These institutions – and CIPPIC, their pro bono legal counsel – are ill-equipped to participate in Board proceedings as presently constituted. These proceedings are long, convoluted, and debilitatingly expensive. Steps that the Board may take to buttress the integrity of proceedings are welcome.

Access Copyright’s proposal has the merit of enhancing the efficiency and reducing the costs of proceedings. Unfortunately, Access Copyright overstates its claims with respect to the burdens imposed by its proposed approach to consolidation. CAUT and CFS are open to creative means of addressing these burdens. However, we do not see any way for

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these to be addressed within the tight timelines governing the 2011-2013 Proposed Tariff proceedings.

We have had the advantage of reviewing Professor Katz's able submissions of November 21. We do not propose to repeat the substance of those submissions, but offer some observations.

1. The 2014-2017 Proposed Tariff Raises Novel Legal and Factual Issues

Access Copyright's 2014-2017 Proposed Tariff purports to address "the reproduction [of] and authorization to reproduce" works in Access Copyright's repertoire. However, the body of the 2014-2017 Proposed Tariff includes within its definition of "Copy" "... the making available to the public by telecommunication" of a "Digital Copy". This is a radical departure from the text of the 2011-2013 Proposed Tariff, and plainly raises controversial and novel legal and factual issues.

2. Access Copyright's Proposal for Reply Argument Raises Procedural Concerns

Access Copyright has already submitted its case. That case has not addressed the novel legal and factual issue identified above. Access Copyright proposes to address issues raised by the interveners in reply. Thus, the first time Access Copyright will address these novel issues will be in reply. The interveners will not have an opportunity to respond to Access Copyright's arguments. This will raise an issue of procedural fairness and inevitably confuse and complicate proceedings.

3. Access Copyright Proposes to Adduce New Evidence

We simply observe that Access Copyright proposes to adduce new evidence. Obviously, no new evidence could be adduced by Access Copyright with respect to the 2011-2013 Proposed Tariff, and its relevance will have to be restricted to the 2014-2017 Proposed Tariff. This will also require a period for the interveners to review and reply to the evidence, including potentially filing responsive evidence. We do not understand how these proceedings could proceed on the schedule set by the Board while admitting this departure from the schedule.

4. Juridical Disadvantage

The absence of institutional objectors from the proceeding in respect of the 2014-2017 Proposed Tariff raises a number of troubling impediments to the Board in fulfilling its mandate to determine fair and . One of the potential mechanisms available to the Board to address this failure of the adversarial process is to take on an inquisitorial role itself. Subsection 68 of the Act provides that:

68. (1) The Board shall, as soon as practicable, consider a proposed tariff and any

objections thereto referred to in subsection 67.1(5) or raised by the Board.... . [emphasis added]

Parliament fully foresaw the need for the Board to address failures in the adjudicative process, such as those at work in the present Proposed Tariffs, by empowering the Board to act as an objector. The limited ability of CAUT and CFS to remedy this failure calls for the Board's involvement in proceedings in an inquisitorial fashion. Consolidation of proceedings would deny the Board the time it will require to participate in proceedings in a meaningful way, and effectively frustrate the Board's inquisitorial function. Access Copyright's proposal accordingly presents the Board with a juridical disadvantage that it may not be able to countenance.

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In the alternative, should the Board grant Access Copyright's consolidation request, CAUT and CFS offer observations on the terms of the Board's accompanying direction to the parties. Consolidation of the hearings does present some financial and efficiency benefits. However, those may be accrued by delaying proceedings, not by advancing them. CAUT and CFS observe that these benefits may accrue under the following circumstances:

- the Proposed Tariffs' substantive terms (including royalty rates) should be harmonized to the level of the 2011-2013 Proposed Tariff, not the 2014-2017 Proposed Tariff;
- the concessions of the 2014-2017 Proposed Tariff should be applied equally to the 2011-2013 Proposed Tariff;
- no new evidence may be adduced by Access Copyright; and
- the hearing of the Proposed Tariffs is delayed a sufficient period to permit the Board to fulfil its inquisitorial mandate.

* * *

We trust the foregoing is clear. Please do not hesitate to contact us should you have any questions.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is fluid and cursive, with "David" on top and "Fewer" below it, both starting with a capital letter.

David Fewer
Director, CIPPIC

Cc: Nancy Brooks
Ariel Katz
Sean Maguire