

February 15, 2016

BY E-MAIL

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

Dear Mr. McDougall:

Re: Access Copyright – Post-Secondary Educational Institutions Tariff (2011-2013) & (2014-2017)

We are aware that the Copyright Board of Canada (the Board) held its hearing in the above-mentioned matter between January 18 and 22, 2016, during which Access Copyright and the objector, Sean Maguire, presented their respective evidence and oral arguments. We understand that Access Copyright indicated that it intends to submit written arguments, but has not yet done so; as a result, the Board may yet consider comments from interested parties.

We are also aware of the letter submitted to the Board by York University (York), dated February 9, 2016.

In this letter, we identify the basis upon which we respectfully request to be considered interested parties in this proceeding, and present our comments.

Introduction to the Undersigned

Schedule A to this letter contains a short description of each of the Canadian post-secondary institutions that are signatories to this letter.

The Undersigned are Interested Parties

All of the undersigned are members of Universities Canada (formerly known as the Association of Universities and Colleges of Canada, or "AUCC"). Universities Canada was previously an objector in these proceedings but withdrew on April 24, 2012. As a result of a subsequent negotiated agreement between Access Copyright and Universities Canada with respect to certain Interrogatories in Abeyance, the Board issued the following Notice of the Board:

The Board notes the withdrawal of the application of Access Copyright dated September 17, 2012. At this stage, the Board does not expect that it will require any further evidence from or about the unlicensed AUCC institutions in these proceedings. Were this to change, parties will be afforded sufficient time to determine their course of action.

The undersigned respectfully request that the Board consider the comments set out in this letter, on the basis that:

- A. The undersigned have adopted copyright policies and practices that, like those of York, give effect to fair dealing, transactional and other licenses, and other forms of permitted use of materials subject to copyright.
- B. It is apparent that Access Copyright may seek to have the final Post-Secondary Educational Tariff certified by the Board in this proceeding, apply to post-secondary institutions across Canada, including the undersigned.
- C. The comments set out below emphasize that York's perspective on the potential structure of a tariff are shared by the broader post-secondary community.

The Comments

The undersigned confirm that the perspective presented by York in its letter to the Board, dated February 9, 2016, is shared by the undersigned.

We also provide the following additional comments.

1. The recent decision of the Supreme Court of Canada in *CBC v. SODRAC*¹ (*CBC*), sets out certain aspects of the legal framework in which the Board is to consider the proposed tariff.

In particular, we highlight the following points:

- In considering whether tariffs certified by the Board should have a mandatory binding effect on users, the Court concluded that "*there is no legal basis on which to hold users to the terms of a licence without their assent*"². Accordingly, our comments are premised upon the freedom to select the licensing arrangements best suited to provide

¹ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 (CanLII)

² *Ibid.*, para 111

copyrighted materials to fulfill our respective educational and research mandates.

- In any tariff setting exercise “[i]t is the Board’s duty to apply the principles of technological neutrality and balance in a reasonable and coherent manner.”³ Further, “the Board must ground its decisions in the Copyright Act, the principles of technological neutrality and balance, its expertise, and the evidence before it.”⁴ Therefore, a range of licensing arrangements must be considered by the Board.
- The Court observed that the *Copyright Act* regulates the actions of collective organizations and that the case law has developed so as to ensure that such organizations do not devolve into “instruments of oppression and extortion”⁵. With these observations in mind, the Court strongly suggested that this would justify finding that the Board does have the power to bind collective organizations to a licence based on the user’s preferred model—transactional or blanket—on terms that the Board finds fair in view of that model.⁶

For the reasons that follow, the undersigned respectfully comment that the structure of any post-secondary tariff should facilitate a range of licensing arrangements.

- A single license model that imposes a high cost on licensees, regardless of the actual usage of in-repertoire works, is neither fair, nor economically efficient.

In particular:

- *Efficiency and breadth.* The educational and research needs of each of the undersigned require access to a broad, international range of copyrighted materials. A range of licensing arrangements are necessary to provide sufficient access to copyrighted materials that Access Copyright asserts are within its repertoire, and a significant number of other materials.
- *There is significant overlap.* Other licensing arrangements, such as a subscription license for electronic materials, provide access to a broad range of materials, both those which Access Copyright asserts are within

³ Ibid., para 93

⁴ Ibid., para 95

⁵ *Vigneux v. Canadian Performing Right Society Ltd.*, 1943 CanLII 38 (SCC), [1943] S.C.R. 348, at p. 356, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128, quoted in *CBC*, para 112.

⁶ *CBC*, para 112

its repertoire, and a significant number of materials outside of Access' purported repertoire. Securing such a license for an electronic resource (as part of a consortium or otherwise), for example, provides full compensation to the copyright holder for the use and copying of their material.

- *Double-paying.* Therefore, a single license model creates the real possibility of double-paying—paying once through another licensing arrangement and, should the institution opt to avail themselves of this option, again through the proposed tariff. This leads to an unbalanced result. As the Court reiterated in *CBC*, quoting from *Théberge*: “*This balance ‘lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them’*”.⁷
- A tariff that requires Access Copyright to offer a range of licensing arrangements, including pay-per-use, would be more flexible and more economically efficient than only a single license model. In particular:
 - *It allows institutions to make targeted purchases.* Institutions may acquire only the materials they require, and pricing would be reflective of the precise extent and purpose of the copying.
 - *It provides flexibility.* Institutions already adjust their copying activity to meet the varied and changing needs of faculty, staff and students. A pay-per-use alternative ensures that the content acquired and cost is adjusted accordingly.

2. The undersigned expect to continue to utilize licensing arrangements such as consortia licensing and pay-per-use licenses, as well as other forms of lawful uses, to meet the educational and research needs of faculty, students and staff.

The undersigned join York in urging the Board to give full consideration to the principles of technological neutrality and balance in its valuation analysis and certification of the final tariff. As noted above, including a range of licensing arrangements in any approved tariff will create important and valuable tools for both rights holders, and the undersigned institutions. Accordingly, the

⁷ Ibid, para 74.

undersigned respectfully submit that the tariff should provide a range of licensing models so that those institutions that choose to enter into a licence with Access Copyright may make appropriate and efficient choices without financial and other disincentives being imposed through a single license tariff.

Yours truly,

**The University of British
Columbia**

Per: Hubert Lai, Q.C.
University Counsel

**The Governing Council of the
University of Toronto**

Per: Steven L. Moate
Senior Legal Counsel

**The Governors of the
University of Alberta**

Per: Brad Hamdon
General Counsel

The University of Winnipeg

Per: Dr. Neil Besner
Provost and Vice-President,
Academic

The University of Calgary

Per: Dru Marshall
Provost and Vice President,
Academic

University of the Fraser Valley

Per: Maureen Murphy
Legal Counsel

The University of Lethbridge

Per: Andrew Hakin, Ph.D
Provost & Vice President,
Academic

Thompson Rivers University

Per: Scott Blackford
Legal Counsel

[Original signatures follow]

Signature page for the letter to the Copyright Board of Canada, dated February 15, 2016, Re: Access Copyright – Post-Secondary Educational Institutions Tariff (2011-2013) & (2014-2017)

The University of British Columbia

Per:



Hubert Lai, Q.C.
University Counsel

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**The Governing Council of the
University of Toronto**

Per:



Steven L. Moate
Senior Legal Counsel

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**The Governors of the University
of Alberta**

Per:

A handwritten signature in blue ink, appearing to read 'BAM', is written over a horizontal line.

Brad Hamdon
General Counsel

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The University of Calgary

Per:

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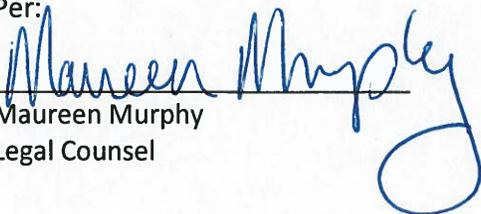
Dru Marshall

Provost and Vice President, Academic

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University of the Fraser Valley

Per:



Maureen Murphy
Legal Counsel

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The University of Lethbridge

Per:

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Andrew Hakin, Ph.D.
Provost & Vice-President, Academic

Signature page for the letter to the Copyright Board of Canada, dated February 15, 2016, Re: Access Copyright – Post-Secondary Educational Institutions Tariff (2011-2013) & (2014-2017)

The University of Winnipeg

Per:



Dr. Neil Besner
Provost and Vice-President, Academic

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Thompson Rivers University

Per:

A handwritten signature in blue ink, appearing to read "S Blackford", is written over a horizontal line.

Scott Blackford
Legal Counsel

Schedule A
Descriptions of the Undersigned Post-Secondary Institutions

The University of British Columbia (UBC)

UBC is a post-secondary institution with campuses in Vancouver and Kelowna, British Columbia. As of 2014/2015, UBC has an enrolment of just under 53,000 students.

As of August 31, 2011, UBC elected not to operate under Access Copyright's interim tariff granted by the Board in its interim decision dated December 23, 2010.

The University of Toronto

The University of Toronto has three campuses (St. George, Mississauga and Scarborough). As of 2014/2015 it has an enrolment of approximately 84,000 students.

In the 2011-2013 period the University of Toronto was covered by a license that it had chosen to enter into with Access Copyright. When that license expired on December 31, 2013 the University and Access Copyright did not agree on a renewal. Thereafter the University of Toronto elected not to operate under the Board's interim tariff.

The University of Alberta

The University of Alberta is a post-secondary institution with campuses in Edmonton and Camrose, Alberta. As of 2014/2015, the University of Alberta has an enrollment of just under 39,000 students.

The University of Alberta operated under a license agreement with Access Copyright until December 31, 2015, after which point the University and Access Copyright did not agree on a renewed license.

The University of Calgary (UC)

UC is a post-secondary institution with a campus in Calgary, Alberta. UC has an enrolment of just over 30,000 students.

As of August 31, 2011, UC elected not to operate under Access Copyright's interim tariff granted by the Board in its interim decision dated December 23, 2010.

The University of Lethbridge

The University of Lethbridge is a post-secondary institution in Alberta with campuses in Lethbridge and Calgary. As of 2015-2016, it has an enrolment is approximately 8,400 students.

As of January 1, 2016 the University of Lethbridge elected not to renew its license with Access Copyright.

The University of Winnipeg

The University of Winnipeg is a post-secondary institution in Winnipeg, Manitoba. As of 2014/2015, it has an enrolment of approximately 7,500 full time equivalent students.

On May 23, 2012, the University of Winnipeg elected not to renew its license with Access Copyright. Shortly thereafter, it ceased operating under the Board's interim tariff.

University of the Fraser Valley

The University of the Fraser Valley (UFV) is a post-secondary institution in British Columbia with campuses in Abbotsford, Chilliwack, Mission, Agassiz and Hope. As of 2014/2015, UFV has an enrolment of approximately 14,400 full time equivalent students.

As of August 31, 2012, UFV elected not to operate under Access Copyright's interim tariff granted by the Board in its interim decision dated December 23, 2010.

Thompson Rivers University (TRU)

TRU is a post-secondary institution with campuses in Kamloops and Williams Lake, British Columbia. As of 2014/2015, TRU has an enrolment of approximately 11,400 full time equivalent students.

As of January 1, 2016, TRU elected not to renew its license with Access Copyright.