



April 13, 2017

[*CB-CDA 2017-026*]

**File: Access Copyright – Elementary and Secondary School Tariff (2010-2015) –
Reconsideration**

NOTICE OF THE BOARD

On January 27, 2017, the Federal Court of Appeal (the “Court”), on judicial review of this matter, issued an order (the “Order”) directing that “the matter is referred back to the Board for reconsideration of only the issue concerning the impact of the coding errors on Access Copyright’s repertoire.”

On March 6, 2017, the Board issued Notice 2017-013 to the Parties, indicating its proposed process for the redetermination of this matter. In that Notice, the Board included the following step: “The Objectors may make submissions on the admissibility of those portions of Exhibit AC-114 that deal with coding errors. Access may reply.” Both Parties made submissions on the proposed process.

It is clear that there is a disagreement between the Parties over the issue of admissibility. In short, Access submits that the Board cannot consider the issue of admissibility since, according to Access, Exhibit AC-114 has already been admitted by the Board. It also argues that the Court’s Order does not permit the Board to consider this issue. The Objectors submit that they have strong concerns about the admissibility of the portions of Exhibit AC-114 that deal with coding errors. They further submit that Access is arguing the issue of admissibility prematurely (at a stage where the Board is merely seeking submissions on the proposed process).

The Board agrees that in order to consider most of Access’ arguments, the Board would be required to resolve the very issue on which the proposed process would permit the Parties to make submissions. It therefore cannot do so at this point.

The Board wishes to avoid a situation where the validity of the entirety of the reconsideration in this matter could depend on the Board’s interpretation of the Court’s Order and potentially require judicial review for this reason alone. This would be neither an efficient use of the Parties’ resources, nor the Board’s.

In Notice 2017-013, the Board wrote:

[t]he Board notes that to the extent there is any disagreement between the parties on the scope of the judgement issued by the Federal Court of Appeal, they are encouraged to jointly seek a clarification on the specific point of disagreement from the judicial administrator.

It appears to the Board that this is such a situation. Indeed, if the clarification provides that admissibility is not an issue the Board may consider in its reconsideration, the reconsideration can immediately proceed with the subsequent steps that the Board would then provide, having taken into consideration the Parties' submissions of April 3, 2017 and the replies thereto of April 12, 2017.

Therefore, we strongly encourage the Parties to jointly submit a request for clarification to the Judicial Administrator of the Federal Court of Appeal on the issue of whether the Order permits the Board to consider the admissibility of a portion of Exhibit AC-114. If only one of the Parties wishes to seek such a clarification, it is encouraged to do so. If neither party wishes to seek such a clarification, the Board may seek such a clarification itself.

By **Friday, April 28, 2017**, the Parties shall report whether they have, jointly, independently, or not at all, submitted a request for clarification to the judicial administrator, and, if applicable, provide the Board with the text of any such request, and what response they have received, if any.



Gilles McDougall
Secretary General