



May 6, 2014

File: Access Copyright – Provincial and Territorial Governments Tariff (2005-2014)

ORDER OF THE BOARD

In relation to the above-mentioned file, the Board intends to provide Access Copyright and the Objectors with a list of events from the 2011 Circum study that it has preliminarily identified as representing acts of copying that would be compensable under the proposed tariffs, and ask the parties to make calculations that will help establish the per-FTE royalty.

However, as the following issue may have a significant impact on the determination of whether or not a study event is compensable, the Board seeks the parties' comments thereon.

In the proposed tariff for 2010-2014, Access Copyright proposes limitations on the use of Digital Copies, including that:

[w]here the Licensee is no longer covered by a tariff for the making and distribution of Digital Copies, the Licensee shall immediately cease to use Digital Copies of Published Works in the Repertoire, delete from their hard drives, servers or storage area networks, and make reasonable efforts to delete from any other device or medium capable of storing Digital Copies, those Digital Copies and upon written request from Access Copyright shall certify that it has done so.

The Objectors have objected to this provision on various grounds.

The Board is of the preliminary view that it will not include such a requirement in the tariff.

It therefore asks the parties to comment on:

1. Whether the Board has the jurisdiction to certify a tariff with such a condition, given that the triggering event – the absence of a “covering” tariff – may occur well after the expiration of this tariff, and that it will not be known when the triggering event will occur at the time of certification;
2. Whether the proposed condition is sufficiently clear in scope and legal effect. For example, if it is clear whether or not the obligation would be triggered

(a) if the Licensee no longer requires a tariff licence from Access Copyright (e.g., because of licences with 3rd parties), and therefore no longer makes payment pursuant to such a tariff, or

(b) if the characteristics of a future tariff diverge from the Proposed Tariff (e.g., the tariff only covers the making of, but not the distribution of, Digital Copies);

and

whether the legal effects and consequences of any non-compliance with the provision are sufficiently clear (e.g., does eventual non-compliance with the provision retroactively make the copying act fall outside of the scope of the tariff?);

3. Whether such an undertaking by the Objectors would be feasible. Please address the fact that this tariff is in relation to acts that will have mostly occurred prior to the date on which it will be certified, as well as the fact that such a provision was agreed to in the 2010 Ontario Licence (AC-2K);

4. The effect that non-inclusion of this condition would have on the compensability of Digital Copies, including whether Access Copyright could issue a licence in relation to the Digital Copies made in the events in the Study;

5. The likelihood that – if such a condition were to be included – any Digital Copies made in the events captured by the Study will eventually be destroyed in accordance with this condition, and any effect this has on the compensability of those copies under the Proposed Tariff;

6. Whether the value of a copy that must eventually be destroyed differs from that of a copy that may be kept indefinitely, and the amount of any adjustment; and

7. Whether the act of “printing from an electronic file”, as used in the Study, results in a Copy (i.e., whether it is a reproduction made by a process identified in ss. 2(a)-(h) of the Proposed Tariff (2010-2014) or whether it is a Digital Copy).

Parties shall provide their answers no later than **Friday, May 23, 2014** and their replies to each other no later than **Friday, May 30, 2014**.



Gilles McDougall
Secretary General