



February 18, 2014

File: Access Copyright – Post-Secondary Educational Institutions Tariff (2011-2013)

QUESTIONS FROM THE BOARD

Questions to Access Copyright

1. (a) Please provide legal justification for targeting the posting of a link or hyperlink to a digital copy in the Proposed Tariff. In particular, explain how the posting of a link or hyperlink triggers the right to reproduce. Please address the *Crookes v. Newton* decision of the Supreme Court of Canada (2011 SCC 47) in your response.

(b) Please explain:

(i) the difference between a link and a hyperlink;

(ii) the meaning of para. 71 of AC-2 (Written Statement of Levy *et al.*), in particular, the difference between the act of linking or hyperlinking to an internal secure network and that of linking or hyperlinking to an external non-secured network.

2. Please provide legal justification for targeting reproductions that are made by or as a consequence of the “displaying [of] a Digital Copy on a computer or other device” in the Proposed Tariff. In so doing, please address s. 30.71 of the *Copyright Act*, as well as any effect the distinction between streams and permanent downloads made by the Supreme Court of Canada in *ESA v. SOCAN* (2012 SCC 34) has on this analysis.

3. (a) Describe the impact on fair dealing in educational institutions of the addition of “education” in s. 29 of the *Copyright Act* and of the *Alberta* and *Bell* Supreme Court of Canada decisions. To what extent do these developments expand fair dealing in educational institutions?

(b) Taking into consideration the jurisprudential and legislative developments referred to above, analyze the ACCC and AUCC fair dealing policies (exhibits AC-2KK and AC-2JJ) adopted by many educational institutions in light of the fair dealing factors identified in *CCH*.

(c) Referring to para. 3 of Access’ Statement of Case (AC-1), please explain the basis for asserting that all copying carried out under the educational institutions’ policies is compensable and subject to the tariff to be certified by the Board. Is it Access’ position that there is no fair dealing at all in educational institutions?

4. Are there similarities or differences between the context of the copying in *Alberta* and the context of the copying in these proceedings? Namely, in *Alberta*, the Supreme Court found that

the copying of short excerpts by the teacher and subsequent distribution to all the students in the class with instructions to read the excerpts was fair dealing for the purpose of research and private study. Please distinguish this fact situation from the creation of a coursepack, where the professor arranges to have one coursepack prepared for each student in the class and instructs them to read the content.

5. Do the characteristics of the dealings in post-secondary institutions tend to generally make the dealings fairer than, less fair than, or as fair as those targeted by the Provincial and Territorial Governments Proposed Tariff?

6. The Board's preliminary view is that the copying of a few pages or a small percentage from a book that is not a collection of short works, such as poems, is not substantial. Assuming that two pages or less of such a book is not a substantial part thereof, the Board would be of the preliminary view that, based on the coursepack copying dataset supplied to the Board, more than 2.5 per cent of the copying would not be compensable.

(a) Please comment on the Board's preliminary view;

(b) Please comment on the Board's estimate.

7. S. 4(3) of the Proposed Tariff provides that:

Copies of Repertoire Works shall not be stored or indexed with the intention or result of creating a library of published works;

S. 5(4) of the Proposed Tariff provides that:

Where the Educational Institution is no longer covered by this tariff, the Educational Institution and all Authorized Persons shall immediately cease to use all Digital Copies of Repertoire Works, delete from their hard drives, servers and 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.

Please explain the meaning and purpose of ss. 4(3) and 5(4) of the Proposed Tariff. There are no such requirements with respect to paper copies. Please explain the reason for this difference. In your response, please also substantiate para. 3-4 of Access Reply Statement of Case (AC-13).



Gilles McDougall
Secretary General