



Canadian Association
Library canadienne
Association des bibliothèques

**Canadian Library Association Objection to the
Access Copyright Post Secondary Educational Institutions Tariff for 2011 – 2013**

Introduction

CLA is Canada’s largest national library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned about enhancing the quality of life of Canadians through access to knowledge and literacy. CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues, including copyright.

CLA objects to Access Copyright’s proposed tariff for Post Secondary Educational Institutions for the period 2011 – 2013 (the tariff) in accordance with section 67.1 of the Copyright Act for the reasons noted below.

Failure to Recognize Existing User Rights and Exceptions

The tariff attempts to cover many uses of works that are already permitted under the Copyright Act and the associated case law. These uses should not be included in the tariff.

For example, no mention is made in the tariff of fair dealing for the purposes or research or private study as interpreted by the Supreme Court of Canada in the case of *CCH Canada Ltd. v. The Law Society of Upper Canada*, 2004 SCC 13 (the CCH case). It appears that Access Copyright is trying to refute that any fair dealing uses exist in an educational setting. Section 3 (c) of the previous Access Copyright Licence provides that: “*This Agreement does not cover any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary;*”. This provision is noticeably absent from the tariff.

The tariff needs to reflect that fair dealing covers many of the uses of copyrighted materials used by educational institutions. In addition to fair dealing, there is no acknowledgment that other library activities, such as interlibrary loan, are covered by exceptions in the Copyright Act (see section 30.2) as noted in paragraph 49 of the CCH case.

Overly Inclusive and Inapplicable Definitions

CLA has serious concerns with many of the Definitions in the tariff as noted below:

Definition of Copy (k) posting a link or hyperlink to a Digital Copy	The right to control linking is not a right given to copyright owners under section 3 or any other section of the Copyright Act . It is not a copy and shouldn't be considered as such.
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<p>Definition of Copy (d) transmission by electronic mail; (e) transmission by facsimile;</p>	<p>In paragraphs 77 – 79 of CCH case, the Supreme Court found that transmissions by fax were not telecommunications to the public. Given that educational institutions faxes and email would have a similar purpose to the Great Library, the same logic should apply to both faxes and electronic mail used by educational institutions. Access Copyright is trying to use the tariff process to override a decision of the Supreme Court of Canada.</p>
<p>Definition of copy (b) scanning a paper copy to make a Digital Copy; (c) printing a Digital Copy; (f) storage of a Digital Copy on a local storage device or medium; (g) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network; (h) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;</p>	<p>Access Copyright is trying to use the back door of the tariff process to turn from a reprographic collective into a digital collective.</p> <p>The market for digital licences has been settled with educational institutions via their libraries paying for the right to used digital content either directly from the copyright owner or via aggregators who licence content. Access Copyright is trying to use the tariff to require educational institutions to pay twice to use the same copyright material: once to the copyright owner and once to Access Copyright.</p>
<p>Definition of copy (i) projecting an image using a computer or other device; (j) displaying a Digital Copy on a computer or other device; and</p>	<p>Use of works in this matter is covered by section 29.4 of the Copyright Act and should not be included in the tariff:</p> <p>29.4 (1) It is not an infringement of copyright for an educational institution or a person acting under its authority</p> <p>(b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution.</p>
<p>“<i>Course Collection</i>” means, for use by an Authorized Person as part of a Course of Study, and whether for required or recommended reading for the Course of Study or otherwise: (a) assembled paper Copies of Published Works; or (b) Digital Copies of Published Works that are (i) emailed, linked or hyperlinked to, or (ii) posted, uploaded to, or stored, on a Secure Network.</p>	<p>Access Copyright has replaced the term ‘Courseware’, used in previous Agreements, with the term ‘Course Collection’, which is far broader in scope and includes not only print compilations but also all digital copies of published works in course reserves and within course management systems such as Blackboard.</p> <p>Course reserves have long been used in libraries and were not covered by the previous Access Copyright licence. There is no need to include this in the licence as digital course reserves should be covered by fair dealing as are print copies course reserves.</p> <p>Linking and hyperlinking to published material are not rights under the Copyright Act, while emailing is either expressly permitted under third party licenses or covered by fair dealing. Neither is within Access Copyright’s remit.</p> <p>Posting, uploading or storing digital copies on a secure network, whether in library electronic reserves or in course management systems, are already paid for and permitted under license with third parties. Institutions should not have to pay for the same use twice.</p>

Unreasonable Royalty Fees

Given the broader definition of fair dealing in the CCH case and the reduced use of non-licensed material, it is likely that the FTE rate for renewal of the previous Access Copyright license would have had to be much lower than the current rate of \$3.39 per FTE. Print course pack revenues are decreasing annually for the same reasons. Increasingly educational institutions licence digital content via their libraries that allows for linking and in many cases for making copies to include in Course Management Software for reserve reading and/or to send to students. There is no legal or factual basis to make post secondary institutions pay 3.5 to 4 times more than the copyright royalties currently being paid.

Unwarranted Anti-Circumvention Provision

Section 5 of the tariff (the anti-circumvention clause) deals with something best dealt with by contracts or by the law, not by a tariff. Currently it is not against the law to circumvent a digital lock. However educational institutions via their libraries have signed contracts with clauses that sometimes do not allow circumvention and sometimes allow it under particular circumstances. Why should educational institutions sign licences directly with the copyright holder that in some cases permit circumvention and then have a tariff that bans circumvention? Until Parliament decides the parameters of the anti-circumvention question, this is best left to individual contract negotiations with rights holders as to whether or when a digital lock can be circumvented.

Unreasonable conditions placed on the use of Repertoire Works

The tariff specifies in section 4(2) that “there shall be no repeated, systematic or cumulative copying of the same Repertoire Work...for one Course of Study in one Academic Year.” This means that a course-pack or course collection may only be used once in one academic year, thus effectively making it impossible for an institution to offer a course more than once a year.

Section 4(3) of the tariff prohibits the storing or indexing of repertoire works “with the intention or result of creating a library of published works.” Since this provision applies to all Authorized Users, this would put an unreasonable burden on the institution, requiring it to ensure that students and faculty do not store their own legitimately obtained copies of course materials. This is neither possible nor required under existing legislation.

Unreasonable Reporting Requirements

The reporting requirements of the tariff are onerous, especially given that most of the material mentioned has already been licensed by the educational institutions in question, and raise several issues of grave concern.

Section 6(1)(m) requires the reporting of direct license information for third party licensed works. These have nothing to do with Access Copyright and should not have to be reported.

Section 6(2) requires that the institution shall compile complete records of and report to Access Copyright, digital copies emailed by or on behalf of a Staff Member. This means that faculty and/or staff will have to submit records of all digital works they email to anyone, including students, other faculty and staff. Not only is this provision unenforceable and raises a privacy

concern, most of the emailed material is already paid for by the institution through other licenses.

With the expanded definitions of Copy and Course Collection, all published material uploaded or linked to in course management software will have to be reported. Again, in the vast majority of cases these uses have already been paid for through direct licenses to content aggregators.

Section 6(3) requires that the institution must forward the records compiled under 6(1) to Access Copyright within 30 days of the end of each month. This provision is far more onerous than the quarterly or trimester reporting previously required, especially given the expanded number of items to be reported, and places a large additional administrative and financial burden on the institution.

Unreasonable requirements of access for Survey purposes

Section 13(2) of the tariff requires the institution to give Access Copyright “right of access throughout the Educational Institution’s premises, including full access to the Secure Network and all Course Collections, at any reasonable times, to administer the survey,” raising a number of major concerns.

This requirement is problematic for a number of reasons. Most third party licenses preclude assigning access to people outside the institution; secondly, providing access to email may be in contravention of faculty collective agreements and finally, providing access to email and other secure environments may also contravene personal data protection legislation in a number of provinces.

Lack of indemnification

Whereas previous Access Copyright agreements contained indemnification clauses, the tariff has eliminated such clauses and does not contain any indemnification for possibly infringing uses, leaving institutions which sign license agreements under the tariff open to lawsuits from rights-holders not represented by Access Copyright. This lack of indemnification removes one of the main benefits provided under the previous agreements.

Conclusion

Access Copyright’s tariff seeks to require payment of an unreasonable amount of royalties for the use of works well beyond its previous licenses, beyond the scope of their legitimate remit under the current law and without regard to the rights of education institutions under the Copyright Act and applicable case law. In addition, it imposes onerous and often unenforceable new conditions on educational institutions and requires actions from them which may well be in contravention of existing legislation and contracts. CLA urges the Copyright Board not to approve any tariff without substantial changes in accordance with these objections and without a significant reduction in the royalty rates.

Dated: July 27, 2010