



VIA EMAIL (gilles.mcdougall@cb-cda.gc.ca)

December 10, 2010

Gilles McDougall
Acting Secretary General
Copyright Board of Canada
56 Sparks street, Suite 800
Ottawa, Ontario
K1A 0C9

Dear Mr. McDougall,

**Re: Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013
Interim Tariff Applications**

Further to the Board's directions of 26 November, 2010, as amended by further directions dated 3 December, 2010, we provide the response of the objectors the Canadian Association of University Teachers ("CAUT") and the Canadian Federation of Students ("CFS") to the application by the Access Copyright for an "interim decision on the Tariff" filed with the Board on 13 October, 2010, notice of which was received by CAUT and CFS on 26 November, 2010 (via a communication from the Board, not from Access Copyright), and amended this week with the December 5, 2010, correspondence of Access Copyright.

The complexity of the opening paragraph of this letter provides the Board with all it requires to dismiss Access Copyright's application.

CAUT and CFS have already provided the Board with comments on the interim tariff, information about which it obtained from Access Copyright's website. These submissions supplement those comments.

Our submissions address two concerns:

1. considerations of procedural fairness; and
2. whether or not Access Copyright has met its burden to show that an interim tariff is warranted in the circumstances.

Université d'Ottawa
Faculté de droit

University of Ottawa
Faculty of Law

57 Louis-Pasteur, Ottawa
(Ontario) K1N 6N5 Canada
Tel.: 613-562-5800 # 2553
cippic@uottawa.ca
www.cippic.ca

1. PROCEDURAL FAIRNESS

The manner in which this interim application has proceeded raises at least three procedural fairness issues:

- (1) The objectors have not had reasonable notice of the interim application;
- (2) Access Copyright has in practice altered the terms of the interim application; and
- (3) The process adopted by the Board has denied objectors the opportunity to test evidence.

a. Notice

Access Copyright's interim application was not provided to CAUT and CFS until November 26, 2010. The substance of this application is complex. The procedural avenue adopted by the Board is complex. This complexity has been added to by Access Copyright's change in the content of the relief sought as recently as this week. Simply, CAUT and CFS have not had time to appreciate the implications of the interim tariff or to address its terms. This is compounded by the truth that this is a busy time of year for academic stakeholders. These concerns should trouble the Board as well, as the quality of its submissions on this interim application will suffer as a result of the short timing. CAUT and CFS appreciate the efforts the Board has made to address this concern, but frankly more time is needed to consider both the merits and the substance of the interim tariff application.

b. Changing Terms

The actual terms sought by Access Copyright have in fact changed between the date of filing the interim application and the present date. On December 5, 2010, Access Copyright provided to CAUT, CFS and other objectors a draft interim tariff that differed in material ways from what it had provided the Board on October 13. For example, the draft interim tariff provided by Access Copyright on December 5 includes for the first time clauses 5(5), declaiming any authorization to "descramble" or otherwise deal with works protected by technological measures.

On December 8, 2010, Access Copyright helpfully provided the objectors with a table comparing the draft interim tariff with the model license which, along with the promise "for no additional payment... to authorize the new digital copying proposed" under the Gazetted tariff, together make up the substance of the interim tariff application. CAUT and CFS appreciate that Access Copyright's submission of December 5 and 8 seek to better and more completely articulate the relief sought. This speaks to the inadequacy of the original filing of the interim application. However, it also speaks to the fact that the actual language sought by Access Copyright in its interim tariff has changed. These changes require careful analysis - analysis that must

be undertaken by the objectors, not by Access Copyright's counsel. Objectors must be afforded a reasonable opportunity to do so.

c. Inability to Test Evidence

CAUT and CFS observe that Access Copyright has filed no evidence with the Board in support of its application. The Only materials before the Board are the bald assertions of Access Copyright's previous legal counsel. Those statements have not been subjected to cross-examination nor sworn. No interrogatories have been exchanged. No documents have been filed. Access Copyright asks the Board to certify an interim tariff in an evidentiary vacuum.

Common sense cautions against the Board taking so risky a position.

From the perspective of procedural fairness, teachers and students will be affected by the Board's decision on this application. The absence of an evidentiary record deprives them of the ability to meaningfully participate in the decision, as they cannot apprehend the case they are to meet.

2. THE TEST FOR AN INTERIM TARIFF

a. The Legal Test

In *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, Justice Gonthier sated the following with respect to the test for the issuance of an interim tariff:

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.¹

The Copyright Board has adopted this view in interim tariff applications:

As stated by the Supreme Court of Canada, an interim order "is made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision", "does not make any decision on the merits of an issue to be settled in a final decision", and "provide[s] temporary relief against the deleterious effects of the duration

¹ [1989] 1 S.C.R. 1722 at 1754.

of the proceedings.”²

In other interim tariff applications, particularly in cases involving inaugural tariffs, the Board has pointed to the danger of setting a policy precedent, and the existence of reasonable disputes as warranting dismissal of the application:

As this matter deals with a currently uncertified tariff, issuing an interim tariff could be interpreted as setting a policy precedent on a substantive matter not yet properly heard by the board.... Furthermore, a reasonable dispute exists on legal issues such as the existence of rights and retroactivity.³

Other factors identified by the Board as warranting consideration in interim tariff applications include context,⁴ the need to preserve the status quo,⁵ and the need to minimize disruption.⁶ We consider these to be aspects of what courts generally consider the balance of convenience.

CAUT and CFS propose the Board in light of these decisions adopt the following test:

- (1) Does the underlying tariff have merit?
- (2) Does the interim application raise a reasonable legal dispute?
- (3) Does the interim application raise policy decisions?
- (4) Will a lengthy proceeding have any deleterious effects?
- (5) Where does the balance of convenience lie?

b. Application

1. Does the underlying tariff have merit?

In a previous decision, the Board set out the legal burden that an applicant for an interim tariff must meet:

When seeking interim relief, it is not necessary for a party to demonstrate *prima facie* that the main application is likely to succeed; indeed, an interim order can be issued in the absence of any evidence or argument, so long as the main application is not plainly without merits.

² Copyright Board's interim decision on an application to vary the television retransmission tariff, 1992-1994 (28 February, 1994), [1994] C.B.D. No. 1.

³ Copyright Board's interim decision on CBRA Commercial Media Monitoring Tariff (11 June, 2003) [Media Monitoring].

⁴ Collective Administration of Performing Rights and of Communication Rights (Re) Copyright Act, section 66.51 Files: Public Performance of Musical Works 2003-2007 and Public Performance of Sound Recordings 2003-2007 Interim Statement of Royalties to be Collected by SOCAN and NRCC in Respect of Commercial Radio for the Years 2003-2007 [2006] C.B.D. No. 8.

⁵ *Ibid.*

⁶ *Association of Universities and Colleges of Canada (AUCC) v. Canadian Copyright Licensing Agency (CANCOPY)* [1996] C.B.D. No. 7.

CAUT and CFS concede that the main application is not plainly without merit in all particulars. However, as discussed below, many aspects of the main application are utterly without legal foundation.

2. *Does the interim application raise reasonable legal disputes?*

Where an interim tariff application raises legal disputes, the Board should decline the application.⁷ Access Copyright's application is rife with controversial interpretations of copyright law:

- Section 5(4) purports to enjoin persons no longer covered by the tariff from making continued "use" of digital copies, despite the absence of any exclusive right "to use" under the *Copyright Act* and despite the fact that the copy is authorized and paid for under the tariff;
- Access Copyright purports to authorize, and so holds as infringing, acts that do not and have never infringed copyright, such as the projection of an image and the posting of a hyperlink (see paragraphs (i) and (k) of the definition of "Copy" in s. 2); and
- Access Copyright purports to sweep within its mandate dealings with content that are plainly covered by fair dealing (see, for example, the definition of "Course Collection" which includes material for use by a student in connection with (but not required by or recommended for) a Course of Study (see s. 2).

Access Copyright's draft interim tariff is also includes terms of dubious legal authority. Access Copyright seeks to impose terms that do not touch on copyright for their authority and dictate information technology management practices of educational institutions. For example:

- Section 5(1) purports to unreasonably require educational institutions to invest in dedicated network resources (see the definition of "Secure Network").

The Proposed Tariff is one of the most controversial ever filed with the Copyright Board of Canada, largely due to its controversial treatment of Canadian copyright law. In asking the Board to impose an interim tariff, Access Copyright asks the Board to gloss over those controversies without considered legal submissions and without an adequate evidentiary record. The Board should not fall into that trap.

3. *Does the interim application raise policy decisions?*

Where an interim tariff raises policy issues, the Board should the application.⁸ CAUT and CFS submit that Access Copyright's interim tariff application raises fundamental policy questions. In their joint objection, filed August 11, 2010, CAUT and CFS

⁷ Media Monitoring, *supra* note 3.

⁸ *Ibid.*

observed that:

The Proposed Tariff attempts to redefine how post-secondary educational institutions carry out their mission. The Proposed Tariff mandates particular responsibilities, imposes a technology mandate, and mandates the design of certain campus-wide information systems that meet certain specifications in terms of being able to implement technological protection measures and monitor usage of content across campus and beyond.⁹

The interim tariff drops these procedural mechanisms for administering the tariff while at the same time imposing the substantive permissions attached to these mechanisms. These substantive permissions touch on fundamental policy issues such as academic freedom, patron privacy and anonymous reading and research. Some of these policy considerations are best left to Parliament to address in the form of legislation. Others, such as academic freedom are appropriate for the Board to consider as arising from matters properly before the Board, but are complex and important, and not amenable to cursory decision-making in an ad hoc manner.

The proposed interim tariff also includes disclaimers with respect to authorization of activities that are legal under the laws of Canada, and do not relate to copyright.¹⁰

Simply, the proposed tariff over-reaches and in so doing raises fundamental policy challenges. The interim tariff, in purporting to offer the same benefits, raises those same policy challenges.

4. Will a lengthy proceeding have any deleterious effects?

The only deleterious effects that Access Copyright has pointed to are financial hardship. The absence of an evidentiary record before the Board prevents CAUT and CFS from providing useful comments. With respect, that same absence counsels the Board to find that Access Copyright has not made its case.

Access Copyright has not shown that it is unable to prosecute the tariff or operate in the absence of an interim tariff. Even on the meagre record before the board – bald assertions by former counsel – Access Copyright has simply not shown that it cannot prosecute the tariff or operate.

5. Where does the balance of convenience lie?

In considering the balance of convenience, CAUT and CFS submit that the Board

⁹ Joint Objection of the Canadian Federation of Students and the Canadian Association of University Teachers to the Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013 (11 August, 2010), online: Canadian Federation of Students <http://www.cfs-fcee.ca/CAUT-CFS_Objection_to_Access%20Copyright_Tariff-2010-08-11.pdf>.

¹⁰ See, e.g., s. 5(5) of the proposed tariff.

should consider three factors:

- (1) The context in which this application arises;
- (2) The “status quo”; and
- (3) The disruption that the granting or denial of the application will cause.

i. Context

This application arises in the context of negotiations over the scope, extent and value of reprographic licensing of post-secondary educational institutions. Access Copyright filed the tariff on the last possible date for the tariff to come into effect for 2011. The proposed tariff is controversial, far-reaching and ambitious. These circumstances all fall within the control of Access Copyright. Access Copyright is in a position that it has engineered to come about.

CAUT and CFS also urge the Board to apply common sense in its assessment of the merit of Access Copyright’s application. All parties agree that it will take some time for the proposed tariff to work its way through the Board and the inevitable appeals process. This interim proceeding will be subject to judicial review and further appeals, unavoidably further delaying the ultimate resolution of the tariff application. As CAUT and CFS noted in its letter to the Board of November 23, 2010, all concerned will be best served by the Board directing participants in this proceeding to simply “get on with it”. The Board’s resources, as well as those of the parties, are best spent on the merits of the proposed tariff, not wrangling over the supporting evidence, merits, terms, and reporting obligations of this interim application.

ii. The Status Quo

CAUT and CFS disagree with Access Copyright’s characterization of its proposed interim arrangement as the “status quo”. Access Copyright seeks to impose as the “status quo” an interim tariff that only loosely resembles a licensing arrangement that has been rejected by many academic institutions involved in this proceeding. Access Copyright’s application demonstrates that it has obtained some voluntary agreement to a license. The balance of the marketplace has not accepted Access Copyright’s terms. It is this unregulated and unmediated operation of the marketplace that represents the status quo – not the draft interim tariff. The draft interim tariff has never formed the basis for any agreement whatsoever between Access Copyright and any third party. Should the Board impose the draft interim tariff, it would amount to an unprecedented interference in the marketplace.

As CAUT and CFS argued in their November 23, 2010, correspondence with the Board, the legal and market environment upon which prior agreements with Access Copyright were concluded are changing. Simply, 2010 is not 2003. Bill C-32, the

Copyright Modernization Act,¹¹ should it become law will similarly change the legal ground upon which the proposed tariff stands.

In CAUT and CFS' submission, the status quo is represented by neither the novel and unfamiliar draft interim tariff nor the abandoned model license agreement, but rather by the unfettered operation of the marketplace. That status quo has some participants entering into agreements with Access Copyright, and others rejecting the license in favour of other licensing options. Other institutions may choose to avail themselves of the protection afforded by s. 70.17 and the inevitable retroactive applicability of any tariff finally concluded.

iii. Disruption

The Board should consider the option causing the least disruption to the parties in considering the balance of convenience.¹² CAUT and CFS submit that this directs the Board to decline Access Copyright's invitation to interfere with the status quo established by the marketplace by rejecting the application for an interim tariff.

iv. Summary - Balance of Convenience

CAUT and CFS conclude that the balance of convenience favours rejection of the application for an interim tariff.

c. Conclusion

CAUT and CFS submit that Access Copyright has not met its burden to show that an interim tariff is warranted in the circumstances. The application for an interim tariff should be dismissed.

* * *

Please do not hesitate to contact me should you have any questions.

Yours truly,



David Fewer
Director, CIPPIC

Cc: James Turk

¹¹ Bill C-32, the *Copyright Modernization Act*, first reading 2 June 2010, online: Parliament of Canada, <www2.parl.gc.ca/HousePublicatons/Publicationc.aspx?Docid=4580265&file=4>.

¹² See, e.g., *Association of Universities and Colleges of Canada (AUCC) v. Canadian Copyright Licensing Agency (CANCOPY)*, File: 70.2-1996-1 (13 September, 1996), [1996] C.P.D. No. 7.

Canadian Association of University Teachers

Noah Stewart
Canadian Federation of Students

Randall Hofley
Counsel to Access Copyright

Objectors