Objection to the *Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013*

Objection filed by the Association of Canadian Community Colleges (ACCC)

Contact:

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1. Background Statement

The **Association of Canadian Community Colleges (ACCC)** is the national and international voice of Canada's 150 colleges, institutes, cégeps, polytechnics, university colleges and universities with a college mandate. [1] Created in 1972, it represents its members to government, business and industry and links college capabilities to national industries. With campuses in 1,000 urban, rural and remote communities, 1.5 million learners, and 60,000 educators, these institutions draw students equally from all socio-economic quarters, and supply graduates with the advanced skills essential to Canada's growth and productivity.

The following Objection has been filed on behalf of the ACCC's membership.

2. Specific Objections to the *Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013*

The ACCC objects to the following aspects of the Access Copyright Post-Secondary Educational Institution Tariff, 2011 – 2013 (the "Proposed Tariff"):

(a) PROPOSED ROYALTY

Subsection 7(1) of the Proposed Tariff states that all post secondary institutions that are not Universities will be required to pay an annual royalty to Access Copyright in the amount of $35 per full-time equivalent ("FTE") student. Those institutions that are defined as Universities will pay a $45 royalty per FTE student. Most of ACCC's members would fall within the $35 royalty category.

(i) Access Copyright's Rationale for the Proposed Royalty

The proposed royalty is based on a new payment model. The previous pricing model consisted of a royalty fee of $3.38 per FTE student plus a payment for each copy made of certain works over the life of the agreement ("Per-Copy Fees").

ACCC is of the understanding that Access Copyright's calculation of the proposed $35 royalty is based on the following factors and components:

(a) An estimate of the combined $3.38 FTE Student royalty fee and the Per Copy Fees that were applicable under the previous tariff;
(b) An additional amount for the added digital rights that have been included in the Proposed Tariff;
(c) An amount for inflation and other increased costs to Access Copyright.

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[1] This document will hereinafter refer to colleges, institutes, cégeps, polytechnics, unversity colleges and universities with a college mandate as colleges.

(ii) ACCC's Objections to the Proposed Royalty

1. ACCC objects to the value ascribed to the new digital rights that are included in the Proposed Tariff. Most of ACCC's members have previously negotiated such rights directly with the applicable publishers. The newly included digital rights are therefore of very limited value to our members. The royalty rate should therefore be reduced.

   In the alternative, another approach to the digital rights issue would be for the Copyright Board to allow ACCC members to opt out of receiving the new digital rights, in exchange for a reduced royalty rate.

2. ACCC objects to the outcome of the calculation which combined the previous FTE Student royalty fee with the previous Per Copy Fees to create the proposed "blended" $35 fee. The royalty in the Proposed Tariff would mark a massive increase in costs when compared to the previous royalty fee. ACCC members have indicated that the proposed royalty fee would result in costs owing to Access Copyright which exceeds their current combined budgets for Access Copyright fees, acquisition of books, periodicals, and electronic subscriptions.

   Given the foregoing, the royalty rate should be reduced in order to better reflect the true effect of combining the previous FTE Student royalty fee with the previous Per Copy Fees.

3. Due to a general downturn in the economy, ACCC members have been faced with severe budget cutbacks stemming from a reduction in funding and revenues. By adopting the proposed royalty, Access Copyright is pricing itself out of the price range of its intended market. Given the foregoing, the proposed royalty fee should be reduced in order to better reflect the market that Access Copyright serves.

4. Many of our members indicate that a significant proportion of their student population do not reproduce or use works covered by the proposed tariff. Unlike Universities, many College students are mature students who attend classes on a limited basis to upgrade their existing skills. This demographic tends to not utilize works that are covered by the Proposed Tariff. Given the foregoing, the proposed royalty fee should be reduced in order to better reflect the use of copyrighted materials by these students.

5. Our members have expressed a concern that the number Published Works that are excluded from Repertoire Works has been increasing markedly, thereby reducing the value received by members in exchange for the royalty fee. Given this reality, the proposed royalty fee should be reduced.

6. It is the understanding of the ACCC that the proposed $35 royalty fee includes a general increase to cover increased costs allegedly incurred by Access Copyright. Our members see no evidence of increased costs to Access Copyright that would justify a royalty fee of $35. Accordingly, the royalty fee should be reduced.

(b) REPORTING AND AUDIT REQUIREMENTS

Section 6 of the Proposed Tariff lists a number of reporting requirements. In addition, Section 13 of the Proposed Tariff lists potential obligations upon Educational Institutions to participate in an annual survey, while Section 14 of the Proposed Tariff imposes obligations upon Educational Institutions to preserve records and comply with audits.

(i) Objections to Proposed Reporting and Audit Requirements

1. The ACCC objects to the reporting requirements listed in Section 6 of the Proposed Tariff. The requirements are onerous, and will require many of the ACCC's members to undergo great expense in the form of additional Human Resources in order to accurately document and report the required statistics. In addition, increased costs are projected by some members in order to implement IT solutions to track of certain e-mails as is required by subsection 6(2) of the Proposed Tariff. The ACCC proposes that more reasonable, less onerous reporting requirements be inserted into the new Tariff.

2. The ACCC objects to the level of access to be given to Access Copyright by virtue of Survey and Auditing provisions found in sections 13 and 14 of the Proposed Tariff. The level of access prescribed is unduly invasive, and will require costly IT expenditures in order to allow Educational Institutions to comply with both the requirements of the Proposed Tariff and its legal obligations with respect to maintaining privacy of personal information and other confidential data. The ACCC proposes that more reasonable, less invasive access requirements be inserted into the new Tariff.

(c) DEFINITION OF "UNIVERSITY" IN THE PROPOSED TARIFF

Section 2 of the Proposed Tariff defines the term "University". University is defined as "an Educational Institution that

(a) Is specifically recognized as a "university" under Canadian law;
(b) Is accepted as a member institution of the Association of Universities and Colleges of Canada;
(c) Is accredited as a university by a recognized accreditation body; or
(d) Has 50% or more of its Students enrolled in degree programs requiring three or more years of full time study."

(i) Objections to the Proposed Definition of "University"

1. The ACCC objects to the definition of "University" provided by clause (d) of the definition.

   The ACCC presumes that the intent of the clause is to ensure that Educational Institutions that are not captured by clauses (a) – (c) of the definition, but which operate in a manner that is substantially similar to other institutions defined as a "University" will pay the $45 University royalty rate.

   The ACCC does not object to the presumed intent of that clause. However, the clause is worded in a fashion that could lead to uncertainty, and could lead to the inclusion of institutions that are clearly not operating as Universities.

Many Colleges in Canada operate joint programs with Universities. These programs operate so that Colleges typically offer one or two years of study in a College program, and students who are successful in completing their College courses are given an automatic right to go to a partner University to study for a further two years to gain a degree from the University. In addition, many Colleges have informal credit transfer agreements that allow students to take a certificate or diploma program, and then successfully apply to have their credits transferred and applied toward a degree program at a University.

The ACCC is concerned that the definition in clause (d) is sufficiently vague to cause Colleges who have many students enrolled in joint programs or credit transfer programs with degrees issued by other institutions to be deemed to be Universities under the Proposed Tariff.

In order to ensure greater certainty and in order to ensure that the clause is more closely aligned with its presumed intent, ACCC suggests that clause (d) be amended so that it reads as follows:

(d) Has 50% or more of its Students enrolled in degree programs which:
- *(i) require not less than three years of full time study, and*
- *(ii) results in the issuing of a degree to graduates by the Educational Institution.*

The ACCC submits that the foregoing amended definition more clearly defines which institutions would be captures by the clause, and more closely mirrors the intent of the clause.

2. The ACCC objects to the definition of University provided by clause (c) of the definition.

   The ACCC presumes that the intent of the clause is to capture situations where Educational Institutions have voluntarily submitted themselves to accreditation as a University by a recognized accreditation body.

   The ACCC has no objection to the presumed intent of the clause. ACCC is concerned that it may be possible for an ACCC member who does not otherwise fall within the definition of “University” to be captured within the definition in the unlikely event that an accreditation body chooses to accredit them without their permission or cooperation. ACCC proposes that the wording for this definition in clause (c) be amended.

(d) EFFECTIVE DATE OF PROPOSED TARIFF

The preamble and Section 18 of the Proposed Tariff imply a January 1 effective date of the new Tariff, and further imply a requirement to make retroactive payments based on the new royalty fees in the event that the new Tariff is certified after January 1, 2011.

(i) Objections to a Retroactive Application of the New Tariff

1. ACCC objects to any retroactive application of the new Tariff that will ultimately be adopted by the Copyright Board. The Proposed Tariff provides many changes in expectations on ACCC’s members. As stated earlier, royalty fees, record keeping and

reporting requirements may greatly change in the new Tariff. It is simply not fair to impose these obligations retroactively on ACCC members.

Given that College budgets have already been set for the 2010-2011 academic year, and given that College budgets did not contemplate the greatly increased expenses for royalty rates and staff that are contemplated by the Proposed Tariff, a retroactive application of any new Tariff would cause undue hardship on Canada's Colleges.

ACCC proposes that the Copyright Board implement an effective date that is not less than 30 days after the certification of the new Tariff by the Board. This will give members some time to assess whether they wish to bind themselves to the new Tariff, and to make the necessary arrangements in order to comply with the new Tariff should they choose to be so bound.

3. Concluding Remarks

Evidence in support of ACCC's assertions and other comments will be presented at the Copyright Board hearing that considers the objections filed in response to the Proposed Tariff.

If the Copyright Board requires anything further from the ACCC in the interim, the Board is encouraged to contact the ACCC at the address provided on the cover of this document.