UNIVERSITY OF TORONTO FACULTY OF LAW

ARIEL KATZ
ASSOCIATE PROFESSOR
INNOVATION CHAIR, ELECTRONIC COMMERCE

November 6, 2013 - BY EMAIL -

Mr. Gilles McDougall
Secretary General
The Copyright Board of Canada
56 Sparks Street, Suite 800
Ottawa, Ontario
K1A 0C9

Dear Mr. McDougall,

Re: Access Copyright Post-Secondary Tariff 2011-2013: Request for Reference to the Federal Court of Appeal

I am writing this letter to urgently request the Copyright Board to refer a question of law—namely the effect of a tariff approved by the Board under section 70.15(1) of the *Copyright Act*—to the Federal Court of Appeal for hearing and determination, pursuant to sections 18.3(1) and 28(2) of the *Federal Courts Act*, and to stay the current proceedings pending the determination of this request by the Board, and pending the final determination of the question on reference, should the Board decide to refer it.

This reference would seek a resolution between two conflicting views on the effect of an approved tariff under the 'general regime' in sections 70.1-70.4 of the *Copyright Act.* According to one view, an approved tariff can become mandatory on users if they make a single infringing copy from the repertoire of the collective society; according to the other view, the tariff can only bind users who choose voluntary to be licensed under its terms.

Such a reference would involve a similar procedure to that which the CRTC has recently initiated in analogous circumstances, involving a copyright question, and which resulted in an important ruling from the Supreme Court of Canada on December 13, 2012.[1] That ruling has direct bearing on the present case. I provide further explanation below.

[1] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII) http://canlii.ca/t/fv76k

The urgency of this request derives from the public policy implications of the very recent withdrawal of the Association of Canadian Community Colleges ("ACCC") from the proceedings, which follows that of the Association of Universities and Colleges of Canada ("AUCC") in 2012, and the imminent deadline for the remaining participants to file their Statements of Case. If an approved tariff can indeed become mandatory, then the absence of the institutions representing Canadian university and college administrations leaves the task of defending the public interest entirely in the hands of the remaining participants, who cannot be expected, and do not have the necessary resources to adequately defend it. Given the failure, for whatever reason, of the adversarial process in this instance, the credibility of any decision made by the Board in this matter—if it indeed has the claimed mandatory effect—will be severely compromised.

As I explain below, determining the effect of a tariff by way of a reference, such as the one suggested herein, will ensure that if this case proceeds, it proceeds in such a way as to not compromise the public interest.

I. Introduction

[1] Recent developments in the current and related proceedings, before this Board and before the Federal Court, have emphasized the need to determine the legal effect of an approved tariff under section 70.15(1) of the *Copyright Act* ("the *Act*"), i.e., whether an approved tariff is mandatory as Access Copyright ("AC") believes, or can it only bind educational institutions who choose voluntarily to take advantage of it. This is an important question of law that goes to the heart of the current proceedings. It has direct and immediate impact on the scope of Board's jurisdiction, its mandate, and the procedures necessary for fulfilling it. The answer determines whether this case should proceed or may be effectively rendered moot; and if it proceeds, on what basis it can be approved, and on what grounds opposed, if opposing it is at all necessary.

[2] The need for such determination has become all the more apparent in light of the recent decision of ACCC to withdraw its participation in the current proceedings, and the AUCC earlier withdrawal in April of 2012. There has been no adequate explanation of the circumstances of the withdrawal of these institutional objectors. Curiously, although both organizations agreed to Model Licences, neither withdrawal resulted in a withdrawal of the tariff application.

[3] Without the active participation of these main institutional objectors, which represent virtually all of the post-secondary university and college administrations in Canada, the current hearing has become a *de facto* default proceeding. While the remaining objectors—essentially a law school clinic, acting *pro bono*, and myself—can bring important perspectives that would have supplemented the perspectives of the institutions, the remaining objectors cannot possibly substitute for those institutions, not least because they cannot mount the resources that are necessary to address all the issues, and do not have access to the evidence that the institutions presumably have marshaled at very great expense.

[4] The Model Licences, the terms of which are essentially similar to those of the Proposed Tariff, as revised in AC's Statement of Case filed on September 13, 2013, were negotiated before Parliament enacted the *Copyright Modernization Act*, and before the Supreme Court of Canada delivered its landmark fair dealing decisions on July 12, 2012, and they have been widely rejected by Canadian universities and colleges since then. Under these circumstances, if the Board certifies a tariff that is similar to these Model Licences, and if it is indeed mandatory as AC believes, the Board's decision will be not only be controversial; it may also lack the credibility that would otherwise result from an adequately fought adversarial proceeding. Therefore, if the Board proceeds with the current approval process, it is essential that the uncertainty about the effect of the tariff, which the Board is asked to approve, be resolved before the case proceeds, because the answer to that question affects the fundamental basis and almost every aspect of the Proposed Tariff.

[5] Determining the effect of an approved tariff authoritatively by way of a reference will clarify an important question of law that goes to the heart of the current proceedings. Clarifying this issue will benefit not only the parties involved in the current proceedings before the Board, but also those involved in related proceedings, and those who may be directly affected by them. Therefore, determining the issue by way of a reference will not only enhance the credibility of the Board in this matter; it will also promote judicial economy and ensure that the Board and the parties to the current and related proceedings do not spend time and scarce resources on unnecessary proceedings.

II. The basis for a reference

[6] Under sections 18.3(1) of the *Federal Courts Act* "A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination." Pursuant to section 28(2), a reference from the Copyright Board shall be made to the Federal Court of Appeal.

[7] The *Federal Courts Act* does not prescribe when a reference should be made or heard. The case law, however, indicates that generally, in order to be heard, a reference must:

- Concern an issue that been raised before the tribunal that makes the reference;[2]
- Involve an issue whose solution can put an end to the dispute before the tribunal. It is not necessary, however, that the answer to be given, whatever it may be, be decisive of the

[2] *Ref. Re Energy Board Act*, [1988] 2 F.C. 196

litigation before the tribunal making the reference; it is sufficient that the question be such that a possible answer to it be decisive of the matter.[3]

- Can be decided on the basis of material facts over which there is no real argument between the parties;[4]

[8] On occasion, the Federal Court has recognized other factors, such as the need to authoritatively resolve an unsettled question of law,[5] or a "messy state of the jurisprudence",[6] or when a there is an issue that raises a complex question, with significant impact on interested parties, and which is potentially applicable to a number of similar cases.[7] As I explain below, at this juncture in the current proceeding, all of these conditions exist.

[9] It is also important to highlight the resemblance between the current proceeding and the proceeding before the CRTC that led to the reference ultimately decided by the Supreme Court last year.[8] The CRTC case is relevant not only because it involved the *Copyright Act* and was determined by way of a reference, but also because of the similarity of the question and the proceedings.

[10] In that case the CRTC sought to introduce a regulatory regime, whereby private local television stations would be entitled to be compensated for the retransmission of their signals by broadcasting distribution undertakings ("BDUs"), such as cable and satellite companies. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*, and the CRTC decided to refer that question to the Federal Court of Appeal.[9] On appeal, the Supreme Court held that the CRTC lacked the jurisdiction to implement the regime, because, among other reasons, the proposed regime would effectively create a new type of copyright, extending beyond the rights of the broadcasters under the *Copyright Act*. A CRTC order purporting to create such a right would be contrary to section 89 of the *Copyright Act*, which requires that "the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body."[10]

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[3] *Martin Service Station Ltd. v. Minister of National Revenue*, [1974] 1 F.C. 398, 1 N.R. 464, 44 D.L.R. (3d) 99, para 14.

[4] *Air Canada, Re*, (1999) 241 N.R. 157 (Fed. C.A.)

[5] *Huang v. Canada (Citizenship and Immigration)*, 2013 FC 576 (CanLII), http://canlii.ca/t/fxsh3, para 2.

[6] *Dina v. Canada (Citizenship and Immigration)*, 2013 FC 712 (CanLII), http://canlii.ca/t/fzht8, paras 9-10.

[7] *Section 4 of the Patented Medicines (Notice of Compliance) Regulations (Re)*, 2002 FCT 1000 (CanLII), http://canlii.ca/t/jn1, para 3 (Notice of Application for a Reference struck on other grounds).

[8] *Ref. re CRTC supra*, note 1.

[9] *Ibid*, para 8.

[10] *Ibid*, para 80.

[11] As I explain in more detail below, the present case raises similar issues. AC asks the Board to approve the Proposed Tariff because it believes that an approved tariff would entitle it to collect royalties from educational institutions, even if those institutions do not wish to obtain a licence from it, and even though AC is neither a copyright owner nor an exclusive licensee and therefore lacks any standing to sue for copyright infringement.[11] In my view, the provisions of the *Copyright Act* dealing with collective administration of copyrights do not support AC's view. But even if they did, the result would be that a tariff, approved by a regulatory body, would effectively create a new type of copyright, conferred upon a collective society, and that extends beyond the scope of the rights that it has been authorized by its members to administer. While there is no question that under section 70.15 the Board has jurisdiction to approve a tariff, approving a tariff having such a compulsory effect on users would run afoul section 89, because it would confer new rights or powers on copyright owners who act collectively, and correspondingly detract from the rights of users, just like the regime that the CRTC sought to implement did. Such an outcome would be the result of an instrument promulgated by a regulatory body, not an Act of Parliament.

[12] In the remainder of this letter, I explain the legal issue in more detail and why it is important to determine this issue now, and by way of a reference. My goal is not to provide a full argument at this time about the effect of an approved tariff, but only to present the essence of the conflicting views, and their effect on the current, and related, proceedings.

[13] If the Board believes that there is at least potential merit to the refer the question to the Federal Court of Appeal, I would invite the Board, at the earliest opportunity, to set out an urgent schedule for a process in which the parties could make submissions about wording of the question to be refereed, and the factual basis that is necessary for its resolution. I believe that neither should be particularly complex or controversial, and that an agreement on the question and the relevant material facts can be reached without difficulty or undue delay. Indeed, delay must be avoided, since the remaining participants have a deadline of December 20, 2013 to respond to AC's Statement of Case.

[14] I would propose the following draft question:

> Does a tariff approved under section 70.15(1) of the *Copyright Act*, concerning the reproduction of literary works by an educational institution, entitle the collective society that filed the tariff to collect the royalties specified therein from any educational institution that is liable for the making of a single infringing reproduction of any work in the collective society's repertoire, as well as to force the institution to comply with the terms and conditions set forth in the tariff?

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[11] *Copyright Act*, sections 13(7) and 41.23(2).

III. Background

[15] A licensing regime allowing the post-secondary educational institutions to make limited reproductions of works from AC's repertoire has been in place since 1994. Since then, most if not all members of AUCC and ACCC have paid royalties and reported usage pursuant to largely similar model agreements.[12] Access Copyright filed the Proposed Tariff following its unsuccessful attempt to negotiate an amended version of the 2003 AUCC Model Licence, and once it concluded that the negotiations had failed.[13]

[16] Since 2012, however, AC has successfully negotiated licence agreements with several institutions, as well as three Model Licences: one applicable to AUCC member, one to ACCC members, and a third one, applicable to proprietary colleges. Those individual and Model licences cover both paper and digital copying of works in AC's repertoire, and "effectively mirror the uses authorized under the Proposed Tariff."[14]

[17] As a result, every post-secondary educational institution that is interested in a licence from AC under the terms of the Proposed Tariff can already avail itself to the relevant Model Licence. 37 universities, 20 ACCC members, and 61 Proprietary Colleges signed such agreements, while others elected not to.[15]

[18] AUCC has withdrawn from the current proceedings on April 24, 2012[16] and ACCC has withdrawn on October 25, 2013.[17] Importantly, none of the institutions that have elected not to sign a licence agreement is asking the Board to approve a tariff on more favourable terms; those institutions apparently believe that they can operate lawfully without such licences, by relying on other licensing sources when necessary, and by relying on fair dealing or other statutory exceptions.

[19] AC disagrees with those institutions. Not only it contests their interpretation of the *Act*, it also believes that those institutions would infringe the copyrights of its members.[18] It further believes that each of those *alleged* infringements, namely **the making of even a single infringing reproduction** by the institution or those under its authority, would trigger an

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[12] *Access Copyright - Post-Secondary Educational Institutions Tariff (2011-2013), Interim Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, March 16, 2011 (Copyright Bd.), para 28.

[13] *Access Copyright - Post-Secondary Educational Institutions Tariff (2011-2013),* AC Statement of Case, Sept. 13, 2013, para 13.

[14] *Ibid*, para 14.

[15] *Ibid*, para 16.

[16] Letter from Glen A. Bloom, counsel for AUCC to the Copyright Board, April 24, 2012,

[17] Letter from J. Aidan O'Neill, counsel for ACCC to the Copyright Board, October 25, 2013,

[18] AC Statement of Case, supra note 13, para 3.

obligation to comply with the approved tariff (whether the approved tariff is an interim or final tariff) and would entitle it to collect from the institution the entire royalties specified in the tariff and on a retroactive basis.[19] As will be shown below, in the case of a large university this could amount to millions of dollars.

[20] In fact, now that Model Licences are available for every institution that seeks a licence, AC's belief that it can compel all institutions to pay it royalties and comply with the tariff seems to be the only reason for its interest to continue with the tariff approval proceedings, because if the tariff is not mandatory then there is nothing to be gained from approving it that cannot be gained by relying on the Model Licences.

IV. The legal issue

[21] AC's theory regarding the effect of an approved tariff (which I will refer to as the 'single reproduction theory') is based on its interpretation of section 68.2(1) of the *Act*.[20] Section 68.2(1) is applicable to the current proceedings pursuant to section 70.15(2), but "with such modifications as the circumstances require."

[22] I am not aware of any case law on sections 70.15(2) or 68.2(1) that supports AC's 'single reproduction theory'. Nevertheless, the Copyright Board seems to have already endorsed this theory. It expressed this view in a ruling from August 18, 2011,[21] and later, even more explicitly, in an intervener factum that it filed with the Federal Court of Appeal when AUCC applied for judicial review of that ruling.[22] The Board expressed this view on its own initiative. None of the parties has ever asked it to make any ruling on this question, and the Board never invited the parties to make any submission on it. Perhaps the Board thought that this interpretation was trite law, but it is not. At most, the effect of a tariff approved under section 70.15 is an open question.

[23] There is at least one contrary view to the 'single reproduction theory'. Under one such view, to which I will refer as the 'licence theory', an approved tariff would only entitle AC to

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[19] *Ibid*, para 3; Case T-578-13, *Access Copyright v. York University*, Statement of Claim, filed Apr. 8, 2013 (FC), para 15. Given the state of the pleadings in this case, it is not apparent that the key issue of the 'single reproduction theory' will ever be resolved, and any determination—even at the trial level—inevitably seems to be years away.

[20] Case T-578-13, Statement of Claim, *supra*, para 19.

[21] *Access Copyright - Post-Secondary Educational Institutions Tariff (2011-2013)*, Ruling on the Board, Aug. 18, 2011.

[22] Cases A-339-11, A-395-11, *AUCC v. Access Copyright*, Memorandum of Fact and Law of the Intervener The Copyright Board of Canada, March 1, 2012 (FCA), paras 23, 28. The Federal Court of Appeal dismissed the application for judicial review summarily, on the grounds that there were no special circumstances that would justify the intervention of the Court at this stage of the proceedings before the Board, and concluded that the Board should be permitted to complete its work before the Court is called upon to consider administrative law remedies. The Court did not comment on any issue relating to the effect of an approved tariff, *AUCC v. Access Copyright*, 2012 FCA 96.

collect the royalties from institutions that have decided *voluntarily* to obtain a licence from it under the terms that the Board has approved.

[24] The gist of this interpretation is that sections 70.1 to 70.13 state explicitly that an approved tariff under the 'general regime' is merely an approved *licensing scheme*. Under section 70.13, a collective society may file with the Board a "proposed tariff … of royalties to be collected by the collective society for *issuing licences*."[23] Therefore, when the Board subsequently certifies that licensing scheme as approved, with or without alterations, it neither certifies amounts of liquidated damages, nor sets a schedule of statutory damages, to be collected "for any act of infringement." The only thing that the Board does is to approve the royalties to be collected "for issuing *licences*". If a licence is not issued, no royalties are owed, and no royalties can be collected.

[25] 'Licence' and 'infringement' are terms with an established meaning in copyright law. A "licence [is] an authorization to do any act that is a right described in s. 3,"[24] and an 'infringement' is the doing "without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do."[25] A licensee is a person who does an act mentioned in section 3 *with the consent* of the copyright owner and therefore cannot be sued for infringement. An infringer is a person who does an act mentioned in section 3 *without the consent* of the copyright owner and therefore can be sued.

[26] Since a licence is "nothing but a permission which would carry with it immunity from proceedings to those who act upon the permission",[26] a licence *simpliciter* cannot impose any obligation on the licensee. A licence may be granted as part of a licence *agreement* entered into between a copyright owner and a user, and it may contain obligations on the licensee, or the grant of a licence may be conditional upon certain terms, but those obligations or terms can only bind those who have voluntarily accepted to be bound by them. A licensor cannot impose obligations unilaterally.

[27] The approval of a tariff under section 70.15 does not change this essential feature of the underlying licensing scheme. It begins and remains a *licensing* scheme, and can only create obligations on licensees who consented to be bound by them. The only change effected by an approved tariff is on the copyright owners who have chosen, *voluntarily*, to administer their copyrights collectively. Upon approval, the owners' otherwise exclusive right is "qualified by a

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[23] *Copyright Act*, section 70.13 (italics added).

[24] *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 (CanLII), [2007] 3 SCR 20, http://canlii.ca/t/1s72h, para 40.

[25] *Copyright Act*, section 27(1).

[26] *British Actors Film Co Ltd v. Glover*, [1918] 1 KB 299, at 306.

statutory licence vested in everybody who pays or tenders … a fee, charge or royalty which has been fixed by the … Board."[27]

[28] Therefore, an institution that has made an unauthorized reproduction of a work from AC's repertoire may have infringed the copyright in the work. The remedy for such infringement, if a court finds that it had indeed occurred, will be determined by that court, and only if the copyright owner, or another person that has standing to sue for infringement,[28] brought an action for infringement and prevailed.

[29] But an institution that has been held liable for the making of an unauthorized reproduction is an infringer, and by definition, is not a licensee. Indeed, the one is the opposite of the other. A licensee, for the current purposes, is either an institution that has entered into a licence agreement with a collective society or an institution that has paid or offered to pay the royalties specified in an approved tariff. Under section 70.17, an institution that has paid or offered to pay the approved royalties is immune from proceedings for infringement. By paying or offering to pay the royalties that the Board approved, the institution avails itself to the statutory licence, namely the approved tariff. As a result, the institution cannot be sued for infringement, but, having become a licensee, it can be sued for the recovery of those royalties in default of their payment.

[30] An institution that has not paid or offered to pay the royalties specified in the tariff is not a licensee. The remedy against such an institution, if it has infringed copyright, will be determined by the court if the copyright owner brings proceedings for the infringement of copyright and prevailed. Parliament has empowered AC to collect royalties *for the issue of a licence*. If Parliament intended to empower AC to collect money for any act of infringement it would have said so, and, presumably, would not have used a term having the opposite meaning.

[31] While there is relevant case law on the effect of the statutory provision that preceded section 68.2(1), and while this case law is more consistent with the 'licence theory' than with the 'single reproduction theory',[29] there does not seem to be any relevant case law on section 68.2(1) in its current form, and there is no case law on how section 70.15(2) modifies section 68.2(1), or on how it should apply to the circumstances of educational institutions. Therefore, the potential application and effect of section 70.15(2) can be seen as a matter of first impression.

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[27] *Vigneux v. Canadian Performing Right Society Ltd.*, 1943 CanLII 38 (SCC), [1943] SCR 348, http://canlii.ca/t/fslvq, at 353; *Copyright Act*, s. 70.17.

[28] Which means an exclusive licensee who must then join the copyright owner. See sections 13(7) and 41.23 of the *Copyright Act*. Mere licensees or agents have no standing to sue for copyright infringement.

[29] E.g., *Performing Rights Organization of Canada Ltd. v. Lion d'or (1981) Ltee*, 17 C.P.R. (3d) 542.

V. The need to determine the effect of the tariff as a preliminary matter

[32] While the meaning of section 70.15(2) may be a matter of first impression, it has a direct and immediate impact on the current proceedings. This impact calls for a determination of this issue *before* the Board proceeds with the approval process, because it can determine whether this case should effectively be rendered moot, and if not, how it should proceed, and on what grounds it can be approved or opposed.

[33] To wit, if the 'licence theory' is correct, and AC would not be able to impose compliance with the approved tariff on institutions that have not elected to operate under the tariff, then the current proceedings effectively become moot. Neither AC nor any institution would gain anything from an approved tariff that they cannot already gain by relying on the relevant Model Licences. Under such circumstances continuing the current proceedings would simply waste the Board's and the remaining parties' scarce resources and time.

[34] If, on the other hand, AC's 'single reproduction theory' is correct, and the approved tariff will become mandatory, then the Board might have to address a series of difficult questions of substance and procedure, before it proceeds with the approval process. The Board will have to address these issues to ensure that it is acting within its jurisdiction, that the substantive and procedural rights of those affected by the tariff are preserved, and that the approved tariff, if mandatory, is nonetheless fair and equitable rather than arbitrary, capricious, disproportionate or punitive.

[35] To illustrate, AC's single reproduction theory implies that if a single infringing reproduction made by a teacher, staff, or student of a university of the size of, say, the University of British Columbia, with its 57,706 students,[30] that university would be required to pay AC an annual royalty of more than $1.5 million, or more than $4.5 million for the three-years period of the Proposed Tariff. Under AC's theory, the university will have to pay these amounts regardless of how many *non*-infringing copies were made, how many fully-paid-for copies were made, and notwithstanding the fact that had the university been held liable for that reproduction in an action for copyright infringement, no copyright owner be able to recover such an award in such circumstances. Indeed, the recently enacted changes in the *Copyright Modernization Act* make it quite clear that Parliament intended to cap the maximum amount of statutory damages available for all copyright owners, and for all infringements prior to any litigation, in a situation involving 'non-commercial purposes', at $5,000.[31]

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[30] UBC Facts and Figures, at http://news.ubc.ca/media-resources/ubc-facts-and-figures/ (visited Oct 26, 2013).

[31] *Copyright* Act, sections 38.1(1)(b), 38.1(1.12), 38.1(1.2). It is highly inconceivable that under such circumstances any copyright owner or owners would be able to prove *actual* damages of any such order of magnitude in the millions of dollars or anywhere close in a normal infringement action.

[36] Effectively, a mandatory tariff having such an effect amounts to "forfeiture", which equity abhors.[32] It creates an absurd result that lacks any proportion between the mischief and the remedy. Indeed, a tariff resulting in such an outcome would seem to be exactly an "instrument[] of oppression and extortion [the prevention of which is] the *raison d'être* of the enactments under consideration."[33] Moreover, it raises a serious concern about double or multiple recovery,[34] which may occur when AC collects the royalties under the tariff and the copyright sues and recovers for infringement, or when AC collects royalties for the *entire* repertoire, even though the university is already paying separate licence fees for using parts of it.

[37] Ensuring that an approved tariff is fair and equitable is not a trivial task in any tariff proceedings (whether the resulting tariff is mandatory or not), and fulfilling it successfully depends crucially on effective representation of all parties concerned and a fully developed record. Ensuring that it does not amount to forfeiture or does not become an instrument of oppression and extortion becomes all the more challenging if the result is indeed mandatory, and if, as in the present case, the withdrawal of the main institutional players, AUCC and ACCC, deprives the Board of the perspectives of the educational institutions.

[38] On a more general level, the correct interpretation of sections 68.2(1) and 70.15(2) goes to the heart of purpose of the legislative scheme, and therefore dictates the scope of the Board's jurisdiction, its mandate, and how it ought to fulfill it. Under the 'licence theory', the purpose of the 'general regime' in sections 70.1-70.4 of the *Act* is to facilitate voluntary licensing when it is in the interest of both users and copyright owners to rely on collective societies to "efficiently manage and administer different copyrights under the *Act*.[35] When users are interested in obtaining a licence from a collective society but the users and the society cannot reach an agreement about the terms of such licences, the general regime provides a mechanism for ensuring that the terms of such licences are fair and equitable. This can be done either in individual cases, under section 70.2, or, in a more cost-effective way by way of a tariff, which sets out a licensing scheme that is potentially applicable to a broader set of users. Forcing users to deal with a collective society when they do not view the society's licensing scheme as an

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[32] *Jones v. New York Guaranty & Indemnity Co.*, 101 U.S. 622, 628 (1879). See also *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., 1994 CanLII 100 (SCC), [1994] 2 SCR 490, http://canlii.ca/t/1frs7, and Section 98 of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43, s. 98 ("[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.")

[33] *Vigneux v. Canadian Performing Rights Society*, supra note 27, at 354 (quoting *Hanfstaengl v. Empire Palace; Hanfstaengl v. Newnes*, [1894] 3 Ch. 109 (C.A.), at 128).

[34] See e.g., *Pro‑Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), http://canlii.ca/t/g1nz6, paras 35-41.

[35] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, para 11.

effective way to clear their copyright needs seems to undermine Parliament's purpose in the first place.

[39] In contrast, the 'single reproduction theory' envisages a legislative scheme with an entirely different purpose. Under that view, the purpose of the legislative scheme is not to facilitate efficient licensing, but to maximize the collection of whatever fees the Board has certified, whether they are interested in obtaining a licence from the collective society or not, and upon any single act of infringement. Essentially, this view envisages a unique two-stage enforcement mechanism, comprising an action by a class of copyright owners against a class of defendants. The role of the Board under this mechanism is to try the case and determine the appropriate relief, stipulated in the form of a tariff. Equipped with this order, the society can enforce it summarily in a court of competent jurisdiction against every member of the defendant class.

[40] Therefore, the question of the effect of an approved tariff goes to the heart of the Board's mandate and jurisdiction. Each of the competing theories entails a different mandate, the fulfillment of which would require different procedural rules and safeguards. The Board's current procedures may be suitable for performing its mandate under the 'licence theory', but if the Board were to have the role that the 'single reproduction theory' envisages, then presumably Parliament would have either required procedural safeguards of the type that exist in class proceedings before the courts, or would have clearly expressed intent to forego them.[36] If Parliament has indeed intended to confer upon AC such extraordinary enforcement powers, allowing it to collect millions of dollars upon a single act of infringement, it should have said so, and would have used the appropriate vocabulary.

[41] Moreover, if AC's interpretation of sections 68.2(1) and 70.15(2) is correct, this interpretation means that any society, association or corporation that proposes a licensing scheme applicable to a repertoire of works of more than one author, can file its scheme with the Board, and upon approval would have powers that exceed the scope of the copyrights that it was authorized to administer. If this were true, then the Board would have possessed legislative powers, allowing it to add new rights, or expand the scope of existing ones, and at the behest of copyright owners. Under this view, the Board has the power to modify Parliament's deliberate and careful allocation of rights between owners and users. This would seem like the least likely interpretation of the legislative scheme, and such an outcome would be inconsistent with the

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[36] Recent case law demonstrates the difficulties in adjudication copyright questions, similar to those arising in the present case, on a class basis. While a court may be willing to certify class proceedings to determine whether the defendant has a general defense, such as fair dealing, that can render the whole case moot, establishing liability, and determining an appropriate monetary relief will not be suitable to determination on a class basis, and may require determination on an individual basis, see *Waldman v. Thomson Reuters Corporation*, 2012 ONSC 1138 (CanLII), see also, *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2nd Cir., 2013).

Supreme Court's recent holding that "that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body."[37]

VI. The advantages of a reference

[42] While the Board is not required to refer legal question to the Federal Court of Appeal and can answer them on its own, at least initially, there are two main reasons that strongly compel determination by way of a reference in the present case.

[43] The first reason is that "the core of the Board's mandate is 'the working out of the details of an appropriate royalty tariff'".[38] The Board does not have the power to enforce its decisions, and therefore it would normally be the role of the courts to determine the effect of a tariff. The particular questions raised in this application are precisely the kind of legal questions that courts, rather than administrative tribunals, have the better institutional capacity and specialized expertise to decide. Since any determination of these questions by the Board will inevitably be reviewed on a standard of correctness,[39] asking the Federal Court of Appeal to decide this question expeditiously and authoritatively will enhance judicial economy, and will also resolve an issue that is common to these and related proceedings.

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[37] *CRTC Reference*, supra note 8, para 80. While in my view the correct interpretation of the *Copyright Act* leads to the conclusion that the tariff cannot be mandatory, if this conclusion is wrong then it is questionable whether enacting a scheme that confers upon the Board such powers is constitutional. The constitutional questions may eventually need to be raised before the Board if decides **not** to make the reference herein requested. Without going into much detail—the point of this letter is to highlight the importance of the question, not to argue its solution—a tariff would appear to be an 'enactment' within the meaning of *Interpretation Act*. But this raises the question whether a federal statute that confers upon a federal tribunal powers to create new mandatory obligations on users is a "law in relation to 'Patents of Invention and Discovery' or 'copyrights'" within the meaning of sections 91(22) and 91(23) of the *Constitution Act*, 1867, or rather a law creating other kinds of rights within the meaning of section 1 of the *Statute of Monopolies*, 1623, or the *Ontario Statute of Monopolies*, 1897, and therefore subject to the provisions of those enactments and the related common law. Another question is whether such mandatory tariff, at least when it targets *educational institutions*, is *intra vires* Parliament's legislative power, or rather an unconstitutional intrusion into the area of education, which, under section 93 of the *Constitution Act*, falls under exclusive Provincial jurisdiction. A further question yet is whether such a mandatory tariff, effectively "appropriating any Part of the Public Revenue, or … imposing any Tax or Impost," is subject to ss. 53-54 of the *Constitution Act*, and cannot be enacted by the Board. The notion of a mandatory tariff, especially if combined with various mandatory reporting, monitoring, and auditing requirements, may also raise questions regarding its compatibility the constitutional right under the *Charter of Rights and Freedoms* to be secure against unreasonable search or seizure, and in the case of educational institutions, may further implicate their and their members' academic freedom, which is inextricably connected to their *Charter*-protected freedom of expression, *see Pridgen v. University of Calgary*, 2012 ABCA 139 (CanLII), para 115. Under the 'licence theory' most, if not all, of these constitutional questions disappear.

[38] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, para 12.

[39] *Ibid*, para 14.

[44] Second, as mentioned earlier, the Board has already explicitly embraced the 'single reproduction theory' on its own initiative and without even asking the parties to make any submission on it. The Board's decision to take sides in a dispute over this controversial question of law makes it difficult to see it as positioned to decide this question impartially. Even if it invited the parties to make submissions on this preliminary question at this point, the Board's decision will inevitably be clouded by its prior actions.

VII. Additional considerations

[45] Many factors have conjoined at this time to make the current proceedings unique, and to highlight the need to determine the effect of an approved tariff expeditiously and authoritatively.

[46] This case began and progressed in a period of considerable changes in the legal environment and in the models of the production, dissemination, and use of works of authorship. It is not only the first tariff dealing with the reproduction of works in the post-secondary education sector, but also the first one dealing with digital copying in the educational context, and it will have to be decided in light of recent Supreme Court decisions and new legislation. Unlike most earlier proceedings before the Board, where parties have either assumed that the tariff would be mandatory, or were interested in relying on an approved tariff whether it were mandatory or not, this case will have to be decided when a growing number of educational institutions, even those who relied on licences from AC in the past, no longer see any need for these licences because they believe they have found alternative and more efficient ways to comply with copyright law. Therefore, a legal question that might have been seen as merely academic in the past has evolved, as the case progressed, into a crucially important question for all the parties concerned.

[47] In addition, the current proceedings concern Canada's system of higher education, numerous educational institutions, thousands of teachers, librarians, staff members, and students, as well as taxpayers who fund significant parts of their operations. The Supreme Court has recognized that the Board was established because Parliament had realized that collective societies' operations are "affected with a public interest".[40] This is true in all matters before the Board, but the public interest in a case such as this one is even more pronounced.

[48] If an approved tariff is indeed mandatory, then the departure of AUCC and ACCC from the current proceedings puts the Board in a difficult situation, because it has deprived it of the opportunity to rule on the basis of a fully developed record and argumentation in an appropriately contested adversarial proceeding, on a matter with very broad implications for the public interest. While the remaining objectors may be able to bring useful and even important perspectives that would supplement the perspectives of the institutions, they cannot substitute for

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[40] *Vigneux v. Canadian Performing Rights Society*, supra note 27, at 353.

them, not least because they do not have access to the evidence that the institutions might have, and cannot muster the resources that are necessary to address all the issues. Therefore, this is not a case where simply approving the proposed tariff for lack of effective objection would be appropriate.

[49] While I would not purport to speak in the name of AC or its members, I would add that in a recent update to its members, AC stated that even though it "disagree[s] with the education sector's broad interpretation of fair dealing" it does not believe that litigation is the best way "to serve those who read, teach and learn". It stated that it "aspires to more productive discussions surrounding collaboration and the creation, production and use of content" but that it may need, as a matter of last resort, "look to the courts for clarity."[41]

[50] I believe that at this juncture, determining the legal effect of an approved tariff by way of a reference will contribute to the necessary clarity, which will benefit both the education sector and the publishers and authors affiliated with AC. I am hopeful that AC would agree with me that whatever the correct interpretation of section 70.15(2) is, clarifying its meaning authoritatively and expeditiously would enable all the parties concerned to adapt to the recent developments in the legal environment and to the ongoing changes in the models of production, dissemination, and use of works of authorship. The Board has the power to make this contribution by exercising its power to refer the question to the Federal Court of Appeal.

VIII. The need for a stay

[51] AC has filed its Statement of Case on September 13, 2013. Its case is based in a significant part on events that have occurred after it filed the Proposed Tariff, and especially since 2012, and its justification is grounded heavily in the 'single reproduction theory'.

[52] Whether an approved tariff is mandatory or not is a question that has direct and immediate impact on the scope of Board's jurisdiction, its mandate, and the procedures necessary for fulfilling it, and on the current proceedings. The answer to this question will determine whether this case may be effectively be rendered moot or should proceed, and if it proceeds, will provide important guidance on what grounds it can be approved, and on what grounds it may be opposed.

[53] Specifically, whether to object and the grounds for objection may depend crucially on the effect of the tariff. Almost every aspect of the Proposed Tariff may or may not be objectionable depending on whether the approved tariff is mandatory or not. Just as it may make little sense for AC, after successfully negotiating Model Licences, to seek an approval of the same terms if the approved tariff will not be mandatory, it may make little or no sense to object to the Proposed

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[41] Access Copyright Member Update, Sept 30, 2013, at http://www.accesscopyright.ca/media/37939/2013-09-30_member_update_sept_2013_final.pdf

Tariff, or many aspects of it, if it is not mandatory, and it may make little sense to spend time, effort, and resources on filing an objection and conducting a hearing "just in case".

[54] Therefore, staying the current proceedings until the Board decides whether to refer the question to the Federal Court of Appeal and pending the determination of such reference will promote judicial economy, and any associated delay may pay-off in the form of a less complicated case to decide, and fewer grounds for any subsequent judicial review.

IX. Conclusion and relief sought

In light of the above, I respectfully request the Board:

- To issue an order referring the following draft, or a substantially similar, question to the Federal Court of Appeal:

  > Does a tariff approved under section 70.15(1) of the *Copyright Act*, concerning the reproduction of literary works by an educational institution, entitle the collective society that filed the tariff to collect the royalties specified therein from any educational institution that is liable for the making of a single infringing reproduction of any work in the collective society's repertoire, as well as to force the institution to comply with the terms and conditions set forth in the tariff?

- To set out a schedule for a process in which the parties could make submissions about wording of the question to be referred, and the factual basis that is necessary for its resolution, and to consider suggestions from the remaining parties as to whom formal notice of this reference should be given under section 322 of the *Federal Courts Rules*, and on other procedural matters.

- To issue an order staying the current proceedings pending the determination of this request by the Board, and pending the final determination of the question on reference, should the Board decide to refer it.

Respectfully submitted,

Ariel Katz

CC: Randall Hofley
Nancy Brooks
David Fewer
Sean Maguire