Copyright Board Canada
Commission du droit d'auteur du Canada
CANADA

February 13, 2014

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

RULING OF THE BOARD

On September 13, 2013, Access Copyright filed, as part of its evidence in the above-referenced proceedings, a list of all persons, individuals or corporations, affiliated with the collective as of August 1, 2013 (the "List"). Access also asked that the List be treated as confidential, without stating grounds for the request.

On December 20, 2013, Mr. Katz requested that the List, the agreements between Access and other reproduction rights organizations (RROs), obtained in the context of Mr. Katz's interrogatories to Access and designated by Access as confidential information, and a non-redacted version of his letter (and Appendix) be placed on the public record. On the same day, the Board asked that Access respond to these requests and that Mr. Katz reply.

Access did not oppose that Mr. Katz's letter and the agreements with other RROs be put on the public record. The Board will thus do so.

As for the List, Access opposed having the List placed on the public record for four reasons. Access does not publish the List. It treats its content as commercially-sensitive business information. If made public, the List may be used in ways that are detrimental to both Access and its affiliates and may be made widely available online. Finally, the List was treated in confidence in all earlier proceedings in which it was provided; indeed, on May 18, 2012, the Board expressly so ordered.

Mr. Katz maintained his request, essentially for the following reasons.

The Board's Directive on procedure provides that evidence is placed upon the public record unless the Board orders otherwise. This reflects the general principle of open justice, which, according to Mr. Katz, applies to the Board. The burden of displacing the principle lies with Access. Mr. Katz argues that this burden has not been discharged.

A confidentiality order should be granted only when necessary to prevent a serious risk to an important public interest, and then only if the salutary effects of confidentiality outweigh its deleterious effects, including effects on the rights guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*: *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41. The interest must be one which can be expressed in terms of a public interest in confidentiality and must be well-grounded in the evidence.

Mr. Katz argues that s. 70.11 of the *Copyright Act* provides additional grounds for requiring disclosure of the List, by requiring that Access disclose the names of those who authorize it to act on their behalf. He also argues that the Board cannot certify a fair tariff if the List remains confidential. A tariff is a regulation; keeping the List confidential would make it impossible to know the works to which the tariff applies, making the tariff a secret law.

Finally, Access cannot rely on the May 18, 2012 ruling, since it was issued without the benefit of reasons and since the Board cannot consider itself bound by its earlier decisions.

For the following reasons, the List shall be treated as confidential within the meaning of the Confidentiality Order that applies in these proceedings.

First, the Board has treated membership lists as confidential in the past; it sees no reason to act differently in this instance. The May 18, 2012 ruling was issued after the Board, of its own motion, asked Access to justify the claim that such a list was confidential. Access invokes the same reasons now as in 2012. The Board agreed with the reasons in 2012 and continues to agree with them now.

Access has satisfied any possible evidentiary burden to justify treating the List in confidence. Its conduct in the matter is not at issue. It acted in accordance with current practice before the Board; the Directive on Procedure is largely ignored in this respect. Access identified specific prejudice, albeit in general terms. The statement that it treats the List as confidential is unchallenged and consistent with what the Board knows of the way in which Access operates.

In all but eleven of its 236 pages, the List provides personal information (i.e. names) of individuals who enjoy privacy rights. Making personal information part of the public record is of itself an issue. The risk that such information may be posted on the Internet exacerbates privacy concerns.

Second, the time that elapsed between the application to treat the List as confidential and the request to make it part of the public record weighs against granting the request.

Third, it is far from certain that the “open court” principle applies to the Board as broadly or as rigidly as Mr. Katz seems to suggest. The judicial decisions referred to deal with matters before ordinary courts; when read in context, all quoted passages only target judicial proceedings. The proposition that the *Sierra Club* test is “routinely applied” before administrative tribunals is supported by statements from tribunals that generally deal with disputes among private parties or the rights of specific individuals. Any analysis of the effects of a confidentiality order must be informed by the fact that the Board does not dispense justice as understood in the expression “open justice”. Tariff proceedings are not judicial proceedings. As Mr. Katz notes, a tariff is in the nature of a regulation, not an order directly enforceable against any given person. Too rigid an application to regulatory proceedings of a principle first developed in respect of adjudicatory processes may make it difficult or impossible to secure the information the Board needs to reach fair decisions, in this instance as well as in others.

Finally, to the extent that *Sierra Club* may apply (and the Board doubts that it applies to the Board either in the form or to the extent suggested), the test would be satisfied. A confidentiality order is necessary to prevent a serious risk to an important public interest, and the benefits of confidentiality outweigh its costs.

Gilles McDougall
Secretary General