

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation File: Educational Rights 2012-2016

Regime Use of Broadcast Programs by Educational Institutions
Copyright Act, section 66.52

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

Proposed Tariffs Considered Application to Vary: Eliminating the years 2014 to 2016 of the tariff

Statement of Royalties to be collected by ERCC from educational institutions, in Canada, for the reproduction and performance of works or other subject-matters communicated to the public by telecommunication for the years 2012 to 2016

Reasons for decision

I. INTRODUCTION

[1] Educational institutions can copy and use certain radio and television programs for free. For other programs, they are expected to pay royalties to the Educational Rights Collective of Canada (ERCC), pursuant to a tariff certified by the Board.¹ On December 24, 2011, the Board certified the *Educational Rights Tariff, 2012-2016*. The tariff was essentially identical to previous ones. The very first tariff, for 1999-2002, was certified following hearings. The process leading to the second tariff, for 2003-2006, ended when the parties agreed to ask that a tariff be certified on the same basis as for 1999-2002. Since then, the matter has proceeded unopposed.

¹ The description found in the *Statement of Royalties to be collected by ERCC from Educational Institutions in Canada, for the Reproduction and Performance of Works or Other Subject-Matters Communicated to the Public by Telecommunications for the Years 1999 to 2002* (25 October 2002) Copyright Board Decision remains essentially valid, except in one respect. Pursuant to an amendment made by section 25 of the *Copyright Modernization Act*, S.C. 2012, c. 20 which came into force on November 7, 2012, an institution can now copy news and news commentaries, keep the copy and perform it for free not just for one year, but forever.

[2] On November 4, 2013, ERCC filed, pursuant to section 66.52 of the *Copyright Act*² (the “*Act*”), an application to vary the 2012-2016 tariff “by eliminating the years 2014, 2015 and 2016 from the current certified tariff with the result that the term of the Tariff will end on December 31, 2013.”

[3] An application to vary cannot succeed unless there is a material change in circumstances since the relevant decision was made (in this instance, December 24, 2011). The material change ERCC relies on is as follows.

1. Royalties received by ERCC pursuant to its tariffs have always been modest; in recent years, they have not exceeded \$10,000 on average. These amounts never came close to covering the collective’s obligations; it continues to carry significant payables dating back to the hearing into the 1999-2002 tariff.
2. Royalty receipts have been supplemented by loans in the amount of \$20,000 from each of its six founding member collectives. These loans have never been paid back.
3. Costs have continued to exceed revenues, and debts have always largely exceeded any amount available to the collective. As a result, nothing has ever been distributed to rights holders.
4. Recent amendments to the *Act* have made it increasingly unlikely that ERCC’s costs would ever be covered by royalty receipts.
5. Unable to sustain continued losses, ERCC’s board of directors, comprised of one representative of each founding member collective, has recently voted to recommend to the five remaining members (one member having left ERCC a few years back) to dissolve ERCC and to write off the \$20,000 loans as well as any accumulated interest. The five members are in the process of signing the required special resolution to commence the dissolution procedure. Accordingly, within approximately 120 days of November 4, 2013, there will be no entity to administer the receipt of any royalties pursuant to the 2012-2016 tariff.
6. ERCC has filed the application to vary as part of the process to have an orderly winding down of its affairs.

[4] ERCC argues that the variance it seeks will not prejudice the interest of any rights holders, whether or not they are represented by ERCC or its member collectives.³ ERCC has never had any money to distribute to royalty claimants and never will. Outstanding debts, including founding member loans, stand at approximately \$830,000. Funds in hand currently are less than \$40,000. Founding members’ loans will not be refunded. Once windup fees of approximately \$15,000 are paid, other creditors will receive less than five per cent of what they are entitled to receive. Any additional royalties that ERCC might receive would serve to pay first the balance of these debts and second the member loans before any payment could be made to royalty claimants.

² R.S.C. c. C-42.

³ Pursuant to section 76 of the *Act*, unrepresented rights holders are entitled to share in royalty distributions.

[5] ERCC's unstated conclusion appears to be that since the cost of receiving royalties is expected to always exceed the amounts that may be so received, especially now given recent amendments to the *Act*, it is in the best interest of all concerned that the tariff be terminated and the collective dissolved.

[6] ERCC states that it cannot be wound up until arrangements have been entered into with its debtors and creditors, which it expects will occur shortly after the Board's decision is received. The application ends with an expression of "hope that the Board recognizes the futility of the situation ERCC and its members find themselves in and hope that the Board will approve the requested variance as expeditiously as possible."

[7] The application to vary is granted, for the reasons set out above.

[8] The Board did not call on anyone else to comment on the application, because, in practice, granting it can prejudice no one.

[9] Royalties payable pursuant to section 29.7 of the *Act* can only be collected by a collective, and only pursuant to a tariff certified by the Board. Since no tariff will be in place, no royalties will be payable. From a practical point of view, this prejudices neither educational institutions, who will be entitled to make the relevant protected uses for free, nor rights holders, since there is not, and will never be, anything to distribute among them.

[10] Unrepresented rights holders, who are entitled to a share of royalty distributions pursuant to section 76 of the *Act*, will be left without a remedy in respect of any protected use made in 2014, 2015 or 2016, a period for which a tariff had already been certified. As interesting as the issue may be in theory, it changes nothing in practice. Represented rights holders would receive nothing even if the tariff were left in place, and unrepresented rights holders are entitled to nothing more than what represented rights holders receive.

A. DECISION

[11] The *Educational Rights Tariff, 2012-2016* is amended as follows:

- In the title page of the tariff and in the notice found on page 3 of the tariff, the words "and 2013" are substituted for "to 2016";
- In the notice found on page 3 of the tariff, "2012-2013" are substituted for "2012-2016";
- In the tariff title found on page 4 of the tariff, the words "2012 and 2013" are substituted for "2012, 2013, 2014, 2015 and 2016";
- In section 1, "2013" is substituted for "2016".
- In section 12, "2019" is substituted for "2022".

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, with the first name "Gilles" being more prominent than the last name "McDougall".

Gilles McDougall
Secretary General