Copyright Board Canada

Commission du droit d'auteur Canada

Date	2013-01-18
Citation	File: Reprographic Reproduction, 2005-2009
Regime	Collective Administration in relation to rights under sections 3, 15, 18 and 21 *Copyright Act*, subsection 70.15(1)
Members	The Honourable William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	Educational Institutions – 2005-2009

Statement of Royalties to be collected by access copyright for the reprographic reproduction, in Canada, of works in its repertoire

Reasons for decision

I. INTRODUCTION

[1] On June 26, 2009, the Board issued its reasons for certifying the *Access Copyright Elementary and Secondary School Tariff, 2005-2009* ("*Access Tariff*").[1] The royalties were set at $5.16 per full-time equivalent (FTE) student, based on a volume survey conducted by the parties. Of the slightly more than 246 million copies on account of which the royalties were set, 6,995,451 were for ministry examinations and 16,861,583 were "Category 4" copies.[2]

[2] On July 23, 2010, the Federal Court of Appeal remitted the decision to the Board, to determine the meaning of the words "in a medium that is appropriate for the purpose" as found

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[1] *Access Copyright (Educational Institutions) 2005-2009* (26 June 2009) Copyright Board Decision.

[2] Referred to as "Multiple copies made for use of the person making the copies and single or multiple copies made for third parties without their request

a. for the purpose of private study and/or research and/or criticism and/or review
    i. for at least one purpose other than those allowable under the fair dealing exception
b. solely for the purpose of private study and/or research and/or criticism and/or review." *Ibid*. table 1.

in subsection 29.4(3) of the *Copyright Act*[3] (the "*Act*") and to assess whether examination copies came within the meaning of these words: *Alberta (Education) v. Access Copyright.*[4]

[3] On July 12, 2012, the Supreme Court of Canada concluded that the Board had erred in its application of the principle of fair dealing to Category 4 copies and remitted the matter to the Board for redetermination: *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright).*[5]

[4] On July 20, 2012, the Board asked Access Copyright (Access) and the departments of education and local school boards who had objected to the proposed tariff (the Objectors) how it should proceed to comply with these decisions.

A. CATEGORY 4 COPIES

[5] With respect to *Alberta (SCC)*, the Board ruled on September 19, 2012 that all that needed to be done was to determine the impact of removing Category 4 copies from the calculation of the FTE rate:

> The decision of the Supreme Court is clear and leaves no room for interpretations: based on the record before the Board and the findings of fact of the Supreme Court, Category 4 copies constitute fair dealing for an allowable purpose and as such, are non-compensable. The FTE rate must be reduced accordingly.

[6] We agree with the parties that the reduction should be calculated as follows:

		% of total / % du total	Exposures / Copies	Value per exposure ($) / Valeur par copie ($)	Value ($) / Valeur ($)
Number of Category 4 copies / Nombre de copies de la catégorie 4	16,861,583				
Books / Livres		86.4	14,568,407.71	0.092	1,340,283.51
Newspapers / Journaux		7.1	1,197,172.39	0.0126	15,084.37
Magazines / Magazines		6.5	1,096,002.90	0.0095	10,412.03
Total per year /		100	16,861,583.00		1,365,789.91

[3] R.S.C. c. C-42.
[4] 2010 FCA 198. [*Alberta (FCA)*] The Court confused examination copies and Category 4 copies. The parties and the Board agree that this is a clerical error, without consequence on the rest of the matter.
[5] 2012 SCC 37. [*Alberta (SCC)*]

Total par année					
Total FTEs / Total des ETP	3,859,715				
Value per FTE of Category 4 copies / Valeur par ETP des copies de la catégorie 4					0.3539
Tariff as certified (before rounding) / Tarif homologué (avant arrondissement)					5.1626
Tariff without Category 4 copies (before rounding) / Tarif sans les copies de la catégorie 4 (avant arrondissement)					4.8087

[7] Consequently, the FTE rate is lowered from $5.16 to $4.81.

B. EXAMINATIONS COPIES

[8] With respect to *Alberta (FCA)*, the parties agreed that the Board should rule on the basis of the existing record and of additional written arguments. These arguments dealing with the remittance from the Federal Court of Appeal allow us to determine whether the examination copies come within the meaning of subsection 29.4(3) of the *Act*.

[9] Subsection 29.4(2) of the *Act* provides that it is not an infringement of copyright for an educational institution to copy a work as required for a test or examination. Subsection 29.4(3) (the "carve-out") provides that subsection (2) does not apply if the work is commercially available in a medium that is appropriate for the purpose referred to in subsection (2).

[10] In the decision under review, Access argued that if it offers a licence to copy a work, the work is commercially available in an appropriate medium. The Objectors replied that the carve-out concerns solely examinations that are published for sale to educational institutions. The Board ruled that "commercially available" must necessarily have the meaning Access ascribes to the expression: to interpret subsection 29.4(3) as suggested by the Objectors would render paragraph (*b*) of the statutory definition of "commercially available" meaningless.

[11] On judicial review, the Objectors argued that while the Board had properly interpreted what is meant by "commercially available", it had failed to consider whether and when a work for which a licence is available is available in "a medium that is appropriate for the purpose". The Federal Court of Appeal agreed:

> [69] [...] with respect to the section 29.4 exception, the Board failed to address an issue that was essential to the disposition of the matter before it. The issue required that the words "in a medium appropriate for the purpose" be defined and applied to the facts of this case.
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> [70] This Court could endeavour to fulfill this task. However, it is for the Board, in first instance, to interpret its own statute, with which it has particular familiarity, and to make the appropriate findings of fact.

[12] In other words, the *Act* required the Board to determine whether the works were commercially available and whether such availability was in a medium appropriate. The Federal Court of Appeal concluded that the Board did the first, not the second. The sole remaining task is to do the second.

[13] The Objectors argue that subsection 29.4(3) exists to protect existing markets. To be in an appropriate medium, the work must already be in the physical form the teacher will use to administer the test or examination (e.g., standardized tests that are sold to educational institutions). Whatever an institution needs must be available in the marketplace exactly as it needs it for examinations if the carve-out is to apply; otherwise, the work may be commercially available, but not in an appropriate medium. If a work must be copied to serve for a test or examination, then it is not in the appropriate medium, in part because a copy always is in a different medium than the source material. A licence only provides the right to make copies of works. It never makes a work available in any medium, let alone one that is appropriate for the purpose of tests and examinations. Legal authorization to transfer a work to a medium does not make the work available in that medium.

[14] Access argues that a licence to copy a work to a medium makes the work available in that medium and if the medium on which the work is copied is appropriate for the purposes of a test or examination, the carve-out applies. All examination copies captured during the volume study were made on a medium the use of which the *Access Tariff* authorizes. The medium on which examination copies were made was necessarily appropriate, since each institution or teacher chose (or was required) to use that medium for the test or examination.

[15] According to the Objectors, if the carve-out does not apply, the FTE rate should be lowered by $ 0.1468. Access does not contest this calculation.

C. ANALYSIS

[16] The relevant provisions of the *Act* are as follows:

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> "commercially available" means, in relation to a work or other subject-matter,

(*a*) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or

(*b*) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;

[...]

29.4(2) It is not an infringement of copyright for an educational institution or a person acting under its authority to

(*a*) reproduce, translate or perform in public on the premises of the educational institution, or

(*b*) communicate by telecommunication to the public situated on the premises of the educational institution

a work or other subject-matter as required for a test or examination.

(3) Except in the case of manual reproduction, the exemption from copyright infringement provided by paragraph (1)(*b*) and subsection (2) does not apply if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose referred to in that paragraph or subsection, as the case may be.

30.1(1) It is not an infringement of copyright for a library, archive or museum [...] to make, for the maintenance or management of its permanent collection [...], a copy of a work [...]

(*a*) if the original is rare or unpublished and is

(i) deteriorating, damaged or lost, or

(ii) at risk of deterioration or becoming damaged or lost;

(*b*) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;

(*c*) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable;

[...]

(2) Paragraphs (1)(*a*) to (*c*) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).

[...]

> 32(1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to
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> (*a*) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
>
> (*b*) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
>
> (*c*) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
>
> [...]
>
> (3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (*a*) of the definition "commercially available".

[17] For the reasons that follow, we conclude that if the tariff authorizes an institution to copy a work onto the medium that will be used to administer a test or examination, the work is available "in a medium that is appropriate for the purpose" of that test or examination.

[18] For the 29.4(3) carve-out to apply in respect of a test or examination, a work must be: (i) commercially available; and, (ii) in a medium that is appropriate for the purpose of that test or examination.

[19] Paragraph (*a*) of the definition of "commercially available" provides that a work is so available if it is available on the Canadian market under certain conditions (reasonable time, reasonable price, reasonable effort). Paragraph (*b*) of the definition provides in addition that a work also is commercially available if, under the same conditions, a licence is available from a collective society.

[20] It is not disputed that, for the purposes of these proceedings, if a work can be copied pursuant to the *Access Tariff*, it is commercially available.

[21] Only three provisions of the *Act*, as it stood before November 7, 2012, use the expression "commercially available": subsections 29.4(3), 30.1(2) and 32(3). Each provision creates a carve-out within a provision that otherwise creates a specific exception.

[22] The subsection 32(3) carve-out only applies if the work "is commercially available [...] within the meaning of paragraph (*a*) of the definition of «commercially available»". Thus,

subsection 32(3) expressly provides that availability of a licence from a collective cannot trigger the carve-out; subsections 29.4(3) and 30.1(2) do not so provide.

[23] In subsection 29.4(3), the carve-out applies if the work "is commercially available in a medium that is appropriate" for the purpose. In subsection 30.1(2), the carve-out applies if the work "is commercially available in a medium and of a quality that is appropriate" for the purpose. To the extent the relevant parts of the wording of both subsections are identical, they must be interpreted in the same manner.

[24] To interpret subsection 29.4(3) (and thus, by extension, subsection 30.1(2)) as the Objectors suggest would render paragraph (*b*) of the definition of "commercially available" meaningless. The Objectors admit as much when stating that "authorization to transfer a work to a particular medium simply does not make the work commercially available in that medium" and that "a licence does not make a work available in any medium".[6] This is not tenable. If a licence does not make a work available in any medium, the "appropriate medium" condition can never be satisfied through a licence being available within the meaning of paragraph (*b*). A work for which a collective's licence is available (and therefore, commercially available pursuant to paragraph (*b*) of the definition) will never trigger either carve-out even though, for the very reason that a licence is available, it is commercially available and even though the definition is used only in those two provisions that, both, create a carve-out. Paragraph (*b*) would be meaningless. The only way to avoid this absurdity is to conclude that if a work is commercially available because a licence is available, that work must sometimes (not always) be in an appropriate medium precisely because the licence is available.

[25] Access submits that a licence to copy a work to a medium makes the work available in that medium. This interpretation does not lead to absurd results; on the contrary, it is the only one that gives meaning to paragraph (*b*) of the definition of "commercially available".

[26] A work for which a collective's licence is available is available in an appropriate medium if, and only if, the licence authorises the institution or teacher to use (copy, perform, communicate) the work in the medium that is appropriate to that particular test or examination. A licence to copy a literary work makes the work available in an appropriate medium if it allows the teacher to copy the work onto the medium the teacher intends to use during the test or examination. A licence that allows only digital copies will trigger the carve-out if tests are administered digitally, but not if tests are administered on paper. A licence to perform a work does not make the work available in an appropriate medium if the teacher intends the student to sight read the score; it does if the teacher intends students to listen to a recorded performance of the work before criticizing it.

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[6] Objectors' reply, October 26, 2012 at pp. 2, (underlining in the original)

[27] Applying the same rule to the subsection 30.1(2) carve-out also yields logical results. A licence that allows a library to copy sheet music (but not a sound recording of music) does not trigger the carve-out if the library wishes to allow users to listen to a recording of the music. A licence that allows a library to reproduce a sound recording (but not sheet music) does not trigger the carve-out if the library wishes to display a transcription of the score.

[28] This interpretation is also valid if a work is available for sale in one medium and through licences in another. For example, if a test is available for sale on paper and an institution wishes to administer the test digitally, the institution may claim the benefit of the subsection 29.4(2) exception unless a collective also offers a licence allowing the institution to administer the test digitally.

[29] An amendment to the *Act* that came into force on November 7, 2012 confirms our interpretation. As of that date, subsection 29.4(3) reads a follows:

> (3) Except in the case of manual reproduction, the exemption from copyright infringement provided by subsections (1) and (2) does not apply if the work or other subject-matter is commercially available, within the meaning of paragraph (*a*) of the definition "commercially available" in section 2, in a medium that is appropriate for the purposes referred to in those subsections. [our underlining]

[30] As has been the case with subsection 32(1) since 1997, the subsection 29.4(3) carve-out now applies only if the work is commercially available within the meaning of paragraph (*a*) of the definition. From now on, the availability of a licence no longer triggers the carve-out. If the *Act* as it stood before read as the Objectors suggest, that amendment was unnecessary.

[31] Therefore, we conclude that a licence to copy a work to a medium makes the work available in that medium; if the medium on which the work can be copied is appropriate for the purposes of a test or examination, the work for which a licence is available also is available in a medium appropriate for the purposes of the test or examination.

[32] All that remains is to apply this principle to the facts of the case. The parties agreed that the copies identified as examination copies during the volume survey should be deemed to be examination copies. All examination copies captured during the volume study and included in the calculation of the royalties were made on a medium the use of which the *Access Tariff* authorizes. The medium on which examination copies were made was necessarily appropriate, since each institution or teacher chose (or was required) to use that medium for the test or examination. The application conditions of the carve-out have been met.

[33] Two further points need to be addressed.

[34] Some debate arose as to how to interpret the Federal Court of Appeal's conclusion that format and medium do not have the same meaning in the *Act*. The *Act* is replete with confused,

conflicting drafting. The Court's interpretation may require careful attention in the future, as it may otherwise risk bringing about unforeseen consequences in the interpretation of other provisions. There is no need to engage in any analysis of this part of the Court's reasons to comply with its remittance order.

[35] Much was made of the Court's discussion of whether, when a book is copied, the book and the copy are in the same medium. The Court addressed the issue in a passage we find perplexing:

> [56] Adopting either of these perspectives wholesale leads to absurd consequences. If a photocopy is always the same medium as a book, schools will have to pay for a licence each time a teacher wants to photocopy a three line quotation from an 800 page book. In turn, under paragraph 29.4(1)(*a*) if the teacher instead wants to write the quotation on a chalkboard, the school will not have to acquire a licence. On the other hand, if a photocopy and a book are always different media, then that same teacher can photocopy the first 799 pages of an 800 page book and claim the exemption. Clearly, the determination of whether two works are of the same medium requires a contextual determination on the facts of a given case.

[36] On the one hand, we fail to understand the Court's apparent discomfort in the fact that photocopying a few lines may require a licence while writing on the chalkboard does not, since it is Parliament that introduced the distinction by inserting the words "Except in the case of manual reproduction" in subsection 29.4(3), thus creating the dichotomy. On the other, the reasoning appears to conflate the notions of medium and of substantial taking. It also appears to imply that a very large taking may prevent an institution from availing itself of subsection 29.4(2). Yet an insubstantial taking is never protected by copyright; subsection 29.4(2) is simply not engaged where a taking is insubstantial. Furthermore, nothing in the provision indicates that the availability of the exception depends at all on how substantial the taking may be. Indeed, some forms of examinations are unconceivable unless all of the work is used or reproduced.

[37] That being said, it would appear of paragraphs 57, 69 and 70 of the decision that paragraph 56 was purely *obiter*.

> [57] I take no position on whether the category 4 copies were indeed available in a medium appropriate for the purpose, and intend to demonstrate only that the Board's reasons are flawed because they are silent on the meaning to be given to the words "in a format appropriate for the purpose" and on the application of that meaning to the facts of this case.
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> [69] [...] with respect to the section 29.4 exception, the Board failed to address an issue that was essential to the disposition of the matter before it. The issue required that the words "in a medium appropriate for the purpose" be defined and applied to the facts of this case.
>
> [70] This Court could endeavour to fulfill this task. However, it is for the Board, in first instance, to interpret its own statute, with which it has particular familiarity, and to make the appropriate findings of fact.

[38] Consequently, there is no need to comment any further on the matter.

D. TRANSITIONAL PROVISIONS

[39] As a result of the decision we issue today, licensees who complied with the tariff certified on June 27, 2009 overpaid Access by 31.5 cents per FTE student in 2005 to 2008 and by 35 cents per FTE student in 2009. Section 15 of the 2009 tariff applied interest factors to the overpayment. In addition, the Objectors asked to be paid interest at the Bank Rate plus one per cent on the overpayment. Access did not comment on the issue.

[40] The amount paid as a result of applying the interest factor on the overpayment should be refunded, as well as any interest paid pursuant to section 9 of the tariff on that same overpayment. The Objectors should also be paid interest from the date an overpayment was made until it is refunded. However, until April 30, 2013 (the date by which Access should refund all overpayments), interest should be payable at the Bank Rate (without the additional one per cent provided in section 9 of the tariff), the rate used to calculate the interest factors included in section 15 of the 2009 tariff. Section 16 of the tariff, which we now add, reflects this.

[41] Also as a result of the decision we issue today, a licensee who, pursuant to section 70.18 of the *Act*, continued to comply with the tariff certified on June 27, 2009 also overpaid Access by 35 cents per FTE student since January 1, 2010. These amounts are also to be refunded by Access, preferably on the same date as the overpayments for 2005 to 2009. If Access does not comply, the Objectors remain free to ask that the Board order Access to do so, by making an application for an interim decision pursuant to section 66.52 of the *Act*. What interest, if any, should attach to overpayments made since January 1, 2010 is an issue better left to the decision certifying the final tariff for the relevant period.

Gilles McDougall
Secretary General