

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

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*Copyright Act*, subsection 70.15(1)

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

**Proposed Tariffs Considered** (*Elementary and Secondary Schools – 2010-2015*)

**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
II. THE PARTIES.....	1
III. BACKGROUND .....	2
IV. POSITION OF THE PARTIES AND PROPOSED RATES .....	4
A. Access .....	4
B. The Objectors.....	5
V. EVIDENCE.....	6
A. Access .....	6
B. The Objectors.....	11
VI. POST-HEARING PROCESS.....	16

VII. THE VOLUME STUDY.....	16
A. Description.....	16
B. Genres in the Volume Study .....	17
C. Interpreting Results of the Volume Study .....	18
VIII. ISSUE ESTOPPEL .....	19
IX. REPERTOIRE .....	22
A. Background.....	22
B. Non-Affiliated Owners of Copyright.....	23
i. To whom is the payment by Access made?.....	24
ii. For which copying does Access make payments to non-affiliated owners of copyright? .....	26
iii. Effects of excluding non-affiliated works .....	27
iv. Conclusion .....	28
C. Agreements with other RROs .....	28
i. Agency relationships with non-affiliated owners of copyright .....	29
ii. Authority to license by virtue of foreign statutory regime .....	29
iii. Conclusion.....	30
D. Sheet Music.....	30
X. COMPOUND COPYING.....	34
XI. COPYING OUTSIDE THE SCOPE OF THE TARIFF .....	36
A. Limitations on Amount Copied .....	37
B. Limitations on Uses .....	38
XII. NON-SUBSTANTIAL COPYING.....	39
A. The Law .....	39
B. Evidence.....	40
C. Conclusion .....	41

XIII. FAIR DEALING.....	42
A. Fair-Dealing Practice .....	42
B. General Arguments .....	43
C. Purpose of the Dealing.....	43
D. Goal of the Dealing.....	45
i. The copyright balance.....	45
ii. Transformativeness.....	46
iii. Conclusion.....	48
E. Character of the Dealing .....	48
i. Number of copies and breadth of distribution .....	48
ii. Destroying a copy .....	50
F. Amount of the Dealing .....	51
G. Nature of the Work .....	53
H. Alternatives .....	56
I. Effect of the Dealing .....	57
i. Effect on sales .....	58
a. The law .....	58
b. The evidence .....	58
ii. Effect on licence royalties .....	60
a. The law .....	60
b. The evidence .....	61
iii. Effect on quality of future works.....	61
iv. Conclusion .....	62
J. How to Evaluate the Amount of Fair Dealing.....	62
XIV. STATUTORY EXCEPTIONS .....	64

A. Subsection 29.4(1) – Display for the Purposes of Education or Training .....	65
B. Subsection 29.4(2) – Reproduction of a Work as Required for a Test or Examination	65
XV. TARIFF ROYALTY STRUCTURE .....	66
XVI. CALCULATING THE COMPENSABLE VOLUME.....	67
A. Introduction.....	67
B. Scaling.....	68
i. Underreporting component.....	70
ii. School-days component.....	70
iii. Sample-size component.....	71
iv. Conclusion .....	71
C. Repertoire .....	72
D. Section 29.4 .....	74
E. A Statistical Approach to Fair Dealing.....	74
i. Introduction.....	74
ii. Fair dealing – Books.....	75
iii. Fair dealing – Newspapers and periodicals .....	76
iv. Fair Dealing – Consumables.....	77
v. Deducting exposures for fair dealing .....	78
F. Reproductions that are not a Substantial Part of the Original.....	79
G. Full-Time Equivalent Students.....	80
H. Price per Page .....	81
I. Spoilage .....	83
J. Per-FTE Royalty Rate and Total Expected Royalties .....	83
XVII. TARIFF PROVISIONS.....	84
A. Provisions Relating to Musical Works .....	84

B. Digital Copies .....	85
C. Copying at Ministries.....	85
D. Consumables .....	85
E. Reproducibles.....	85
F. Notification of Terms of Copying.....	85
G. Transitional Provisions .....	86

## I. INTRODUCTION

[1] On March 31, 2009 and March 30, 2012, the Canadian Copyright Licensing Agency operating as Access Copyright (Access) filed, pursuant to subsection 70.13(1) of the *Copyright Act*<sup>1</sup> (the “*Act*”), proposed tariffs for the reproduction in Canada (excluding Quebec) of works in its repertoire by elementary and secondary educational institutions and persons acting under their authority (“K-12 Schools”) for the years 2010 to 2012 (the “2010 Proposed Tariff”) and for the years 2013 to 2015 (the “2013 Proposed Tariff”), respectively (together the “Proposed Tariffs”). The Proposed Tariffs target paper and digital copies of published works in Access’ repertoire, including sheet music.

[2] The Proposed Tariffs were published in the *Canada Gazette* on May 5, 2009 and June 16, 2012, respectively, with a notice informing potential users and their representatives of their right to object to the statements, as required by the *Act*.

[3] The ministries of education of twelve Canadian provinces and territories (all, excluding Quebec) and each of the Ontario school boards (jointly, the “Objectors”) filed objections to the 2010 Proposed Tariff on July 6, 2009, and to the 2013 Proposed Tariff on August 9, 2012.

[4] The Board consolidated the examination of the Proposed Tariffs into a single matter for the certification of a tariff for the period of 2010 to 2015 (the “Tariff”). The hearing began on April 29, 2014 and lasted 9 days. The oral arguments were presented on September 12, 2014. The record was finally perfected on December 19, 2014, once the parties answered the Board’s additional questions.

## II. THE PARTIES

[5] Access is a not-for-profit corporation. It licenses the reproduction of works whose copyright is owned by individuals, often authors, and publishers (jointly, the “Affiliates”) with whom it has “affiliation” agreements.<sup>2</sup> Access also licenses the reproduction of works whose owner of copyright has authorized another organization, which in turn has authorized Access, to license the reproduction of those works.

[6] The Objectors are the ministries of education of the twelve Canadian provinces and territories (excluding Quebec) and each of the Ontario school boards. The ministries of education belong to an intergovernmental body, the Council of Ministers of Education, Canada (CMEC). The Ministers of Education are responsible for determining the curriculum in their educational system.

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<sup>1</sup> *Copyright Act*, RSC 1985, c C-42.

<sup>2</sup> Exhibit AC-2F, “Standard Affiliation Agreements and Forms”.

### III. BACKGROUND

[7] In 1991, the Province of Ontario became the first jurisdiction in Canada to enter into a licence agreement with Access for elementary and secondary publicly funded schools. The royalty rate was \$1.00 for each full-time student or full-time equivalent student (FTE). By 1997, all other provinces and territories (excluding Quebec) had entered into similar licence agreements with Access.<sup>3</sup>

[8] In 1998, CMEC concluded a licence agreement with Access for all ministries of education in all jurisdictions (excluding Ontario and Quebec) and for school boards in Ontario. The royalty rate was \$2.10 per FTE, with an annual increase of the lesser of the rate of change of the Consumer Price Index (CPI) or 3 per cent.<sup>4</sup>

[9] In March 2004, following unsuccessful negotiations with CMEC, Access filed a proposed tariff for the reproduction in Canada (excluding Quebec) of works in Access' repertoire by K-12 Schools for the period of 2005 to 2009.

[10] In April 2005, during the proceedings for the certification of Access' proposed tariff, Access and the Objectors agreed on the methodology that would be used in conducting a study to measure a sample of the volume and nature of photocopying that occurred in elementary and secondary educational institutions, school boards, and ministries of education throughout Canada, save Quebec (the "Volume Study"). The Volume Study was carried out during the 2005-2006 school year in 894 schools, 31 school boards, and 17 offices of ministries of education.

[11] On June 26, 2009, the Board issued its decision in relation to Access' proposed tariff.<sup>5</sup> Relying on the data from the Volume Study, the Board concluded that approximately 270 million pages<sup>6</sup> of published works that would be covered by the *K-12 (2005-2009) Tariff* were copied per year by K-12 Schools, ministries of education and school boards. The Board identified 18.5 million pages as having been made for a purpose permitted by the fair-dealing provisions in sections 29 or 29.1 of the *Act*. Of these, the Board found 1.6 million pages to have been made by fair dealing. The Board concluded that the royalty rate for the tariff would be \$5.16 per FTE. On June 27, 2009, the tariff, as certified by the Board, was published in the *Canada Gazette*.<sup>7</sup>

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<sup>3</sup> Exhibit AC-2 at paras 61–62.

<sup>4</sup> *Ibid* at paras 63–64.

<sup>5</sup> *Access Copyright (Educational Institutions) 2005-2009* (26 June 2009) Copyright Board decision. [*K-12 (2009)*]

<sup>6</sup> In this decision, the terms "pages" and "exposures" are used interchangeably.

<sup>7</sup> *Statement of Royalties to Be Collected for the Reprographic Reproduction, in Canada, of Works in Access Copyright's Repertoire for the Years 2005 to 2009 (Educational Institutions)* (27 June 2009) *Canada Gazette* (Copyright Board). [*K-12 (2005-2009) Tariff*]

[12] The Objectors sought judicial review of the Board's finding of non-fair dealing with respect to approximately 16.9 million pages. On July 23, 2010, the Federal Court of Appeal upheld the Board's conclusion.<sup>8</sup> On July 7, 2012, the Supreme Court of Canada reversed that decision in *Alberta v. Canadian Copyright Licensing Agency*,<sup>9</sup> holding that the Board's finding misapplied the factors enunciated in *CCH Canadian v. Law Society of Upper Canada*,<sup>10</sup> and was therefore unreasonable. It remitted the matter to the Board for reconsideration.<sup>11</sup>

[13] On July 20, 2012, the Board asked Access and the Objectors how it should proceed to comply with the Supreme Court's order. After receiving submissions from the parties, the Board concluded that all that needed to be done was to determine the impact of removing the 16.9 million pages from the calculation of the FTE rate, resulting in a rate of \$4.81 per FTE.<sup>12</sup>

[14] In December 2012, prompted by the decision of the Supreme Court, CMEC, the Canadian School Boards Association, and the Canadian Teachers' Federation published an updated version of a booklet entitled "*Copyright Matters!*" ("the Guidelines").<sup>13</sup>

[15] On December 5, 2012, counsel for the Objectors informed Access that as of January 1, 2013, the Objectors would not be operating under the *K-12 (2005-2009) Tariff* and thus, would no longer pay royalties to Access pursuant to the tariff, for which the next payment was to have been due on April 30, 2013.<sup>14</sup>

[16] On April 8, 2013, Access applied for an interim tariff that would reduce the royalty rate to \$4.66 per FTE on the basis that this would take into account the amendments to section 29.4 of the *Act* as a result of the *Copyright Modernization Act*<sup>15</sup> (the "*CMA*"). The Objectors did not comment on this request. The Board agreed with Access that the changes to s. 29.4 warrant the certification of an interim tariff, and did so for the period of 2013 to 2015.<sup>16</sup>

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<sup>8</sup> *Alberta (Education) v. Access Copyright*, 2010 FCA 198, [2011] 3 FCR 223. [*Alberta (FCA)*] On a separate issue (the applicability of section 29.4), the Federal Court of Appeal remitted the decision to the Board for reconsideration. The Board dealt with this issue at the same time it dealt with the reconsideration of fair dealing, as ordered by the Supreme Court in *Alberta*, *infra* note 9 in its January 2013 redetermination *K-12 (2013)*, *infra* note 12.

<sup>9</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345. [*Alberta*]

<sup>10</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339. [*CCH*]

<sup>11</sup> *Alberta*, *supra* note 9 at para 37.

<sup>12</sup> *Access Copyright (Educational Institutions) 2005-2009– Redetermination* (18 January 2013) Copyright Board Decision at paras 5–7. [*K-12 (2013)*]

<sup>13</sup> Exhibit Objectors-3B: Wanda Noel & Jordan Snel, *Copyright Matters! Some Key Questions & Answers for Teachers*, 3rd ed (2012). [*Guidelines*]

<sup>14</sup> Exhibit AC-2O.

<sup>15</sup> *Copyright Modernization Act*, SC 2012, c 20. [*CMA*]

<sup>16</sup> *Access Copyright (Educational Institutions) 2010-2015* (29 May 2013) Copyright Board Interim Decision.



## IV. POSITION OF THE PARTIES AND PROPOSED RATES

### A. ACCESS

[17] Access' initial proposed rates were \$15 per FTE for the 2010 Proposed Tariff and \$9.50 per FTE for the 2013 Proposed Tariff. In its Statement of Case, Access reduced its request to \$13.69 per FTE for the 2010 Proposed Tariff and maintained its request at \$9.50 per FTE for the 2013 Proposed Tariff.<sup>17</sup>

[18] Access argues that the results of the Volume Study from the 2005-2006 school year are still relevant, and can serve as a reliable and conservative proxy for copying behaviour in K-12 Schools for both Proposed Tariffs. Therefore, the volume of compensable copying in these proceedings should be determined with reference to the volume of compensable copying found by the Board in its *K-12 (2009)* decision.

[19] In addition to the genres of published works that were licensed under the *K-12 (2005-2009) Tariff*, Access proposes to license the copying of consumables, reproducibles, and sheet music (which are described in Part VII.B, below). The Proposed Tariffs would also permit the making of digital copies. However, Access states that it is not asking the Board to fix royalties for the copying of reproducibles, nor for the making of digital copies, as it "has been unable to collect information about the volume of reproducibles copied in its repertoire and the extent of digital copying in K-12 Schools during the periods covered by the Proposed Tariffs."<sup>18</sup>

[20] Access states that in these proceedings, just as the Board concluded in *K-12 (2013)*, approximately 18.5 million pages, or 7 per cent of the total measured volume in 2006, should be removed from compensability since such copying was done for an allowable purpose under section 29 of the *Act* and was fair. Furthermore, for the 2013-2015 period, which is covered by the 2013 Proposed Tariff, approximately 6.9 million copied pages have to be deducted by reason of the amendments to section 29.4 of the *Act* in relation to the exception for the purpose of tests and examinations, just as was done in the 2013 decision fixing the 2013-2015 interim tariff.<sup>19</sup>

[21] Access submits that no copying beyond the 18.5 million pages is fair dealing. Access disagrees with the Objectors' position that the Guidelines correctly identify what constitutes fair dealing, and that copies that are made in accordance with the Guidelines are fair. Broadly speaking, Access disagrees with the Objectors' interpretation of the legal impact of the *Alberta* decision and the addition of "education" in section 29 of the *Act* as a fair-dealing purpose. Access characterizes the Guidelines as evaluating fairness solely based on the amount of the

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<sup>17</sup> Exhibit AC-1 at paras 6-7.

<sup>18</sup> *Ibid* at para 22.

<sup>19</sup> *Supra* note 16.

dealing, an approach that, it argues, is not supported by Canadian jurisprudence. Access submits that the Guidelines authorize and encourage the pre-planned and non-spontaneous systematic copying, a behaviour that—it argues—cannot be fair.

[22] According to Access, the Guidelines do not constitute a fair practice or system of dealing, and therefore, it submits, the Objectors have the legal burden to establish that every copying event was for an allowable purpose and was fair.

[23] With respect to its repertoire, Access argues that, in addition to the works of Affiliates, it is entitled to claim royalties for works owned by non-affiliated copyright holders who would have authorized Access to act on their behalf by way of an implied agency.

[24] Access also submits that the Objectors should be estopped from re-litigating the issues of repertoire and the volume of compensable copying.

[25] Lastly, in response to the Objector's proposal for a transactional tariff, as opposed to the flat-fee per-FTE tariff proposed by Access, Access submits that the Objectors did not adduce any evidence that would support such a tariff. It argues that any transactional tariff is completely unsuitable.<sup>20</sup>

## **B. THE OBJECTORS**

[26] In response to Access' rates for the Proposed Tariffs, the Objectors proposed a rate of \$0.49 per FTE for the period of 2010 to 2012 and \$0.46 per FTE for the period of 2013 to 2015. The Objectors argue that these proposed rates take into account the new users' rights enacted by Parliament in the 2012 *CMA*. On November 7, 2012, the *Act* was amended by the coming into force of most provisions of the *CMA*. The amendments included the addition of "education" in section 29 as a fair-dealing purpose.

[27] The Objectors' proposed rates also take into account new, calculated page-values for books, periodicals, newspapers, sheet music, and consumables.

[28] Furthermore, the Objectors argue that Access' repertoire can only consist of works for which a valid affiliation agreement has been concluded between Access and the copyright holder. It is the Objectors' position that the acceptance of a payment creates an agency relationship only for the copying event for which a payment has been received. The work by itself does not form part of Access' repertoire and Access cannot collect royalties for such works in accordance with the Proposed Tariffs.

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<sup>20</sup> Exhibit AC-107 at paras 205–217.

[29] The Objectors submit that fair dealing is a users' right that can be assessed as a practice or a system of dealings in accordance with the Supreme Court of Canada's decision in *CCH*,<sup>21</sup> and that, by following the Guidelines, the Objectors do, in fact, have practices and policies that are fair.

[30] The Objectors also argue that the Supreme Court of Canada held, in the *Alberta* decision, that it is fair for educational institutions to copy short excerpts from works for students in their classes. The Objectors state that, taken together, the *Alberta* decision and the *CMA* amendments to the *Act* constitute changes by which most of the copies made by educational institutions no longer trigger payments under the Proposed Tariffs—leaving only a relatively small volume of compensable copying.

[31] As such, the Objectors also request a transactional tariff “to cover any copying in K to 12 schools of published works in Access Copyright's repertoire that is not permitted by users' rights in the *Copyright Act*.”<sup>22</sup>

## **V. EVIDENCE**

### **A. ACCESS**

[32] Ms. Roanie Levy, Executive Director of Access, Ms. Jennifer Lamantia, Manager, Education Licensing, and Ms. Kerrie Duncan, Director of Operations, described Access' organizational structure, mandate, and activities. They described the copyright holders represented by Access and how works become part of Access' repertoire.

[33] They provided a description of the genres of works covered by the Proposed Tariffs and explained that three genres of works were now included in the Proposed Tariffs that were not included in the *K-12 (2005-2009) Tariff*: consumables (works that contain a statement to the effect that copying is not permitted), sheet music (printed music not published in books) and reproducibles (works that contain a statement to the effect that copying is permitted).

[34] They stated that while the Proposed Tariffs also include digital copying, a use not included in the *K-12 (2005-2009) Tariff*, Access was unable to collect sufficient information with respect to the extent of digital copying for the period covered by the Proposed Tariffs. As such, they stated that it is not asking the Board to ascribe a specific value for these copies under the Proposed Tariffs.

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<sup>21</sup> *CCH*, *supra* note 10.

<sup>22</sup> Exhibit Objectors-1 at para 12.

[35] They also described the licence and tariff history for the publicly and privately funded K-12 Schools since 1991, leading to the filing of the Proposed Tariffs. They stated that since January 1, 2013, the Objectors have paid no royalties to Access for the reproductions made by K-12 Schools. They also mentioned that 21 privately funded schools gave Access a notice of termination of their respective licence as of July 1, 2013, and that a further 4 licensees failed to pay royalties in 2013.

[36] They described the revenues received by Access for copying by K-12 Schools and stated that, until 2009, Access received approximately \$10 million per year from the Objectors and independent schools, and approximately \$18 million per year for the period of 2009-2012. They also explained how these royalties were distributed in accordance with Access' policies as set by its Board of Directors. Some distributions are directly based on measured copying, such as the results of the Volume Study and the bibliographic surveys conducted by Access, while other distributions, such as "repertoire payments" and "Payback for Creators distribution," are not directly based on measured copying. They explained that bibliographic surveys were conducted by Access in 291 schools in 2010, 286 schools in 2011 and 257 schools in 2012, and that a repertoire analysis of the data collected was made by Access.

[37] Finally, with respect to the Volume Study, they explained how the copying events where copies were made of consumables or reproducibles were subjected to a new repertoire analysis by Access. This new analysis included sending 145 works to five large publishers who are affiliates of Access Copyright for the purpose of having these publishers identify the genre of the works, and their compensability.<sup>23</sup>

[38] Mr. Glenn Rollans, partner and co-principal owner of Brush Education Inc. and consultant in the education resources publishing area, provided an overview of the K-12 publishing industry in Canada and reported on the health of that industry as of the end of 2012. He stated that the K-12 publishers are facing challenges that most other manufacturers of vendible goods do not; the overall sales of K-12 publishers in Canada have been plummeting, resulting in a reduction in the availability of funds for developing new products. According to Mr. Rollans, the royalties collected from the schools and distributed by Access are essential for a publisher to remain competitive in a changing marketplace.

[39] Mr. Rollans described the likely impacts on the K-12 publishing industry of the adoption of the Guidelines by the K-12 Schools. In his opinion, the Guidelines' definition of what constitutes a short excerpt converts the copying under an Access licence into a category of fair dealing.

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<sup>23</sup> Exhibit AC-11 at paras 32-36.

[40] Mr. Gerry McIntyre, Executive Director of the Canadian Educational Resources Council (CERC) explained the mandate and objective of CERC. He described how, without success, CERC contacted a number of provincial Ministers of Education in October 2012 to seek an opportunity for dialogue with the purpose of “adjusting to the new copyright environment.”<sup>24</sup>

[41] He also described how CERC contacted ministries of education, without success, to explain why the adoption of the Guidelines would be unfair. Mr. McIntyre explained the impact of the adoption of the Guidelines on publishers, and how the Objectors’ copying, made under the Guidelines, would be non-compensable.

[42] Mr. McIntyre talked about the economic impacts of the Guidelines on CERC members with loss of revenues from Access and a decline in the sales of books and printed materials which was exacerbated by the adoption of the Guidelines. He explained how lost sales to publishers will translate into fewer investments in the developments of new educational resources.

[43] Ms. Nancy Gerrish, President of the School Division of McGraw-Hill Ryerson Limited (MHR) and Co-Chair of Access’ Board of Directors described the structure of MHR and its activities. She provided information on the amount of royalties distributed to it by Access for the copying in K-12 Schools between 2005 and 2012.

[44] Ms. Gerrish described the process of publishing textbooks in Canada as being complex, with investment required to develop material customized to curriculum that varies among provinces and territories. She provided a list of books published by MHR that were captured in Access’ bibliographic surveys conducted in 2011 and 2012, and expressed the opinion that the copying might have led to a decrease in sales. She also stated that the Guidelines would result in the further decrease of Canadian titles in the marketplace. With the forecasted loss of secondary licensing revenue through Access, Ms. Gerrish explained that MHR had to cancel projects that are less profitable and that their K-12 Division was significantly affected with the elimination of 25 positions across MHR.

[45] Mr. Chris Besse, Senior Vice-President and Managing Director, School Division at Nelson Education Ltd. (Nelson) described the structure of Nelson and its activities. He provided details on Nelson’s sales total per year in the K-12 sector and the amount of royalties received from Access for the copying in that sector between 2005 and 2013.

[46] Mr. Besse provided a list of books published by Nelson that were captured in Access’ bibliographic surveys conducted in 2011 and 2012. He also provided the top 20 titles for which Nelson received royalties from Access and for which sales had plummeted from 2005 to 2013.

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<sup>24</sup> Exhibit AC-4 at para 14.

With respect to the Guidelines, Mr. Besse explained how the royalties received from Access flowed directly to Nelson's profit and how, without them, additional titles would have to be sold to maintain Nelson's profit base.

[47] Mr. Rick Wilks, president and co-founder of Annick Press Limited (Annick) described the structure of Annick and its activities as a trade publisher. He provided details on the amount of royalties received from Access for the copying in K-12 Schools between 2005 and 2013 and described how these royalties have been important to Annick's business.

[48] Mr. Wilks testified that some of Annick's publications were works comprised of discrete plays, stories or topics. He also provided the list of two titles copied between 2005 and 2006, and one additional title captured in Access' bibliographic survey conducted in 2011.

[49] Mr. Wilks explained how the Guidelines and the loss of royalties from Access would have an impact on Annick's business. He also added that Annick stopped publishing books of plays because of their vulnerability under the Guidelines.

[50] Mr. Alan R. Taylor, a retired educator, is an affiliated author of Access since January 2001. He described the educational resources authored by him for which the content changed in accordance with the provincial curricula. Mr. Taylor also explained that he is the co-owner and Vice-President of Raven (Guway) Research Associates Inc. (Raven), a publishing company, and how Raven was publishing its educational resources. He provided details on Raven's sales total for each of the past five years in the K-12 sector and the amount of royalties received by Access for the copying in K-12 Schools since 2003. Mr. Taylor explained how royalties received from Access were important to Raven.

[51] Mr. Taylor opined that the Guidelines would permit certain educational resources, such as "send-in-assignments," which often represent less than 10 per cent of the entire book, to be copied in their entirety. Moreover, chapter tests in Raven's regular series of mathematic books, which usually account for less than 10 per cent of the overall book, could also be copied for free under the Guidelines.

[52] Mr. Taylor also explained that in March 2013, he received a letter from a former teacher in British Columbia reporting systematic copying of a substantial number of Raven's resources in their entirety, and how Access and he communicated with the Superintendent of the school to resolve this matter.

[53] Ms. Caroline Rioux, president of the Canadian Musical Reproduction Rights Agency (CMRRA) described CMRRA's organizational structure, mandate and activities. She described the copyright holders represented by CMRRA, and how musical works become part of the repertoire covered under the Proposed Tariffs.

[54] She explained that CMRRA's Publisher Affiliation Agreement Kit included, as of March 2012, a schedule (Schedule G) relating to reprographic reproduction of the print version of publishers' musical works. Schedule G grants CMRRA the exclusive right to exercise and manage such reprographic rights through collective licensing. Schedule G also authorizes Access to act on CMRRA's behalf. CMRRA entered into an agreement with Access authorizing the latter to file tariffs before the Board and to collect royalties for the reprographic reproduction of the print version of publishers' musical works in CMRRA's repertoire.

[55] Ms. Rioux stated that in the period of March to October 2012, a small number of publishers signed Schedule G; at that the time of the hearing, 51 publishers had signed Schedule G.

[56] She explained how CMRRA analyzed a dataset provided by Access with respect to instances of reproduction of print version of musical works by K-12 Schools for the purpose of identifying which of these works were in CMRRA's repertoire. The results of the analysis were filed as Exhibit AC-9C. CMRRA identified 22.1 works<sup>25</sup> that were in its repertoire. These results were provided to Access to estimate the total volume of works copied in schools during the Volume Study.

[57] In order to establish its proposed rates, Access presented the testimony of two expert witnesses. The first, Mr. Benoît Gauthier, President of Circum Network Inc., was retained to report and estimate the volume of copying in K-12 Schools.

[58] He described the conclusions of his reports,<sup>26</sup> presented and interpreted the results of the Volume Study and explained that they were a reliable proxy for the copying behaviour in K-12 Schools in both the 2010 and the 2013 Proposed Tariffs.

[59] Mr. Gauthier also provided evidence on the volume of copying of published works found in the bibliographic surveys performed by Access in 2010, 2011 and 2012. He presented the results from the bibliographic surveys and compared them to the results obtained in the Volume Study. Mr. Gauthier explained that for books, newspapers, and magazines, the volume of copying was 2 per cent less in 2010 and 8 per cent less in 2011, as compared to 2005-2006. For 2012, he explained that the volume of copying was 17 per cent higher than that captured in the Volume Study.

[60] Mr. Gauthier also estimated the volume of compensable consumables and sheet music from the data collected in the Volume Study. Finally, Mr. Gauthier estimated the volume of copying of published works in Access' repertoire triggering remuneration for the Proposed Tariffs.

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<sup>25</sup> Some of the works were only partially in its repertoire. This occurs, for example, where the affiliated person is a part-owner of the copyright in a work.

<sup>26</sup> Exhibit AC-11; Exhibit AC-67.

[61] Access' second expert witness was Michael Dobner, Partner with PricewaterhouseCoopers LLP. Mr. Dobner's mandate was twofold. First, he was asked to establish an annual royalty rate and to express that rate on a per-page and per-genre basis. Second, Mr. Dobner was asked to provide an assessment of the likely market impact of the implementation of the Guidelines.

[62] With respect to the determination of royalty rates, Mr. Dobner gave an overview of the methodology adopted by the Board in the *K-12 (2009)* decision and explained how certain aspects of this methodology had to be adjusted. Mr. Dobner stated that the Board incorrectly applied the selection premium and creative contribution in the selling price elements and explained how they should be calculated.<sup>27</sup>

[63] According to Mr. Dobner, the selection premium should be applied to the average volume-discounted price per page, before incremental costs are deducted. Furthermore, when considering creative contribution, only printing and binding should be deducted in arriving at a value of a photocopied page. He explained how the adjusted selling prices for books, newspapers, magazines, consumables, and sheet music were calculated.

[64] Finally, Mr. Dobner explained how these factors translated into an annual royalty rate.

[65] With respect to the impact of the Guidelines on the market, Mr. Dobner explained the scope of his review, and analyzed the likely impact of the Guidelines on secondary licensing income, primary sales, creators' decisions to produce works, publishers' decisions to make investments, and content characteristics.

[66] His conclusions<sup>28</sup> were that copying in schools in accordance with the Guidelines would likely result in the virtual elimination of secondary licensing income, a reduction in primary sales, fewer works produced due to reduced income to creators, reduction in publishers' investments due to a fall in revenues, and a decline in content diversity and quality.

## **B. THE OBJECTORS**

[67] Ms. Shannon Delbridge is the Executive Director, Corporate Policy for the Department of Education and Early Childhood Development in the Government of Nova Scotia. She is the Chairperson of the CMEC Copyright Consortium Steering Committee (CMEC Consortium).

[68] She gave an overview of the mandate and activities of the CMEC Consortium. She described the structure, responsibilities and past activities of the organization. With a mandate to provide copyright information, the CMEC Consortium educates teachers, school staff, and

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<sup>27</sup> *K-12 (2009)*, *supra* note 5 at paras 135ff.

<sup>28</sup> Exhibit AC-13.



school board administrators about their rights and obligations under the *Act*. The CMEC Consortium publishes the *Copyright Matters!* Guidelines. In 2012, following amendments to the *Act* and the decision of the Supreme Court in *Alberta*, the CMEC Consortium published an updated edition of the Guidelines.<sup>29</sup>

[69] Ms. Delbridge explained that the Guidelines described the changes made to the *Act* and their impact on the obligations of teachers when using copyright-protected works. She stated that over 300,000 copies of the Guidelines were published and distributed to K-12 teachers in Canada, sufficient for every teacher in Canada to receive a copy, and that copies are also available for free download online.

[70] She provided a description of the content of the Guidelines and how the CMEC Consortium prepared informational materials to educate teachers on the changes to the *Act*, including a description of how fair dealing should be applied in K-12 Schools.

[71] Ms. Delbridge stated that the Guidelines were adopted and implemented by all K-12 Schools within the jurisdictions of the Ministers of Education comprising the CMEC Consortium. She also stated that by December 2012, all schools and schools boards under the CMEC Consortium decided that they would no longer rely on the *K-12 (2005-2009) Tariff*.

[72] Mr. Chris George is a government relations specialist. He owns and operates CG&A Communications. He is responsible for the CMEC Consortium's communications strategies.

[73] He explained how the CMEC Consortium made decisions and provided advice on issues related to the copyright reform process. He also explained how the Communications Sub-Committee developed support material for teachers, schools, school boards and ministries of education staff. The Guidelines were developed by the Communications Sub-Committee.

[74] Mr. George explained how he was asked to develop a communications strategy to inform teachers, schools, school boards and ministries of education staff of the changes in the *Act* and the decision of the Supreme Court of Canada in *Alberta*. This communications strategy included four elements.

[75] The first element was the initial communications with media releases issued through the summer of 2012 with the passage of the *CMA* on June 29, 2012 and the decision of the Supreme Court of Canada in *Alberta* on July 12, 2012. The second element was the development of core information on the changes to copyright law. Mr. George explained how the Communications Sub-Committee developed the Guidelines along with promotion materials such as posters and PowerPoint decks. The third element was the distribution of the Guidelines. Mr. George

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<sup>29</sup> *Guidelines*, *supra* note 13.

explained that between December 2012 and March 2013, the Communications Sub-Committee undertook a communications initiative to distribute the Guidelines and posters to schools, school boards, and within the ministries of education of the CMEC Consortium jurisdictions. The fourth element was a teacher-focused outreach initiative. Mr. George provided details on how the Communications Sub-Committee oversaw the implementation of this initiative with the goal to raise awareness on the changes to copyright in Canada and their impact on classroom practices.

[76] Jim Giles is Executive Assistant, Professional Services with the Elementary Teachers' Federation of Ontario (ETFO). He stated that the ETFO is the largest teachers' union in Canada with 76,000 members and that his role is to assist members and ETFO locals to work with committees, and to develop and administer programs, services, and policies.

[77] Mr. Giles explained how the communications campaign described by Mr. Chris George reached the K-12 teacher-members of the ETFO. Approximately 6,000 members of ETFO, 155,000 members of the Ontario Teachers' Federation and 200,000 members of the Canadian Teachers' Federation received a copy of the Guidelines and posters. According to Mr. Giles, Ontario K-12 teachers are familiar with the permitted scope and limits imposed on their rights to make copies under the Guidelines. He added that the ETFO considers that one of its principal roles is educating and supporting its members, including providing information related to Canadian copyright law. According to him, teachers are expected to limit their copying activities to what is permitted under copyright law.

[78] Ms. Lori Lisi, Coordinator of Programs, Secondary, of the York Catholic District School Board in Aurora, Ontario and Karen Gill, Director, Curriculum and Assessment Policy Branch of the Ontario Ministry of Education described the curriculum development processes in Ontario and how textbooks are supplemented by other learning resources.

[79] They explained how the textbooks on the Trillium List (a list of textbooks approved by the Ontario Ministry of Education as meeting certain criteria) are subject to a rigorous evaluation and how school boards are responsible for selecting textbooks for use in their schools from that List.

[80] They described how Ontario K-12 teachers also use a variety of teacher-developed educational resources that are supported by the Ontario Ministry of Education, available both in print and electronic format. They provided details on the process followed by teachers to develop resources, as required by the Ontario Ministry's Curriculum and Assessment Policy Branch. Ms. Lisi and Ms. Gill gave details on the type of resources developed by the Ontario Ministry of Education and the content of the Ontario Education Resource Bank (OERB).

[81] They explained that the OERB contains resources developed by the Ontario Ministry of Education and by teachers, which do not infringe copyright. They added that teachers use

different types of learning resources as well as resources accessed through databases to which various Ontario school boards subscribe.

[82] They stated that teachers in Ontario K-12 Schools received a copy of the Guidelines and that they do not infringe copyright.

[83] Ms. Carole Bilyk, Coordinator of the Development Unit in the Instruction Curriculum and Assessment Branch for Manitoba Education and Advanced Learning, and Ms. Brenda McKinny, Chief Operating Officer of the Manitoba Textbook Bureau, described the textbook buying trends in Manitoba and how textbooks are supplemented by other learning resources.

[84] They explained the purchase-decision process for a learning resource or textbook in Manitoba for K-12 Schools. They stated that Manitoba Education and Advanced Learning develops web-based courses and print-based distance-learning courses, available to teachers in Manitoba to use as supplementary material. They added that most of this material is created by teachers and that material from other sources is identified and reproduction licences are sought by the Desktop Publishing Unit within Manitoba Education and Advanced Learning. They added that textbooks are no longer the sole learning resource supporting education in K-12 Schools.

[85] Ms. Bilyk and Ms. McKinny explained that school divisions in Manitoba are moving to a model where students bring a laptop, netbook, or tablet to schools to access educational resources. Some schools are therefore purchasing electronic versions of textbooks for that purpose. Decisions to acquire educational resources are made solely on the basis of students' needs and the Ministry of Education curriculum policies— not on a question of costs. According to them, Manitoba's Ministry of Education funding to schools has been stable since the 2007-2008 school year.

[86] They stated that teachers in Manitoba, through Manitoba Education and Advanced Learning, received copies of the Guidelines. They added that teachers do not infringe copyright and have restricted photocopy budgets.

[87] Ms. Cathy Viva, Coordinator of Secondary Programs for the Cape-Breton-Victoria Regional School Board in Nova Scotia described the role of textbooks and other printed learning resources and how the Nova Scotia Department of Education and Early Childhood Development is involved in the development, evaluation and authorization of all K-12 educational resources.

[88] She explained the credit allocation system for learning resources and how the learning resources are selected and purchased. She also described how teachers use other resources and strategies to supplement textbooks. For example, she explained that teachers may download materials from Internet or have access to "moodle sites," where educational materials are uploaded and shared. She also added that schools, boards and the Department of Education and

Early Childhood Development in Nova Scotia use Internet sites to obtain supplemental materials to complement textbooks, and pay licensing fees when required.

[89] Ms. Viva also described the relationship between the Nova Scotia education sector and educational publishers.

[90] In order to estimate the volume of photocopying in K-12 Schools, the Objectors called Drs. Piotr Wilk and Paul Whitehead, both professors at the University of Western Ontario. Their mandate was to review the report of Mr. Benoît Gauthier<sup>30</sup> and produce estimates of the volume of compensable copying for both Proposed Tariffs.

[91] They explained that the five steps of their analysis were the identification of published works, the identification of copying events involving books, newspapers, periodicals, sheet music and consumables, the identification of copying events of works in Access' repertoire, a bibliographic analysis, and the evaluation of the impact of users' rights.

[92] Drs. Wilk and Whitehead proposed a measure of compensable volume for the Proposed Tariffs.<sup>31</sup>

[93] With respect to the value of Access' repertoire, the Objectors called Mr. Dustin Chodorowicz of Nordicity Group Ltd. His mandate was to provide the fair market value of licences provided by Access to K-12 Schools.

[94] Mr. Chodorowicz explained the valuation framework established by the Board in the *K-12 (2009)* decision and added that this methodology could be used to determine the royalty rates for the Proposed Tariffs with adjustments for the volume of compensable copying and the value of a copied page for each genre of works in Access' repertoire.

[95] In his report<sup>32</sup> and testimony Mr. Chodorowicz provided details on his valuation analysis and the establishment of a value of a copied page for books, newspapers, periodicals, consumables and sheet music, and proposed royalty rates for the Proposed Tariffs.

[96] Mr. Chodorowicz was also retained by the Objectors to review the report of Mr. Michael Dobner on the likely market impact of the Guidelines. Mr. Chodorowicz criticized the conclusions of Mr. Dobner and explained that the five categories identified in his report can be

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<sup>30</sup> Exhibit AC-11.

<sup>31</sup> Exhibit Objectors-10.

<sup>32</sup> Exhibit Objectors-8.

limited to one: the impact on primary sales which addresses more directly the criterion of the “effect of the dealing on the work” as established by *Alberta*.<sup>33</sup>

[97] He stated that there were several reasons to explain the decline in publishers’ net sales. The use of open educational resources, the sharing of lessons by teachers, the creation of resources by teachers, the availability of free materials on the Internet as well as of portals and repositories of educational material are some of these reasons.

[98] Mr. Chodorowicz then discussed the concept of social welfare to assess the economic impact of copying and explained that the key question was whether or not the copying under the Guidelines resulted in the substitution of copies for the purchase of original works.

[99] Concluding that the evidence did not demonstrate that the copying was substitutive, Mr. Chodorowicz explained the conclusions of his report, namely that social welfare, in economic terms, was not negatively affected.<sup>34</sup>

## **VI. POST-HEARING PROCESS**

[100] On June 6, 2014, the Board issued a notice ordering the parties to provide submissions in response to a series of legal and technical questions related to the scope of fair dealing, the definition of Access’ repertoire, the proposed rates, and the weighting of transactions in the Volume Study.

[101] All the responses to the legal questions were provided by the parties by August 29, 2014. The Board received all the responses to the technical questions by December 19, 2014.

## **VII. THE VOLUME STUDY**

### **A. DESCRIPTION**

[102] The Volume Study was described extensively in the Board’s *K-12 (2009)* decision.<sup>35</sup> We add the following to supplement that description.

[103] First, for simplicity, the Volume Study was described at the Federal Court of Appeal as having taken place “across the country for 10 days.”<sup>36</sup> In the report filed by Mr. Gauthier in 2006, the description was: “as many as 10 days per location.”<sup>37</sup> In their filings in response to the technical questions, the Objectors filed information about each study location, including the

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<sup>33</sup> Exhibit Objectors-9 at paras 19, 22.

<sup>34</sup> Exhibit Objectors-9 at para 113.

<sup>35</sup> *K-12 (2009)*, *supra* note 5 at paras 29– 36.

<sup>36</sup> *Alberta (FCA)*, *supra* note 8 at para 13.

<sup>37</sup> Exhibit AC-11 at p 69.

number of school days that were surveyed.<sup>38</sup> This evidence shows that 84 per cent of study locations were surveyed for 10 school days, 13 per cent of locations were surveyed for fewer than 10 school days, and the remaining 3 per cent of locations were surveyed for more than 10 school days. This precision affects our weighting, since we do our analysis at the global level, rather than at the transaction level.

[104] Second, micro-data (i.e., respondent-level data) are typically dirty;<sup>39</sup> the data in the Volume Study are no exception. Mr. Gauthier lists a number of data-cleaning rules that Access and the Objectors agreed to in 2006. These rules include the following: “[W]here the recorded number of pages in the publication is smaller than the number of pages copied, assume a recording error, attribute the smaller number to the number of copies made and assign a missing value to the number of pages in the publication.”<sup>40</sup> There was no evidence led as to the number of times this occurred. The calculation of the percentage of the work copied requires the number of pages in the publication. The Objectors stated that this information was available for about 4,000 of the about 7,000 works copied.<sup>41</sup>

[105] Finally, of the more than 95,000 copying events measured in the Volume Study, there were approximately 23,000 that were not analyzed by Access due to time constraints.<sup>42</sup> On June 3, 2013, the Objectors wrote to the Board requesting an order for Access to analyze these transactions. The Board denied this request on June 19, 2013, ruling that it was not necessary to analyze these transactions, stating that

there is no need to complete the unfinished repertoire analysis. Statistical theory suggests that the 6 per cent of exposures that were not analyzed should be broadly similar to the 94 per cent of exposures that were analyzed by Access in 2006. Furthermore, since the 6 per cent of exposures were already treated proportionally in the 2006 analysis, the maximum possible decrease in compensable transactions is approximately one percentage point.<sup>43</sup>

[106] On June 13, 2014, the Board solicited comments on the unanalyzed transactions in reference to technical questions it posed to the parties. On July 2, 2014, the Board ruled again that these transactions need not be analyzed.

## **B. GENRES IN THE VOLUME STUDY**

[107] The 2006 analysis of the Volume Study categorized works into the following genres: books, newspapers, periodicals, sheet music, consumables, and reproducibles. The manner in

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<sup>38</sup> Exhibit Objectors-52A.

<sup>39</sup> Data that includes mistakes, omissions, invalid responses, etc. and can therefore not be readily analyzed.

<sup>40</sup> Exhibit AC-11 at p 77.

<sup>41</sup> Exhibit Objectors-10 at para 162.

<sup>42</sup> *Ibid* at para 53.

<sup>43</sup> Ruling of the Board, June 19, 2013.

which these were originally coded in the Volume Study was reproduced in Mr. Gauthier's expert report.<sup>44</sup>

[108] Sheet music is distinguished from musical works printed in books, as it is a “ ‘stand alone’ sheet(s) of paper upon which music, with or without words, is printed.”<sup>45</sup>

[109] It is important to mention that consumables and reproducibles are actually books, magazines, newspapers or sheet music that have particular characteristics. For example, the presence of a statement purporting that the work cannot be reproduced, even under a licence from Access, would indicate that the work is a consumable. On the other hand, the presence of a statement which purports to permit copying would indicate that the work is a reproducible. Given the manner in which the parties made their submissions in this matter, we treat consumables and reproducibles as genres distinct from books, newspapers, and periodicals.

[110] While Access proposes to license the copying of reproducibles, and the making of digital copies, we do not do so in this matter.

[111] In regard to reproducibles, Access stated that it does not have sufficient evidence of the amount of copies made of such works from its repertoire. This being the case, we decline to include this genre in the Tariff. Given this conclusion, we do not address the issue of whether a licence is even required for the reproduction of works correctly identified as reproducibles.

[112] In regard to the licensing of digital copying, given that there is no evidence on the extent of digital copying in K-12 Schools, it would be premature to certify a tariff that licenses this activity. Given this conclusion, we do not need to consider the various issues that the Board addressed in *Access Copyright (Provincial and Territorial Governments) 2005-2014*,<sup>46</sup> such as a proposed requirement for the deletion of digital copies and Access' authority to license the making of digital copies.

### **C. INTERPRETING RESULTS OF THE VOLUME STUDY**

[113] Both of the parties rely on the 2005-2006 Volume Study in their calculation of a royalty rate for the Proposed Tariffs. While we believe it is still possible to use this study for the purposes of establishing a royalty rate for this Tariff, it may not be so in the future. The study may then be sufficiently dated as to call into question its representativeness. Further, we note that our findings in relation to the Volume Study are actually findings as to what the Volume Study represents in relation to the activities contemplated by the Tariff to be certified.

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<sup>44</sup> Exhibit AC-11 at pp 247–248.

<sup>45</sup> Exhibit AC-1 at para 16.

<sup>46</sup> *Access Copyright (Provincial and Territorial Governments) 2005-2014* (22 May 2015) Copyright Board Decision. [*Governments*]

[114] The Objectors submit that

Copyright Board tariffs deal with copying in the *abstract*, not with individual instances of alleged infringement. Individual instances are, instead, simply a proxy to estimate current copying behaviour for the purpose of setting a tariff rate. This is why both Access Copyright and the Objectors must argue about the fair-dealing factors, and other considerations, in general terms. Broad, quantitative rules need to be developed for this very reason.

This is why insubstantial copying, for example, can be measured quantitatively as a flat percentage, even if in an action for copyright infringement, qualitative factors would also be relevant. The percentage measure is not a determination of actual insubstantiality for each individual transaction, but rather, an estimate of the total amount of insubstantial copying in the overall volume of copying, now and in the future.<sup>47</sup>

[115] We agree. A finding that a given volume of copies is not compensable for the purposes of calculating a royalty rate is not a finding that those actual copies that were captured during the course of the Volume Study in 2005-2006 were non-infringing; similarly, a finding of compensability is not a finding that the copies were infringing. Rather, it is a finding that the volume, as described by the data captured in the Volume Study, represents compensable or non-compensable copying events that will have occurred during the period of the Tariff.

## VIII. ISSUE ESTOPPEL

[116] The Objectors agree with Access that the volume data generated by the 2005-2006 study, which was relied on by the Board in its *K-12 (2009)* decision, should again be used to calculate the volume of compensable copying in in this matter.<sup>48</sup>

[117] Access submits that since the same evidence (the Volume Study) is being used to determine a royalty rate in these proceedings as was used in its *K-12 (2009)* decision, findings from that decision for which the Objectors did not successfully seek judicial review are binding on the parties. Therefore, the Objectors should be precluded, by virtue of issue estoppel, “from relitigating the Board’s previous substantive findings of fact and law relating to the breadth of Access Copyright’s repertoire and the total number of photocopied pages of published works.”<sup>49</sup> According to Access, the *Act* was not modified in a way that would have an effect on these issues, nor were any new facts not previously discoverable presented in these proceedings.

[118] Access argues that “[i]f the Objectors are permitted to relitigate issues previously decided with finality, confidence in the fairness and integrity of the Board’s previous decisions are

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<sup>47</sup> Exhibit Objectors-44 at paras 57–58.

<sup>48</sup> Exhibit Objectors-1 at para 25.

<sup>49</sup> Exhibit AC-105 at para 2.



undermined by the possibility of inconsistent findings in unnecessarily duplicative proceedings.”<sup>50</sup>

[119] The leading authorities on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies*<sup>51</sup> and *Toronto v. C.U.P.E., Local 79*.<sup>52</sup> Both of these decisions emphasized the importance of balance and discretion in applying finality doctrines, such as issue estoppel.

[120] The doctrine of issue estoppel is designed as an implement of justice, and a protection against duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings.<sup>53</sup> It inevitably calls upon the exercise of judicial discretion to achieve fairness according to the circumstances of each case.<sup>54</sup>

[121] While finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice. In the administrative law context, the more specific objective of applying these doctrines is to balance fairness to the parties with the protection of the administrative decision-making process. Thus, even when the traditional elements of the finality doctrines are present, the decision maker must go on to exercise discretion as to whether or not to allow the claim to proceed.<sup>55</sup> “[S]uch discretion ‘is necessarily broader in relation to the prior decisions of administrative tribunals’ because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.”<sup>56</sup>

[122] Finch J.A., as he then was, noted in *British Columbia v. Bugbusters Pest Management*<sup>57</sup> that

[i]t must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.<sup>58</sup>

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<sup>50</sup> *Ibid* at para 9.

<sup>51</sup> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460. [*Danyluk*]

<sup>52</sup> *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77.

<sup>53</sup> *Danyluk*, *supra* note 52 at para 18.

<sup>54</sup> *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para 61, [2011] 3 SCR 422.

<sup>55</sup> *Ibid* at para 61 citing *Danyluk*, *supra* note 52.

<sup>56</sup> *Ibid* [emphasis in original].

<sup>57</sup> *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 BCLR (3d) 1 (CA), 1998 CanLII 6467 (BCCA). [*Bugbusters*]

<sup>58</sup> *Ibid* at para 32.

[123] We are aware of the list of factors that may be considered in exercising this discretion surveyed in *R. v. Consolidated Maybrun Mines*<sup>59</sup> and *Minott v. O'Shanter Development*,<sup>60</sup> as indicated by the Supreme Court of Canada in *Danyluk*, and that these factors are an open list. For the reasons below, we are of the opinion that, even if the *Danyluk* criteria were met in this case, issue estoppel should not apply.

[124] First, the Board is free to raise and examine issues not addressed by parties to a proceeding. It has a duty to the public to establish fair and equitable tariffs, which may involve accepting the views of one or more of the parties to tariff proceedings, or none of them. It would be counter-productive to prevent a party from raising an issue that the Board itself may consider.

[125] Second, not permitting arguments to be made on the basis that they are supported by evidence that was already previously ascertained, or ascertainable, could lead to the certification of a tariff that, in view of the impugned arguments, may not be fair and equitable. Since a tariff may apply to all persons who do that which the tariff permits them to do, not only to the parties that decide to participate in the proceedings, this concern is heightened.

[126] Third, in this matter, Access, the party raising the issue estoppel argument, itself wishes to revisit issues that were decided in the previous *K-12* matter. In particular, it

- i. argues that the manner in which the creative contribution percentage was determined in *K-12 (2009)* was incorrect,<sup>61</sup>
- ii. argues that copies made in school boards should not be deducted from the total compensable volume,<sup>62</sup> (which, according to the Objectors, would be contrary to the *K-12 (2009)* decision), and
- iii. re-analyzes the Volume Study to reclassify certain works from reproducible to consumable,<sup>63</sup>

all on the basis of evidence that was ascertained, or was ascertainable, at the time of the previous K-12 tariff proceedings.

[127] Finally, in this matter, relying on the 2006 Study was likely seen as expeditious and economical by the parties. The development and carrying-out of such a study is time- and resource-consuming. While the data collected in that study is now over nine years old, it is possible that the parties were of the opinion that a new study may not have resulted in a substantially different set of results,<sup>64</sup> making such an undertaking wasteful for both the potential

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<sup>59</sup> *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706, 1998 CanLII 820 (SCC).

<sup>60</sup> *Minott v. O'Shanter Development Co.*, (1999), 42 OR (3d) 321, 1999 CanLII 3686 (ONCA).

<sup>61</sup> Exhibit AC-12 at paras 39–50.

<sup>62</sup> Exhibit AC-67 at para 63.

<sup>63</sup> Transcripts Vol. 1 at pp 74–75.

<sup>64</sup> See e.g. Exhibit AC-30.

licensees and the copyright owners. A party should not have to insist on the carrying-out of a new study for the sole purpose of being able to raise arguments that were not accepted in relation to the determination of a different tariff that relied on the same data. As a matter of policy, it would be problematic to prevent a party from making an argument that it could have made had they not relied on a study used in previous proceedings.

[128] Therefore, given all the reasons above, we exercise our discretion not to apply issue estoppel in this case.

## **IX. REPERTOIRE**

### **A. BACKGROUND**

[129] Access enters into agreements with individuals that are Canadian citizens or permanent residents (referred to by Access as “creators”) and Canadian organizations (referred to by Access as “publishers”).<sup>65</sup> These agreements authorize Access to license the reproduction of works for which those persons are owners of copyright, and state that only Access is permitted to license the reproduction of these works by means of a collective licence.<sup>66</sup> Owners of copyright that have entered into such agreements are referred to as “affiliates.”

[130] Access has also entered into agreements with other organizations that administer copyright, so that it may seek a tariff and collect royalties for the reproduction of works in those organizations’ repertoire. Access has an agreement with CMRRA in relation to the reproduction of musical works,<sup>67</sup> and with the Canadian Artists Representation Copyright Collective (CARCC),<sup>68</sup> and some members of the Society of Reproduction Rights of Authors, Composers and Publishers (SODRAC) in relation to the reproduction of images in publications.

[131] Similarly, Access has agreements with organizations in other jurisdictions (referred to as Reproduction Rights Organizations or “RROs”) which designate Access as their agent for the purposes of licensing the reproduction of works in the RRO’s repertoire. Access has agreements with 31 RROs for 29 jurisdictions.<sup>69</sup>

[132] Broadly speaking, in determining the royalty rates in the 2010 Proposed Tariff and the 2013 Proposed Tariff, Access included the copying of works whether or not the owner of copyright was an affiliate of Access, as well as those works published in a country the RRO of

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<sup>65</sup> See Exhibit AC-2F, “Standard Affiliation Agreements and Forms”.

<sup>66</sup> *Ibid* at p 5.

<sup>67</sup> Exhibit AC-2K, “CMRRA Agreements”.

<sup>68</sup> Exhibit AC-2G, “CARCC Agreement”.

<sup>69</sup> Exhibit AC-2I.

which has a bilateral agreement with Access, whether or not the owner of copyright had signed an affiliation agreement with that RRO.

[133] The Objectors argue that only those works for which the owner of copyright has explicitly authorized Access, or a collective with which Access has an agreement, should be counted in the determination of a royalty rate.

[134] In particular, works for which the owner of copyright has not authorized Access or another collective to license the reproduction of that work should be excluded from such a calculation. For those RROs where it is difficult to ascertain the scope of their actual repertoire, it should be assumed that their affiliated to non-affiliated ratio is the same as that of Access.

[135] We therefore consider the issues of non-affiliated Canadian owners of copyright and the scope of the repertoire of RROs.

## **B. NON-AFFILIATED OWNERS OF COPYRIGHT**

[136] It is Access' position that when a recipient accepts payment from Access for a reproduction, an implied agency relationship between Access and the recipient is created, confirming retroactively Access' mandate to act on the recipient's behalf. On this basis, Access argues that all works, unless explicitly removed by the owner of copyright, form part of its repertoire.

[137] In *K-12 (2009)*, the Board wrote that

[f]or the purpose of these proceedings, it is enough to note the following. First, the parties agree to set the royalty based on the data from the volume study. Second, Access has distributed royalties for the relevant period, based on the study. Third, Access has paid out royalties to non-affiliated rights holders whose works were "captured" during the study. Fourth, the decision to distribute royalties to non-affiliated rights holders reflected the society's past practice; there is therefore no window dressing or sham. Fifth, almost all of the non-affiliated rights holders have cashed the cheque they received.

[...]

Non-affiliated rights holders who cash the cheque they received as a result of the distribution of royalties based on the volume study, retroactively and implicitly grant to Access the power to act on their behalf in respect of copies captured by the study.<sup>70</sup>

[138] In the present proceedings, Access submitted that "[i]t remains appropriate that the Board include works of non-affiliated rights holders in the royalty calculation based upon the proven

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<sup>70</sup> *K-12 (2009)*, *supra* note 5 at paras 131, 133.

facts and reasonable inferences therefrom that: (a) Access Copyright has continued, and will continue, to distribute royalties once they are paid, to non-affiliated rights holders when their works are copied[.]”<sup>71</sup>

[139] However, there are two issues with this claim. The first relates to the question of whether it is the *owner of copyright* in the work copied that receives the royalties from Access. The second relates to the question of which copying events are actually the subject of a royalty payment by Access.

**i. To whom is the payment by Access made?**

[140] Access submits that “[f]or non-affiliated rights holders, Access Copyright communicates directly with and pays the copyright owner.”<sup>72</sup> However, testimony of Access’ witnesses shows that while Access may communicate directly with non-affiliated publishers, payments to non-affiliated creators are provided to publishers, to be redistributed to the creators.<sup>73</sup> Furthermore, in response to subsequent questions from the Board, Access responded that it “cannot answer what percentage of the books in the Volume Study are ‘owned’ by the publisher. This would involve an assessment of the author-publisher contracts for each work, to which Access Copyright does not have access.”<sup>74</sup>

[141] On the basis of this evidence, we conclude that, in practice, when distributing royalties for the copying of works of non-affiliated copyright owners, Access generally sends royalties to the publisher of a work, and asks that the publisher send some portion of that amount to the author of the work.<sup>75</sup> Access argues that when a publisher accepts payment from Access for a copying of the publisher’s work, “it ratifies the licensing act and agrees to ‘make prompt payment of the royalties to the [unaffiliated] creator.’”<sup>76</sup>

[142] In other words, Access does not distribute royalties based on who can authorize Access to grant licences for the copying of a work; rather, “Access Copyright relies on standard industry practices and its affiliation agreements with its affiliated creators and publishers for its distribution policies.”<sup>77</sup> However, if the publisher is not the owner of copyright in the work that has been copied, it has no power to ratify the copying act.

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<sup>71</sup> Exhibit AC-105 at para 12.

<sup>72</sup> Exhibit AC-105 at para 16.

<sup>73</sup> Transcripts Vol. 1 at pp 112:15–113:1; Exhibit AC-2 at para 23; Exhibit AC-110 at p 3.

<sup>74</sup> Letter from Access to the Board, 26 September 2014 at p 6 (Re. 12 September 2014 Questions). [*Letter, 26 September 2014*]

<sup>75</sup> Transcripts Vol. 1 at pp 101–102.

<sup>76</sup> *Letter, 26 September 2014*, *supra* note 75 at p 4.

<sup>77</sup> Exhibit AC-110 at p 1.

[143] When distributing royalties for the copying of works whose owners of copyright have signed an affiliation agreement, the question of whether such a method of distribution is correct is a matter between Access and the affiliated copyright owner. However, since Access has a similar practice in relation to payments made for the copying of works for which the owner of copyright has not authorized Access to license the work (nor agreed to any particular formula for distribution of royalties), it may or may not be true for any particular case that a payment is made to the owner of copyright, or that the payment is made in its entirety to the owner of copyright.

[144] To support its argument that payments not based on ownership of copyright are appropriate, Access relies on its affiliation agreement which sets out these methods of distributions. However, a non-affiliated owner has—by definition—not agreed to such a method of distribution. In order for a claim of agency to be meaningful, it must be formed with a person who is legally competent to authorize Access to grant a licence for copying a work. A distribution policy for works of non-affiliated copyright owners not based on this requirement cannot ensure that the agency relationship—if any—that is eventually formed will have the effect of authorizing Access to grant a retroactive copying licence.

[145] Lastly, Access argues that the owner of copyright in a compilation work, such as a newspaper or magazine, may authorize the reproduction of an article in that compilation. Since publishers of newspapers and magazines are almost always the owner of copyright in the compilation, sending royalties to the publisher is sufficient.<sup>78</sup>

[146] However, ownership in the compilation is not the relevant criterion in this matter, since it is not usually the compilation that is being copied. Generally, when only a single work from a compilation is copied, it is the owner of copyright in this latter work that must authorize the copying, not the owner of copyright in the compilation, as no selection or arrangement of the compilation work will have been reproduced. Unless obtained through other means, a person who becomes the owner of copyright in a compilation does not by virtue of being such an owner gain the power to authorize a component of the compilation to be copied.

[147] Therefore, we cannot conclude that Access' practices ensure that royalty distributions in relation to works of non-affiliated copyright owners are, as a rule, made directly, and in their entirety, to the person that is the owner of copyright (or to a person that may lawfully authorize Access to license the making and distributing reproductions).

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<sup>78</sup> Exhibit AC-110 at p 6.

**ii. For which copying does Access make payments to non-affiliated owners of copyright?**

[148] Access states that it “will continue [...] to distribute royalties[,] once they are paid, to non-affiliated rightsholders when their works are copied.”<sup>79</sup> Access argues that including the copying of works of non-affiliated owners of copyright in the calculation of a royalty rate “ensures that rightsholders whose works are copied receive fair compensation for the copying and use of their works.”<sup>80</sup>

[149] This is an over-statement. First, as discussed above, the payments made by Access are not strictly based on the recipient being the owner of copyright. Second, Access’ ability to distribute copying-based royalties to non-affiliated copyright owners is restricted to those copying events of which it is made aware. This is not a negligible issue. Access appears to treat payments made to unaffiliated owners of copyright whose works were captured by a sample as being equivalent to making payments to all non-affiliated owners of copyright whose works were copied in a given tariff period.<sup>81</sup> Indeed, Access itself confirms that it continues to pay royalties to non-affiliated rights holders whose works were captured during the 2006 study—apparently regardless of whether those works were copied subsequently to 2006 or not. As such, while copying of works of non-affiliated copyright owners that happened to be captured in a study may be the subject of copying-based royalty distributions by Access, the vast majority of copying (not being sampled or otherwise measured) cannot be.

[150] In *Governments*, the Board held that “[a]cceptance by rights holders of distributions not based on actual copying cannot serve as the basis for the kind of retroactive ratification contemplated in the *K-12* decision”<sup>82</sup> and—more importantly— that

[a]ny payments that may eventually be made to non-affiliates in relation to copying events captured in the Volume Study are not representative of what will occur in relation to all other past and future copying of works of non-affiliated rights holders. The latter copying cannot be, and will never become—by its very nature of not being measured—the subject of a copying-based payments from Access, and thus never be the subject of the kind of temporary agency relationship contemplated in the *K-12* decision.<sup>83</sup>

[151] Access correctly notes that some of the lack of information stems from the acts of the Objectors. However, the information that the Objectors stopped providing would have provided Access with a sample of the works of non-affiliated copyright owners that have been copied. Even if Access had been able to form an agency relationship with those owners of copyright

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<sup>79</sup> Exhibit AC-105 at para 12.

<sup>80</sup> *Ibid* at para 10.

<sup>81</sup> *Ibid* at para 11.

<sup>82</sup> *Governments*, *supra* note 47 at para 132.

<sup>83</sup> *Ibid* at para 137.

whose works were captured in the sample, it would still not have been able to do so with those whose works were not so captured. Any copying of works of non-affiliated copyright owners not captured in the sample could never be ratified through an agency relationship, and Access would still have no source of authorization by means of which it itself could authorize the copying of those works.

[152] The evidence does not allow us to determine how the royalties that can be notionally attributed to non-sampled non-affiliated owners of copyright gets (or would get) distributed; but it is enough to know that payment for non-measured copying has not, and cannot be made, to them. It is clear that the vast majority of copying of non-affiliated works is not the subject of copying-based royalty distributions. As such, these works cannot be the subject of an implied agency by means of ratification and should therefore not be compensable for the purposes of determining a royalty rate in this Tariff.

### **iii. Effects of excluding non-affiliated works**

[153] Access argues that

[i]t would be patently unjust if the Board allowed the Objectors to copy the works of non-affiliated rightsholders without consequence and without payment because the Objectors decided to stop paying royalties under the Access Copyright tariff and ceased to disclose which works have been copied. The Objectors should not, by their unilateral actions, be permitted to copy from copyright-protected works of non-affiliated rightsholders simply because they refuse to pay the tariff or otherwise abide by its terms.<sup>84</sup>

[154] We do not agree. In fact, it is likely that the inclusion of such works could be unjust. As the Board noted in *Governments*,

[t]o count such copying events as compensable would have the effect of requiring the licensee to notionally pay for copying events that will never become ratified by the rights holder, cannot be authorized by Access, and thus remain potential infringements of copyright.<sup>85</sup>

[155] Furthermore, the Objectors' copying is not without consequences. Not including such works in the determination of the Tariff's royalty rate does not permit the Objectors "to copy from copyright-protected works of non-affiliated rightsholders." The Tariff will have no such effect; permission can only be granted by the owner of copyright or by its agent. Any non-licensed copying will remain a potential infringement of copyright, and infringing activity can be pursued by means of an action for infringement.

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<sup>84</sup> Exhibit AC-105 at para 14 [emphasis omitted].

<sup>85</sup> *Governments*, *supra* note 47 at para 140.



[156] Therefore, we find nothing unjust about setting a royalty rate for this Tariff based on the copying of only those works for which Access (already) has the legal authority to licence reproductions.

[157] We note that Access' approach in claiming all published works as being in its repertoire presented coherency difficulties even during the proceedings, when it turned out that both CMRRA and Access claimed that musical works in published book form are part of their repertoire. This possible conflict was not resolved by Access's submission, which stated that "[t]o the extent a CMRRA affiliate publishes print musical works in the form of books, there is no expansion of Access Copyright's repertoire since the reproduction of those works already falls within Access Copyright's repertoire[.]"<sup>86</sup> giving greater credence to the possibility that both CMRRA and Access may be claiming to administer the reproduction right in relation to the same work.

#### **iv. Conclusion**

[158] Given the above, where the evidence does not indicate that the copying was of a work whose owner of copyright has entered into an affiliation agreement with Access, that copying is not included in the determination of the royalty rate for this Tariff.

### **C. AGREEMENTS WITH OTHER RROs**

[159] Access states that it has agreements with 31 organizations that manage reproduction rights of publications in their respective jurisdictions.<sup>87</sup> These agreements appoint Access as a non-exclusive agent to license the reprographic rights on behalf of the foreign RROs. Based on the sample agreements provided by Access,<sup>88</sup> it would appear that the RROs may limit their representation to owners of copyright that are resident in, or citizens of, the RROs' country.

[160] Not much additional evidence was adduced as to how such other RROs function. Presumably, the owners of copyright in the foreign jurisdictions authorize an RRO from that jurisdiction to authorize the reproduction of their work worldwide.

[161] Access states that "[b]y virtue of its bilateral agreements with foreign RROs discussed above, Access Copyright's repertoire also includes works created and published by persons in other jurisdictions who have entered into an affiliation agreement with such foreign RROs."<sup>89</sup>

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<sup>86</sup> Exhibit AC-105 at para 24.

<sup>87</sup> Exhibit AC-2 at para 19.

<sup>88</sup> Exhibit AC-2J.

<sup>89</sup> Exhibit AC-2 at para 30.

[162] In calculating the proposed royalty rate for the Tariff, Access included all works that it identified as being from a foreign RRO as being in its repertoire, and therefore compensable. Since such RROs do not typically provide lists of their affiliates to Access, Access does not actually know with which copyright owner a particular RRO has signed an affiliation agreement.<sup>90</sup> Presumably, in order to claim a copying from a work as compensable, Access would have to identify the copyright owner of a work and identify the jurisdiction in which the owner was a citizen or resident. If the jurisdiction was one in which there was an RRO with which Access had an agreement, Access would indicate that it can authorize the copying of that work.

### **i. Agency relationships with non-affiliated owners of copyright**

[163] Access states that

[t]he RROs of the United Kingdom and the United States search for and distribute royalty distributions to non-affiliated rightsholders when the RROs are notified that those rightsholders' works have been copied. When foreign non-affiliated rightsholders accept payment through their RRO, they ratify the agency relationship.<sup>91</sup>

[164] However, Access "does not receive confirmation that an affiliation agreement was entered into with the foreign RRO."<sup>92</sup>

[165] For the same reasons that we do not consider payments made to non-affiliates as granting Access the authority to license the copying of all works, we cannot conclude that the RRO's practices, as described by Access, grants Access the authority to license the copying of all such works in Canada.

### **ii. Authority to license by virtue of foreign statutory regime**

[166] Access states that certain jurisdictions grant the RRO of their country the right to authorize the reproduction of works, whether or not the owner of copyright has authorized the RRO to do so. Access provided the example of Australia, which

has a statutory licence for educational and government copying of books, magazines and newspapers that is managed by Copyright Agency, so there are no 'non-affiliated' rightsholders in Australia relevant to this tariff.<sup>93</sup>

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<sup>90</sup> Transcripts Vol. 1 at pp 142:8–143:2, 143:16–143:24.

<sup>91</sup> Exhibit AC-105 at para 17.

<sup>92</sup> *Ibid* at para 18.

<sup>93</sup> *Ibid* at para 17.

[167] The Objectors agree with Access' submission.<sup>94</sup> They argue, however, that while there is a compulsory regime in Australia, under which all rights holders may be considered affiliates of the Australian RRO, other RROs, such as those of the United Kingdom and the United States, function substantially on the same basis as Access Copyright.<sup>95</sup> It is therefore incorrect to assume that all works from countries with which Access has an agreement are represented by Access.<sup>96</sup>

[168] Since it is impossible to identify whether each work is represented or not, the Objectors submit that foreign RROs should be deemed to have the same proportion of affiliates/non-affiliates as Access in Canada. In their opinion, foreign works are as likely to be represented by an RRO as Canadian works are to be represented by Access.<sup>97</sup>

[169] We agree with the Objectors that an appropriate means of approximating the size of Access' repertoire is to use the same affiliate/non-affiliate ratio for works purportedly in Access' repertoire through agreements with RROs as it has for copyright owners that are resident in Canada. As such, we need not address the issue of the applicability of foreign laws to Canadian copyright, nor attempt to determine the substance of each and every legal framework of every jurisdiction in which an RRO with which Access has an agreement is located.

### **iii. Conclusion**

[170] Given the foregoing, we find that the Objectors' premise that foreign RROs have the same proportion of affiliates to non-affiliates as Access does is reasonable.

### **D. SHEET MUSIC**

[171] Of the more than 95,000 copying events measured in the Volume Study, 565 were initially identified as being of sheet music.<sup>98</sup> Access states that it is claiming royalties for the copying of sheet music containing works that are in the repertoire of CMRRA.

[172] At the time the Volume Study was carried out, neither Access nor CMRRA had received authorization from owners of copyright to license the reproduction of sheet music. While CMRRA had a standard agreement into which it entered with its copyright holders, this agreement did not include the reproduction of sheet music.

[173] On October 1, 2010, CMRRA and Access entered into an agreement which permitted Access to license CMRRA's repertoire for the purposes of the 2010 Proposed Tariff.<sup>99</sup> On March

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<sup>94</sup> Exhibit Objectors-44 at para 36.

<sup>95</sup> *Ibid.*

<sup>96</sup> Exhibit Objectors-10 at para 109.

<sup>97</sup> *Ibid.*

<sup>98</sup> Transcripts Vol. 1 at p 78; Exhibit AC-11 at para 43.

1, 2012, this agreement was amended to permit Access to licence CMRRA's repertoire for future tariffs for the K-12 sector.<sup>100</sup>

[174] Having been informed by Access that sheet music was copied in K-12 Schools, and that Access wished to collect royalties for such copies, CMRRA created a schedule to its affiliation agreement, "Schedule G." Schedule G states that the copyright holder assigns to CMRRA

the exclusive right to exercise and manage the Publisher's reprographic reproduction rights for Published Musical Works in the Repertoire through collective licensing pursuant to the Tariffs, and to authorize Access Copyright to do the same on behalf of CMRRA as its collecting body.<sup>101</sup>

[175] Schedule G purports to back-date the agreement to January 1, 2010, presumably to coincide with the commencement of the 2010 Proposed Tariff. While we express substantial reservations about the effect of such a retroactive grant on the valuation of a royalty rate, we need not address this issue given our conclusion on the inclusion of sheet music, below.

[176] Furthermore, Schedule G defines "Published Musical Works" as including print copies which have been issued to the public and would therefore include scores in book format and sheet music format.<sup>102</sup> There is therefore some uncertainty surrounding which of the collectives, Access or CMRRA, administers the rights in a given work. As Access itself states,

the CMRRA print music right affiliation schedule defines "published musical works" to include sheet music and musical scores in book form. [...] [T]he reproduction of [works in book form] already fall within Access Copyright's repertoire.

[...]

Any redundancy introduced by the broad definition of "published musical works" used in Schedule "G" by CMRRA with its affiliates to include musical scores in books does not add or subtract works from Access Copyright's already-established collective administration mandate.<sup>103</sup>

[177] This means that a work, appearing in book form, may be—purportedly—within both Access' and CMRRA's repertoires. A possible conflict of consistency arises, as the agreements by which Access becomes authorized to licence the reproduction of these works state that the copyright holder names the collective exclusively for the purposes of collective licensing. That being said, for the purpose of these proceedings, as long as one of the agreements validly

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<sup>99</sup> Exhibit AC-2K; Transcripts Vol. 1 at p 48:1–10.

<sup>100</sup> Exhibit AC-2K at pp 5–6.

<sup>101</sup> Exhibit AC-9.A at p 25.

<sup>102</sup> Exhibit AC-2K at p 7; Transcripts Vol. 1 at pp. 94:21–95:5.

<sup>103</sup> Exhibit AC-105 at paras 24–25.

authorizes one of the collectives, the end result is the same: Access has been authorized to licence the reproduction of the musical work by collective licensing.

[178] CMRRA represents approximately 5,000 affiliates.<sup>104</sup> CMRRA began to acquire ratification of Schedule G from copyright holders in March 2012.<sup>105</sup> Access filed evidence that 11 publishers ratified Schedule G before September 2013.<sup>106</sup>

[179] Ms. Rioux explains that

when we received a sample in September 2013 from Access Copyright to be analyzed and we started to look at the list of the works, we saw evidently that there were a number of other music publishers on that list that hadn't signed our Schedule G of the Affiliation Agreement. So, in the course of reviewing the list, we reached out specifically to those publishers as well to have them sign Schedule G.<sup>107</sup>

[180] Of course, a sample of a group is not statistically representative in relation to an attribute that is manipulated after the selection of the sample. In this case, the fact that CMRRA sought affiliation agreements with publishers that appeared in the sample provided by Access means that the affiliation status of members of that sample is no longer representative of the whole. Access appears to be cognizant of this issue, as it states that it is only claiming royalties in respect of those works that were in CMRRA's repertoire before it was provided with the list of works captured in the Volume Study in September 2013.<sup>108</sup> We agree that this is appropriate.

[181] Exhibit AC-2T identifies 36 copying events of sheet music where at least one of the works copied (as works such as medleys can contain more than one musical work) were in the repertoire of CMRRA. This number is based on CMRRA's analysis<sup>109</sup> of December 2013 where it found that that 22.1 works were represented by CMRRA, and that 13 works were possibly represented by CMRRA.<sup>110</sup> Those works identified as "possibly represented" were those where a person signed Schedule G, but where CMRRA was unable to satisfy itself that the person was, in fact, the owner of those rights.

[182] We note with appreciation that CMRRA appears to have performed its repertoire analysis very carefully, going even to such lengths to note that it may not have been the owner of copyright that had purportedly authorized CMRRA.

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<sup>104</sup> Transcripts Vol. 3 at p 591:9–11.

<sup>105</sup> Transcripts Vol.1 at p 119:11–15.

<sup>106</sup> Exhibit AC-9 at para 10; Exhibit AC-9B.

<sup>107</sup> Transcripts Vol. 3 at pp 597:19–598:2.

<sup>108</sup> Transcripts Vol. 1 at pp 95:23–96:4.

<sup>109</sup> Exhibit AC-2 at paras 117–118; Exhibit AC-75 at p 9.

<sup>110</sup> Exhibit AC-9 at para 16; Exhibit AC-9C.

[183] At the time of the hearing, 51 affiliates had signed Schedule G.<sup>111</sup> However, a significant number of musical works analyzed by CMRRA, 392, could not be identified.<sup>112</sup>

[184] Subsequently, after discussions with Access, CMRRA performed a new repertoire analysis of the copying events. It identified 64.75 musical works for which the rights holder had authorized CMRRA, and 18.75 for which the rights holder had possibly authorized CMRRA.<sup>113</sup> Of the 64.75 musical works, 39.75 were in its repertoire prior to September 2013, and 25 works entered CMRRA's repertoire after it was informed by Access of the sample.<sup>114</sup> Lastly, 99 musical works were in the public domain,<sup>115</sup> and 299 could not be identified.<sup>116</sup>

[185] The Objector's fundamental objection to the inclusion of sheet music is as follows:

the sheet music repertoire claimed by Access Copyright is so small that, as a practical matter, it is valueless to K to 12 teachers—and consequently to the Objectors. At this point in time, the Proposed Tariffs would only authorize to copy the musical works that are represented in the 36 transactions for which Access Copyright claims payment. A blanket licence covering such a small number of works is not a comprehensive tariff, and would pose significant administrative problems to the Objectors. Without information on which musical works are covered by the Proposed Tariffs, or the inclusion of an indemnity provision by Access Copyright, K to 12 teachers would be unable to rely on the tariff to ensure that their copying of sheet music would be permitted.<sup>117</sup>

[186] We agree that a blanket licence is not appropriate in this matter. The number of copying events that we can reliably consider as containing musical works in the repertoire of CMRRA is low. As such, the likelihood that a copy of sheet music made in an educational institution would be of a work for which Access has received the authorization from CMRRA to license its reproduction is also low. In such a situation, a per-use, or transactional tariff would be more appropriate. However, no party has proposed a transactional tariff for sheet music, or given details of how it would operate. Furthermore, since records of sheet-music copying were not kept by the Objectors, there would be no way in which to determine the royalties paid in past years.

[187] We therefore do not include sheet music in the Tariff.

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<sup>111</sup> Transcripts Vol. 3 at p 596.

<sup>112</sup> Exhibit AC-9 at para 16.

<sup>113</sup> Exhibit AC-66 at para 18.

<sup>114</sup> *Ibid* at para 14.

<sup>115</sup> *Ibid* at para 18.

<sup>116</sup> *Ibid* at para 11.

<sup>117</sup> Exhibit Objectors-1 at para 24.

## X. COMPOUND COPYING

[188] In his reply report, Mr. Gauthier raised the issue of compound copying: “[c]omponent copying occurs when multiple portions of a single work are copied in different copying events.”<sup>118</sup>

[189] Pointing to the Supreme Court’s statement in *CCH* that repeated requests within a short timeframe for multiple excerpts from the same work could be unfair,<sup>119</sup> Access argues that compound copying should be considered by the Board in assessing whether dealings are fair.<sup>120</sup> It further argues that compound copying is highly relevant to any assessment of non-substantial copying.<sup>121</sup>

[190] While not an issue raised explicitly by the parties, we note that compound copying may result in the making of copies that are not permitted by the Tariff. In particular, more than 10 per cent of a book (or a chapter not exceeding 20 per cent of the book) may thereby be copied.

[191] In considering the issue of compound copying, we note that since the user of a copy will frequently be the recipient (e.g., a student), rather than the copier (e.g., a teacher), the definition of compound copying, for the purposes of this matter, should be restricted to those instances where different portions of the same work are copied for the same recipients of the copies.

[192] Access filed 24 examples where the same work was copied in the same school in the same observation period.<sup>122</sup> In addition to a spreadsheet that documented the examples, Access also filed copies of the logging stickers and the most-bibliographically-relevant pages of those examples.<sup>123</sup> This allows us to determine whether the copies were made by the same person. However, we cannot conclude that the copies were made for the same recipients.

[193] If compound copying occurs, it interferes with the calculations relating to fair dealing and insubstantial copying, as well as copying events beyond the scope of the tariff. Recognizing some of the difficulties of using the data from the Volume Study to quantify the amount of compound copying, the Board posed the following question to the parties, intending to, at least, measure the theoretical maximum of such occurrences:

There was some discussion of compound copying during the hearing. Computing the number of compound copies would be difficult, since this would require opening each record

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<sup>118</sup> Exhibit AC-67 at para 57.

<sup>119</sup> *CCH*, *supra* note 10 at para 68.

<sup>120</sup> Exhibit AC-104 at p 3.

<sup>121</sup> Exhibit AC-112 at para 36.

<sup>122</sup> Exhibit AC-61B.

<sup>123</sup> Exhibit AC-61C.

manually. However, an upper bound to compound copying can be computed in a simpler manner.

Define a “potential compound copy” as two (or more) transactions where the copy was made at the same school, in the same two-week period, of the same published title. For each potential compound copy, define the percentage of the work copied as the total number of originals copied in all copying events in the same potential compound copy divided by the number of pages in the work. [...]

For each of the following cutoff values, determine the percentage of potential compound copy transactions that exceed the cutoff in terms of the percentage of the work copied [...]: 1 per cent, 2.5 per cent, 5 per cent, 10 per cent, and 20 per cent.

[194] Access noted several problems with this question. First, compound copying events may occur at some distance in time; the question can only measure compound copying if the two copying events occurred in the two-week observation period. Second, the subsequent event in the compound-copying sequence may be a copy from a copy. In which case, there is a decreased likelihood that the most bibliographically-relevant page is copied; identification of the subsequent event as part of a compound-copying sequence is much more difficult. Third, it is not known which pages are copied; if the same pages are copied repeatedly, this is not compound copying. Fourth, it is not known who made the copy; if different people made the copy, it is not compound copying.<sup>124</sup>

[195] As such, Access submits that “[s]ince the Volume Study was neither designed nor is it capable of measuring or quantifying the extent of compound copying, it is not possible to empirically assess the incidence or volume of such compound copying.”<sup>125</sup>

[196] The Objectors did not address these concerns in their response to Access.

[197] We agree with Access that there are problems with measuring compound copying in the context of the Volume Study.

[198] The 10-day samples show that approximately ten per cent of exposures in the Study were potentially involved in compound-copying, that is, were made in the same school, of the same work. If compound copying were to be considered for the evaluation of substantiality, fairness, or being outside of the scope of the tariff in these cases, then only some of the copying events would have a different evaluation of these characteristics as a group than they would on their own. For example, an individual event that was already substantial does not affect the conclusion of substantiality when grouped with its related copying events. Similarly, a triad of copying

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<sup>124</sup> Exhibit AC-112 at pp 8–10.

<sup>125</sup> Exhibit AC-104 at p 3.



events where only one page was copied from a hundred-page book on each occurrence would do little to change the evaluation of the amount of the dealing factor, and even less likely to shift a prior evaluation of fair dealing into unfair dealing.

[199] Furthermore, we cannot ascertain whether the instances of potential compound copying were for the same recipients, and thus properly considered as compound copying. A test that might approximate this criterion, such as whether the amount of copies made is approximately the same between the related copying events (suggesting that the copies were made for the same class), significantly reduces the number of exposures that are involved in instances of potential compound copying.

[200] The above considerations would tend to make the effect of compound copying, as observed in the 10-day sample, on the tariff rate very small (approximately one per cent). However, if the individual events that make up a compound-copying group typically do not occur close together in time (i.e., a few days), then the 2006 Study would have no means of capturing them and any approximations based on the 10-day samples would under-represent the actual number of such events.

[201] Access states that it “fully recognizes these limitations of the Volume Study – it is not asking the Board to make any proportional assessment of the incidence or volume of compound copying. It simply asks the Board to consider that the phenomenon of compound copying exists.”<sup>126</sup>

[202] Given that the effects of compound copying can both increase and decrease the final royalty rate, that the data from the 10-day study does not permit us to ascertain which of the potential copying events were actually part of a compound-copying group, that the data, limited to the 10-day sample, indicates that the amount of exposures whose compensability would be affected is very small, and that the evidence is incapable of demonstrating whether, and to what extent, compound copying occurs across greater periods of time, we conclude that we cannot account for compound copying with any accuracy, and do not, therefore, make adjustments for it in our consideration of non-substantial copying, fair dealing, and copying outside of the scope of the tariff.

## **XI. COPYING OUTSIDE THE SCOPE OF THE TARIFF**

[203] The Proposed Tariffs have various limitations on the copying that may be done under their aegis. These include limits on the amount of a work that may be copied, the number of copies that may be made, and the purposes for which a copy may be made.

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<sup>126</sup> Exhibit AC-104 at pp 3–4 [emphasis in original].

## A. LIMITATIONS ON AMOUNT COPIED

[204] The main restrictions on the amount of a work that may be copied appear in parts 3(a) of the Proposed Tariffs. They are reproduced here:

<b>2010 Proposed Tariff</b>
Copy up to ten per cent (10%) of a Published Work, provided that such limit may be exceeded in respect of the following portions of a Published Work: (i) an entire newspaper article or page; (ii) a single short story, play, essay or article; (iii) an entire single poem; (iv) an entire entry from an encyclopaedia, annotated bibliography, dictionary or similar reference work; (v) an entire reproduction of an artistic work (including drawings, paintings, prints, photographs and reproductions of works of sculpture, architectural works of art and works of artistic craftsmanship); (vi) one chapter, provided it is no more than twenty per cent (20%) of a book; (vii) an entire reproduction of a musical work provided that, if taken from a book, forms no more than twenty per cent (20%) of that book; and (viii) up to one hundred per cent (100%) of reproducibles such as assignment sheets and blackline masters.
<b>2013 Proposed Tariff</b>
Copy up to 10 per cent of a Published Work in the Repertoire, provided that such limit may be exceeded in respect of (i) an entire newspaper article or page, (ii) an entire single short story, play, essay, article or poem from a Published Work that contains other Published Works, (iii) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work, (iv) an entire reproduction of an artistic work (including drawings, paintings, prints, photographs and reproductions of works of sculpture, architectural works of art and works of artistic craftsmanship), from a Published Work that contains other Published Works, (v) one chapter, provided it is no more than 20 per cent of a book, (vi) an entire reproduction of a Musical Work provided that, if taken from a book, it forms no more than 20 per cent of that book, and (vii) up to 100 per cent of reproducibles such as blackline masters;

[205] Copying beyond these limits would place that act of copying outside of the scope of the Proposed Tariffs, making it not compensable for the purposes of calculating a royalty rate.

[206] As discussed in Part X above, we cannot determine what amount, if any, of copying should be considered as being outside of the scope of the tariff as a result of taking compound copying into consideration. Potential compound copying aside, the data from the Volume Study indicates that it is likely that very few copying events surpass these limits. While the data does show that some instances of copying surpassed the general 10 per cent limit, it is possible that these were nevertheless permitted under the exception in paragraph (vi) of the 2010 Proposed Tariff or paragraph (v) of the 2013 Proposed Tariff.

[207] Therefore, we make no adjustments to the volume of compensable copying in respect of copying where the amount of the work copied was not permitted by the Tariff.

## B. LIMITATIONS ON USES

[208] The Proposed Tariffs also restrict the uses for which copies can be used. Among these is a restriction on the creation of course packs, reproduced below.

<b>2010 Proposed Tariff</b>
2. In this tariff [...] “ <i>Course Pack</i> ” means a compilation of materials (bound or otherwise assembled, either at once or gradually over time) that is designed for use by students of an Educational Institution to support a course or unit of study and is either intended, or may reasonably be expected, to be used instead of a Published Work that might otherwise have been purchased. A Course Pack may comprise a variety of types of material, published and unpublished, and may include original content. A compilation that includes Copies taken from fewer than four sources and totalling fewer than twenty (20) pages is not a Course Pack for the purposes of this tariff. [...]
4. (c) Copies shall not be made for or used in a Course Pack.
<b>2013 Proposed Tariff</b>
2. In this tariff [...] “ <i>Course Pack</i> ” means a compilation of materials (bound or otherwise assembled, either at once or gradually over time) that is designed for use by students of an Educational Institution to support a course or unit of study and is either intended, or may reasonably be expected, to be used instead of a Published Work that might otherwise have been purchased. A Course Pack may comprise a variety of types of material, published and unpublished, and may include original content. A compilation that includes Copies of Published Works taken from fewer than four sources or totalling fewer than 20 pages is not a Course Pack for the purposes of this tariff. [...]
4. (3) Copies of Published Works in the Repertoire shall not be made for or used in a Course Pack.

[209] As such, to the extent that copies captured in the Volume Study were “made for or used in a Course Pack,” they must be excluded from the calculation of a royalty rate.

[210] The parties presented little evidence to what extent copies are made to form part of a course pack. While the Guidelines theoretically permit the making of copies for course packs,<sup>127</sup> and Access argues that this should make the dealings unfair,<sup>128</sup> a view adopted by the Association of Canadian Publishers,<sup>129</sup> Access adduced an August 2010 study prepared by Mr. Rollans and Michel de la Chenelière that the making of course packs appears to be “relatively uncommon in the K to 12 sector, except as informal solutions to resource challenges.”<sup>130</sup>

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<sup>127</sup> Exhibit AC-2U at p 8.

<sup>128</sup> Exhibit AC-60 at para 54; Exhibit AC-105 at paras 84–85.

<sup>129</sup> Exhibit AC-62A at p 1.

<sup>130</sup> Exhibit AC-3C at p 91.

[211] Because of the limitations of the Volume Study, we are unable to determine which copies, if any, were made for inclusion in a course pack. We therefore rely on the Rollans and de la Chenelière statement that such uses are uncommon, and assume that none of the copies captured in the Volume Study were for such purposes. We therefore make no adjustments to the volume of compensable copying in respect of copying done for the purpose of inclusion in a course pack.

## **XII. NON-SUBSTANTIAL COPYING**

### **A. THE LAW**

[212] Under the *Act*, “ ‘copyright,’ in relation to a work, means the sole right to [...] reproduce the work or any substantial part thereof [...]”<sup>131</sup> Since “copyright” does not include the sole right to reproduce a part of a work, where the part of the work that is reproduced is not a substantial part thereof, the issue of whether an act was in relation to a substantial part of a protected work is a threshold question.

[213] As the Supreme Court stated in *Cinar v. Robinson*,<sup>132</sup> “[a] substantial part of a work is a flexible notion. It is a matter of fact and degree [...] As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.”<sup>133</sup>

[214] Access correctly notes that, as a general proposition, “[w]hether a part copied is substantial must be decided using a qualitative and holistic approach rather than merely considering the quantity copied.”<sup>134</sup>

[215] Access submits that “K-12 teachers value the ability to copy from publishers’ works and that the portions copied are qualitatively instrumental to meet the educational needs of students. As such, the portions copied are not ‘unimportant’ or ‘*de minimis*’ and thus cannot constitute ‘insubstantial copying.’”<sup>135</sup>

[216] While Access argues for a *de minimis* approach for the assessment of what constitutes substantial copying, the Board is guided by the principles established by the Supreme Court in *Robinson*. We do not conclude that what represents a substantial portion of the author’s skill and judgment is the equivalent to “any portion” or “some portion” of a work—the amount copied must be substantial. While it can be argued that the term “insubstantial” is the opposite of the term “substantial,” the term “insubstantial,” in our opinion, has a different connotation than the

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<sup>131</sup> *Copyright Act*, *supra* note 1, s. 3.

<sup>132</sup> *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 SCR 1168. [*Robinson*]

<sup>133</sup> *Ibid* at para 26.

<sup>134</sup> Exhibit AC-105 at para 46 [emphasis in original].

<sup>135</sup> *Ibid* at para 52.

term “not substantial,” which more closely mirrors the language in section 3 of the *Act*. Therefore, a finding of “insubstantiality” is not necessary to determine that a copy does not represent a substantial portion of the author’s skill and judgment.

[217] Furthermore, whether teachers value the ability to copy from a work, or whether those portions that are copied are useful to meet educational needs is not a suitable proxy for substantiality in this matter. Such an approach would mistake utility to the end-user for originality of the author, and risk reinforcing the now-discarded maxim that “what is worth copying is *prima facie* worth protecting.”<sup>136</sup>

## **B. EVIDENCE**

[218] Access’ witness, Ms. Gerrish, testified that

the layout and content of two pages of a book is often pedagogically important: it is often designed to contain an entire lesson so that a student is not required to turn the page, which disrupts the student’s focus and impacts the student’s learning. [McGraw Hill Ryerson] spends a great deal of time, effort, skill and judgment in developing the content, design and layout for two pages of a book.<sup>137</sup>

[219] She chose several pages from a textbook to support this assertion.

[220] Unfortunately, this anecdotal evidence does not provide the Board with a reasonable appreciation of the qualitative characteristics of the portions actually copied in the Volume Study. While a substantial amount of skill, labour, and judgment may be used in the creation of expression contained in one or two pages of a work, it may not in other excerpts that are longer.

[221] The Volume Study measured general information about the number of pages copied (and even this with some limitations), and, for a sub-sample, made copies of the actual portions that were copied. Even from this sub-sample, only a small number of copies were put before the Board as evidence. Thus, for the vast majority of the sample captured by the Volume Study, the Board cannot make a *qualitative* analysis of whether the portion copied represents a substantial part of the whole.

[222] Furthermore, as the litigation in *Robinson* demonstrated, analyzing the qualitative aspects of even one work can involve numerous expert witnesses with conflicting testimonies, and voluminous supporting evidence. The Objectors state that “it would be so time-consuming for the parties and the Board to track down the original works and perform that analysis case-by-

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<sup>136</sup> *University of London Press Ltd. v. University tutorial Press Ltd.*, [1916] 2 Ch 601, Peterson N.J.

<sup>137</sup> Exhibit AC-64 at para 20.

case that it would be effectively impossible.”<sup>138</sup> We agree. Such an approach may be unworkable in some situations, such as tariff proceedings.

[223] The Objectors propose one to two pages as an approximation of copying that does not reproduce a substantial part of the copied work. Access proposes that no volume of copying be considered as non-substantial.

[224] In *Governments*, the Board held that it was appropriate to approximate the amount of non-substantial copying in that matter by considering that the copying of one to two pages from a book or journal article as not being substantial, provided that this amount does not surpass 2.5 per cent of the length of the work.<sup>139</sup>

[225] Since we do not have per-event information as the Board did in *Governments*, it is not possible to ensure that every instance where one to two pages were copied is one where the amount did not surpass 2.5 per cent of the entire work. Therefore, for the purposes of this Tariff, we deem the copying of newspaper and magazine articles to always be substantial, as these tend to be shorter works.

[226] In relation to books and consumables, we make the following observation: the evidence in this matter demonstrates that the use of the one- to two-page threshold results in a smaller volume of copying being classified as non-substantial<sup>140</sup> (approx. 22.3 per cent) than even a threshold of 1 per cent<sup>141</sup> of a work would have (approx. 26.7 per cent of exposures).<sup>142</sup> Therefore, we accept that the amount of non-substantial copying in the Volume Study can be reasonably approximated by considering the copying of one or two pages from a book or consumable as not being a substantial reproduction of the work copied.

### C. CONCLUSION

[227] Without the benefit of a qualitative analysis of each of the copied works, and without knowing—for the vast majority of cases—which portions of a work were copied, we find the approach proposed by the Objectors to be more reasonable than that of Access for approximating the amount of non-substantial copying in this matter, and we adopt it for the purposes of determining a royalty rate with respect to books and consumables.

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<sup>138</sup> Exhibit Objectors-44 at para 30.

<sup>139</sup> *Governments*, *supra* note 47 at paras 204–205.

<sup>140</sup> Exhibit Objectors-10 at p 87 (table 30).

<sup>141</sup> *Governments*, *supra* note 47 at para 204 citing *SOCAN, NRCC, CSI - Multi-Channel Subscription Satellite Radio Services* (6 May 2009, corrected version) Copyright Board decision at paras 96–103 (The Board established an acceptable threshold of 2.5 per cent).

<sup>142</sup> Exhibit Objectors-48 at p 22 (table Q4-3).

[228] On the other hand, the usually shorter length of newspaper and magazine articles leads us to conclude that, in this matter, there is no non-substantial copying with respect to these genres.

### **XIII. FAIR DEALING**

#### **A. FAIR-DEALING PRACTICE**

[229] In *CCH*, the Supreme Court stated that

[p]ersons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.<sup>143</sup>

[230] On the basis of this, the Objectors submit that the Guidelines were designed to establish both a fair practice and a fair policy,<sup>144</sup> and argue that “copying behaviour in K to 12 schools is, in practice, generally consistent with fair dealing, and that the Fair Dealing Guidelines provide schools with a fair policy that renders the Objectors’ copying, as a whole, fair.”<sup>145</sup>

[231] Access, on the contrary, argues that the Guidelines encourage unfair dealing, and that the Objectors’ actual copying behaviour is unfair.<sup>146</sup>

[232] Access and the Objectors both put forward arguments about whether there is a practice that can be evaluated for fairness, as was the case in *CCH*, and whether the practice is, in fact, fair. Much of these arguments focused on the Guidelines, with particular attention to the amount of the dealing permitted by the Guidelines.

[233] However, in this matter, the parties have asked the Board to treat the Volume Study as representative. Thus, on one hand, the Board is being asked to consider the effect of the Guidelines on the copying behaviour of the Objectors, and on the other hand, to evaluate the copying captured by the Study. These two approaches are not readily reconcilable. If the Guidelines have modified the copying behaviour of the Objectors, then the Volume Study is no longer representative. If the Volume Study is representative, then the introduction of the Guidelines has not had a pronounced effect on the copying behaviour of the Objectors.

[234] Much of the evidence presented by the Objectors related to only certain schools or school boards. Evidence showed that while the Guidelines may have been distributed, and may even be

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<sup>143</sup> *CCH*, *supra* note 10 at para 63.

<sup>144</sup> Exhibit Objectors-43 at para 16.

<sup>145</sup> *Ibid* at para 17.

<sup>146</sup> Exhibit AC-105 at para 2.

known by, teachers and other persons that make copies of published works, there was insufficient evidence of the extent of the compliance with those Guidelines. Indeed, cross-examination of Objectors' witnesses showed that there was little or any emphasis on monitoring and compliance with the Guidelines.<sup>147</sup> As such, we cannot conclude that there is a generally uniform practice among all the elementary schools, secondary schools and school boards that can be evaluated for fairness in the manner contemplated in *CCH*.

[235] The Volume Study, urged upon us by both parties as being representative, serves as much better evidence of the copying behaviour in K-12 Schools. As such, we determine the extent to which copying benefits from the exceptions in ss. 29–29.1 from the data present in the Volume Study. Based on the evidence presented to us, we consider the arguments about the Guidelines to be irrelevant to the evaluation of fairness of the copies made in the 2006 Volume Study and do not consider them further in these reasons.

## **B. GENERAL ARGUMENTS**

[236] One argument that is repeated by Access in relation to different aspects of the fair-dealing test is that since the copies that are made can be used to replace the purchase of the works being copied, they are unfair.<sup>148</sup> We do not find that argument persuasive for several reasons. First, it only addresses one of the six *CCH* factors—alternatives to the dealing. Second, it assumes that a purchase of the work being copied is always an alternative to the dealing. However, the Supreme Court held in *Alberta* that “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks.”<sup>149</sup>

## **C. PURPOSE OF THE DEALING**

[237] The 2006 Study permitted persons making copies to indicate the purpose or purposes for which they were making the copy. The options available to the copier were:<sup>150</sup>

- Administration
- Criticism or review
- Entertainment
- Future reference
- Inclusion in student tests or examinations
- Private study
- Projections in class
- Research

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<sup>147</sup> See e.g. Transcripts Vol. 5 at pp 882– 884.

<sup>148</sup> See e.g. Exhibit AC-105 at para 60.

<sup>149</sup> *Alberta*, *supra* note 9 at para 32.

<sup>150</sup> Exhibit AC-11 at p 127.



- Student instruction, assignments and class
- Other, please specify
- Undetermined

[238] In the *K-12 (2009)* decision, the Board concluded that only those copies where the logging sticker indicated “Criticism or review,” “Private study” or “Research” could qualify as fair dealing under section 29 of the *Act*. Given that the vast majority of copies were indicated as being for the purpose of “Student instruction,” that decision did not consider the fairness of the vast majority of the copying. Indeed, no mention of these copies appears in Table 1 and Table 2 of that decision.

[239] Thus, the Objectors submit that “[i]t is therefore almost certain that a great deal of copying that was not the subject of the Supreme Court appeal [in *Alberta*] was incorrectly categorized as compensable in the previous tariff proceeding.”<sup>151</sup> The Objectors argue that any copying event where administration, criticism or review, future reference, inclusion in student tests or examinations, private study, projection in class, research, or student instruction was indicated, the copying event was done for a purpose permitted under sections 29–29.1 for the 2010-2012 portion of the Tariff.<sup>152</sup>

[240] Access concedes that “all purpose of the copying in K-12 schools meets an allowable purpose under the first step of the *CCH* test (other than copying made solely for the purpose of entertainment).”<sup>153</sup> As such, “[t]he Board must now engage in a second step fairness analysis and assess the evidence and arguments advanced in these proceedings in respect to the six fair-dealing factors identified in *CCH*.”<sup>154</sup>

[241] In *Alberta*, the Supreme Court repeated the assertion from *CCH* that the allowable fair-dealing purposes must be given a “large and liberal interpretation.”<sup>155</sup> In *Governments*, the Board, after considering relevant legislation and case-law, concluded that “all of the purposes enumerated in sections 29–29.2 of the *Act* must receive a large and liberal interpretation.”<sup>156</sup> We have no reason to depart from this conclusion, and therefore agree with the parties, save in relation to copies marked as being made for the purposes of “Administration,” for the reasons set out in the following paragraph.

[242] The Objectors characterize copies where “administration” was marked as copies “made for the purpose of administering an educational institution and for the purpose of facilitating the

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<sup>151</sup> Exhibit Objectors-43 at para 4.

<sup>152</sup> *Ibid* at paras 6–12.

<sup>153</sup> Exhibit AC-105 at para 58.

<sup>154</sup> *Ibid*.

<sup>155</sup> *Alberta*, *supra* note 9 at para 19 citing *CCH*, *supra* note 10 at para 51.

<sup>156</sup> *Governments*, *supra* note 47 at para 240.

proper functioning of an educational institution.” They submit that such copies are permitted under the new “education” purpose in section 29. We disagree. While “education” may be sufficiently broad to include administration closely related to education, in this matter, where copies were made not only at schools but also at school boards, there is insufficient evidence for us to conclude that copies made for the purpose of “administration” were dealings “for the purpose of [...] education” as contemplated in s. 29 of the *Act*.

[243] In *K-12 (2009)*, the Board established four categories of copying that met the first step of the fair-dealing test, which it subjected to a fair-dealing analysis.<sup>157</sup> Together, these categories represented approximately 7 per cent of copies from published works targeted by the tariff.

[244] However, the Volume Study shows that, for those genres that were targeted in *K-12 (2009)*, approximately 75 per cent of copies from published works were made for the purpose of “student instruction, assignments and class work,”<sup>158</sup> a concept captured by the purpose of “private study,” as described by the Supreme Court in *Alberta*. In that case the Supreme Court stated that the instruction of a teacher cannot be separated from the research and private study of students: “The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.”<sup>159</sup>

[245] Therefore, while we still need to determine whether such copies are fair or not, the volume of copying that is being considered for fair dealing in this matter is of an order of magnitude greater than what was considered in *K-12 (2009)*.

#### **D. GOAL OF THE DEALING**

[246] As described in *Governments*, in an attempt to prevent confusion, we refer to the first factor considered in the second step of a fair-dealing analysis as the “goal” of the dealing, to distinguish it from the “purpose” that is to be considered in the first step of the test.<sup>160</sup>

##### **i. The copyright balance**

[247] Access argues that

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<sup>157</sup> *K-12 (2009)*, *supra* note 5 (table 1).

<sup>158</sup> See Exhibit Objectors-10, tables 18–19 (Adding consumables to our consideration of fair dealing results in approximately 58 per cent of all copying being done for the purpose of “student instruction, assignments and class work”).

<sup>159</sup> *Alberta*, *supra* note 9 at para 23.

<sup>160</sup> *Governments*, *supra* note 47 at para 259.

[w]hether or not the purposes are, on balance, fair requires an assessment of copyright policy: does the purpose of the copying further the “public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator[.]”<sup>161</sup>

[248] The Supreme Court in *Théberge v. Galerie d’art du Petit Champlain*<sup>162</sup> stated that

[t]he *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.<sup>163</sup>

[249] It went on to explain that

[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.<sup>164</sup>

[250] Thus, the Supreme Court adopted a balancing test that can be described in terms of economic efficiency: interpreting rights over-broadly results in economic rent, while limiting them provides insufficient incentive to create certain works.

[251] In arguing that the goal of every copying event is to be tested individually to determine whether it—on its own—furthers all aspects of the “proper balance” of copyright, Access confounds the goal of the entire copyright regime with the characteristics that a component of that regime ought to have. The scope of an exception goes towards the overall balance of the copyright system. Whether or not every component meets this ideal balance is not indicative of whether or not the system as whole does or does not.

[252] *CCH, Bell v. SOCAN*<sup>165</sup> and *Alberta* did not address the question of “just reward for the creator” as a separate element to consider in the fairness of the goal for which a dealing was done. We decline to do so here.

## ii. Transformativeness

[253] Borrowing from US case-law,<sup>166</sup> Access submits that the Board ought to consider whether or not the goal of the copying was transformative in nature.<sup>167</sup> It argues that where a dealing is

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<sup>161</sup> Exhibit AC-105 at para 93 [emphasis in original].

<sup>162</sup> *Théberge v. Galerie d’art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 SCR 336. [*Théberge*]

<sup>163</sup> *Ibid* at para 30.

<sup>164</sup> *Théberge*, *supra* note 163 at para 31.

<sup>165</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SRC 326. [*Bell*]

transformative, in the sense that “a new audience will experience the expression of the idea or an audience will experience the expression in a new way,” or if the dealing was done “for a purpose other than the purpose for which the original work was created” the dealing will tend to be fair.

[254] Access goes on to argue the contrapositive as well “that when the goal of the dealing is identical to the goal underlying the creation of the original work, or where no sale will result, that dealing tends towards unfairness.”<sup>168</sup> It claims that “the copies at issue in this case are made for the goal of avoiding the purchase of the original work.”<sup>169</sup>

[255] Access argues that since the dealing was not transformative, the goal of the dealing tends to unfairness—and this because the dealing does not result in the sale of a work. Such an approach would short-change the full evaluation of such considerations that are properly made through the “alternatives to the dealing” lens. Similarly, whether a dealing significantly competes with exploitation of the work is better considered as part of the “effect of the dealing” factor. The approach implicitly argued by Access would mean that the fairness of the goal of the dealing can be determined based on the fairness of other factors.

[256] The Objectors argue that

the notion that copying must be “transformative” does not exist in Canadian jurisprudence or in the Copyright Act. This is a U.S. fair use criterion that Canadian courts have never accepted and which was indeed explicitly rejected by the Supreme Court of Canada in *SOCAN v. Bell*.<sup>170</sup>

[257] In *Bell*, the Supreme Court, in considering the scope of “research” in s. 29, rejected the argument that such research must be transformative.<sup>171</sup> In *CCH*, the Supreme Court stated that “[i]n some contexts, there may be factors other than [the six] that may help a court decide whether the dealing was fair.”<sup>172</sup> As such, whether a dealing is transformative *may* be a relevant consideration in the evaluation of fairness of a dealing. That being said, the non-transformative nature of the dealings considered by the Supreme Court in *CCH*<sup>173</sup> and *Alberta*<sup>174</sup> were not an obstacle to a finding that such dealings were fair—nor did it even appear to make the dealings somehow less fair.

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<sup>166</sup> *Ibid* at paras 23–30 citing *United States v. American Society of Composers, Authors and Publishers*, 599 F. Supp. 2d 415 (S.D. 2009); *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994) at p 579.

<sup>167</sup> Exhibit AC-105 at para 94.

<sup>168</sup> *Ibid* at para 97.

<sup>169</sup> *Ibid* at para 100.

<sup>170</sup> Exhibit Objectors-44 at para 9.

<sup>171</sup> *Bell*, *supra* note 166 at paras 23–25.

<sup>172</sup> *CCH*, *supra* note 10 at para 60.

<sup>173</sup> *CCH*, *supra* note 10.

<sup>174</sup> *Alberta*, *supra* note 9.

[258] We therefore disagree that the mere lack of transformativeness makes the goal of a dealing tend towards unfairness. Furthermore, evidence of reasonable alternatives and the effect of the dealing on the work are considered separately, under the aegis of other factors. Where an evaluation of the fairness of one factor hinges on the fairness of another, those factors become conflated, erasing proportionality from the fairness analysis.

### **iii. Conclusion**

[259] In *K-12 (2009)*, the Board considered that copies that were made “on the teacher’s initiative for his or her students or at the student’s request with instructions to read them” had a goal that made the dealing less fair, on the basis that it should be evaluated from the perspective of the teacher. On appeal of the judicial review from the Board’s decision, the Supreme Court rejected this view, and stated that “[t]eachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study.”<sup>175</sup>

[260] Relying on the same Volume Study as the Board did in *K-12 (2009)* and the *K-12 (2013)*, we conclude that the goal of the copies made in the Volume Study, where there is evidence that the copy was made for criticism or review, future reference, inclusion in student tests or examinations, private study, projection in class, research, or student instruction, assignments and class work, were made for the goal of education of students in K-12 Schools. This is a goal that is fair, in alignment with the public interest of facilitating access to educational materials in educational institutions. Therefore this factor for such copies tends towards fairness.

## **E. CHARACTER OF THE DEALING**

[261] In assessing the character of a dealing, courts must examine how the works in question were dealt with. This can include consideration of the breadth of the distribution of the work, as well as whether the copy of the work is destroyed after it is used.

### **i. Number of copies and breadth of distribution**

[262] The Supreme Court stated in *CCH* that “[i]f multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.”<sup>176</sup>

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<sup>175</sup> *Ibid* at para 23.

<sup>176</sup> *CCH*, *supra* note 10 at para 55.

[263] In assessing the character of a dealing, courts must examine how the works in question were dealt with. For example, “if multiple copies of works are being widely distributed, this will tend to be unfair.”<sup>177</sup>

[264] Access argues that the character of the dealing must be viewed as a function of all copies made: according to Access, “over 300 million pages from works in Access Copyright’s repertoire – approximately 90 pages per student – are copied in each academic year by K-12 institutions. K-12 teachers make multiple copies from works for wide distribution to the entire class.”<sup>178</sup>

[265] The Objectors argue that

the only correct “aggregate” to consider would be that of one work being copied and distributed to a single student, not all works copied in every transaction conducted by whatever large group Access Copyright chooses to target. A particular student’s right to deal fairly with one particular work for his/her own instruction cannot be cut short by the existence of a different teacher copying a different work for a different student at a different school, no matter how many pages these separate transactions may collectively add up to.<sup>179</sup>

[266] Furthermore, according to the Objectors, considering the aggregate of all copies made at all schools

is an arbitrary and nonsensical way to group copying transactions. Why should one teacher’s copying behaviour affect the fair dealing rights of another teacher’s students, let alone another school or school board’s rights? The Objectors may be collectively represented in this proceeding, but in most ways, the school boards and ministries they represent are completely distinct legal entities.<sup>180</sup>

[267] In the assessment of this factor, the Objectors evaluated this factor based on whether copies were made for distribution within the school (classifying such copying as tending towards fairness), or for distribution outside the school (classifying such copying as tending towards unfairness). Depending on the genre of the work, between 97 and 99 per cent of copies were distributed within schools.

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<sup>177</sup> *Ibid.*

<sup>178</sup> Exhibit AC-105 at para 103 [footnotes omitted].

<sup>179</sup> Exhibit Objectors-43 at para 33.

<sup>180</sup> *Ibid* at para 34.

[268] As the Board stated in *Governments*, “[t]he fact that, in total, the copies made by all users that benefit from the tariff ended up in the hands of many people does not automatically mean that each of those dealings was an instance where a “wide” dissemination occurred.”<sup>181</sup>

[269] We therefore agree with the Objectors’ conclusion that “the ‘character of the dealing’ factor looks at the size of a particular transaction or a set of transactions involving the same work.”<sup>182</sup>

[270] In this matter, there is little evidence that permits us to determine what volume of copying was made for many students, and what volume of copying was made for a few, or a single, student. However, by their very nature, copying events where copies were made for an entire class likely account for a greater volume of works than those copying events where copies were made for only a few students.

[271] While making copies for an entire class entails the making of more copies than the hypothetical single copy referred to in *CCH*,<sup>183</sup> the breadth of distribution is significantly more constrained than the distribution that was at issue in *Bell*, where online music services permitted potential customers to download previews of musical works.

[272] Given the above, and given the absence of evidence that would give us a more nuanced appreciation of how many copies of a particular work were made, be it in the course of one transaction, by one teacher, or in one school, we conclude that for copies made for distribution within the school, this factor does not tend to make the dealing fair or unfair.

## **ii. Destroying a copy**

[273] In *CCH*, the Supreme Court stated that

[if] [...] a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.<sup>184</sup>

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<sup>181</sup> *Governments*, *supra* note 47 at para 289.

<sup>182</sup> Exhibit Objectors-43 at para 33.

<sup>183</sup> *CCH*, *supra* note 10, McLachlin C.J. (“If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.” at para 55).

<sup>184</sup> *Ibid.*

[274] Access states that the above passage “stands for the proposition that the wide distribution of multiple copies of works that are not destroyed after use tends toward unfairness.”<sup>185</sup>

[275] As discussed by the Board in *Governments*,<sup>186</sup> we disagree with this characterization. *CCH* does not state that not destroying a work after it is used for its specific intended purpose favours a finding of unfairness—but only that destroying a work favours a finding of fairness.

[276] Destruction of a copy may favour fairness where the copy would no longer be necessary to achieve the permitted purpose, and destruction helps ensure that it is not used for other, unfair, purposes. This does not mean that non-destruction of the copy will always favour unfairness. Where destruction does not help ensure that the copy is used for a permitted purpose, or where destruction would undermine the very reason why it was made, non-destruction of a copy may not have any effect on the evaluation of the “character” factor.

[277] In this matter, there is no evidence about destruction. It could very well be that most handouts are discarded shortly after use, or at the end of the school year. The logging sticker did not capture such information. In any case, we have little reason to believe that the copies made in the Volume Study were subsequently used for a purpose other than that for which they were made.

[278] As such, the lack of evidence on the destruction of the copies does not make the “character” factor make the dealing tend to unfairness.

#### **F. AMOUNT OF THE DEALING**

[279] In *CCH*, the Supreme Court of Canada said that in evaluating this factor, “[b]oth the amount of the dealing and importance of the work allegedly infringed should be considered.”<sup>187</sup> Furthermore,

[t]he amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.<sup>188</sup>

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<sup>185</sup> Exhibit AC-107 at para 167.

<sup>186</sup> *Governments*, *supra* note 47 at paras 294–299.

<sup>187</sup> *CCH*, *supra* note 10 at para 56.

<sup>188</sup> *Ibid.*



In *Alberta*, the Court stated that this factor entails “an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated.”<sup>189</sup>

[280] Access argues that “[t]he Objectors bear the burden to establish that the amount of the dealing, considered both qualitatively and quantitatively, is fair.”<sup>190</sup>

[281] As the Board noted in *Governments*, it is not readily apparent from the Supreme Court’s recent fair-dealing case law to what extent the qualitative aspect of the amount of the dealing is even to be considered in assessing the “amount of the dealing” factor. In *CCH, Alberta*, and *Bell*, only the quantitative aspects were considered in this factor. Notably, many previews in the *Bell* case would have likely included the “hook” of a song—arguably the most qualitatively important portion of a song.

[282] It is possible that in *Alberta* and *Bell*, the “amount of the dealing” factor was analyzed from a purely quantitative aspect due to the fact that those cases considered numerous dealings with a multitude of works—and did not have evidence of the qualitative aspects of the portions that were dealt with in those matters. If this is the case, then the Board is in a situation similar to that of the courts (and itself) in *Bell* and *Alberta*. Namely, it does not have evidence about the qualitative aspects of the amount of the dealing.

[283] With respect to a quantitative assessment, Access submits that

[t]he Objectors were the only parties to these proceedings who could shed light on the frequency of such behaviour and the typical amount of the work copied. The Objectors bore the burden to adduce evidence on this phenomenon. Such evidence could have been led by calling teachers, or panels of teachers, as witnesses or, better yet, polling them to gather evidence as to the incidence of compound copying and introducing this polling evidence through Mr. Chodorowicz.<sup>191</sup>

[284] We note that Access appears to be arguing that the Objectors bear the burden of adducing evidence demonstrating that teachers do not repeatedly copy from the same work. We do not agree that in the absence of such evidence, we can draw the conclusion that the amount of the dealing will always tend towards unfairness.

[285] Access agreed on the methodology of the Volume Study when it was first carried out, and asks the Board to rely on it again in this decision. Given that it knew that the absence of the phenomenon cannot be established from the Volume Study, the argument that in light of

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<sup>189</sup> *Alberta*, *supra* note 9 at para 29.

<sup>190</sup> Exhibit AC-105 at para 108.

<sup>191</sup> *Ibid* at para 121.

insufficiency of the data of the study the Board should presume that a phenomenon occurs seems somewhat disingenuous.

[286] As discussed in Part X above, we do not consider compound copying in our evaluation of the “amount of the dealing” factor.

[287] For short works, such as newspaper and magazine articles, given the limitations of the Volume Study, we presume that the totality of the work was always copied. As such, we evaluate the “amount of the dealing” factor as tending to make such dealing unfair for such genres.

[288] For longer works, such as books, guided by the Supreme Court’s decisions in *CCH*, *Alberta*, and *Bell*, we use the following approximation: where the amount of a work copied was less than or equal to 5 per cent of the work, we conclude that the amount copied tends to make the dealing fair; where the amount copied was more than 5 per cent but no more than 10 per cent of the work, we conclude that the amount copied did not affect the fairness of the dealing; where the amount copied was greater than 10 per cent of the work, we conclude that the amount copied tends to make the dealing unfair.

[289] The Objectors presented the most complete calculations of this information.<sup>192</sup> As such we rely on these. Our findings are described in Part XVI.E, below.

## **G. NATURE OF THE WORK**

[290] The Supreme Court stated in *CCH* that

[t]he nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.<sup>193</sup>

[291] In *Bell*, the Supreme Court stated that this factor examines whether the work is one that should be widely disseminated.<sup>194</sup>

[292] Access argues that the nature of the works at issue, “educational works created and published for profit [...] triggers no access-to-law considerations or other public interest.” Nor does “[t]he copying [...] engage the broader public interest to ensure the public have unfettered access to the law. These facts related to the nature of the works tend to make the dealing

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<sup>192</sup> Exhibit Objectors-10.

<sup>193</sup> *CCH*, *supra* note 10 at para 58.

<sup>194</sup> *Bell*, *supra* note 166 at para 47.

unfair.”<sup>195</sup> Furthermore, in relation to consumable works, Access submits that such works are workbooks which are created and intended for one-time use—making the copying of them manifestly unfair as the copying eliminates the need to purchase them.<sup>196</sup>

[293] The Objectors, on the contrary, submit that such works should be widely shared and disseminated, as “[i]t is in the nature of most educational works to seek the largest audience (of appropriate age and skill) possible.”<sup>197</sup> The Objectors are therefore of the view that the copying of those works tends towards fairness, while stating that this might be different for consumable works intended for one-time use.

[294] In the report of Drs. Wilk and Whitehead,<sup>198</sup> the authors state that “[they] were instructed to consider the nature of the work factor to tend toward unfairness if the original work is a Consumable. If the original work is not a Consumable, [they] were instructed to consider the nature of the work factor to tend toward fairness.”<sup>199</sup> As such, we understand the Objectors to be of the view that the copying of consumables may be less fair than other works under the *nature of the work* factor.

[295] In relation to non-consumable works, we do not see the argument by either party as persuasive. While it is true that published works, even those created for profit, benefit from greater dissemination—and this is one of the fundamental purposes of the *Act*—the dissemination of the works in question (largely educational material) is not, in our opinion, more important than the dissemination of other works, such as literary works not created for educational purposes. Furthermore, there is nothing about the nature of the works at issue that would suggest there is a valid policy reason to dissuade further dissemination. Therefore, we conclude that the nature of non-consumable works does not tend to make the dealing either fair or unfair.

[296] Access’ argument that the copying of consumable works eliminates the need to purchase them—while being better suited in the evaluation of the effect of the dealing on the work—can be considered in the “nature of the work” factor, as long as it is not used again in the evaluation of the effect of the dealing factor or any other factor. Given that both parties made their submissions on this issue in relation to this factor, we deal with it here as well.

[297] Access’s claim of substitution is repeated in relation to all works in its consideration of the effect of the dealing factor: “the copying behaviour at issue has had an impact on primary sales

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<sup>195</sup> Exhibit AC-105 at para 133.

<sup>196</sup> *Ibid* at para 135.

<sup>197</sup> Exhibit Objectors-43 at para 43.

<sup>198</sup> Exhibit Objectors-10.

<sup>199</sup> *Ibid* at para 185.

and will substitute for the works from which copies are made.”<sup>200</sup> Therefore, according to Access, such substitution is not something particular to works identified as consumables. Furthermore, the argument that a dealing must be unfair if copying eliminates the need to purchase them, would turn a factor into a criterion, and be contrary to the Supreme Court’s statement that the effect of the dealing “is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”<sup>201</sup>

[298] The Board stated in *Governments*, in considering the copying of a crossword puzzle where there was no evidence regarding the effect of the dealing on the work, that “[w]hile not a strict rule, the copying of works that, [...] by their very nature, [will be] consumed and discarded upon use can tend to make a dealing less fair, and in this case, it does.”<sup>202</sup> Furthermore, the Objectors agree that the nature of consumables can make dealings with such works less fair. As such, we evaluate the nature of consumables differently than the nature of other genres.

[299] A “consumable” may contain information pages, as well as pages to be completed by the student. Copying the information pages is more akin to copying a textbook, whereas copying the pages to be completed is quite different. In the present matter, however, we cannot distinguish which portions of a consumable were copied. As such, we assume that the pages copied are pages to be completed by the student, in all cases of consumable copying.

[300] Workbooks and similar works—by their very nature—are most useful until they are completed. The copying measured in the Volume Study was most likely of uncompleted consumables, with the goal that the copies so made be completed. As such, we conclude that the nature of the consumable works at issue, in the context of copying to permit the consumable to be completed multiple times, makes the dealing tends towards unfairness.

[301] Lastly, we note that both Access and the Objectors submitted that whether or not a book appears on one of the lists of “approved” textbooks, such as the Trillium List, that are prepared by ministries of education or school boards, is not, in and of itself, relevant to fair dealing. As the Objectors state: “[t]he relevant consideration is the use to which the copy is being put—and therefore the reason the original may have been purchased—not the publisher’s classification.”<sup>203</sup> We agree, and do not differentiate, for the purpose of evaluating this factor, between those works that are on such a list and those that are not.

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<sup>200</sup> See e.g. Exhibit AC-107 at para 202.

<sup>201</sup> *CCH*, *supra* note 10 at para 59.

<sup>202</sup> *Governments*, *supra* note 47 at para 384.

<sup>203</sup> Exhibit Objectors-43 at para 67 [emphasis in original].

## H. ALTERNATIVES

[302] In *Alberta*, the Supreme Court concluded that

buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board's approach, schools would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study.<sup>204</sup>

[303] Relying on the above, the Objectors argue that "[t]his reasoning is equally applicable in this proceeding"<sup>205</sup> and that "there are no realistic alternatives to the dealing[.]"<sup>206</sup>

[304] Access claims that

the evidence establishes that publishers offer reasonable alternatives to copying the content for free (e.g. McGraw Hill's iLit digital, disaggregated collection of literary selections). One of the Objectors' witnesses from the Manitoba Textbook Bureau confirmed that it could purchase individual chapters from the publishers separate from the textbook.<sup>207</sup>

[305] The evidence in this matter does not show any realistic alternatives being available at the time the copies were made (as this is what is being evaluated). The little evidence that was adduced shows only that some alternatives, for some resources, have become available more recently.

[306] Therefore, in relation to all copying of non-consumable works, we conclude that the "alternatives to the dealing" factor tends to make the dealings fair.

[307] For consumables, we do not have evidence of how realistic it was for such material to be purchased for every single instance of copying. We are therefore left with having to approximate the frequency with which purchasing is realistic. We do know, however, that consumables are cheaper than books.<sup>208</sup> The evidence shows that the price-per-page for consumables is in fact

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<sup>204</sup> *Alberta*, *supra* note 9 at para 32.

<sup>205</sup> Exhibit Objectors-43 at para 41.

<sup>206</sup> *Ibid.*

<sup>207</sup> Exhibit AC-105 at para 125.

<sup>208</sup> See Exhibit AC-12 at para 84; Exhibit Objectors-8, Table 29.

about half that of books. Accordingly, we distinguish consumables from books. As such, while we concluded, in relation to copying of non-consumable works, that the alternative to the dealing factor tends to make the dealings fair, we come to a different conclusion in relation to consumable works. We believe that buying a consumable, that is a book intended for student to write in, is a reasonable alternative to copying the work.

[308] In addition, the Objectors have stated that “[c]onsumable works, by definition, are intended for one-time use. Copying them may reasonably be considered less fair than other works under the *alternative to the dealing* factor.”<sup>209</sup>

[309] Therefore, this factor tends to make the dealing unfair in all cases of copying of consumable works.

## **I. EFFECT OF THE DEALING**

[310] In *CCH*, the Supreme Court stated that

the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.<sup>210</sup>

[311] Access submits that the Board should consider not only actual impacts of the dealing, but also likely impacts; and that these impacts need not be only on the market for the work, but the market for the publishers, supplier, and even the users.<sup>211</sup>

[312] Furthermore, Access contends that “copies are not made to complement a core textbook, but rather, are made as the core learning resource for a class, thereby substituting for the purchase of textbooks.”<sup>212</sup> While it is an argument made in relation to the “character” factor, we believe it is best considered here, under the “effect” factor.

[313] Access’ arguments can be grouped into two main arguments. The first argument is that there has been a decrease in sales in the kind of works that were copied in the study. The second argument is that, were the copying in this matter found to be fair, then the fact that royalties would thereby not be paid would result in similar future works not being created, or lacking in one or more respects.

[314] The Objectors, on the other hand, contend that the only relevant consideration is whether Access is able to make a causal link between copying behaviour and a corresponding effect on

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<sup>209</sup> Exhibit Objectors-43 at para 45 [emphasis added].

<sup>210</sup> *CCH*, *supra* note 10 at para 59.

<sup>211</sup> Exhibit AC-105 at para 138.

<sup>212</sup> *Ibid* at para 105 [emphasis in original].

the market for that work. They point to *Bell*, where the Supreme Court stated that the final factor is “the effect of the dealing on the work and whether the dealing adversely affects or competes with the work.”<sup>213</sup>

### **i. Effect on sales**

#### **a. The law**

[315] Access Copyright submits “the Board must consider all likely impacts upon the ‘markets for the publishers’ works’, including all suppliers (publishers and creators) of educational resources to those markets and the users (ultimately students) of such resources.”<sup>214</sup>

[316] In *CCH*, the Supreme Court of Canada stated that the final factor is the “effect of the dealing on *the* work.”<sup>215</sup> While it is true that this is then equated to being “the effect of the dealing on the market of the copyright owner is an important factor”,<sup>216</sup> the Court’s later pronouncements on this factor in *Alberta* leads us to conclude that the correct consideration is, in fact, the work that was dealt with. In *Alberta*, the Supreme Court stated that this factor “assesses whether the dealing adversely affects or competes with the *original work*.”<sup>217</sup>

[317] In considering the effect of the dealing, we consider the effect that a dealing has on the work that has been dealt with. A dealing does not become less fair simply because it may have a negative effect on another work. For example, an owner of copyright cannot complain about dealings with other works even if those dealings obviate the purchase of works in which she owns copyright. While there may be situations where it could be appropriate to consider the effect on closely related works (such as a later edition of the same work), this was not specifically addressed by the parties, nor was there evidence led on the incidence of this particular form of potential substitution.

[318] Therefore, in considering the effect-of-the-dealing factor, we only consider the effect of the dealing on the work with which the dealing occurred.

#### **b. The evidence**

[319] In support of its argument that the copying has had an effect on the copied works, Access provided a market analysis of the Guidelines.<sup>218</sup> For the same reasons discussed above at

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<sup>213</sup> *Bell*, *supra* note 166 at para 48.

<sup>214</sup> Exhibit AC-105 at para 138.

<sup>215</sup> *CCH*, *supra* note 10 at para 59 [emphasis added].

<sup>216</sup> *Ibid.*

<sup>217</sup> *Alberta*, *supra* note 9 at para 33 [emphasis added].

<sup>218</sup> Exhibit AC-13.

paragraph [235], we do not consider these to be relevant in our consideration of the fairness of the copying captured in the Volume Study. If the Volume Study is representative of copying behaviour in 2010-2015, as the parties have asked us to treat this study, then the Guidelines are irrelevant.

[320] Access also adduced evidence that there has been a decrease in primary sales of education resources of the six largest publishers over several years,<sup>219</sup> that one publisher has ceased the publication of consumables,<sup>220</sup> and that one publisher has ceased the publication of books of plays and reduced the publication of anthologies.<sup>221</sup>

[321] As an appendix to his report, Dr. McIntyre filed CERC sales statistics. In 2008, CERC sales were slightly higher than they were in 2007. In 2009, CERC sales were lower than they were in 2008; this marks the beginning of a downward sales trend that continued through 2013 (the last year for which data were filed).<sup>222</sup>

[322] Was the decline in sales from 2009 to 2013 related to the copying behaviour in 2005-2006 or a continuation of the sales trend from the preceding years? It is possible that both are the case. On cross-examination, counsel for the Objectors cited three factors that could be leading to declining booksales—the open educational resources movement, digital sharing and the general emergence of new technologies—and asked Dr. McIntyre if they could be responsible for declining book sales. Dr. McIntyre answered in the affirmative.

[323] There are two developments, however, that are hard to interpret as being anything other than effects of the dealing on the market for the work, at least viewed in the aggregate. First, Oxford University Press announced in February of 2014 that it was not going to continue developing materials and publishing materials for the K-12 sector in Canada. Second, McGraw-Hill Ryerson decided to cease publishing consumables, effective 2013. While these two effects are quite far removed temporally from the copying behaviour in question, one may still identify an effect of the dealing in them.

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<sup>219</sup> Exhibit AC-4E.

<sup>220</sup> Exhibit AC-5 at para 23.

<sup>221</sup> Exhibit AC-7 at paras 15–16.

<sup>222</sup> Exhibit AC-4E.



## ii. Effect on licence royalties

### a. *The law*

[324] In *CCH*, the Supreme Court stated that “[t]he availability of a licence is not relevant to deciding whether a dealing has been fair.”<sup>223</sup> Even though this statement was made when considering the “alternatives to the dealing” factor, it appears to be sufficiently broad to be applicable in relation to the other factors as well.

[325] In *Bell*,<sup>224</sup> SOCAN sought royalties from online music services when they provided previews of musical works with a view to sell copies of those works. In considering the effect of the dealing, the Supreme Court of Canada considered only whether such previews compete with their sales,<sup>225</sup> not whether such previews compete with the possible payment of royalties under a licence.

[326] In *Alberta*,<sup>226</sup> Access Copyright sought royalties for the making of copies of literary works made by teachers without a prior request from a student. In considering the effect of the dealing, the Supreme Court of Canada considered only whether there was evidence to support the conclusion that a decline in textbook sales were linked of photocopying done by teachers,<sup>227</sup> not whether such copies compete with possible payment of royalties under a licence.

[327] In the case of a royalty-setting exercise, considering the loss of royalties as an effect of the dealing on the work when evaluating fairness would result in circularity: it is the finding of fairness that results in the non-payment of royalties, which—it is argued— makes the dealing not fair. The non-payment of such royalties should not be considered as its own effect, as this is a consequence that flows from a finding of fairness, not an effect of the dealing on the work that occurs independent of such a finding. Were it otherwise, every licensable activity would have a negative effect on the work simply by the virtue of it potentially being fair, and therefore non-compensable.

[328] Based on the findings of the Supreme Court of Canada in *CCH* and *Alberta*, we reject the argument that the loss of licensing royalties has an effect on the work that is to be considered.

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<sup>223</sup> *CCH*, *supra* note 10 at para 70.

<sup>224</sup> *Bell*, *supra* note 166.

<sup>225</sup> *Ibid*, Abella J. (“Because of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself” at para 48).

<sup>226</sup> *Alberta*, *supra* note 9.

<sup>227</sup> *Ibid* at paras 33–36.

[329] If that statement was to be restricted to the consideration of alternatives, then we consider to what extent the evidence adduced by Access demonstrates that the copying, and a decrease in royalties, had a negative effect on the market of the original work.

***b. The evidence***

[330] In support of its argument that a decrease in royalties would have an effect on similar future works, Access filed a report on a survey of affiliated authors of literary works.<sup>228</sup> The document is a statistical report, not an economic report. However, it has a considerable amount of its pages devoted to an economic topic—the shape of the labour supply curve for creators.

[331] First, we take into account the elasticity of labour supply. Creators surveyed received 21 per cent of their income as writers from Access royalty payments in 2012. This is a comparably low portion of income with which to analyze a labour supply curve. Put another way, money earned from Access royalties is supplementary income, not regular income. This implies that the elasticity of labour supply is relatively low.

[332] Under the hypothetical scenario where creators would cease to receive royalties from Access, 60 per cent of respondents indicated that this would have no impact on the number of works they create, and 23 per cent indicated that they would reduce the number of works they create. Since the majority would continue to produce works even when no royalties are paid, this suggests that Access royalties do not have a strong effect on creator future output.

[333] We note that, since the survey dealt with the creation of future works, the survey does not provide information about the effect of the dealing on the market for the work copied; rather, it provides information about the effect of the dealing on the market for future similar works.

[334] According to this evidence, the impact of copying on the market for future works is small. Any individual copying event has a much smaller impact on the market than does the decision to stop paying royalties to Access. Even collectively, the impact of all the copying not being compensable is still relatively small.

**iii. Effect on quality of future works**

[335] Access argued that the Guidelines and the cessation of royalty payments has already had, and will likely have in the future, a detrimental impact on “the quantity, diversity, indigeneity

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<sup>228</sup> Exhibit AC-10.

and quality of educational resources available to the K-12 education system, resulting in long term negative impacts on Canadian students.”<sup>229</sup>

[336] We are of the opinion that these are not relevant considerations in the examination of the effect of the dealing. Furthermore, the Board is an ill-suited forum for the evaluation of the impact a decrease in the “diversity, indigeneity, and quality” of educational resources would have on students.

#### **iv. Conclusion**

[337] While the evidence was mostly general in nature, and does not directly show that the copying of the works in 2006 resulted in a negative effect on those copied works, there is sufficient circumstantial evidence in this matter to conclude that some unlicensed copying of works will have a direct negative effect on the market for the copied work.

[338] Our quantitative evaluation of this factor is found in Part XVI.E, below.

#### **J. HOW TO EVALUATE THE AMOUNT OF FAIR DEALING**

[339] Unlike in *Governments*, where the Board had evidence on the characteristics of every measured copying event in the volume study used in that matter, the evidence in this instance on the characteristics of the copying is almost entirely aggregate. This means that a fair-dealing analysis cannot be done event-by-event. In addition, there would have been no point to ask the parties for additional evidence since the information parties have (the logging stickers) is limited and does not permit a disaggregated fair-dealing analysis. As an example, the logging sticker does not contain information on alternatives to the dealing, and only limited information on character of the dealing. Thus, even if we had obtained the 7,000 or so logging stickers from the individual copying events in evidence, we would not have had enough information to conduct fair-dealing analyses on a per-event basis.

[340] Unless we were to accept, in their entirety, the contentions of one party or the other on fair dealing—which we do not—the calculations by the parties cannot be accepted as they are. Nor is it apparent that the data can be readily disaggregated. This poses some difficulties in the evaluation of the amount of fair dealing that we expect occurred during the 2010-2015 period.

[341] Since fair dealing is a matter of impression, one approach would be to consider the copying as a group, or in groups, the latter of which the Board did in the *K-12 (2009)* decision and its redetermination in the *K-12 (2013)* decision.

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<sup>229</sup> Exhibit AC-105 at para 141.

[342] In *K-12 (2009)*, the Board identified four categories of copies that met the first step (i.e., the purpose) of the fair-dealing test. It then considered whether such copies were fair. Following the redetermination in the *K-12 (2013)* decision, all four categories were found to be fair dealing. In other words: all copies that were identified as having been done for a permitted fair-dealing purpose were found to be fair.

[343] In relation to genres that were compensable in *K-12 (2009)* (namely: books, newspapers, and magazines) the evidence does not suggest that the copying identified as Categories 1 through 4 in *K-12 (2009)* has characteristics that differ from copying that was not placed into a category. The only potential difference between copying that was placed into Categories 1 through 4 and that which was not, is in their purpose of the dealing and goal of the dealing.

[344] As noted above in our consideration of the purpose of the dealing, in Part XIII.C, approximately 75 per cent of all copying of books, newspapers and magazines in this matter was done for the purposes of “student instruction, assignments and class work,” and qualifies to be considered for fair dealing, but was not considered for fair dealing in the *K-12 (2009)* decision nor in its redetermination in *K-12 (2013)*. As per our discussion in our consideration of the goal of the dealing,<sup>230</sup> above, the goal of such a dealing would tend towards fairness.

[345] Given that copying identified in Categories 1 through 4 were all found to be fair, and given that copying done for the purposes of “student instruction, assignments and class work” shares the characteristics of copying identified in those categories, were copying of books, newspapers, and magazines to be considered in a group, or groups, it is likely that we would conclude, in relation to those copies made for a permitted purpose, that such dealings were fair.

[346] However, it is unlikely that it is actually the case that all copies under consideration that were made for a permitted purpose are non-infringing. In the absence of evidence of a sufficiently followed practice, and among such a large and varied number of institutions, the approximation created by such a group-based approach likely be too rough of a measure.

[347] We therefore require some means of establishing an actual measure of fair-dealing copying. In this matter, since the data adduced by the parties is at the aggregate level, we approximate the amount of fair-dealing copying by using this data.

[348] We generally proceed with our calculations in the same manner as the parties, by determining the number of copies that were made for a permitted purpose, and, of those, how many were fair. However, in order to use the aggregate information in evidence, we must make the assumption that the characteristics of copying (such as the goal of the dealing, the amount of

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<sup>230</sup> At para 259–260

the dealing, or nature of the work) are independent of one another. For example, whether a copy is made for one purpose or another, the amount of the work copied is not dependant on the purpose. This assumption is necessary, since the data that was adduced by the parties from the Volume Study does not let us correlate such characteristics with one another with any confidence.

[349] Given that the information in relation to consumables, which were not compensable under the *K-12 (2013)* decision, is also drawn from the 2006 Volume Study, and was also provided to the Board in aggregate form, we use the same method for approximating the amount of fair dealing in relation to consumables as well.

[350] The full methodology and calculations are discussed in Part XVI.E and in Appendix B. The methodology is of our own design, inspired however by submissions of the parties, particularly those of the Objectors. The calculations use data that is part of the evidence. Our assumptions and inferences are also based on the evidence. Because we are of the opinion that the parties did not adequately address fair dealing, we had no choice but to fashion a methodology of our own.

[351] The use of our own methodology raises the issue of whether or not we should submit it to the parties for comments. We decline to do so, for three reasons. First, allowing the parties to comment on the methodology issue would introduce several months of needless delay. We believe that the record is complete enough as it is. Second, the methodology is fundamentally based on the six-factor legal framework from *CCH*. This is a well-known framework, on which the parties have already commented extensively. Finally, the methodology uses data found in the evidence. The later has been extensively examined and cross-examined by the parties.

#### **XIV. STATUTORY EXCEPTIONS**

[352] The *Copyright Act* provides several statutory exceptions for educational institutions. Three were raised by the Objectors: reproducing a work to display it for the purposes of education or training (subsection 29.4(1)), reproducing a work for a test or examination (subsection 29.4(2)), and the reproduction of a work that is available through the Internet (subsection 30.04(1)).

[353] The logging sticker used in the Volume Study permitted a copier to indicate whether they were making a copy for “projection” and “inclusion in student tests or examinations.” The Objectors submit that where such a purpose was indicated, the exceptions apply. We agree that copies for which such purposes were indicated may be covered under subsections 29.4(1) or (2).

[354] On the other hand, no evidence was adduced as to what volume of copies in the Volume Study, if any, were made on the basis of subsection 30.04(1). Therefore, no deductions to the compensable volume are made on the basis of this exception.

**A. SUBSECTION 29.4(1) – DISPLAY FOR THE PURPOSES OF EDUCATION OR TRAINING**

[355] Subsection 29.4(1) of the *Act* provides that “[i]t is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.”<sup>231</sup>

[356] Access argues that subsection 29.4(1) does not apply when multiple copies are made. However, as the Objectors note, there is no such restriction in that provision.

[357] While there may be instances where an excessive number of copies made would suggest that the purpose was not, in fact, for “display,” there is no reliable evidence beyond the logging stickers as to the purpose for which those copies were made. Furthermore, even if the frequency with which multiple copies were made when this purpose was checked could be treated as an approximation of the frequency with which copies were not actually made for “display,” the parties did not submit this information.

[358] Given that the purposes indicated on the logging stickers from the Volume Study are otherwise accepted by the parties, we do not have a sufficient reason to depart from that approach here.

**B. SUBSECTION 29.4(2) – REPRODUCTION OF A WORK AS REQUIRED FOR A TEST OR EXAMINATION**

[359] Subsection 29.4(2) of the *Act* provides that

(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.

[360] Access submits that the Objectors’ deductions to compensable volume made on the basis of subsection 29.4(2) include copying of consumable works. It argues that

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<sup>231</sup> *Copyright Act*, *supra* note 1, s. 29.4(1).

consumables do not qualify for the exception because they are “commercially available” (as defined in ss. (a) of the definition in the *Act*) in a medium appropriate for the purpose. Consumables are workbooks that provide space for students to perform exercises and are intended for one time use.<sup>232</sup>

[361] The Objectors submit that using consumable works such as workbooks, are not suitable for tests and exams:

Some workbooks may include answers in the back or examples and guidance that make them inappropriate for testing purposes. Moreover, simply as a practical matter, many workbooks are likely too large or cumbersome, in a class of twenty or thirty students, for teachers to distribute and collect for grading.<sup>233</sup>

[362] Subsection 29.4(3) states that subsection 29.4(2) is not applicable if the work 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.”

[363] While it is possible that there may be occasions where a workbook may be suitable for a test or exam, it appears to us—based on the limited evidence before us—that in the vast majority of cases, it is unlikely to be so. Not only would such a workbook have to be devoid of instructive material (or answers) on which a student is being tested, the questions from the workbook would have to, at least, comprise a great portion of the test to be practical. Thus, it appears to us unlikely that an entire workbook will, in most situations, meet the requirements of being “in a medium that is appropriate for the purposes referred to in those subsections.”

[364] That being said, we note that, in future cases, we would prefer to see more evidence of the composition of such workbooks and their suitability for these purposes.

## **XV. TARIFF ROYALTY STRUCTURE**

[365] Access proposed a tariff for which the royalties are a rate per FTE, multiplied by the number of students enrolled in a school that is subject to the tariff. While the Objectors proposed a lower amount under such a fee structure, they also proposed a transactional tariff, whereby the amount payable would be based on the actual number of copies made.

[366] The Objectors argued that an FTE-based tariff has been made obsolete by the passage of the *Copyright Modernization Act*, as well as the Supreme Court’s decisions in *CCH* and *Alberta*.<sup>234</sup> Since there are no records of copying transactions, the Objectors proposed that for

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<sup>232</sup> Exhibit AC-105 at para 154.

<sup>233</sup> Exhibit Objectors-44 at para 52.

<sup>234</sup> Exhibit Objectors-43 at para 88.

previous years a per-FTE royalty-rate tariff be used, while a transactional tariff would apply to future years.

[367] Given the very large volume of copying (even if much of it is not compensable), and given the variations among the various K-12 institutions subject to the tariff, both organizational and jurisdictional, we do not believe it is currently feasible for every single institution to carry out a comprehensive reporting on all compensable copying.

[368] While a transactional tariff may be appropriate where mechanisms to track the copying at issue are already in place, or could very likely be in place, there is nothing in this matter that would permit us to conclude that this is the case. To be clear, the Board may be inclined in the future to consider an application for a transactional tariff if such an application were made; however, for such an application to be considered, the Board would require that the application rely on a strong record, namely that the applicant demonstrate how institutions would keep record of copies made, and address issues pertaining to monitoring and compliance. As the Board stated in the context of post-secondary educational institutions, a transactional licensing regime that would not contain such monitoring and compliance provisions would be an invitation to copyright violation.<sup>235</sup>

[369] Therefore, we establish a per-FTE royalty-rate for this Tariff, and proceed to calculate that rate.

## **XVI. CALCULATING THE COMPENSABLE VOLUME**

### **A. INTRODUCTION**

[370] In *K-12 (2009)*, the Board agreed with the parties that the tariff should be set using a three-step approach:

The parties agree to set the tariff using a three-step methodology. First, they estimate the total number of photocopied pages triggering remuneration in all of the institutions involved. Next, they determine the value of a photocopy, followed by the total value of the photocopies, which is the product of the number of photocopied pages multiplied by the value of each. The tariff itself is obtained by dividing the total value of photocopied pages in one year by the number of FTE students.<sup>236</sup>

[371] In the present matter, this aspect of the methodology was not at issue. While the parties proposed different estimates for the volume of photocopying, the value of those photocopies, and the number of FTEs, they agreed with the methodology of multiplying the first two components

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<sup>235</sup> *Access Copyright (Post-Secondary Educational Institutions) 2011-2013* (23 September 2011) Copyright Board decision (Application to Vary: Transactional Licence) at paras 21–22.

<sup>236</sup> *K-12 (2009)*, *supra* note 5 at para 135.



(by genre), summing across the genres, and dividing by the third. Furthermore, the parties agreed that the data to estimate the volume of photocopying comes from the Volume Study.<sup>237</sup>

[372] Using the Volume Study to estimate the volume of photocopying is done in several steps. First, we need to address the question of how to scale the data from the Volume Study to be representative of a full year across all the user-licensees. Second, we need to restrict our consideration to published works that are in the repertoire of Access. Third, we need to examine which copies of these works are compensable and which are excluded from compensability.

[373] After completing our volume estimates, we need to determine an estimate of the per-page value by genre. The parties' submissions draw heavily on the value submissions in *K-12 (2009)*. Finally, with respect to the numbers of FTEs, we use the parties' submissions to establish our estimation.

## **B. SCALING**

[374] Both parties agree that 376,544 copying events occurred in the Volume Study.<sup>238</sup> Both parties agree that these events are of three types. First, there are 353,639 copying events that occurred at schools. Second, there are 17,696 copying events that occurred at school boards. Finally, there are 5,209 copying events that occurred at ministries of education.

[375] In their respective expert reports,<sup>239</sup> the parties took different positions on which of these events should be included. The Objectors included only the copying at schools in their estimate of the total volume. Access included all three types of copying in their estimate of the total volume, and then subtracted the copying at ministries at a later step.

[376] We note that there was some controversy between the parties as to what should be included. In our opinion, copying at school boards should be included in the volume calculation; copying at ministries should not, by reason that this copying is already covered by the *Governments* tariff. Since copying at school boards is not covered by the *Governments* tariff, it should be included in the Tariff.

[377] Because the Objectors provided the measured data from the Volume Study in their filings, we begin by considering these. The Objectors document that 17,365,899 exposures were recorded as being copied at schools during the study; this corresponds to 353,639 copying events.<sup>240</sup> This translates to approximately 49 exposures per event.

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<sup>237</sup> See *K-12 (2009)*, *supra* note 5 at paras 29–36 (substantial additional description of the volume study is given).

<sup>238</sup> Exhibit Objectors-10 at para 17; Exhibit AC-113A.

<sup>239</sup> Exhibits Objectors-10; Exhibit AC-11.

<sup>240</sup> Exhibit Objectors-10 at para 25.

[378] We estimate that, if the Objectors had included the copying events at school boards, they would have documented 371,335 copying events consisting of 18,234,884 exposures.

[379] Access evaluated scaled exposures at 10,330,149,264, of which 299,677 were made at ministries.<sup>241</sup> This leaves 10,329,849,587 scaled exposures made at schools and school boards. Dividing this figure by the 18,234,884 unscaled exposures, we estimate that a scaling factor of 566.49 yields at schools and school boards.

[380] As explained by Access<sup>242</sup> and the Objectors,<sup>243</sup> this scaling factor is the product of three components. First, there is a component associated with the number of school days per year. Second, there is a component associated with underreporting of copying. Finally, there is a component associated with the number of schools (and their size) and the number of school boards in the sample as opposed to the number of schools (and their size) and the number of school boards in the provinces and territories that participated in the Volume Study.

[381] Access stated that its school-days component is 19.4 and its underreporting component is 2.49.<sup>244</sup> This implies that the third component would be approximately 11.73.

[382] The Objectors stated that there were 3,972,664,471 scaled exposures.<sup>245</sup> Based on 17,365,899 exposures captured in the Volume Study, this implies a scaling factor of 228.76.

[383] The Objectors stated that their school-days component is 19.8 for elementary schools and 20.9 for secondary schools.<sup>246</sup> The universe of schools in Canada (outside Quebec) contains 9,518 elementary schools and 2,091 secondary schools.<sup>247</sup> Using these numbers as weights generates a weighted average of 20.0.<sup>248</sup> We take this to be the Objectors' single figure for the school days component. The Objectors stated that their underreporting component is 1.0546.<sup>249</sup> Given a total scaling factor of 228.76, the last component, the sample-size component, is 10.85.

[384] To put these figures into perspective, we note that for each exposure that was captured in the Volume Study, Access counts it as being worth more than twice as many exposures as the Objectors do. We need to decide which of these two systems of scaling is more accurate.

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<sup>241</sup> Exhibit AC-67 at p 26 (table 6.1).

<sup>242</sup> Exhibit AC-11 at para 23.

<sup>243</sup> Exhibit Objectors-10 at para 27.

<sup>244</sup> Exhibit AC-11 at para 23.

<sup>245</sup> Exhibit Objectors-10 at p 17 (Table 1).

<sup>246</sup> *Ibid* at p 102.

<sup>247</sup> Exhibit AC-11 at p 80.

<sup>248</sup> 
$$\frac{(19.8)(9518) + (20.9)(2091)}{(9518 + 2091)} \cong 20.0$$

<sup>249</sup> Exhibit Objectors-10 at p 107.

[385] This issue of scaling arose in the *K-12 (2009)* proceedings, but in a much more limited way. In those proceedings, the Objectors' expert questioned the weights used by Access, but ended up accepting those weights as accurate.<sup>250</sup>

[386] In this matter, scaling is a significant issue, and we treat the three components separately.

### **i. Underreporting component**

[387] The largest discrepancy between the parties concerns the underreporting component. The Objectors raised several issues with the calculation by Access.<sup>251</sup> First, the Objectors claimed that Access did not use data from photocopiers where fewer than 365 days of reporting was available. Second, the Objectors argued that the prorating should be to the number of school days (no more than 209), rather than 365 days. Third, the Objectors noted some problems with the counter data. Finally, the Objectors remarked that the "one-in-ten" copies, made for the purpose of facilitating the survey, were not subtracted from the photocopier counters.

[388] Ultimately, the Objectors sampled 54 schools and came up with the underreporting component 1.0546.

[389] We reject the contentions of the Objectors for the following reasons, some of which were raised by Access in its reply.<sup>252</sup> First, the Objectors misinterpreted what Access actually did with copiers that had fewer than 365 days in their copier logs. Access did not boost these copier counts as if they had 365 days; on the other hand, these copiers were not excluded from the analysis. Second, we agree with Access that prorating to 365 days is better than prorating to 209 days. The counters are based on 365 days; as such prorating to 209 days would be incorrect. Third, Access' method for dealing with outliers should address most of the data problems.<sup>253</sup> Finally, we agree with Access that there should be no effect on the weighting of including the one-in-ten data.

[390] As such, we accept Access' estimate of the underreporting component of 2.49.

### **ii. School-days component**

[391] The Objectors' assumption that elementary schools are open for 198 days, despite the fact that there are only 194 instructional days is reasonable, as is the analogous assumption that secondary schools are open for 209 days. Access did not adduce written evidence to challenge

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<sup>250</sup> *K-12 (2009)*, *supra* note 5 at para 52.

<sup>251</sup> Exhibit Objectors-10 at pp 104–107.

<sup>252</sup> Exhibit AC-67 at paras 37–44.

<sup>253</sup> Board staff examined the photocopier counter data. They are distributed power-normally.

this assumption. In his oral testimony, Mr. Gauthier reminded the Board that the number of school days was an agreed figure in 2005.<sup>254</sup>

[392] However, the fact that the parties agreed on this figure in 2005 does not bind them to agree on the same figure in the present proceedings. We think it reasonable that schools are open for more than instructional days. Accordingly, we accept the Objectors' figure of 20.0 for the school-days component.

### **iii. Sample-size component**

[393] The sample-size component is perhaps the most difficult to determine, since neither party directly led evidence on it. Access implicitly proposes a figure of 11.73 and the Objectors implicitly propose a figure of 10.85.

[394] Since the calculations we will be performing rely on the exposure data provided by the Objectors, we accept the Objectors' value of 10.85 for this component. However, since this value is based on the position that copies made at school boards should not be included, and since we disagree with this position, we will make an adjustment based on the assumption that an average copying event at a school has the same number of exposures as an average copying event at a school board.

[395] This adjustment is based on the ratio of the exposures that the Objectors documented as having been made at schools, 17,365,899, and the number of exposures we approximate should have been documented for schools and school boards, 18,234,884. This provides an adjustment of 5 per cent that will have to be added to account for copies made at school boards.

### **iv. Conclusion**

[396] We therefore conclude that our three weighting components are 2.49 (the underreporting component), 20.0 (the school-days component) and 10.85 (the sample-size component). The product of these three figures is 540.28, which we use as our scaling factor.

[397] In those instances where the parties provided the Board with already-scaled figures, we use the scaling factors from the parties, namely 566.49 for Access' data, and 228.76 for Objectors' data, to determine the unscaled weighted data that are implicitly being submitted.

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<sup>254</sup> Transcripts Vol. 4 at p 792.

### C. REPERTOIRE

[398] There are five genres of works in the Volume Study: books, newspapers, periodicals, consumables and sheet music. Our first step is to exclude all sheet music from the repertoire of Access.

[399] We do so since not a single page of sheet music was in the repertoire of Access in 2005-2006 when the copies were made and recorded in the Volume Study.<sup>255</sup>

[400] Our second step is to recognize that the remaining four genres have three types of works. As explained in Part IX above, the copyright in some works is owned by a rights owner who has signed an affiliation agreement with Access. The copyright in other works is owned by a Canadian rights owner<sup>256</sup> who has not signed an affiliation agreement with Access. Finally, the copyright in some works is owned by a foreign rights owner; in this case, the work could be administered by a RRO<sup>257</sup> other than Access.

[401] Further to our conclusion on the issue of repertoire, we perform the repertoire calculations in two steps. First, we do the calculations for books, newspapers and periodicals. Then we do similar calculations for consumables.

[402] Table 9 of Exhibit Objectors-10 shows the works copied for the three genres (books, newspapers, and periodicals) divided into four types: affiliates, RROs, non-affiliates, and type unknown.

[403] Table 1 (All Board's tables are found in Appendix A) reproduces the exposure counts from Table 9 of Exhibit Objectors-10.

[404] We recognize that these exposure counts are based on two variables in the dataset filed by Access: `ac_pub_affiliate` and `ac_rro_bilateral`. According to Access' Codebook,<sup>258</sup> the variable `ac_pub_affiliate` was binary (having a value of 1 or 0), and was an "[i]ndicator that the publisher has signed an affiliation agreement with Access Copyright."<sup>259</sup> The variable `ac_rro_bilateral` was also binary, and was an "[i]ndicator that the publication is from a country with which Access Copyright has a bilateral agreement."<sup>260</sup> Where both fields had a value of 0, this was interpreted as a situation where the publisher was not an affiliate of Access, nor was the publication from a

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<sup>255</sup> Exhibit AC-2 at para 45.

<sup>256</sup> This excludes persons resident in Quebec.

<sup>257</sup> In this case, this includes COPIBEC.

<sup>258</sup> Exhibit Objectors-10 at p 176, Appendix F, "Access Copyright Photocopy Volume Study Data Codebook" (November 23, 2006).

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

country with which Access had a bilateral agreement (indicated as “Neither Nor”). Where the values were blank (as opposed to having a value of 1 or 0), this was interpreted as “Unknown.”

[405] In a filing responding to the Board’s technical questions, Access explained some problems with these variables.<sup>261</sup> In particular, Access claimed that using these variables to measure the volume of copying of works owned by its affiliates or authorized by bilateral agreements with RROs greatly underestimates the volume of such copying. We reject this claim for three reasons. First, Access has provided no evidence of the degree of underestimation. Second, Access has had many years to correct the underestimation but has chosen not to do so. Third, to the extent that the underestimation is related to works that were not in Access’ repertoire in 2005-2006 when the copies were made but now are, we do not want to make that correction.

[406] These exposure counts are already scaled using the Objectors’ scaling factor. To be able to compare these exposure counts to those reported by Access, we need to descale them. Table 2 shows these exposures descaled (i.e., dividing by the Objectors’ scaling factor of 228.76)

[407] Next we delete the works of unknown repertoire status and insert them pro-rata into the other three types. This requires accepting the assumption that a work for which Access does not know the repertoire status is just as likely to be in-repertoire as a work with a known repertoire status. Table 3 shows raw exposures with unknown exposures incorporated into the other three types.

[408] Next, we determine the RRO adjustment by genre. As discussed in Part IX.C, we assume, as do the Objectors, that the proportion of copies that will not be in an RRO’s repertoire is the same as it is for Access. In other words, if 80 per cent of exposures from Canadian works measured in the Volume Study have copyright owners that are affiliated with Access, we assume that the RRO also has 80 per cent and scale the exposures accordingly. The adjustments in Table 4 come from Exhibit Objectors-10.<sup>262</sup>

[409] We now sum the number of potential compensable copies from works of affiliates with the potential compensable exposures of RRO, as calculated in Table 4. This provides us with the amount of potentially compensable exposures, as shown in Table 5.

[410] We now apply the same process to consumables. In its response to the Board’s technical questions, Access filed a repertoire analysis of consumables that partitioned them into the four categories listed in Table 3.<sup>263</sup> Table 6 shows the sum of the weighted exposures provided by Access for each category, divided by the scaling factor of 566.49. Furthermore, copies by

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<sup>261</sup> Exhibit AC-112 at pp 1–4 (answer to Question 1).

<sup>262</sup> Exhibit Objectors-10 at para 111.

<sup>263</sup> Exhibit AC-112B.

schools boards were subtracted (by dividing the amounts by 1.05) so that all subsequent calculations dealt with the volume of copying that only occurred in schools. As described in paragraph [395], copies by schools boards were subsequently added back.

[411] Distributing the Unknown exposures pro-rata leads to numbers shown in Table 7.

[412] We calculate the RRO adjustment as 91.12 per cent in the same manner as the Objectors calculated the RRO scaling factor for books, newspapers, and magazines. This provides an RRO volume of 61,069.

[413] Thus, the total potentially compensable exposures of consumables is 284,797, as shown in Table 8.

[414] The figures from which we did these calculations are those of the Objectors, which only included copying in schools. Multiplying by our scaling factor of 540.28 gives the number of exposures of in-repertoire, published works in schools. We therefore multiply by 1.05 to account for copies made in school boards. These numbers are shown in Table 9.

#### **D. SECTION 29.4**

[415] As discussed in Part XIV, above, we conclude that subsection 29.4(1)—display for the purposes of education or training—is applicable to copying events that were indicated as being for projection in class. This is so for both the first and second period of the Tariff.

[416] We also conclude that subsection 29.4(2)—reproduction of a work as required for a test or examination—is applicable to copying events that were indicated as being for a student test or exam, but only for the second period of the Tariff.

[417] The amounts so deducted, in terms of Objector-scaled exposures, are set-out in Tables 10 and 11.

#### **E. A STATISTICAL APPROACH TO FAIR DEALING**

##### **i. Introduction**

[418] As explained in Part XIII.J, above, we are well aware that a fair-dealing analysis is usually done copied-work by copied-work, using the first-step purpose and the six factors enumerated in *CCH*.<sup>264</sup> In the present matter, however, this is not possible. The logging sticker did not collect nearly enough information on each copying instance to do this evaluation. Furthermore, doing a

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<sup>264</sup> *CCH*, *supra* note 10.

fair-dealing analysis according to each logging sticker would require, in effect, more than 7,000 separate fair-dealing analyses.

[419] Therefore, unlike in *Governments*, we do not have the benefit of event-by-event data. The information we have is at the aggregate level. We rely on the law of large numbers and approximate the amount of fair dealing in the following manner:

[420] First, we determine the number of copies that pass the first step in a fair-dealing analysis, being done for a purpose found in sections 29–29.1 of the *Act*. As discussed above in Part XIII.C, and as will be seen in the calculations at Part XVI.E.5, the vast majority of copies pass the first-step purpose test. The only ones that do not pass this test are the copies made exclusively for the purpose of administration or entertainment. Furthermore, any copies that had already been captured by s. 29.4 are deemed ineligible for fair dealing, to prevent possibly double-counting the same copies.

[421] For conceptual simplicity, and since our fair-dealing analysis proceeds in terms of percentages, we ignore the first step for now and set up our analysis as if all copies proceed to the second step.

[422] Second, as explained in *CCH*, the following factors help determine whether a dealing is fair: goal of the dealing (second-stage purpose), amount of the dealing, character of the dealing, nature of the work, alternatives to the dealing, and effect of the dealing. We determine, for each fairness factor (independently), the percentage of exposures for which that factor tends towards fairness, unfairness, or neither direction. The sum of these three percentages for any given factor equals 100 per cent. We then calculate the percentage of exposures for which the factors tended more towards fairness than towards unfairness.

[423] We apply this percentage to the number of copies that are made for a purpose permitted under the fair-dealing exceptions in ss. 29–29.1 to approximate the number of copies that are made for a permitted purpose and that are also fair.

[424] A detailed description of this approach can be found in Appendix B.

## **ii. Fair dealing – Books**

[425] With respect to goal, we find that 100 per cent of dealings for books tend to fairness. This is because there are two underlying goals—private study and education—that cover all the copying that takes place in the educational context.

[426] With respect to amount of the dealing factor, and as explained above in Part XIII.F above, we apply the following rule. If fewer than or equal to 5 per cent of the pages in the work were



copied, the dealing tends to fairness. If more than 10 per cent of the pages in the work were copied, the dealing tends to unfairness. The intermediate interval has a neutral tendency.

[427] The data relating to the amount copied were filed in Exhibit Objectors-10.<sup>265</sup> They demonstrated that about 75 per cent of the exposures tend to fairness, 12.3 per cent of the exposures have a neutral tendency, and 12.7 per cent of the exposures tend to unfairness.

[428] With respect to character of the dealing, the Objectors proposed the following: “We were instructed to consider the character of the dealing to be fair if the copies were made for the use only of ‘staff, teachers, librarians and/or students’.”<sup>266</sup> We agree with the Objectors that the person or group for whom the copy was made is an indication of the breadth of distribution and, as such, is relevant in assessing the character of the dealing. We disagree, however, with the conclusion of the Objectors with regards to the fairness of the dealing. Rather, we treat the character of the dealing as neutral if the copies were made for the use only of staff, teachers, librarians and/or students and as tending to unfair otherwise. In total, 97.7 per cent of the exposures were made for the use of staff, teachers, librarians, or students, and thus have a neutral tendency, while 2.3 per cent of the exposures were made for other persons and are therefore deemed to tend to unfairness.

[429] With respect to the nature of the work factor, we find that 100 per cent of the dealings (and therefore exposures) have a neutral tendency. All of the works are published, but this does not tend to make the dealings unfair.

[430] With respect to alternatives and as explained above in Part XIII.H, we find that 100 per cent of the dealings (and therefore exposures) tend to fairness.

[431] With respect to effect of the dealing on the market for the work, and as discussed in Part XIII.I, above, we find that 80 per cent of the exposures have a neutral effect and 20 per cent of the exposures tend to unfairness.

[432] Using the methodology described in Appendix B and the above percentages of exposures for which the factors tend towards fairness, unfairness, or having no tendency, we determine that about 97.2 per cent of the exposures of books done for a permitted purpose are fair.

### **iii. Fair dealing – Newspapers and periodicals**

[433] As with books, we consider 100 per cent of the goals of the dealings to tend to fairness, using the two goals private study and education.

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<sup>265</sup> Exhibit Objectors-10 at pp 69, 71(Tables 21 and 23).

<sup>266</sup> Exhibit Objectors-10 at para 177.

[434] Unlike for books, we do not use the data on amount copied for newspapers. The data filed by the Objectors suffered from a counting problem. Namely, it treated the whole newspaper as an entire work. Therefore, if an entire article of one page was copied out of a 100-page newspaper, the Objectors counted it as 1 per cent of the entire work.

[435] We asked the parties to recount the amount of the dealing, treating the article as constituting the work. Access considered that 100 per cent of the work was always copied.<sup>267</sup> The Objectors agreed with this statement.<sup>268</sup> As such, we treat 100 per cent of dealings with newspapers as tending to unfairness.

[436] The character of the dealing tends 98.1 per cent to neutrality and 1.9 per cent to unfairness, using the same calculation as for books in paragraph [428].

[437] The nature of the work tends to neutrality for 100 per cent of the dealings, as with books.

[438] Alternatives to the dealing tend 100 per cent to fairness; there was no evidence about alternatives to copying a newspaper article.

[439] Finally, there was no evidence about the effect of the dealing on the market for newspapers. We treat 100 per cent of these dealings as tending to neutrality.

[440] Calculating the sum of the product of percentages whose combinations are more fair than not,<sup>269</sup> we find that 98.1 per cent of the dealings with newspapers were fair.

[441] For periodicals, all the factors are the same as newspapers, with the exception of the character of the dealing, which is 98.5 per cent tending to neutrality and 1.5 per cent tending to unfairness. We therefore find that 98.5 per cent of the dealings with periodicals tend to fairness.

#### **iv. Fair Dealing – Consumables**

[442] For consumables, 100 per cent of the goal of the dealing tends to fairness. Once again, the goal can be subsumed under private study and education.

[443] The amount of the dealing is based on the same trichotomy as we used for books. Accordingly, 56.3 per cent of the amounts of the dealing tend to fairness; 12 per cent have neutral tendency; and 31.8 per cent of the amounts of the dealing tend to unfairness.

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<sup>267</sup> Exhibit AC-112A at p 9.

<sup>268</sup> Exhibit Objectors-48 at p 21.

<sup>269</sup> The calculation is relatively trivial here, since 5 of the 6 factors are set at 100 per cent.

[444] Using the same calculation as for books in paragraph [428], we find that character of the dealing is 97 per cent neutral tendency and 3 per cent tending to unfairness.

[445] The nature of the work is 100 per cent unfair tendency.

[446] We found earlier in this decision that there are reasonable alternatives to copying consumables and therefore, the alternatives to the dealing factor tends to make the dealing unfair for 100 per cent of consumable works.

[447] Finally, we set the effect of the dealing on the work factor to 70 per cent neutral tendency and 30 per cent tending to unfairness. This is because there appears to have been some effect on the large publishers as well. McGraw-Hill Ryerson ceased publishing consumables altogether.<sup>270</sup> Therefore, we approximate the effect of the dealings to be slightly greater than that on books.

[448] From this, we find that none of the dealings with consumables were fair.

#### **v. Deducting exposures for fair dealing**

[449] In order for a dealing to benefit from the exceptions in sections 29–29.1 of the *Act*, the dealing must have been for an allowable purpose, and the dealing must be fair.<sup>271</sup> While we have approximated the percentage of exposures that are fair, we must still establish the number of exposures that were made for an allowable purpose.

[450] We note that for the purposes of calculation where a copying event benefited from a statutory exception (such as that found in section 29.4), that event was considered as not qualifying under sections 29–29.1 to prevent double-counting these events.

[451] Exhibit Objectors-10, Table 18, provides us with the number of copies that were made that had the identified purpose indicated. This is reproduced as Table 12.

[452] Except for the row “No Purpose Indicated,” these numbers are not exclusive. A single copying event from the Volume Study could have had zero, one, or more purposes indicated on the related logging sticker.

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<sup>270</sup> Exhibit AC-5 at para 23.

<sup>271</sup> *Copyright Act*, *supra* note 1, s. 29.1 (for the purpose of criticism or review, additional information must be mentioned in order for the dealing to benefit from the exception).

[453] According to the Objectors, all purposes listed in Table 12 are a purpose for which fair dealing is permitted, except for “Entertainment” for both tariff periods, and “Administration” in the first tariff period (2010-2012).<sup>272</sup>

[454] The Objectors set out the number of copying events, and the related copying volume, that had one or more fair-dealing purposes indicated.<sup>273</sup> However, we do not agree with the Objector’s submissions with what purposes qualify for fair dealing in this calculation. In particular, we do not consider “Administration” to be a permitted fair-dealing purpose in this matter (the Objectors do for the 2013-2015 period); we do not consider “Student test or exam” to be a permitted fair-dealing purpose for the 2010-2012 period and already account for it in our s. 29.4 calculation above, for the 2013-2015 period (thus exclude it as possible fair dealing); and we already account for “Projection in class” in our s. 29.4 calculation above for both periods.

[455] Since the data we received does not explicitly provide the copying volume associated with these purposes, we estimate it by calculating the average exposures per event for each purpose in Tables 13 and 14 and use that average to approximate the number of Objector-scale exposures made for purposes we have determined qualify for fair dealing (Criticism or Review, Future reference, Private study, Research, and Student instruction).

[456] Multiplying the number of purposes by the average exposures per purpose, we get the number of exposures that we have determined to have a fair-dealing purpose. These numbers are set-out in Tables 15 and 16.

[457] In Parts XVI.E.2 to 4, above, we determined the percentage of exposures that are fair. For each genre, we multiply this percentage by the number of exposures that had an allowable fair-dealing purpose from Tables 15 and 16, thereby determining the number of exposures that both had an allowable fair-dealing purpose, and were actually fair. The results are set-out in Tables 17 and 18.

## **F. REPRODUCTIONS THAT ARE NOT A SUBSTANTIAL PART OF THE ORIGINAL**

[458] To calculate the gross insubstantial copying, we use Table 30 of Exhibit Objectors-10 for books and consumables. This applies the rule that a copy is not substantial if it consists of one or two pages.

[459] For newspapers and periodicals, however, we assume that there is no non-substantial copying, because it is assumed that the entire work is copied. Thus, non-substantial copying for newspapers and periodicals is zero. Results are shown in Table 19.

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<sup>272</sup> Exhibit Objectors-10 at paras 146–147.

<sup>273</sup> Exhibit Objectors-10 at pp 61–62 (table 19).

[460] However, certain non-substantial copying is already captured by s. 29.4. In order to avoid double-counting these, we estimate the number of exposures that are both non-substantial and were captured by s. 29.4.

[461] We assume that the proportion of copies that were non-substantial is the same for those copies captured by s. 29.4, as it is for the entire sample. Therefore, we multiply the amount deducted under section 29.4 (see Tables 10 and 11) by the proportion of published, in-repertoire works that correspond to non-substantial copying events (see Table 19). The resulting number of exposures is shown in Tables 20 and 21.

[462] Similarly, certain non-substantial copying is already captured by fair dealing. Having been defined as one or two pages from a book or consumable, we assume that exposures captured by this rule are all from copying events that had their amount-of-the-dealing factor tend towards fairness.

[463] Modifying the calculations carried out above in Part E so that this factor tends towards fairness for 100 per cent of the copies, the percentage of copies that would be fair dealing is 100 per cent for books, and 49.5 per cent for consumables. The resulting number of exposures is shown in Tables 22 and 23.

[464] In order to calculate the net non-substantial exposures, we start with the gross number of exposures (Table 19), subtract exposures from non-substantial reproductions that have already been captured by s. 29.4 (Tables 20 and 21), and subtract exposures from non-substantial reproduction that have already been captured by fair dealing (Tables 22 and 23). Results are in Tables 24 and 25.

## **G. FULL-TIME EQUIVALENT STUDENTS**

[465] Access submitted the following FTE counts.<sup>274</sup> For 2005-2009, there were 3,859,715 FTEs. For 2010-2012, there were 3,748,427 FTEs. For 2013-2015, there were 3,732,367 FTEs. In the Circum report, the number of FTEs was calculated based on the 2012 FTE count and extrapolated to the tariff periods.<sup>275</sup> However, no explanation of the methodology for extrapolation was given.

[466] The Objectors posited the following FTE counts. For 2010-2012, there were 3,896,340 FTEs. For 2013-2015, there were 3,902,868 FTEs. These figures were calculated based on

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<sup>274</sup> Exhibit AC-67 at p 26.

<sup>275</sup> Exhibit AC-11 at pp 20–21.

enrolments for the years 2010-2011, 2011-2012, and 2012-2013, as well as Statistics Canada data on population growth by province.<sup>276</sup>

[467] Were we minded to insert new figures for the number of FTEs for 2010-2012 and 2013-2015, we would prefer the Objectors' figures, since they appear to have greater precision. However, since the number of copies made in a given year depends on the number of students enrolled in that particular year, the correct number of FTEs for the divisor in the formula is the number of FTEs that were enrolled in 2005-2006 when the copying measured in the volume Study was done, namely 3,859,715.

#### **H. PRICE PER PAGE**

[468] In *K-12 (2009)*, the Board determined the per-page price by taking the average per-page retail price, subtracted amounts not attributable to creative contribution, and added a selection premium. For books, an additional educational volume discount was applied to take into consideration pricing for K-12 Schools.

[469] The educational volume discount reflects the fact that educational institutions usually receive discounts on the suggested retail price. The creative contribution adjustment reflects the fact that the tariff provides a licence in relation to copyright, and is not intended to compensate for costs such as printing, distribution, marketing, or administration. Lastly, the selection premium reflects the value added of a photocopy arising from the mere selection made by the user.

[470] The resulting royalty-rate, per-page, was 9.2¢ for books, 1.26¢ for newspapers, and 0.95¢ for magazines.

[471] In this matter, the parties have proposed the per-page pricing shown at Table 26.

[472] For books, newspapers, and periodicals, the Objectors used the same starting point as in *K-12 (2009)*, adjusted for sector-specific inflation, and made the same adjustments as those made in that file (creative contribution and selection premium), but increased the volume discount.<sup>277</sup> For consumables, the Objectors accepted as a starting point the average retail price per page as calculated by Access, and applied the volume discount, creative contribution and selection premium as done for books. In subsequent submissions, the Objectors withdrew their increase to the volume discount.<sup>278</sup>

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<sup>276</sup> Exhibit Objectors-8 at pp 19, 20.

<sup>277</sup> Exhibit Objectors-8 at pp 22-28.

<sup>278</sup> Exhibit Objectors-36 at p 6.

[473] Access did almost the same calculations except that it adjusted the creative contribution calculation. There are four categories of costs: paper, print, and binding; invoicing; marketing; and administration. In *K-12 (2009)*, all four categories of costs were deducted from the average retail price per page, to obtain the value of creative contribution. Access proposed that only the first category of costs (paper, print, and binding) be deducted, because the remaining costs were also creative contribution.

[474] The decision as to whose prices to use comes down to a decision about how we interpret creative contribution.<sup>279</sup> In *K-12 (2009)*, the Board wrote:

The tariff we certify is remuneration for use of the work, but a book is more than just the work it contains. Inputs in the economic chain following the making of a work contribute to increasing the market value. These contributions can usually be attributed to economic agents other than the rightsholders, such as the transportation company that delivers the work on its medium to the recipient.<sup>280</sup>

[475] Each of the four categories of costs at issue (paper, print, and binding; invoicing; marketing; and administration) relates to an economic input for which the remuneration goes to someone other than the rights holder. Indeed, it is not clear that the publisher incurs all of these costs directly, or whether it pays these costs as a result of contracts with other firms. In either case, these costs cannot be described as creative contribution. Therefore, we conclude that all four costs should be deducted, as they were in *K-12 (2009)*, and adopt the same creative contribution rates for books, newspapers, and magazines as we used in that decision.<sup>281</sup>

[476] The Objectors submit that the creative contribution for consumables should be the same as for books.<sup>282</sup> They argue that this is appropriate since consumables are published by the same publishing companies that also publish textbooks.

[477] We note that “consumables” are actually works of any other genre that contain a statement to the effect that the works may not be reproduced. The vast majority of these are books. Therefore, it is appropriate to use the creative contribution adjustment of books for consumables.

[478] In *Governments*, the issue of the sector-specific inflation indexes versus overall inflation was implicitly raised by those Objectors, who used sector-specific inflation for some genres and overall inflation for others. In that decision, the Board chose to use overall inflation for all

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<sup>279</sup> See Transcripts Vol. 10 at p 2176; Exhibit Objectors-36 at p 7 (There was an initial disagreement about the educational discount, but it was resolved by the end of the hearing).

<sup>280</sup> *K-12 (2009)*, *supra* note 5 at para 158.

<sup>281</sup> *Ibid* at para 163.

<sup>282</sup> Exhibit Objectors-8 at para 96.

genres.<sup>283</sup> In the present matter, this issue is not live. In its economic reply report, Access stated: “We accept Nordicity’s position in this regard and have adjusted the page rates accordingly.”<sup>284</sup> We accept the parties’ common position and use the sector-specific inflation indexes.

[479] We therefore adopt the *K-12 (2009)* price as the base, with sector-specific inflation indexes. We use the same volume discount and creative contribution as in *K-12 (2009)*, and use the values from books for consumables as well. This provides us with the per-page prices shown in Tables 27 and 28.

## **I. SPOILAGE**

[480] In their oral testimony, Drs. Whitehead and Wilk introduced the possibility that some copies might be spoiled.<sup>285</sup> Drs. Whitehead and Wilk conducted a study of one photocopier at one school for one day and found that 8.9 per cent of photocopies were spoiled.<sup>286</sup>

[481] We disregard this evidence, for several reasons. First, it was introduced “late in the day.” Had this evidence been introduced as part of the main report of Drs. Whitehead and Wilk, Access would have had the opportunity to reply to this evidence as part of its reply case. Second, the evidence is thin. Examining a single photocopier and attempting to extrapolate this evidence across the country is not a sufficiently robust methodology.

[482] In the absence of good, timely evidence, we decline to make an adjustment for spoilage.

## **J. PER-FTE ROYALTY RATE AND TOTAL EXPECTED ROYALTIES**

[483] The Tables 29 and 30 show how we obtain the total compensable exposures.

[484] Table 29 and 30 show exposures using the Objector’s scaling factor of 228.76. However, as discussed in Part XVI.C, we have determined that the correct scaling factor is 540.28. Furthermore, we did not determine the total number of published, in-repertoire exposures in the same manner as the Objectors. We therefore compare the values provided by the Objectors to the values we determined in Part XVI.C, and compute the ratio of the two, as shown in Table 31.

[485] We scale the exposures listed in Tables 29 and 30 for each genre, using these ratios and obtain Tables 32 and 33.

[486] The Volume Study represented the copying that occurs when 3,859,715 FTEs are enrolled. We believe that the amount of copying that occurs is directly proportional, or very nearly so, to

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<sup>283</sup> *Governments*, *supra* note 47 at para 497.

<sup>284</sup> Exhibit AC-68 at para 31.

<sup>285</sup> Exhibit Objectors-22 at p 65.

<sup>286</sup> Transcripts Vol. 6 at p 1156.



the number of FTE. Therefore, we use this figure to determine the number of compensable exposures, per FTE. We then use the per-page value from Part XVI.H, to determine the per-FTE royalty-rate, for each genre, and in total (see Tables 34 and 35).

[487] From the calculations shown in Appendix A, the rates we obtain are \$2.46 and \$2.41 per FTE, for 2010-2012 and 2013-2015, respectively. These are the rates we certify. These rates are lower than the previously certified rate of \$4.81 established by the Board for copying in K-12 Schools for the years 2005-2009. This is so despite the inclusion of consumables in the Tariff, which were previously excluded.

[488] From our analysis, the single largest contributor to this decrease is the consideration of copies that were made for student instruction, assignments or class work as dealings that were done for an allowable purpose under sections 29–29.1 of the *Act*. Such copies were therefore included in the overall consideration of fair dealing. This is due to the decision of the Supreme Court in *Alberta*, in which copies made for student instruction, assignments, or class work qualify as being made for the purpose of research or private study. In contrast, in *K-12 (2009)*, these copies were not the subject of a fair-dealing analysis.

[489] A smaller, but still notable, decrease was due to the adjustment made in consideration of Access’ repertoire.

[490] Since the parties largely agreed on which logging sticker purposes indicate an allowable fair-dealing purpose, it was not necessary for us to consider the full scope of the new “education” purpose, beyond concluding that—in this matter—there was insufficient evidence to conclude that a logging sticker indicating “Administration” was made for the purpose of education.

[491] Access provided us with its most recent available data for the number of FTEs as being 3,734,383 for the year 2012. Assuming that the student population is relatively stable, we estimate the total annual royalties as approximately \$9.5 million for the years 2010-2012, and approximately \$9.3 million for the years 2013-2015.

## **XVII. TARIFF PROVISIONS**

[492] The Board certifies a single tariff for the whole period. It used as a basis the 2013 Proposed Tariff. Several changes have been made to this proposal. We address below the most salient changes that we have made to Access’ proposed tariff.

### **A. PROVISIONS RELATING TO MUSICAL WORKS**

[493] As confirmed by Access, many provisions of the 2013 Proposed Tariff relate to sheet music (definitions of “Choral Work,” “Grand Right Work,” “Musical Work,” “Orchestral or Band Work”; subsection 3(4) and paragraph 4(1)(c).

[494] Musical works can be included in books or take the form of stand-alone sheet music. Since the Tariff does not cover sheet music, all references to sheet music have been removed. The references to musical works have also been removed. Since the copying of a musical work included in a book is treated in the same manner as the copying of any other page of that book, this characterization is not relevant. This is consistent with other Access certified tariffs.

## **B. DIGITAL COPIES**

[495] The Volume Study did not capture the making of any digital copies. Furthermore, Access is not seeking any royalties for the making of digital copies. Therefore, we exclude the making of digital copies from this Tariff.

[496] As such, the *in fine* portion of the definition of “Copy” in section 2 of the 2013 Proposed Tariff has been amended to exclude digital copies. In addition, the definition of “Secure Authentication” and section 5 have been removed.

## **C. COPYING AT MINISTRIES**

[497] As discussed in the decision, copying at ministries is covered by the *Governments* tariff.

[498] Therefore, subsection 3(2) and the reference to “Ministries” in subsection 3(3) have been removed.

## **D. CONSUMABLES**

[499] Paragraph 4(1)(d) of the 2013 Proposed Tariff prohibits the copying of “Published Works that contain a notice prohibiting Copying under a licence from a collective society.” This definition pertains to consumables. Since consumables have been considered in the volume of compensable copies and may be copied under the Tariff, this limitation, as well as others pertaining to consumables, has been removed.

## **E. REPRODUCIBLES**

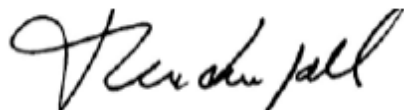
[500] Subparagraph 3(3)(a)(vii) of the 2013 Proposed Tariff pertains to the reproduction of reproduces. For the same reasons that digital copies are excluded, we exclude reproduces from the Tariff. Subparagraph 3(3)(a)(vii) has therefore been removed.

## **F. NOTIFICATION OF TERMS OF COPYING**

[501] The wording of section 7 of the 2013 Proposed Tariff has been modified to read as the equivalent provision in the *Governments* tariff. An appendix (Appendix A) is provided.

### **G. TRANSITIONAL PROVISIONS**

[502] Given that the Tariff is certified after its effective period, we include transitional provisions. For the reasons set out in previous decisions,<sup>287</sup> we also set interest multiplying factors applicable to payments due or overpaid as a result of this Tariff. These amounts will be payable in two equal installments on October 31, 2016 and April 30, 2017. In spite of these two distinct dates of payments, for ease of administration, we only establish one set of interest multiplying factors, calculated as of October 31, 2016.



Gilles McDougall  
Secretary General

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<sup>287</sup> See for instance *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board decision.

**APPENDIX A**

**Table 1: Objector Exposures by Genre and Repertoire Status**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>
Direct Affiliate	36,153,104	5,419,340	1,958,149
RRO	10,423,756	142,950	3,351,162
Neither	12,523,100	1,499,449	968,235
Unknown	47,079,144	83,627	667,372
<b>Total</b>	<b>106,179,104</b>	<b>7,145,366</b>	<b>6,944,918</b>

**Table 2: Raw Exposures by Genre and Repertoire Status**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>
Direct Affiliate	158,039	23,690	8,560
RRO	45,566	625	14,649
Neither	54,743	6,555	4,233
Unknown	205,799	366	2,917
<b>Total</b>	<b>464,146</b>	<b>31,235</b>	<b>30,359</b>

**Table 3: Raw Exposures by Genre and Repertoire Status**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>
Direct Affiliate	283,931	23,971	9,470
RRO	81,864	632	16,206
Neither	98,351	6,632	4,683
<b>Total</b>	<b>464,146</b>	<b>31,235</b>	<b>30,359</b>

**Table 4: RRO Adjustment for Books, Newspapers, and Periodicals**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>
RRO Adjustment	74.27%	78.33%	66.91%
RRO Exposures	60,802	495	10,844

**Table 5: Potentially Compensable Exposures for Books, Newspapers, and Periodicals**

<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>
344,733	24,466	20,314

**Table 6: Repertoire Status of Consumables**

	<b>Raw Exposures</b>
Direct Affiliate	134,043
RRO	40,153
Neither	13,058
Unknown	125,287
<b>Total</b>	<b>312,541</b>

**Table 7: Repertoire Status of Consumables with Unknown Treated Pro-Rata**

	<b>Raw Exposures</b>
Direct Affiliate	223,728
RRO	67,018
Neither	21,795
<b>Total</b>	<b>312,541</b>

**Table 8: Potentially Compensable Consumables**

	<b>Raw Exposures</b>
Direct Affiliate	223,728
RRO	61,069
<b>Total</b>	<b>284,797</b>

**Table 9: Exposures of published, in-repertoire works**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Exposures (schools)	186,252,374	13,218,271	10,975,275	153,870,017
Exposures (schools & school boards)	195,572,393	13,879,710	11,524,475	161,569,631

**Table 10: Section 29.4 Exposures (in Objector-scale exposures), 2010-2012**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
S. 29.4(1)	1,984,286	176,709	52,080	990,814
S. 29.4(2)	-	-	-	-
<b>Total</b>	<b>1,984,286</b>	<b>176,709</b>	<b>52,080</b>	<b>990,814</b>

**Table 11: Section 29.4 Exposures (in Objector-scale exposures), 2013-2015**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
S. 29.4(1)	1,966,030	182,679	53,251	984,063
S. 29.4(2)	2,150,345	166,794	79,877	2,324,424
<b>Total</b>	<b>4,116,374</b>	<b>349,473</b>	<b>133,128</b>	<b>3,308,486</b>

**Table 12: Number of copying events according to identified purpose**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Administration	55	19	22	29
Criticism or Review	56	43	16	11
Entertainment	39	28	4	40
Future reference	112	57	28	34
Student test or exam	105	21	6	137
Private study	82	14	16	30
Projection in class	96	23	4	58
Research	126	43	25	22
Student instruction	3,081	446	235	2,712
No Purpose Indicated	204	38	18	2

**Table 13: Exposures per event, according to Objectors, 2010-2012**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Objector fair-dealing purposes events (Objectors-10, Table 18 without Administration and Entertainment)	3,658	647	330	3,004
Objector-scale exposures with fair-dealing purpose (Objectors-1, Table 19)	75,609,563	4,970,894	4,296,577	51,317,318
Exposures per event (Objector-scale)	20,670	7,683	13,020	17,083

**Table 14: Exposures per event, according to Objectors, 2013-2015**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Objector fair-dealing purposes events, without Entertainment (Objectors-10, Table 18)	3,713	666	352	3,033
Objector-scale exposures with fair-dealing purpose (Objectors-1, Table 19)	76,040,291	5,289,745	4,686,114	51,459,690
Exposures per event (Objector-scale)	20,479	7,943	13,313	16,967

**Table 15: Exposures that have fair-dealing purpose, 2010-2012 (Objector-scale)**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Criticism or Review	1,157,500	330,369	208,319	187,913
Future reference	2,315,000	437,930	364,558	580,822
Private study	1,694,911	107,562	208,319	512,490
Research	2,604,375	330,369	325,498	375,826
Student instruction	63,683,178	3,426,613	3,059,684	46,329,083
Total	71,454,964	4,632,842	4,166,378	47,986,134

**Table 16: Exposures that have fair-dealing purpose, 2013-2015 (Objector-scale)**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Criticism or Review	1,146,851	341,530	213,005	186,633
Future reference	2,293,701	452,726	372,759	576,864
Private study	1,679,317	111,196	213,005	508,998
Research	2,580,414	341,530	332,821	373,265
Student instruction	63,097,263	3,542,382	3,128,514	46,013,412
Total	70,797,545	4,789,364	4,260,104	47,659,172

**Table 17: Fair-dealing exposures, 2010-2012 (Objector-scale)**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Criticism or Review	1,124,714	323,940	205,194	0
Future reference	2,249,427	429,409	359,090	0
Private study	1,646,902	105,469	205,194	0
Research	2,530,606	323,940	320,616	0
Student instruction	61,879,331	3,359,938	3,013,788	0
Total fair dealing	69,430,979	4,542,697	4,103,882	0
Published, in-repertoire works (Objectors-10, Table 17)	80,232,823	5,613,011	4,848,904	53,573,829

Fair dealing exposures as % of published, in-repertoire works	86.54%	80.93%	84.64%	0%
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**Table 18: Fair-dealing exposures, 2013-2015 (Objector-scale)**

	Books	Newspapers	Periodicals	Consumables
Criticism or Review	1,114,366	334,885	209,810	0
Future reference	2,228,731	443,917	367,168	0
Private study	1,631,750	109,032	209,810	0
Research	2,507,323	334,885	327,828	0
Student instruction	61,310,012	3,473,454	3,081,586	0
Total fair dealing	68,792,182	4,696,173	4,196,202	0
Published, in-repertoire works (Objectors-10, Table 17)	80,232,823	5,613,011	4,848,904	53,573,829
Fair dealing exposures as % of published, in-repertoire works	85.74%	83.67%	86.54%	0%

**Table 19: Gross non-substantial copying (in Objector-scale exposures)**

	Books	Newspapers	Periodicals	Consumables
Gross non-substantial copying	17,854,776	0	0	5,203,027
(as % of published, in-repertoire works)	22.25%	0.00%	0.00%	9.71%

**Table 20: Exposures from non-substantial copying already captured by s. 29.4, 2010-2012 (Objector-scale)**

	Books	Newspapers	Periodicals	Consumables
S. 29.4 Exposures (Table 10)	1,984,286	176,709	52,080	990,814
% of which are non-substantial	22.25%	0.00%	0.00%	9.71%
Non-substantial exposures already captured by s. 29.4	441,577	0	0	96,227

**Table 21: Exposures from non-substantial copying already captured by s. 29.4, 2013-2015 (Objector-scale)**

	Books	Newspapers	Periodicals	Consumables
S. 29.4 Exposures (Table 11)	4,116,374	349,473	133,128	3,308,486
% of which are non-substantial	22.25%	0.00%	0.00%	9.71%
Non-substantial exposures already captured by s. 29.4	916,046	0	0	321,316

**Table 22: Exposures from non-substantial copying already captured by fair dealing (in Objector-scale exposures), 2010-2012**

	Books	Newspapers	Periodicals	Consumables
Exposures that have fair-dealing purpose (Table 15)	71,454,964	4,632,842	4,166,378	47,986,134
% of which are non-substantial	22.25%	0.00%	0.00%	9.71%
% of which are fair	100%	-	-	-

Non-substantial exposures already captured by fair dealing	15,901,377	0	0	0
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**Table 23: Exposures from non-substantial copying already captured by fair dealing (in Objector-scale exposures), 2013-2015**

	Books	Newspapers	Periodicals	Consumables
Exposures that have fair-dealing purpose (Table 16)	70,797,545	4,789,364	4,260,104	47,659,172
% of which are non-substantial	22.25%	0.00%	0.00%	9.71%
% of which are fair	100%	-	-	-
Non-substantial exposures already captured by fair dealing	15,755,077	0	0	0

**Table 24: Non-substantial copying (in Objector-scale exposures), 2010-2012**

	Books	Newspapers	Periodicals	Consumables
Gross non-substantial copying (Table 19)	17,854,776	-	-	5,203,027
Already captured by s. 29.4 (Table 20)	-441,577	-	-	-96,227
Already captured by fair dealing (Table 22)	-15,901,377	-	-	-
Net non-substantial copying	1,511,822	0	0	5,106,800

**Table 25: Non-substantial copying (in Objector-scale exposures), 2013-2015**

	Books	Newspapers	Periodicals	Consumables
Gross non-substantial copying (Table 19)	17,854,776	-	-	5,203,027
Already captured by s. 29.4 (Table 21)	-916,046	-	-	-321,316
Already captured by fair dealing (Table 23)	-15,755,077	-	-	-
Net non-substantial copying	1,183,653	0	0	4,881,711

**Table 26: Pricing Proposals of the Parties (cents per page)**

	Period 1 Objectors	Period 2 Objectors	Both Periods Access
Books	9.94	10.59	19.66
Newspapers	1.55	1.74	3.52
Periodicals	1.05	1.06	3.12
Consumables	4.82	5.05	9.75

**Table 27: Price per page, 2010-2012 (cents)**

	Books	Newspapers	Magazine	Consumables
K-12 (2009) price	16.29	2.8	2.7	
Inflation factor	1.18	1.23	1.11	
CPI Adjusted Price	19.22	3.45	2.99	9.31
Minus Educational Discount (10.26%)	1.97	-	-	0.96
Discounted Price	17.25	3.45	2.99	8.35
Plus Selection Premium (30%)	5.18	1.04	0.90	2.51
Selected Price	22.43	4.49	3.89	10.86
Minus non creative contribution	11.57	2.94	2.84	5.60
Final Price per page	10.85	1.55	1.05	5.26



**Table 28: Price per page, 2013-2015(cents)**

	<b>Books</b>	<b>Newspapers</b>	<b>Magazine</b>	<b>Consumables</b>
K-12 (2009) price	16.29	2.8	2.7	
Inflation factor	1.26	1.38	1.12	
CPI Adjusted Price	20.48	3.87	3.02	9.76
Minus Educational Discount (10.26%)	2.10	-	-	1.00
Discounted Price	18.38	3.87	3.02	8.76
Plus Selection Premium (30%)	5.51	1.16	0.90	2.63
Selected Price	23.89	5.03	3.92	11.39
Minus non creative contribution	12.33	3.29	2.87	5.88
Final Price per page	11.56	1.74	1.06	5.51

**Table 29: Compensable exposures, 2010-2012 (Objector-scale)**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Published, in-repertoire works (Objectors-10, Table 17)	80,232,823	5,613,011	4,848,904	53,573,829
Minus s. 29.4 (Table 10)	1,984,286	176,709	52,080	990,814
Minus Fair Dealing (Table 17)	69,430,979	4,542,697	4,103,882	0
Minus Net Not substantial (Table 24)	1,511,822	0	0	5,106,800
Total compensable	7,305,736	893,605	692,942	47,476,215
As a percentage of published works	9.11%	15.92%	14.29%	88.62%

**Table 30: Compensable exposures, 2013-2015 (Objector-scale)**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Published, in-repertoire works (Objectors-10, Table 17)	80,232,823	5,613,011	4,848,904	53,573,829
Minus s. 29.4 (Table 11)	4,116,374	349,473	133,128	3,308,486
Minus Fair Dealing (Table 18)	68,792,182	4,696,173	4,196,202	0
Minus Net Not substantial (Table 25)	1,183,653	0	0	4,881,711
Total compensable	6,140,614	567,366	519,574	45,383,632
As a percentage of published works	7.65%	10.11%	10.72%	84.71%

**Table 31: Ratio of Copyright Board to Objectors exposures of published, in-repertoire works**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Published, in-repertoire exposures (Copyright Board) (Table 9)	195,572,393	13,879,710	11,524,475	161,569,631
Published, in-repertoire exposures (Objectors) (Objectors-10, Table 17)	80,232,823	5,613,011	4,848,904	53,573,829
Board-to-Objectors exposure ratio	2.44	2.47	2.38	3.02

**Table 32: Compensable Exposures, 2010-2012**

	<b>Books</b>	<b>Newspapers</b>	<b>Periodicals</b>	<b>Consumables</b>
Published, in-repertoire works	195,572,393	13,879,710	11,524,475	161,569,631
Minus s. 29.4	-4,836,818	-436,961	-123,779	-2,988,127

Minus Fair Dealing	-169,242,241	-11,233,065	-9,753,768	0
Minus Net Not substantial	-3,685,157	-	-	-15,401,248
Total compensable	17,808,177	2,209,685	1,646,928	143,180,255

**Table 33: Compensable Exposures, 2013-2015**

	Books	Newspapers	Periodicals	Consumables
Published, in-repertoire works	195,572,393	13,879,710	11,524,475	161,569,631
Minus s. 29.4	-10,033,914	-864,167	-316,408	-9,977,837
Minus Fair Dealing	-167,685,133	-11,612,575	-9,973,187	0
Minus Net Not substantial	-2,885,226	-	-	-14,722,416
Total compensable	14,968,120	1,402,968	1,234,880	136,869,377

**Table 34: Per-FTE Price Calculation, 2010-2012**

	Books	Newspapers	Periodicals	Consumables	Total
Total Compensable Exposures	17,808,177	2,209,685	1,646,928	143,180,255	
Final price per page (cents)	10.85	1.55	1.05	5.26	
Royalties	\$1,932,846	\$34,314	\$17,227	\$7,526,752	\$9,511,139
TOTAL FTE					3,859,715
Final rate per FTE					\$2.46

**Table 35: Per-FTE Price Calculation, 2013-2015**

	Books	Newspapers	Periodicals	Consumables	Total
Total Compensable Exposures	14,968,120	1,402,968	1,234,880	136,869,377	
Final price per page (cents)	11.56	1.74	1.06	5.51	
Royalties	\$1,730,607	\$24,419	\$13,033	\$7,542,770	\$9,310,830
Total FTEs					3,859,715
Final rate per FTE					\$2.41

## APPENDIX B

[1] Each of the six factors can tend towards fairness, be neutral or tend towards unfairness. In each of these cases, we assign a value of 1, 0 or -1, respectively.

[2] For books, as set in the decision, the percentage of exposures that has each of the factors tend towards fairness, be neutral or tend towards unfairness, are as follows:

**Table 1: Percent of exposures for each factor – Books**  
**Tableau 1: Pourcentage des copies selon le facteur – Livres**

	Fair / Équitable (1)	Neutral / Neutre (0)	Unfair / Inéquitable (-1)
Goal / But	100	0	0
Amount / Ampleur	75	12.3	12.7
Character / Nature de l'utilisation	0	97.7	2.3
Nature / Nature de l'œuvre	0	100	0
Alternative / Solutions de rechange	100	0	0

Effect / Effet	0	80	20
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[3] The greatest theoretical value that a given exposure could have, 6, would occur where all six factors tended towards fairness. The smallest theoretical value, -6, would occur where all six factors tended towards unfairness. Intermediate values will arise where not all factors tend in the same direction.

[4] For example, for books, an exposure whose goal tended to fairness (+1), where the amount, character and nature of the dealing had no tendency (0), where the alternative to the dealing tended to fairness (+1), and where the effect of the dealing tended toward unfairness (-1), would have a total sum of 1. This particular permutation of factors is reflective of approximately 2.4 per cent of exposures. Other permutations will also have a total sum of 1. For books, 12.9 per cent of exposures have a permutation with a total sum of 1.

[5] There are  $3^6$  or 729 such permutations. For each of the possible sums, we have calculated the following percentage of exposures to have a particular permutation of fair-dealing characteristics:

**Table 2: Percent of exposures for each sum – Books**  
**Tableau 2: Pourcentage des copies associé à chaque valeur – Livres**

Sum of the assigned values / Valeur totale	Exposures / Copies (%)
6	0
5	0
4	0
3	58.6
2	25.7
1	12.9
0	2.8
-1	0.1
-2	0
-3	0
-4	0
-5	0
-6	0
Percentage of exposures where sum equals or is greater than 1 / Pourcentage des copies dont la valeur est égale ou supérieure à 1	97.2

[6] When the sum of the assigned values equal or exceed 1, we interpret this as a case where, on the whole, the dealing tends more to fairness than it does to unfairness. By summing the probabilities of all combinations whose sum of values is 1 or greater, we determine the probability that the copying was fair. We interpret this as a proportion of copied pages that were fair. For books, we thus determine that 97.2 per cent of all exposures are fair.

[7] The corresponding tables for the other three genres, as set in the decision, are as follows:

**Table 3: Percent of exposures for each factor – Newspapers (%)**  
**Tableau 3: Pourcentage des copies selon le facteur – Journaux (%)**

	Fair / Équitable (1)	Neutral / Neutre (0)	Unfair / Inéquitable (-1)
Goal / But	100	0	0
Amount / Ampleur	0	0	100
Character / Nature de l'utilisation	0	98.1	1.9
Nature / Nature de l'œuvre	0	100	0
Alternative / Solutions de rechange	100	0	0
Effect / Effet	0	100	0

**Table 4: Percent of exposures for each sum – Newspapers**  
**Tableau 4: Pourcentage des copies associé à chaque valeur – Journaux**

Sum of the assigned values / Valeur totale	Exposures / Copies (%)
6	0
5	0
4	0
3	0
2	0
1	98.1
0	1.9
-1	0
-2	0
-3	0
-4	0
-5	0
-6	0
Percentage of exposures where sum equals or is greater than 1 / Pourcentage des copies dont la valeur est égale ou supérieure à 1	98.1

**Table 5: Percent of exposures for each factor – Periodicals (%)**  
**Tableau 5: Pourcentage des copies selon le facteur – Périodiques (%)**

	Fair / Équitable (1)	Neutral / Neutre (0)	Unfair / Inéquitable (-1)
Goal / But	100	0	0
Amount / Ampleur	0	0	100
Character / Nature de l'utilisation	0	98.5	1.5
Nature / Nature de l'œuvre	0	100	0
Alternative / Solutions de rechange	100	0	0
Effect / Effet	0	100	0

**Table 6: Percent of exposures for each sum – Periodicals**  
**Tableau 6: Pourcentage des copies associé à chaque valeur – Périodiques**

Sum of the assigned values / Valeur totale	Exposures / Copies
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	(%)
6	0
5	0
4	0
3	0
2	0
1	98.5
0	1.5
-1	0
-2	0
-3	0
-4	0
-5	0
-6	0
Percentage of exposures where sum equals or is greater than 1 / Pourcentage des copies dont la valeur est égale ou supérieure à 1	98.5

**Table 7: Percent of exposures for each factor – Consumables (%)**  
**Tableau 7: Pourcentage des copies selon le facteur – Documents consommables (%)**

	Fair / Équitable (1)	Neutral / Neutre (0)	Unfair / Inéquitable (-1)
Goal / But	100	0	0
Amount / Ampleur	56.3	12	31.8
Character / Nature de l'utilisation	0	97	3
Nature / Nature de l'œuvre	0	0	100
Alternative / Solutions de rechange	0	0	100
Effect / Effet	0	70	30

**Table 8: Percent of exposures for each sum – Consumables**  
**Tableau 8: Pourcentage des copies associé à chaque valeur – Documents consommables**

Sum of the assigned values / Valeur totale	Exposures / Copies (%)
6	0
5	0
4	0
3	0
2	0
1	0
0	38.2
-1	25.6
-2	25.8
-3	10
-4	0.3
-5	0
-6	0
Percentage of exposures where sum equals or is greater than 1 / Pourcentage des copies dont la valeur est égale ou supérieure à 1	0

