



## **COPYRIGHT BOARD OF CANADA APPROVES NEW TARIFF INCREASE FOR THE REPROGRAPHIC REPRODUCTION OF PRINTED WORKS BY EDUCATIONAL INSTITUTIONS**

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On June 26<sup>th</sup> 2009, the Copyright Board of Canada (the “Board”), a Canadian regulatory body empowered to establish the royalties to be paid for the use of copyrighted works entrusted to a collective society, approved a new tariff applicable in Canada towards the reproduction of literary, dramatic and artistic works included in books, newspapers and magazines for use in primary and secondary level educational institutions. This decision represents the first time that the Board was requested to approve such a tariff increase for these types of works since photocopies are widely known as being an important tool for Canadian educational institutions.

Party to this decision is Access Copyright, the Canadian Copyright Licensing Agency, a non-profit entity representing authors and publishers of copyright protected works published in books and other printed materials in Canada. Access Copyright signs agreements with copyright owners and administers the right, through the issuance of licenses, to authorise the reprography of their works.

On March 31 2004, Access Copyright filed a proposed tariff change with the Copyright Board of Canada, requesting that for the years 2005 to 2009 the current rate (\$2.45 per student per year) be increased after having been unable to reach a new agreement with respect to the royalties to be paid for photocopies of copyright protected works made by educational institutions.

To justify this tariff change, Access Copyright cited a marked increase in the volume of works being photocopied, as well as the fact that most documents being copied do not fall under the fair dealing exception to copyright infringement as recognized by the Canadian Copyright Act (the “Act”).

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The Canadian concept of fair dealing (not to be confused with the American fair use) recognises that reproduction of work for the purpose of research, private study, criticism, review or news reporting would not be considered as infringing on copyright. Access Copyright was of the opinion that most of the photocopies made by educational institutions did not fit within the scope of the fair dealing exception and therefore the tariff increase is justified to take into account this use.

Objecting to the proposed tariff are the Ministries of Education of the Canadian provinces and territories outside Quebec (The Objectors). They submitted several reasons to the Board as to why the tariff should not be increased. Firstly, the Objectors were of the opinion that the fair dealing exception is applicable to the photocopies being made in schools since research, private study, criticism and review are all cornerstones to any educational institution's curriculum. Also, the Objectors stated that pursuant to the 2004 important decision rendered by the Supreme Court of Canada, in the CCH case it was recognized that all exceptions to copyright infringement are to be considered as "user rights" and therefore must be given a liberal interpretation. Given this liberal interpretation, the Objectors believed that virtually all use of copyright protected works should constitute fair dealing by educational institutions.

Lastly, the Objectors referred to another exception to copyright infringement under the Act, where reproduction of a work for examination or for display purposes by an educational institution is not considered copyright infringement, provided that the work in question is not commercially available in a medium that is appropriate for the purpose referred to.

In order to evaluate the issues at hand, the Board reiterated the general principals surrounding copyright and copyright infringement. The board confirmed that exceptions to the Act are considered user rights that must be given a liberal interpretation in order to maintain a balance between the rights of copyright holders and the interests of users.

The Board also mentioned that the fair dealing exception only applies to the purposes specifically provided for in the Act, that of private study, research, criticism, review and news reporting. Other dealings would not be covered by the exception, even if they could rationally be considered as "fair".

On the topic of dealings, an allowable dealing does not make it a "fair dealing" as fairness is assessed by several factors such as the purpose, the character and the amount of the dealing, any alternatives to the dealing, the nature of the work and the effect of the dealing on the work.

More specifically however, the legal issues that were raised by the Board were the following:

- 1) To what extent can schools benefit from the fair dealing exception that exists under Canadian Copyright Law?
- 2) Does the exception applicable to educational institutions concerning non-commercially available works apply to works in Access Copyright's repertoire?
- 3) Are works of non-affiliated rights holders, who have cashed a royalty cheque, part of Access Copyright's repertoire?

Concerning the first question, the Board took note of a study prepared by the parties that measured the volume of photocopying made each year by financial institutions. For example, for the 2005-2006 period, it was determined that 10.3 billion pages were photocopied, 250 million pages of those were subject to remuneration as per the tariff.

The Board proceeded to analyze all the criteria for fair dealing and acknowledged that many of the photocopies did in fact benefit from the exception given the context of their use; the Board then separated the documents into 4 categories, with only the fourth one being subjected to a tariff, that where a copy is made by a teacher with instructions to read the material.

For the second question concerning the exception towards educational institutions, the Board was of the opinion that a work is "commercially available" if a licence is available "within a reasonable time and for a reasonable price and may be located with reasonable effort". Therefore the exception covering reproduction of works for instruction and examination in an educational institution would not apply to works available under license by Access Copyright since those works would be "commercially available".

Lastly, on the question of royalties paid to non-members of Access Copyright and the influence that would have on a new tariff, the Board concluded that naturally, Access Copyright would only be able to collect royalties for works found in its repertoire. However, a "collective society" such as Access Copyright is authorized to act by appointment as one's agent and this agency relationship does not need to be explicit. Therefore, ratification of the agreement between parties can be implied by an act such as cashing in a cheque issued to them by the collective society. The Board concluded that Non-member rights holders, who cash the cheque they received for royalties by Access Copyright, implicitly grant them the power to act on their behalf and therefore copies of such works should be calculated in the remuneration.

To conclude, in light of the abovementioned reasons, the Board approved and established the new rate at \$5.16 per Full-Time Equivalent student, per year. Given

that the estimated number of students was determined to be about 4million for the 2005-2006 period, the royalties to be paid would be in the number of 20million. However, the Board acknowledged the financial burden that this new tariff would create on the Canadian education system and applied a 10 per cent discount for the first four years, at a rate of \$4.64 per student; the rate returning to 5,16\$ for 2009 onward.

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