

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date of Reasons 1996-09-13

Date of Decision 1996-08-21

Citation FILE: 70.2-1996-1

Regime *Copyright Act*, Sections 66.51 and 70.2
Applications, pursuant to subsection 70.2(1) of the *Copyright Act*, to fix the royalties for a licence and their related terms and conditions.

Members Michel Héту, Q.C.
Ms. Adrian Burns
Mr. Andrew E. Fenus

**Association of Universities and colleges of Canada (AUCC) and Wilfrid Laurier University
v. Canadian copyright licensing agency (CANCOPY)**

CANCOPY v. AUCC and Wilfrid Laurier University

Reasons for decision

I. REASONS FOR DECISION

In March 1994, the Association of Universities and Colleges of Canada (AUCC) and the Canadian Copyright Licensing Agency (CANCOPY) reached an agreement on a "Model Licence" for Canadian colleges and universities outside of Quebec. Subsequently, some 55 institutions signed licence agreements with CANCOPY on terms that were overall similar to those contained in the Model Licence.

All of these agreements expired on August 31, 1996. Negotiations between AUCC and CANCOPY have yet to produce an agreement. CANCOPY was willing to accept a model licence on terms essentially similar to those in force except for the so-called Part B rate.¹ Until August 31, 1996, that rate was 3.5¢ per page. CANCOPY was willing to accept a rate of 5¢.

¹ The Part B rate is the rate paid for copies that are included in coursepacks sold by universities to students for use in courses of instruction offered by the university.

AUCC insisted that the rate remain at 3.5¢, with an increase to reflect inflation since the first Model Licence had been finalized.

On August 13, 1996, pursuant to section 70.2 of the *Copyright Act*, AUCC and Wilfrid Laurier University (WLU) asked the Board to set the terms and conditions for licences authorizing the 55 institutions to continue the protected uses set out in the CANCOPY licences that were to expire at the end of that month. AUCC and WLU asked that the Board look into the "Part B rate" only, and requested that the rate be set at "3.5¢ per page plus an increase to reflect inflation and that the term of the licence be for a period to expire August 31, 1999." At the same time, pursuant to section 66.51 of the *Act*, AUCC and WLU applied for an interim licence based on the same terms, for the period ending August 31, 1997.

In its response dated August 15, 1996, CANCOPY states that if the Part B rate is less than 5¢, it will not be operating a licensing scheme and therefore, will fall outside the Board's jurisdiction. Nevertheless, it consents to an interim licence that sets the Part B rate at 5¢, undertakes to hold the difference between 3.5¢ and 5¢ in escrow for the purposes of a refund if the final rate is lower than 5¢, and undertakes not to ask for more than the interim rate if the final rates are higher than in the interim tariff to which it consents. CANCOPY concluded with its own application under section 70.2, asking in essence that all the terms of the licence be reexamined.

On August 21, 1996, the Board issued the following decision:

The AUCC's and Wilfrid Laurier University's request for an interim decision is granted upon the following terms:

- The licences issued by CANCOPY to Wilfrid Laurier University and to University of Lethbridge, which expire on August 31, 1996 are extended on an interim basis;
- The interim licences will now expire on the earlier of the date of the Board's final decision in this matter or August 31, 1997;
- In all other respects, the terms of the interim licences shall be identical to those of the original licences.

The following are the reasons for this decision.

A. THE PARTIES IN PRESENCE

AUCC's application is made on behalf of all universities and colleges who had a CANCOPY licence expiring on August 31, 1996. However, AUCC is not a potential user under the terms of the licence. Therefore, it can act only as a representative of a user. This is not a universal licensing scheme; only those who are properly party to the proceedings are bound by the results. Therefore, only those users who are before the Board either in person or through a legally mandated representative are proper parties to the proceedings. Since AUCC has secured such a mandate only from the University of Lethbridge, only that institution and WLU will be directly affected by the outcome of these proceedings.

AUCC is properly before the Board as the representative of the University of Lethbridge.

B. REASONS FOR MAINTAINING THE *STATUS QUO*

Interim decisions are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision.²

The Board is of the view that maintaining the *status quo* will cause the least disruption to the parties and is therefore the most appropriate thing to do under the circumstances.

The Board is now seized of two applications. CANCOPY's is clearly wider and subsumes that of AUCC and WLU. All the terms of the licence are now under examination, unless and until the parties advise the Board, pursuant to subsection 70.3(1) of the *Act*, "that an agreement touching *the matters in issue* has been reached." [our emphasis]

The parties should also note that the interim rate may very well not be the final rate for the period between September 1, 1996 and the date of the Board's decision. The *Bell Canada* decision has made it clear that it is of the very essence of interim decisions that they be revisited. The Board is of the view that the amounts involved are small enough that universities will be in a position to pay any deficiency resulting from any retroactive increase, if there should be one. That should remain true whether or not at that time, the institutions are able to pass through the increase to former or current students.

C. THE JURISDICTIONAL ISSUE

In its response, CANCOPY states that if the Part B rate is less than 5¢, it will not be operating a licensing scheme and therefore, will fall outside the Board's jurisdiction. There is no need to dispose of this issue at this time. At the time of issuing the decision, CANCOPY was operating a licensing scheme within the meaning of the *Act*. The interim decision can always be adjusted later, if this proves to be no longer the case and if, as a result, the Board is no longer seized of a matter within its area of competence.

D. AUCC'S REQUEST FOR A POSTPONEMENT OF PROCEEDINGS

AUCC asked that the hearings into this matter be deferred to allow for negotiation. CANCOPY asks that the matter proceed expeditiously.

This matter will proceed as quickly as possible. A timely decision will avoid the disruption caused by the interim nature of the decision that has been just issued. If the result is an increase in price, CANCOPY will be able to compensate its members in a timely fashion. If the result is the *status quo*, then the universities and authors will know where they stand and will be able to draw appropriate conclusions as to their future course of conduct.

Therefore, the Board asks the parties to file proposals for a timetable as soon as possible, and no

² *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722, at 1752 (c-g), 1754(g-j).

later than Friday, September 27, 1996.

A handwritten signature in black ink that reads "Claude Majeau". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Claude Majeau
Secretary to the Board