

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Use of Broadcast Programs by Educational Institutions
Copyright Act, subsection 73(1)

Members Justice John H. Gomery
Mr. Stephen J. Callary
Mr. Andrew E. Fenus

**Statement of Royalties to be collected by ERCC from educational institutions in Canada,
for the reproduction and performance of works or other subject-matters communicated to
the public by telecommunication for the years 1999 to 2002**

Reasons for decision

EDUCATIONAL INSTITUTIONS AND COPYRIGHT

Educational institutions¹ have long insisted that they need ready (or even free) access to certain repertoires protected by copyright if they are to fulfill their mandate. Sections 29.4 to 30 of the *Copyright Act* (the *Act*) address some of those concerns.

Sections 29.6, 29.7 and 29.9 of the *Act*, which came into force on January 1, 1999, deal specifically with radio and television programs. Educational institutions no longer need the copyright owner's authorization to make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication or to perform in public that copy on the premises of the institution, so long as certain conditions are met. Any performance

¹ The *Act* defines an educational institution as

“(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,

(b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,

(c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or

(d) any other non-profit institution prescribed by regulation;”

Anything an institution can do also can be done by a person acting under its authority.

must occur for educational and training purposes, before an audience consisting primarily of students. An institution can copy news and news commentaries, keep the copy and perform it for one year for free; it also can copy other programs and keep the copy for assessment purposes for thirty days. Anything else requires that the institution pay the royalties and comply with the conditions set by the Board in a tariff.

Sections 71 to 76 of the *Act* set out who can file a tariff and how it gets certified. The regime is a universal, statutory licence scheme. Anyone owning rights in a program that is copied and performed, including those who have not joined a collective society,² is entitled to a share of the remuneration. The amount of royalties is set at a level sufficient to compensate all works that educational institutions copy and perform.

Educational institutions must comply with record-keeping requirements that are set by the Board in regulations made pursuant to subsection 29.9(2) of the *Act*. The *Educational Program, Work and Other Subject-matter Record-keeping Regulations* (SOR/2001-296) came into force in August 2001. Though their final wording is the Board's own, their contents reflect the results of a Board sponsored mediation process which was successful due in large part to the sustained efforts of the facilitator, Mr. C. Craig Parks, barrister and solicitor of Toronto, and the participants to these proceedings.

I. INTRODUCTION

These reasons deal with the royalties that educational institutions will pay for the taping of radio and television programs and performance of those tapes in the classroom for the years 1999 to 2002. The Educational Rights Collective of Canada (ERCC) filed a proposed statement of royalties, which was published in the *Canada Gazette*, with a notice outlining the right to object pursuant to subsection 72(1) of the *Act*.

ERCC was established in 1998. It currently is the only collective society that is entitled to ask for the payment of royalties pursuant to sections 29.6 and 29.7 of the *Act*. Its affiliates include Canadian producers, Canadian private and public broadcasters, major Hollywood studios, American educational broadcasters and producers, music rights societies, overseas broadcasters and producers as well as some of the major educational video distributors. Its repertoire comprises every type of work or subject-matter which educational institutions are likely to copy.

Several representatives from the education sector filed timely objections to the proposed tariff. They formed the Education Coalition, whose members are the Association of Canadian Community Colleges, the Association of Universities and Colleges of Canada, the Canadian Association of University Teachers, the Canadian School Boards Association, the Canadian Teachers' Federation and the Copyright Consortium of the Council of Ministers of Education, Canada.

The Education Coalition and ERCC were the only participants in the hearings and arguments,

² See subsection 76(1) of the *Act*.

which extended over three days between November 20 and December 12, 2001.

From the publication of the proposed tariff to the final hearing in this matter, more than three years elapsed. In large part, this delay was the result of the participants' wish to come to the broadest possible consensus on a large number of issues raised by the proposed tariff and the reporting regulations. Participants expended a considerable amount of time and effort in this exercise. As a result, the Board's task was made significantly easier.

II. ANALYSIS

ERCC and the Education Coalition agree that educational institutions should be allowed to choose between two rate formulas or tariffs. Under the comprehensive tariff, in exchange for paying a set amount per year per student full-time equivalent (or FTE), institutions will be allowed to copy as many programs as they wish and perform them as often as they wish in the year for which the royalty is being paid (and for some time thereafter). Under the transactional tariff, institutions will pay a set amount per minute of program copied; they will then be entitled to keep the copy and perform it as long as it lasts.

A. THE TRANSACTIONAL TARIFF

A market currently exists in Canada in which distributors sell prerecorded videocassettes to educational institutions, along with the right to perform the videocassette in the classroom. ERCC and the Education Coalition agree that the transactional rate for television programs should be a function of the price paid in that market. They also agree that the price was roughly \$2 per minute in 2000.³

ERCC rejects virtually all adjustments to this figure. By contrast, the Education Coalition would bring it down to somewhere between 51 and 63 cents per minute. According to the Education Coalition, the tariff should account only for the "copyright royalty portion" of the price of a prerecorded videocassette. The tariff should also discount all distributors' revenues from sources other than the sale of video programs, and not just duplication revenues. Finally, the rate should be discounted to reflect what the Education Coalition sees as significant costs associated with the taping of broadcast programs. Each of these issues is examined in turn.

i. Should the tariff focus on the copyright royalty portion of the price of a videocassette?

On average, educational distributors pass on approximately one-third of their gross revenue to

³ Testimony of Mr. Goldstein and Exhibit ERCC-10, page 3, Table 1 (Revised). This amount excludes duplication rights, which allow an institution to purchase a single tape to make multiple copies, allowing simultaneous use in more than one classroom. The broadcast taping regime only allows the making of a single copy of a program. Testifying for the Education Coalition, Mr. Gauthier would have reduced this amount even more on account of duplication rights. In the end, the Education Coalition appeared to agree with ERCC's figure as a starting point. Had the Board ruled on the matter, it would have preferred the evidence of Mr. Goldstein to that of Mr. Gauthier. Neither relied on a random sample; however, Mr. Goldstein's interviewees accounted for a much larger share of the market. Furthermore, Mr. Gauthier's information came from media centres, which naturally would tend to purchase more duplication rights than individual educational institutions.

copyright owners.⁴ The Education Coalition argues that the tariff is meant to compensate for this and nothing else. In the Board's view, the Education Coalition's approach is flawed.

First, setting the rate at the level proposed by the Education Coalition would defeat the objectives of the regime. Its main object is to provide access to programs that educational institutions find valuable and that are not readily accessible currently. It is meant to allow access to more programming, not less. The regime was not set up to allow institutions to lower their cost of accessing programming, nor to reduce the income of rights holders. As a result, and under the current conditions, the tariff must coexist with the existing distribution market, and not act as a substitute for it.

To the user, the ERCC tariff is elective, not compulsory. Ultimately, if educational institutions consider the certified ERCC tariff rates resulting from this decision are too high relative to the value they attribute to the use of the ERCC's repertoire, then they can simply choose not to pay the tariff and continue to purchase prerecorded programming from existing distributors.⁵ Even then, they own (at no cost) the option of using the transactional tariff to purchase those few programs that are available only when broadcasted and that they may find especially valuable.⁶ Under this scenario, the amount of programming available to institutions remains the same: programs will not cease being produced if no one takes up the ERCC licence.⁷

By contrast, those who own rights in programs have no say in the matter. The educational institution owns the option to purchase the ERCC licence or do without it; neither ERCC nor the rights owner can opt out of the regime. If the institution finds the rate very attractive, it can stop buying any tapes in the existing distribution market, or reduce its purchases to the point of threatening the viability of that market. Programs that can only be purchased from distributors would no longer be available. This result is not in accord with the objectives of the regime. Indeed, if the Education Coalition is correct in its assumption that what is available from distributors is better targeted and better suited to use in the classroom than programming generally, the result would be counterproductive.

A tariff that threatens existing markets also seems to run against the reasons which generally lead Parliament to ask the Board to play a role in a market. When the Board is asked to intervene, it generally is to address market failures, not to bring failure to properly functioning markets. The Board's role is not to protect the existing market, but to provide educational institutions with reasonable access to educational programming at a reasonable price. If the existing market

⁴ The Education Coalition initially estimated that amount at 30 per cent. During final argument, it agreed that ERCC's figure of 37.3 per cent probably was more accurate(see transcripts, page 548).

⁵ Australian universities did something similar: Exhibit Coalition-7, paragraph 9. By contrast, broadcasters cannot operate without a licence to perform musical works, which they can buy only from SOCAN; importers of blank recording media cannot avoid paying the private copying levy.

⁶ The Education Coalition itself cast doubt as to the importance of that part of the repertoire. It repeatedly implied that educational institutions can easily function without any broadcast taping. According to the Education Coalition's own witness, New Brunswick intends to continue to deal with distributors "whatever happens with ERCC".

⁷ The institution also is allowed, for free, to copy and perform that part of the repertoire for which it constantly needs immediate access: news and news commentary.

became inefficient or uncompetitive, a tariff set at a reasonable rate would (rightly) force the market into a new discipline or lead to its demise. In the same vein, if a competing distribution model ⁸ succeeded in bringing down the educational institutions' cost of purchasing programming, that would probably have a direct impact on the rate of the tariff.

ERCC does not just sell the right to copy and perform. It fulfils many of the functions of educational video distributors, including entering into affiliation agreements with rights holders; identifying educational institutions, contacting them and responding to their inquiries and invoicing; and distributing royalties to rights holders. ERCC will also perform additional tasks with respect to compliance, as it does not control the physical delivery of the medium. There are differences between ERCC's and the distributor's functions that should be taken into account; they are addressed below.

There is no reason to believe that simply because a "product" (whatever it may be) can be purchased directly from the copyright owner that its price would be lower than that available through an intermediary or distributor. Educational institutions pay the same price for books whether purchased through a distributor or directly from the publisher. Nothing indicates that producers that have chosen to distribute their own titles ⁹ somehow discount their products because they sell directly to the institutions.

The Board finds unhelpful the Education Coalition's attempt to compare the broadcast taping regime and the private copying regime.¹⁰ In the Board's view, the ERCC and Private Copying tariffs are not directly comparable in nature. Both involve compensation for copying, without authorization, intellectual property that is already physically available in the marketplace, yet each regime is different in several respects. The private copying levy is paid on practically all blank audio recording media, including those that are used for purposes other than copying music. The ERCC licence is paid on account of protected acts which educational institutions are free to perform or not. The levy targets the importer of the recording medium, not the person who makes the private copy. The ERCC licence is issued to the institution that allows the broadcast program to be copied and performed in the classroom. The focus in the private copying regime is the act of copying for one's private use: no licence is required for a private performance. In the ERCC tariff, the focus is on the eventual performance in the classroom of the taped copy: without that intended performance, there would be no need to make the copy in the first place.

ii. Other factors

The Board agrees with the Education Coalition that a number of factors would tend to lower the price of a taped copy in a functioning market.

⁸ Such as satellite delivery.

⁹ For instance, the CBC, Radio-Canada, National Geographic and the National FilmBoard.

¹⁰ *Private Copying 1999-2000, Copying for Private Use*, Decision of the Copyright Board of Canada, December 17, 1999 and *Private Copying 2001-2002, Copying for Private Use*, Decision of the Copyright Board of Canada, December 19, 2000.

First, all revenues from sources other than the sale of prerecorded programs should be discounted in calculating the tariff. Based on the little evidence available in these proceedings, the Board agrees with ERCC that once duplication is accounted for, the revenues from those activities are not very significant.

Second, while ERCC will provide some services akin to those offered by distributors, it will not provide as much added value as them. Making a taped copy requires that the institution carry out some of the work itself, and presents some features that make it less attractive to the institution. Taping of broadcast programs takes time and requires purchasing a blank videocassette. Pretaped programs go through a premarketing process of selection, cataloguing and organization by subject matter and age suitability.¹¹ They are commercial free.¹² They typically come with some form of pedagogical guide.¹³ Finally, many distributors offer replacement copies for lost or damaged tapes at a reduced price or even for free.

The Board considers that these factors should be taken into account in setting the rate. Blank videocassettes cost approximately two cents per minute. Only qualitative evidence was provided as to the relative valuation of taped versus prerecorded programs in other respects. Overall, the Board views these factors as somewhat significant, but no more. Taking all of the evidence into account, the Board believes that the transactional rate should be set at a 20 per cent discount relative to the current per-minute rate charged for prerecorded programs.

On average, elementary or secondary schools pay \$2 per minute for prerecorded programs, while post-secondary institutions pay \$2.55. The Board considers it appropriate to maintain this price difference in setting the ERCC transactional tariff. Therefore, applying the above-noted 20 per cent discount, the Board sets the ERCC transactional rates at \$1.60 per minute for elementary/secondary schools. For post-secondary schools, that approach would yield a rate of \$2.04. However, since ERCC is only asking for \$2, the rate is set at that amount.

ERCC and the Coalition agree that the rate for making a copy of a radio program should be 1/12th of the rate for making copies of television programs. Consequently the Board sets the rate at 13 cents per minute for elementary and secondary schools and 17 cents per minute for post-secondary schools.

B. THE COMPREHENSIVE TARIFF

The approaches put forward by ERCC and the Education Coalition in this respect differ markedly.

¹¹ The evaluation performed by the educational institution is not relevant in setting the tariff; it should remain essentially the same whether the material is taped from broadcast or purchased from a distributor.

¹² Some recording devices can automatically edit out commercials. However, we know nothing of how many of these devices educational institutions have purchased.

¹³ ERCC debated whether those guides have any value. The Board prefers the evidence of Mr. Breau, who stated that his service maintains a separate library system to accommodate the guides, and that the guides often contain significant information about suitable preparation and follow-up activities as well as likely questions students may ask with suggested answers.

ERCC proposed rates of \$2.40 per FTE in elementary and secondary schools and of \$4.80 per FTE in post-secondary institutions. ERCC saw no readily apparent proxy that can be used to help set the comprehensive rate. It suggested that the Board rely on foreign experience to establish a fair and reasonable comprehensive rate level, and especially on the situation in Australia, where a similar regime has been in place for more than a decade. In ERCC's view, the Australian model supports the establishment of a much higher rate for post-secondary institutions than for others.

The Education Coalition proposed to determine the comprehensive rate by dividing the copyright royalty portion of revenues from the sale of prerecorded videocassettes by the current number of FTEs. The key assumption underlying this approach is that the institutions' budgets for purchasing videocassettes are fixed at current levels and that institutions would transfer those funds to the payment of the comprehensive tariff.¹⁴ This would yield a rate of 37 cents per FTE. The Education Coalition sees no reasons why post-secondary institutions should pay more than other institutions. In its view, just as there should be a single transactional rate, there should also be a single comprehensive rate.

The Board finds neither proposal satisfactory.

Though rates set in foreign jurisdictions for similar uses may serve as a reality check, to establish a Canadian rate solely on the basis of one or more existing foreign rates raises too many difficulties. As the ERCC's evidence shows, tariff rates covering similar rights can vary significantly from country to country¹⁵, but not all regimes deal with the same uses. Institutions essentially can copy news and news commentary programs for free in Canada, but not in the United Kingdom, Australia or New Zealand. Canadian institutions must pay for performing programs in the classroom while institutions in the United Kingdom, Australia and New Zealand can do so for free. Markets are different. The amount of broadcast programs varies significantly. Exchange rate adjusted comparisons bear no real relation to the value of a right in each respective country and, consequently, are of dubious worth at best.

Assuming, as the Education Coalition does, that educational institutions' video programming budgets are fixed at current levels for the purpose of setting a comprehensive tariff rate, is equally unjustified. It amounts to arbitrarily setting how much schools might be willing or able to spend on making use of the ERCC's repertoire and to arrive at the corresponding comprehensive tariff rate. It assumes that institutions will substitute the taping of broadcast programs for the purchase of prerecorded videos, when the object of the regime is not to offer a substitute to the existing market but to complement it. It ignores the fact that institutions are often confronted with finding new money for new goods: when computers developed as an important addition to existing educational tools, institutions found funds with which to purchase some.

There are ways in which current consumption patterns can usefully serve in setting the tariff. This can be done by first calculating the average number of prerecorded videos currently

¹⁴ Exhibit Coalition-2, paragraphs 41 and 42.

¹⁵ As the evidence on tariff rates in Australia and the U.K. amply demonstrates.

purchased by schools. The next step is to determine the amount at which the comprehensive tariff would need to be set in order for a school, making that number of taped copies, to pay the same amount of royalties under the transactional and comprehensive tariffs (before any conversion charges that may apply for switching from the comprehensive to the transactional tariff). As two transactional rates have been set, two separate comprehensive rate calculations are required.

In the Board’s view, the comprehensive rate should be designed to appeal to institutions that use more video programs than average. Consequently, the Board considers that the figure obtained through the previous calculation should be “grossed-up” so as to increase the number of copies required before the comprehensive tariff becomes more economical than the transactional tariff. For the time being, and given the impossibility of finding out how this may influence the use of either tariff, the Board sets this “gross-up factor” at 50 per cent.

Table 1 summarizes the Board’s calculations leading to the rate for the comprehensive tariff. The calculation for elementary and secondary institutions can be summarized as follows. These institutions currently purchase, on average, 24 30-minute videos per 1000 FTE. Applying the gross-up factor to this figure increases the number of taped programs at which the institution pays the same amount of royalties under the comprehensive and transactional tariffs to 36. The cost of 36 tapes under a transactional rate of \$1.60 per minute is \$1,728. The equivalent comprehensive rate is determined by dividing this amount by 1000 (number of FTE). A similar calculation is made with respect to post-secondary institutions. These calculations yield a comprehensive rate of \$1.73 per elementary or secondary FTE and of \$1.89 per post-secondary FTE.

TABLE / TABLEAU 1
Comprehensive Rate Calculations / Calcul du taux forfaitaire

Item	Elementary and Secondary Schools / Écoles élémentaires et secondaires	Post-Secondary Schools / Écoles postsecondaires
1. Number of tapes purchased per 1000 FTE Nombre de bandes achetées par 1000 ETP	24	21
2. Breakeven gross-up factor Facteur de majoration du point d’équilibre	50%	50%
3. Number of tapes at which point expenditures are equal under the TR and CR rates [line 1 × (1 + line 2)] Nombre de bandes au point où les dépenses sont égales selon les taux TT et TF [ligne 1 × (1 + ligne 2)]	36	31.5
4. TR per minute TT par minute	\$1.60	\$2.00
5. Amount paid under the TR for the number of tapes indicated in line 3 [line 3 × 30 × line 4] Montant payé selon le TT pour le nombre de bandes indiqué à la ligne 3 [ligne 3 × 30 × ligne 4]	\$1,728	\$1,890
6. Implied CR rate per FTE [line 5 / 1000]	\$1.73	\$1.89

Taux TF dérivé par ETP [ligne 5 / 1000]		
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Notes:

TR = Transactional Rate

CR = Comprehensive Rate

Each tape is assumed to be 30 minutes in length on average.

Due to rounding, some numbers may not be exactly replicable.

Notes:

TT = taux transactionnel

TF = taux forfaitaire

Il est supposé qu'en moyenne chaque bande a une durée de 30 minutes.

Du fait de l'arrondissement, il se peut que certains calculs ne puissent être reproduits exactement.

C. THE COST OF CONVERTING FROM THE COMPREHENSIVE TARIFF TO THE TRANSACTIONAL TARIFF

Under ERCC's proposal, copies made under the transactional tariff may be used indefinitely. In contrast, the comprehensive tariff allows schools to make as many copies as they wish and use them at will only for as long as they opt for the comprehensive tariff. A school wishing to switch over from the comprehensive to the transactional tariff must either erase the tapes it made under the comprehensive tariff or pay a conversion charge on each tape it chooses to keep going forward. The school would then acquire the right to use the copy indefinitely, just as if it had been made under the transactional tariff. An institution that switches from the comprehensive to the transactional tariff would be allowed one year to cull its collection before having to pay the conversion charge on the remaining tapes. ERCC would set the conversion charge at half the price of a copy made under the transactional tariff.

The Education Coalition argues that there should be no conversion charge. Schools making tapes under the comprehensive tariff should be entitled to use them indefinitely, even if they convert to the transactional tariff. It also claimed that is beyond the power of ERCC to require the destruction of tapes that are legally made under the *Act*.

The Coalition's argument misses the point. The copy of a broadcast program is "legally made" only as long as the institution that made it complies with the requirements of the *Act*. One of these requirements is to pay the royalties that are set by the Board in a tariff. It is within the Board's power to set a tariff based on a rental model (as is the case with the comprehensive tariff), to set a tariff based on an outright purchase model (as is the case with the transactional tariff), or to allow for both models to coexist and to set the rate for transferring from one to the other.

ERCC's proposal for a conversion charge makes sense. The Board agrees that a conversion charge, as proposed by the ERCC, is appropriate and therefore should apply to schools shifting from the comprehensive to the transactional tariff. Among other things, the conversion charge would serve to deter schools from switching back and forth between the comprehensive and

transactional tariffs in order to consolidate the vast majority of their taping activities under the comprehensive rate, while reverting back to the transactional rate on an intermittent basis in other years. Without a conversion charge, schools could “game” the ERCC tariff in order to reduce their copyright payments to the detriment of ERCC’s members and, in the process, unduly increase the administrative burden placed on the ERCC. This would risk destroying the existing distribution market¹⁶ while even further reducing ERCC’s revenues.

ERCC provided no evidence in support of the level of its proposed conversion charge. If a school decides to convert to the transactional tariff, the magnitude of the conversion charge would depend on a variety of factors, including the magnitude of the transactional rate discount, the volume of tapes made under the comprehensive tariff rate and the number of tapes, if any, erased upon conversion to the transactional tariff regime. All else being equal, the lower the comprehensive rate the higher the conversion charge should be relative to the transactional rate, and vice versa. Based on the Board’s assessment of alternative conversion charges together with the level of the comprehensive rate set in this decision, the Board finds that a charge of 50 percent is reasonable. The charge applies only to what the institution keeps after being allowed one full year to clean up its collection. At this level, the conversion rate should not be prohibitive while, at the same time, effectively deter gaming of the transactional and comprehensive tariffs.

The Board notes, however, that without actual experience under the ERCC tariffs it is difficult to assess the reasonableness of the charge. Consequently, when the ERCC tariff is next reviewed before the Board, the conversion charge will need to be revisited in light of actual experience.

D. IMPACT OF THE TARIFF

No information was provided by either party as to the likely take-up rate of the ERCC licence or the likely substitution rate between taped versus prerecorded programs. While there is overlap between ERCC’s repertoire and what is available through distributors, there is no doubt that a variety of programs of interest to educational institutions are available only from one of the two sources. The substitution rate between taped and prerecorded programs therefore would not likely be one-for-one. This makes it even more difficult to gauge the potential impact of alternative rates on the existing distribution market for prerecorded programs.

Nevertheless, the Board expects that no disruption to the existing distribution market should result from the rates being set in this tariff. However, when the tariff is next reviewed, the Board expects that usage and revenue data under the tariff, along with sales volumes and revenues relating to the distribution of prerecorded programs, will be made available for review. Adjustments to the approved rates could be made, if necessary, based on this data and any other relevant information.

E. RETROACTIVITY

The Education Coalition asked that the tariff not be retroactive, comparing the situation with

¹⁶ An issue that was explored earlier.

what occurred in respect of the private copying levy in 1999. It requested that the Board provide legal certainty with respect to any retroactive liability for taping done prior to the coming into force of the reporting regulations.

The Education Coalition repeatedly insisted that little taping of broadcast programs, if any, had occurred or would occur before a tariff was in place. ERCC acknowledged that they had no way of knowing how many copies may have been made between January 1, 1999 and September 1, 2001.¹⁷

ERCC's proposed tariff covers a four-year period beginning on January 1, 1999. It asked that the tariff go back to that date. It would allow some measure of flexibility for copies made before September 1, 2001. As long as institutions use their best efforts to report on those copies within several weeks from the publication of the certified tariff, and as long as those copies are destroyed before that same date, ERCC is prepared to accept a royalty of \$1 per copy. Under ERCC's proposal, any copy made before September 1, 2001 that was not documented and destroyed by a certain date, would trigger the transactional tariff, unless the institution opted for the comprehensive tariff. In that second scenario, the copy would be deemed to have been made under the comprehensive tariff.

Two matters must be clarified before a decision can be made on this issue.

First, ERCC is entitled to a tariff covering the entire period under examination. ERCC cannot be asked to forego its remuneration right. Comparisons with the private copying levy are not appropriate. In that case, the collective society involved voluntarily decided not to apply the tariff retroactively, partly in recognition of the fact that once the affected blank media were sold, it was not possible for manufacturers and importers to retroactively recover additional costs resulting from the tariff. In other words, it is not possible to retroactively change past market prices. The same is not true in this case. Furthermore, the ultimate user is not the target of the levy under the private copying regime, whereas the educational institution is both the user and the target of the ERCC tariff.

Second, the "legal certainty" that the Education Coalition seeks from the Board already exists. First, the *Act* sets out what triggers the payment of royalties set out in a tariff certified by the Board and what does not. Otherwise, the institution can make copies and use them for free as long as it complies with the *Act* and any regulations. Second, reporting requirements can be imposed only through regulations. Reporting regulations came into force on August 31, 2001, and were not retroactive. Therefore, institutions cannot be forced to report on the making or use of copies before that date.

The rest is a matter of what is fair to do under the circumstances. In that respect, two facts are important. First, educational institutions have been left in a state of uncertainty as to what their retroactive financial liability may be. Second, no one knows just how much taping took place

¹⁷ Since that date, educational institutions are required to report on their copying activity as well as on the use they make of such copies: see *Educational Program, Work and Other Subject-matter Record-keeping Regulations* (SOR/2001-296).

between January 1, 1999 and September 1, 2001. Granting a discount with respect to copies made before September 1, 2001 will encourage the reporting of data which, were it not for the discount, would never get reported.

The Board considers that it is critical to encourage the reporting of any taping activities. The Board will therefore set the tariff to allow educational institutions to benefit from a discount if they voluntarily provide, with respect to copies made before September 1, 2001, information similar to that which they are required to provide under the regulations. If, as the Education Coalition says, little or no taping has taken place to date, then ERCC loses nothing. If the contrary is true, then the Board and ERCC will obtain important information that may otherwise remain unavailable.

Under ERCC's proposal, a discount would be granted for copies made before September 1, 2001 only as long as they were destroyed. The proposal makes no allowance for copies that an institution may wish to keep. The institution still would not have to report on the copy unless it used it after September 1, 2001. Some discount must be granted on account of those copies if useful information is to be provided in a timely fashion.

Some account must be taken of the date at which this tariff is being certified. The dates have been adjusted to allow institutions to decide on which option they wish to adopt.

Consequently, institutions will be allowed to avail themselves of the following discounts on account of whatever taping may have been done during the period January 1, 1999 to August 31, 2001:

- institutions will pay one dollar for any copy made prior to September 1, 2001 that is reported and destroyed no later than December 31, 2002;
- institutions that opt for the transactional tariff in 2002 will be allowed to purchase a transactional licence for any reported copy that they do not destroy by December 31, 2002 at a 75 per cent discount;
- institutions that opt for the comprehensive tariff in 2002 will be deemed to have made reported copies pursuant to their 2002 licence. Those copies will attract a conversion charge equal to 25 per cent of the applicable transactional rate (i.e., a 50 per cent discount of the normal conversion charge) if an institution opts out of the comprehensive tariff at a later date.

The Board does not find it necessary to provide a discount for copies made between September 1, 2001 and the date the tariff is certified. No incentive is needed to ensure that information is reported, since the duty to report is set by regulations and is independent of any tariff being in place. Furthermore, if little or no taping has taken place to date, as the Education Coalition has stated, then the financial liability of educational institutions will be minimal.

F. TARIFF WORDING

The wording of the tariff and the substance of its administrative provisions largely reflect a consensus reached by ERCC and the Educational Coalition. Only one matter requires further comment.

In its final proposal, ERCC asked that students enrolled in distance education or correspondence courses be expressly mentioned in the definition of “other FTE student”. It would appear that the relevant Statistics Canada data only account, as part-time students, for those students following a course leading to a degree. No reliable data is kept on students that are not enrolled in degree-granting programs. For the time being, the Board opts to leave the matter open, with an expectation that educational institutions will not attempt to “back out” of the data they provide to Statistics Canada, off-campus students who are pursuing a degree.

G. AMENDING THE REGULATIONS

The Education Coalition asked that the Board amend the regulations so as to remove any reporting requirement with respect to performances. This request relies on the fact that the tariff formula in no way depends on the number of performances of a program. This request must be rejected for two reasons. First, a hearing is not the process through which changes to regulations should be entertained. Second, as these hearings clearly demonstrated, there is a remarkable lack of information concerning how often programs are performed in the classroom. Consequently, quite apart from any information required to calculate the tariff, there is value in asking that institutions report their protected uses of programs until those use patterns are better known.

H. DESIGNATING ERCC FOR THE PURPOSES OF “ORPHAN” COPYRIGHT OWNERS

By virtue of subsection 76(2) of the *Act*, anyone who owns rights in a program who is not an affiliate of ERCC is entitled to receive royalties for actions covered under the regime by the collective that is designated by the Board subject to the same conditions as those to which a person who has so authorized that collective is subject. ERCC currently is the only collective society that is entitled to ask for the payment of royalties pursuant to sections 29.6 and 29.7 of the *Act*. It has asked for the designation. Under the circumstances, designating ERCC in advance of any possible claims makes eminent sense. Consequently, and pursuant to subsection 76(2) of the *Act*, the Board hereby designates ERCC as the collective society which is obligated to pay royalties to “orphan” copyright owners.



Claude Majeau
Secretary General