Copyright Board Canada

Commission du droit d'auteur Canada

Date of Decision	2009-06-26
Corrected Version	2009-07-17
Citation	File: Reprographic Reproduction 2005-2009
Regime	Collective Administration in relation to rights under sections 3, 15, 18 and 21 *Copyright Act*, subsection 70.15(1)
Members	Mr. Justice William J. Vancise Mrs. Francine Bertrand-Venne Mrs. Sylvie Charron
Proposed Tariff(s) Considered	(Educational Institutions – 2005-2009)

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

Reasons for decision

I. INTRODUCTION

[1] These reasons deal with a tariff that applies to the reproduction of literary, dramatic and artistic works included in, among other things, books, newspapers and magazines for use in primary and secondary level educational institutions in Canada outside Quebec. This is the first time the Board has been requested to certify a tariff for these types of works. Photocopies of these works are important administrative and teaching tools for educational institutions in Canada, where photocopying is common practice.

A. THE PARTIES

[2] Access Copyright, The Canadian Copyright Licensing Agency (Access Copyright or Access) is a not-for-profit corporation. Its members are organizations representing authors and publishers of copyright protected works published in books, magazines, journals and newspapers. An equal number of persons representing authors and publishers comprise its 18-member board of directors.

[3] Access acquires its repertoire in two ways. It signs affiliation agreements with Canadian authors and publishers who own copyrights. It also represents rights holders from Quebec and 23 other jurisdictions pursuant to bilateral agreements. In practice, Access administers the right to authorize reprography of that entire repertoire for all of Canada except Quebec, where the repertoire is administered by *La Société québécoise de gestion collective des droits de reproduction* (COPIBEC).

[4] The Objectors in this case are the Ministries of Education of the twelve Canadian provinces and territories outside Quebec and each of the Ontario school boards (the "Objectors").

B. GLOSSARY

[5] To allow the reader to better understand the following reasons, we find it useful to begin by defining a certain number of terms that will be used throughout.

[6] The *volume study* is the survey that Access conducted to estimate the volume and nature of transactions, copies and photocopied pages in primary and secondary educational institutions and in the Ministries of Education throughout Canada, except in Quebec.

[7] A *transaction* takes place when one or more documents are reproduced, in whole or in part, a certain number of times.

[8] A *copy* is a set of pages from the copied document. A transaction where three documents are each reproduced three times creates nine copies.

[9] Every reproduction of each page is a *photocopied page*. Reproducing a two-page document three times produces six photocopied pages.

[10] The *logging sticker* documents the particulars of each transaction recorded during the volume study. It is filled out by a freelance research assistant hired for that purpose, and initialled by the person making the copy. It indicates the number of photocopied pages, the number of copies made, the number of pages reproduced from the original, the person for whom the copy was made (person making the copy, staff member, student, other), the person who initiated the transaction and the purposes for which the copies are intended (administration, criticism or review, entertainment, future reference, inclusion in an exam, private study, projection in class, research, student instruction, undetermined purpose or other).

[11] A *class set* is a set of books intended to remain in a specific place at all times and be shared by students. The books may be used by more than one class or by various students in the same class.

[12] A *consumable* is a document that is intended for a single use and that may not be reproduced. In contrast, a *reproducible* is a document sold with the authorization to reproduce it for in-class use.

[13] An *allowable purpose* is a purpose that may give rise to the fair dealing exception in sections 29, 29.1 or 29.2 of the *Act*. These are research, private study, criticism, review and news reporting.

C. BACKGROUND

[14] The filing of the proposed tariff under review marks the culmination of a long process. Shortly after it was founded in 1988, CANCOPY (as Access Copyright was then known) sought to negotiate agreements for the photocopying of its repertoire at the primary and secondary school levels. In 1991, it reached a first agreement with Ontario. Between 1991 and 1997, other provinces and territories followed suit. All agreements established the royalty at $1 per full-time equivalent (FTE) student.[1]

[15] From the beginning, Access advanced a principle it views as fundamental: eventually, royalties should reflect the volume and nature of the pages actually photocopied. In the absence of data allowing that volume to be established, Access negotiated progressive increases based on certain surveys. Since the number of photocopies captured in surveys greatly exceeded the predetermined volume used to set an upper limit on the royalties, the rates quickly reached those limits, which could go up to $2 per FTE student.

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[1] FTE is used to determine a full course load, since a part-time student generates a smaller number of photocopies.

[16] Starting in 1998, Access began negotiations with a sub-committee of the Council of Ministers of Education, Canada (CMEC). All but one of the provinces agreed to set the royalties for the 1998-1999 school year at $2 per FTE student. Only British Columbia insisted that the royalty it paid remain at $1.60. Access filed an application with the Board to fix royalties pursuant to subsection 70.2(1) of the *Copyright Act* (the "*Act*"). The Board did not proceed with the application after the province accepted the $2 royalty.

[17] In 1999, Access reached a five-year pan-Canadian agreement. The agreement, which was to end in August 2004, provided for progressive royalty increases per FTE student up to about $2.30.[2] The agreement presented certain advantages for Access, but the royalty was still not based on the actual number of photocopied pages.

[18] Beginning in December 2003, Access and a negotiating committee of the CMEC undertook negotiations intended to lead to the licence's renewal. From the outset, Access made it clear that the new agreement would have to reflect the value and volume of photocopied pages. After several months, the parties still had not managed to agree on a methodology to establish that value and volume, so Access decided to take another approach.

[19] On March 31, 2004, pursuant to subsection 70.13(2) of the *Act*, Access filed two proposed statements of royalties. This decision deals with the one targeting copies made by primary and secondary educational institutions and persons who are acting under their authority. The proposal, which applies to the years 2005 to 2009, was published in the *Canada Gazette* as required in the *Act*. Prospective users and their representatives were notified of their right to challenge the proposal. The Objectors exercised that right.

[20] The process leading to the hearings was long, even though the parties acted diligently. Up until April 2005, the parties discussed how the volume study should be conducted. On April 15, 2005, the Board approved an agreed-upon schedule leading to hearings in late January 2007. The lengthy interval was intended to allow for the collection and analysis of the study data. The analysis ran into difficulties, which led to the hearings being delayed until June 12, 2007. Then, the ill-health of an important witness caused the hearings to be suspended on June 20, until they resumed from October 22 to 24. In total, the hearings lasted eight days. The file was closed on February 22, 2008, once the parties had complied with undertakings made during the hearings and answered the Board's additional questions.

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[2] Owing to inflation-based adjustments, the interim royalty was approximately $2.45 at the time of the hearings.

II. THE PARTIES' POSITION

A. ACCESS COPYRIGHT

[21] The published proposed rate was $12 per FTE student. When filing its evidence, Access reduced its request to $7.40. The data analysis problems we mentioned required significant corrections to the number of copies made and a revision of the conclusions on the proposed rate, which increased to $8.25. During the hearing, Access amended its proposal yet again. The amendment took into account new data on the number of FTE students during the relevant period and the fact that Access accepted to subject photocopies made by the Ministries of Education, other than those related to examinations and distance education, to the tariff targeting governments instead of educational institutions. Once those amendments were made, Access proposes a rate of $8.92.

[22] Access acknowledges that some copies cannot or need not be subject to the tariff. The first are copies of documents of which reproduction is not allowed (and therefore, illegal): essentially, consumables. The second are those already authorized by the rights holder or by the *Act*: these are copies of reproducibles and copies authorized pursuant to exceptions under the *Act*, including the fair dealing exception. For the remainder, Access assumes that practically all copies of published documents given to students will result in remuneration.

[23] Access agrees to treat as constituting fair dealing only those copies made at the recipient's request for the sole purpose of private study or research. Copies made for the purpose of criticism or review would not qualify, either because that purpose is not relevant in a school context, or because the conditions for application of the exception are not met. Copies made on the teacher's initiative or made for both an allowable and a non-allowable purpose would not benefit from the exception, either because they are made primarily for a non-allowable purpose (student instruction), or because they cannot be considered fair.

[24] Access acknowledges that educational institutions enjoy an exception for the use of works required for an examination. However, it submits that the exception is virtually irrelevant in this case, since it does not apply once the contemplated use is subject to the tariff under review.

[25] Lastly, Access argues that it is entitled to claim royalties not only for works within its repertoire, but also for those held by non-affiliated rights holders who authorized Access to act on their behalf by way of implied agency.

B. THE OBJECTORS

[26] The Objectors state that, for the most part, they agree with the approach put forward by Access to determine the number and value of photocopied pages. That said, they propose making several adjustments to Access Copyright's calculations.

[27] The Objectors submit that there are far more reproductions authorized as fair dealing than Access admits. This point of view is essentially based on four submissions. First, virtually all copies made in schools of documents in Access Copyright's repertoire constitute fair dealing. Second, research, private study, criticism and review are the cornerstones of the elementary and secondary school curricula. Third, copies made for several purposes are fair as long as one is allowable pursuant to the relevant provisions of the *Act*. Fourth, copies made on the teacher's initiative are fair provided that the prospective user is a student and the dealing involves one allowable purpose under the *Act*.

[28] Furthermore, the Objectors argue that the exception dealing with copies made by educational institutions for use in examinations applies even though Access offers a licence for that purpose. Lastly, they deny Access Copyright's allegation that it may claim royalties for works held by non-affiliated rights holders. According to them, the facts Access relies on are quite simply insufficient to create an implied agency relationship. In the end, Objectors propose a tariff of $2.43 per FTE student.

III. EVIDENCE

A. VOLUME STUDY

[29] Access and the Objectors agreed on the methodology for the volume study. Circum Network Inc. (Circum) developed the study for Access in collaboration with the Objectors and directed it. R.A. Malatest and Associates (Malatest) performed the data collection. AJD Data Services (AJD) captured the data and carried out an initial coding. Access carried out the bibliographic analysis and the final coding. Circum closed the loop by performing the statistical analysis.

[30] The study is based on a stratified sample of 894 schools, 31 school boards and 17 offices of Ministries of Education. That number of schools represents nine per cent of all institutions; that was the required percentage to ensure the targeted reliability of the results. The number of school boards simply represents the same percentage of all school boards targeted by the tariff. Lastly, given the low number of offices of Ministries of Education, all of them were included in the study, with the exception of those in Ontario that did not participate.

[31] The data collection was spread out over the entire 2005-2006 school year, excluding vacations. The study was conducted for ten consecutive school days in each institution. A freelance research assistant hired and trained by Malatest was posted next to each photocopier. For each transaction, the research assistant copied the bibliographic page of each copied document and then wrote the information mentioned in paragraph 10 on a logging sticker. The *full sample* compiles information for all of the 366,344 transactions carried out during the study, from 942 observation posts.

[32] A *partial sample* was also gathered, at the Objectors' request, during one of the ten days of the study. On that day, in addition to gathering all of the information contained in the full sample, the research assistant collected a copy of all pages photocopied during each transaction.

[33] AJD carried out the digital conversion and entry of the collected data. The document type, title, author, publisher, country of origin and ISBN were identified for each document, as well as whether it was a consumable or a reproducible. This allowed the clearly irrelevant data to be sorted out immediately, thus ensuring a better use of time in the subsequent steps. AJD also created a PDF document for each transaction, all of which were then grouped by institution and country.

[34] Access performed the bibliographic analysis. To the extent possible, it verified, corrected and completed the bibliographic information collected during the study. Then, it sought to identify which works were in the public domain, which ones appeared on the list of works excluded from the scope of the Access licence, and which ones were held by rights holders affiliated with Access or one of its sister societies. The analysis was restricted to transactions involving documents that AJD had identified as potentially being part of the repertoire: books, newspaper articles, periodicals, undetermined and unknown documents. Reproducibles, consumables and other types of documents were disregarded. The analysis led to the creation of a database containing information allowing the identification of transactions containing published documents as well as bibliographic information on copied documents. Circum carried out its statistical volume analysis using this database.

[35] To obtain an estimate of the nation-wide, total volume of photocopies for the school year, Circum made two adjustments to the full sample. The first took into account the size of the sampled schools and their distribution by province or territory. That adjustment served to estimate the number of pages photocopied nationally over a two-week period. The second extrapolated the results to estimate an annual volume. The volume of photocopied pages varies over the course of the school year; therefore, it is not possible to obtain a reliable estimate simply by multiplying the volume obtained for the two weeks by 26. Using the photocopiers' counters, Circum compared, for a sub-sample of schools, the number of photocopied pages made during the observation period with the number made over the entire school year. The ratio thus obtained was then applied to the study volume to generate the total annual volume.

[36] The two parties agreed to rely entirely on the volume study data to establish the number of photocopied pages that trigger remuneration. They thus accepted the study results as fact. They also agreed that the decision as to whether a copy benefited from the fair dealing exception has to be based solely on the information written on the logging stickers, therefore accepting the statements on the stickers as proven facts.

[37] In addition to the information from the volume study, the parties filed the following evidence in support of their positions.

B. ACCESS COPYRIGHT

[38] In support of its allegations, Access called the following witnesses.

[39] Ms. Maureen Cavan, Executive Director and Ms. Roanie Levy, Director of Legal Affairs and Government Relations at Access, described the collective society's structure, mandate and activities. They explained how Access acquires its repertoire, the principles governing royalty distribution, the development of relationships between the society and educational institutions and the reasons that led Access to file the proposed tariff under review.

[40] Messrs. Greg Pilon, President of Thomson Nelson Publishing, Michel de la Chenelière, founder of Chenelière Éducation, and Glenn Rollans, General Manager of Thomson Duval Publishing, provided the viewpoint of schoolbook publishers. In Canada, the production of educational supplies is a complex and costly process that involves significant financial risk. Since each province has its own requirements, the Canadian market is fragmented. Furthermore, a given province's approval of a textbook is no guarantee of sale. Schools and school boards select their books from among those that have been approved. Therefore, schoolbook publishers cannot be sure they will recover the costs incurred to have the textbook approved and produced. What is more, the dictates of the school calendar often mean that the textbook must be printed before orders are even received.

[41] The publishers admitted they are unable to assess to what extent their textbooks are photocopied or the impact those copies may have on their sales. However, they did stress that over the last 20 years or so, those sales have fallen by over 30 per cent. Therefore, they submit, without giving exact figures, that photocopying negatively impacts their sales. Since they believe that educational institutions make copies in lieu of purchasing textbooks, they conclude that a tariff based on the textbook's retail price would prevent excessive substitution.

[42] Ms. Sara Slinn, a labour law professor at Queen's University, sought to establish a parallel between this instance and public sector labour relations adjudication. Adjudicators resist determining the ability to pay of public sector agents, and refuse to require suppliers to subsidize those agents by granting them lower remuneration than they would have obtained on private markets. Since the Objectors do not raise ability to pay, there is no need to elaborate on the issue.

[43] Mr. Marcel Boyer, holder of the Bell Canada Chair of Industrial Economy at the Economics Department of the Université de Montréal, provided an economic analysis of the notion of fair dealing and its relevance in the context of these proceedings. In his opinion, from an economic standpoint, it might be appropriate to apply a liberal interpretation of this notion in order to limit the power that certain authors may have over the market, to promote the dissemination of ideas

contained in works or to offset the high transaction costs that arise in the absence of efficient markets.

[44] Professor Boyer concluded that in the context of these proceedings, there are insufficient economic grounds to justify such an interpretation. First, authors are not in a position to exert control over the schoolbook market: they offer substitutable goods and cannot prevent other authors from entering the market. Second, the dissemination of ideas is already taken into account, since the Board is aware of the tariff's impact on access to works. Third, the tariff's very existence and the blanket character of the licence it offers greatly decrease transaction costs, for instance by reducing the difficulties related to identifying rights holders and determining a fair price to compensate them.

[45] Ms. Kimbalin Kelly, Director of Customer Services and Operations at Access, explained how her team conducted the bibliographic analysis of the volume study data to establish what should or should not result in remuneration.

[46] Mr. Benoît Gauthier, President of Circum, presented and interpreted the results of the volume study. His analysis of the study data led him to conclude that during the 2005-2006 school year, primary and secondary schools and Ministries of Education under review photocopied 10.3 billion pages. Of these, he estimates the number of photocopied pages from published works at 3.1 billion and, applying the legal principles submitted by Access, the number of photocopied pages triggering remuneration at 265.1 million.

[47] Messrs. Paul Audley, President of Paul Audley & Associates, and Douglas Hyatt, professor of business economics at the University of Toronto's Rotman School of Management, proposed a way of determining the value of photocopied pages. The witnesses noted that the Board had never set a tariff that could be used to establish the value of a photocopy. They proposed using the average selling price per page of literary works (books, newspapers and magazines) in the market as a reference value.

C. THE OBJECTORS

[48] The Objectors called witnesses from all backgrounds. Administrators, teachers and students gave their opinion on the role and importance of photocopying in educational institutions as well as on the processes and motivations governing the selection, purchase and distribution of educational resources. These witnesses claimed, among other things, that a reproduction is worth less than the original, if only because a book is used for many years by many students, while a copy is used by only one student, even if many keep it until the end of the school year, that is, for as long a time as they would use a textbook. The witnesses did confirm that the acquisition of class sets is becoming increasingly frequent. These testimonies allowed us to better understand the point of view of certain interested parties. That being said, to the extent that a statement could have cast doubts on the volume study data, it was not taken into account.

[49] Mr. Gary Hatcher, Senior Director of School Services in the Department of Education of Newfoundland and Labrador, described the organizational structure of the Canadian education system, the financing of primary and secondary schools, the role of reprography licences and the context and reasons for which the Objectors take issue with the proposed tariff.

[50] Mr. Paul C. Whitehead, Professor of Sociology at the University of Western Ontario, served for some 20 years as representative on copyright matters for the Ontario Catholic School Trustees' Association. He described the process that led to the signing of the pan-Canadian agreement and the disagreements that made its renewal impossible. He laid out the administrative imperatives that lead him to conclude that it should be open to each province or territory to decide whether the province or the school boards will be the licence holder. In the same vein, he stated the practical and administrative reasons that, in his opinion, warrant applying the government tariff, and not the tariff under review, to photocopies made by the Ministries of Education. Lastly, he explained why he deems the auditing measures proposed by Access to be costly, intrusive and pointless.

[51] Mr. Robert Andersen, Professor of Sociology at the University of Toronto, provided the Objectors' position on the volume study. Having participated in developing the study, he said he agreed with the essential points of the approach, results and conclusions asserted by Mr. Gauthier, but nevertheless provided some comments.

[52] Professor Andersen first criticized the weighting used by Circum to determine the total volume of photocopied pages. After examining the detailed data of the partial sample, he concluded that the stickers correctly estimated the number of pages photocopied from published documents but underestimated the number of pages photocopied from non-published documents by about 10 per cent. In reply, Mr. Gauthier demonstrated that Professor Andersen's analysis was based on erroneous hypotheses, and that by correctly using the partial sample data, one could arrive at the same figure he had given. In the end, Professor Andersen agreed with Mr. Gauthier.

[53] As well, Professor Andersen took issue with Mr. Gauthier's method of dealing with documents he deemed to be published without being able to assign them to a category. He also explained how he would carry out the various adjustments the Objectors are asking the Board to make to Access Copyright's proposals, namely: to exclude reprographies made in ministries: to exclude copies made for examination purposes; to take into account a more liberal interpretation of the fair dealing exception; and, to exclude photocopies of works of non-affiliated rights holders. Considering the preceding, Professor Andersen estimates the number of pages triggering remuneration at 185.8 million (rather than 265.1 million).

[54] Messrs. Peter Lyman and Dustin Chodorowicz, from the Nordicity Group, testified on the method used to establish the value to assign to reproductions. Although they do not object to the

overall methodology suggested by Access, they propose discounting the reference price by half to reflect the fact that a book is used many times while a photocopy is generally used only once. They also propose reducing the royalty to take into account the cost of making a photocopy, a cost they estimate at 1.6¢ per photocopied page.

[55] Mr. Steven Globerman, Kaiser Professor of International Business at Western Washington University, commented on Professor Boyer's analysis. Rather than criticizing the theoretical approach, he took issue with the lack of reliable empirical data to support the hypotheses put forward.

IV. LEGAL ISSUES

[56] This case raises three legal issues. First, to what extent can primary and secondary schools avail themselves of the fair dealing exception? Second, does the exception set out in subsection 29.4(2) of the *Act* apply to works in Access Copyright's repertoire? Third, are works of non-affiliated rights holders who have cashed a royalty cheque part of Access Copyright's repertoire for the purposes of this case?

A. TO WHAT EXTENT CAN PRIMARY AND SECONDARY SCHOOLS AVAIL THEMSELVES OF THE FAIR DEALING EXCEPTION?

[57] Several provisions of the *Act* allow a protected work to be used without permission. One of those exceptions, now elevated by the Supreme Court of Canada to a user's right,[3] concerns fair dealing. The relevant provisions are as follows:

> 29. Fair dealing for the purpose of research or private study does not infringe copyright.
>
> 29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:
>
> *(a)* the source; and
>
> *(b)* if given in the source, the name of the
>
> (i) author, in the case of a work,
>
> [...]
>
> 29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:
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> *(a)* the source; and

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[3] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 48 [*CCH*].

(b) if given in the source, the name of the

(i) author, in the case of a work,

[...]

[58] A reproduction made pursuant to the fair dealing exception does not trigger remuneration and must therefore be subtracted from its calculation. That said, the parties do not agree on the categories of copies that fall under this exception.

[59] Access emphasizes that the exception only applies if the use involves an allowable purpose, is fair and, if applicable, meets the formal requirements mentioned in sections 29.1 and 29.2. Since all of these requirements are compulsory, the exception does not apply where the user fails to meet any one of them.

[60] Access consents to exclude from the royalty calculation single copies made solely for the purpose of research or private study. It also agrees to exclude multiple copies made at the request of third parties solely for these same purposes, on the assumption that the party requesting several copies for private study or research is acting for the benefit of others who are themselves engaged in research or private study. Access expresses one reservation about this principle: making a copy for a student who is required to read it is not fair dealing because the copy is necessarily made for educational purposes rather than for research or private study.

[61] For the rest, Access argues that the exception does not apply for the following reasons.

[62] To begin with, and without challenging the volume study data, Access submits that fair dealing for the purpose of criticism or review is not relevant in this case, for two reasons. First, criticism or review is necessarily communicated to the public. Yet, any criticism or review that could be done by a student will not be communicated to anyone. Second, the file provides no basis to conclude that the formal requirements were complied with.

[63] Next, Access submits that the question of knowing whether the dealing is for an allowable purpose is assessed according to the true purpose of the dealing. If the dealing is for more than one purpose, the allowable purpose must be the predominant purpose of the dealing for it to satisfy that requirement of the exception. Access argues that in a school setting, as soon as a purpose other than research or private study is identified, that other purpose must be assumed to be the predominant purpose of the dealing.

[64] Moreover, Access refers to a number of decisions to conclude that copies made on the teacher's initiative are not made for the purpose of research or private study. When a work is required by the teacher, the dominant purpose of the dealing is student instruction, not research or private study. Furthermore, Access contends that the notion of research must be interpreted in view of the companion concept of "private study"; it therefore involves an investigation, a

search, a close study. By contrast, a teacher intends nothing more than to convey knowledge to his or her students.

[65] Access then analyzed the six criteria (purpose, character and amount of the dealing, available alternatives, nature of the work and effect of the dealing on the work) identified by the Supreme Court in *CCH* to establish whether the dealing is fair. The approach of Access Copyright on the subject can be summarized as follows.

[66] Access does not appear to distinguish between the identification of an allowable purpose and the assessment of the purpose of the dealing. We will return to this question at paragraph 88.

[67] As regards the character of the dealing, Access proposes to rely on the logging stickers. When a teacher makes copies for all of the students in his or her class without their requesting those copies, there are multiple copies that are widely distributed,[4] therefore tending to be unfair.

[68] Moreover, Access argues that the Board should refrain from examining the amount of the dealing and the available alternatives. Access submits that the decision of the Supreme Court of Canada in *CCH* concluded that these criteria could only be considered on an individual basis.

[69] In addressing the nature of the work and the effect of the dealing on the work, Access relies on the evidence to conclude that most of the copies are made from textbooks.[5] Access argues that making multiple copies of these textbooks competes directly with the original works. Large-scale photocopying of works within the only market open to those same works would thus tend to be unfair.

[70] By contrast, the Objectors submit that the liberal interpretation recommended in *CCH* necessarily leads to the conclusion that the fair dealing exception applies to practically all copies made in schools. In their opinion, it is most definitely certain that all of the categories mentioned on which a disagreement subsists must be excluded from the royalty calculation.

[71] The Objectors' argument seems to be based on two main propositions. First, it is possible to determine the fairness of a practice without examining each transaction; as long as the practice is fair, there is no need to go further. Second, any dealing for an allowable purpose is fair *ipso facto*.

[72] Regarding the character of the dealing, the Objectors first reiterate the same arguments, and then add that if for-profit research can be fair, we must conclude that students' unpaid pursuit of knowledge is equally so. The Objectors do not contend that the copies distributed to an entire

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[4] *Ibid*. at para. 55.
[5] Exhibit Access-8 at 2; Exhibit Access-5 at paras. 84-85; Transcript at 1036-37; Exhibit Access-7B at 3.

class are "widely distributed". Moreover, the fact that students tend to get rid of photocopies once they no longer need them would also weigh in favour of the fairness of the dealing.

[73] With respect to the amount of the dealing, the Objectors argue that *CCH* now allows reproduction of larger excerpts of a work for purposes of fair dealing. Photocopies are, for the most part, limited to short excerpts from a great variety of books, complementing the use of textbooks. Contrary to what Access alleges, this is not the same scenario as described in *CCH* where a user reproduces several excerpts from a same work over a short period of time.[6]

[74] Relying on *CCH*, the Objectors contend that certifying a tariff is no more an alternative to fair dealing than is the availability of a licence.[7] They also submit that the nature of the works in issue tends to favour the fairness of the dealing. Lastly, they deny that photocopying competes with original works in the schoolbook publishing market. The evidence does not establish that the use of photocopies has caused a decrease in sales; rather, a combination of factors caused the decrease.[8] Furthermore, the industry is doing quite well, and publishing houses continue to produce and publish new textbooks.

i. Analysis

[75] *CCH* now is the unavoidable starting point of any analysis of the notion of fair dealing. Without repeating the full analysis provided by the parties, it may be helpful to state what we believe to be the substance of the propositions resulting from that decision.

[76] First, all exceptions provided in the *Act* are now users' rights. They must be given a liberal interpretation, according to the purposes of copyright in general, including maintaining a balance between the rights of copyright holders and the interests of users, and the exception in particular.[9]

[77] Second, the fair dealing exception applies only to certain allowable purposes: private study, research, criticism, review, and news reporting. Dealings for other purposes are not covered by the exception, even if they would otherwise be fair.

[78] Third, dealings for an allowable purpose are not *ipso facto* fair. The fairness of the dealing is assessed separately, according to an open list of factors including the purpose, character and

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[6] *CCH*, *supra* note 3 at para. 68.
[7] *Ibid*. at para. 70.
[8] The factors are listed at paragraph 110 of these reasons.
[9] *CCH*, *supra* note 3 at para. 48.

amount of the dealing, available alternatives, the nature of the work and the effect of the dealing on the work.[10]

[79] Fourth, since all of the conditions for application of the exception must be satisfied, the exception will not apply as long as any one condition is not met.

[80] Fifth, a practice or a system may constitute a "dealing" just as well as an individual act. The exception can benefit a practice or system if it is established either that all of the individual dealings are research-based and fair, or that the practice or the system itself is research-based and fair.[11]

[81] Sixth, the notion of fair dealing is a legal concept that must be interpreted according to the framework laid down in *CCH*. Although interesting, Professor Boyer's study and Professor Globerman's criticism of that study are not relevant.

[82] In this instance, we must decide the following questions. First, is there a "practice" within the meaning of *CCH* in the educational institutions under review? Second, are the relevant dealings for allowable purposes? For one thing, is the exception for criticism or review relevant in this instance? Third, are the dealings fair? What if the person making the copy requires the student to read the text that the student apparently requested? What becomes of the copy made for multiple purposes, some of which are not allowable under fair dealing? And how should we deal with copies made by a teacher for an entire class, at the teacher's initiative, when the teacher states that the copies are made for the purpose of private study or research?

a. Educational Institutions and the Notion of Practice

[83] *CCH* found the existence of a practice or system essentially by relying on the Great Library's access policy.[12] This policy limits which copies will be made (photocopy requests for most non-allowable purposes are refused)[13], restricts the length of excerpts that can be reproduced and warns that librarians may refuse requests of greater scope than is usually deemed reasonable.[14]

[84] Nothing in the record leads us to conclude that there is a practice or system equivalent to the Great Library's access policy. There seem to be only two constant facts. The first is the posting

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[10] 10. *Ibid*. at para. 53.
[11] *Ibid*. at para. 63.
[12] *Ibid*. at para. 64.
[13] The access policy allows photocopies for court, tribunal and government proceedings. Strangely, the Supreme Court postulates that allowing copies to be made for these non-allowable purposes "further supports a finding that the dealings were fair": *Ibid*. at para. 71.
[14] *Ibid*. at paras. 68, 71.

of notices required by the pan-Canadian licence, stating what is permitted by the licence, not what the institution believes is allowed as fair dealing. The second is that, as a general rule, students are not allowed to use photocopiers. These facts do not suffice to establish a system. Stating that research, private study, criticism and review are the cornerstones of primary and secondary education is one thing; establishing that the institutions have implemented measures aimed either at restricting photocopying only to fair dealing or at separately documenting dealings that are fair from those that trigger remuneration is quite another.

[85] Moreover, the use of logging stickers during the study period is not part of a practice or system within the meaning of *CCH*. Nothing indicates that institutions used the stickers before or after the study period. Nothing indicates that the stickers were intended to govern the conduct of those making copies or that of the recipients; among other things, nothing indicates that stickers might have served to verify compliance with any policy. Everything leads to the conclusion that the stickers were merely the means used by the parties to collect the data they required.

[86] It thus appears that, in theory, should the Objectors seek to invoke the fair dealing exception, they would have to establish that each single dealing with the works was for an allowable purpose and was fair. That said, the fact the parties agreed to treat the information on the logging stickers as proven facts should allow us to do a more general analysis.

b. Is the Dealing for an Allowable Purpose Under the Act?

[87] Since we accept as fact, for the most part, that a copy was made for an allowable purpose if the attached sticker so states, we could ignore most of the parties' arguments on the subject. However, we do intend to make a few comments.

[88] Access contended that, when a dealing is for more than one purpose, the question of whether it is for an allowable purpose under the *Act* is assessed according to the dealing's predominant purpose.[15] If the predominant purpose is not an allowable one, the exception would not apply, even if the dealing is fair and incidentally for an allowable purpose. We do not agree. This interpretation renders superfluous the analysis of the dealing's purpose within the discussion on what is fair. Rather, in our opinion *CCH* established a simple, clear-cut rule for this aspect of the exception, leaving the finer assessment (establishing the predominant purpose) to the analysis of what is or is not fair. Accordingly, as soon as the logging sticker mentions that the dealing is for an allowable purpose, we must proceed to the next step. Whether the

[15] *Sillitoe et al v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545 at 559 (Ch. Div.) [*Sillitoe*].

predominant purpose is or is not an allowable purpose is one of the factors that must be taken into account in deciding whether or not the dealing is fair.[16]

[89] Access also alleges that research entails an investigation, a search or a close study. We find it difficult to adopt that principle. The notion of research must be interpreted broadly. *CCH* seems to stand for the proposition that a lawyer is involved in research as soon as he or she performs the most elementary consultation of his or her everyday work tools. It would be difficult to contend that legal research always, or even often, involves an investigation, a search or a close study. Accordingly, and contrary to certain decisions in other jurisdictions,[17] we prefer to rely on the interpretation used by the Board in a previous case. Research occurs provided that effort is put into finding, regardless of its nature or intensity:

> If copying a court decision with a view to advising a client or principal is a dealing "for the purpose of research" within the meaning of section 29, so is streaming a preview with a view to deciding whether or not to purchase a download or CD. The object of the investigation is different, as are the level of expertise required and the consequences of performing an inadequate search. Those are differences in degree, not differences in nature.[18]

[90] On another issue, it appears that *CCH* did not challenge previous interpretations of the notion of private study. Almost a century ago, British courts established a dichotomy between private study and teacher-student classroom interaction.[19] Canadian decisions followed that theme, concluding that distributing copies to all students attending a course could not constitute private study.[20] The Federal Court of Appeal seems to be of the same view: "[...] if a law professor requests a copy of a work for the purpose of distributing it among his or her students, such a request would not be for the purpose of private study".[21] It therefore seems impossible that a copy made by a teacher for his or her class can be for the purpose of private study, no matter what is written on the logging sticker.

[91] A similar problem arises when the sticker indicates that the copy was made for the purpose of criticism or review. To the contrary, it seems to us that a copy is not made for the purpose of criticism unless it is incorporated into the criticism itself. It would be possible, however, to claim that the copy supplied to the person intending to engage in criticism is made for the purpose of research that may or may not lead to criticism.

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[16] As a result, the relevance or ambit of certain decisions rendered before *CCH* may need to be re-evaluated.
[17] *Television New Zealand v. Newsmonitor Services Ltd.*, 1993 NZLR LEXIS 725 at 49-50 (N.Z. H.C.); *De Garis v. Neville Jeffress Pidler Pty Ltd.* (1990), 18 I.P.R. 292 at 298 (F.C. Aust.). See also *Hager v. ECW Press Ltd.* (1998), 85 C.P.R. (3d) 289 at paras. 53-54 (F.C.T.D.) [*Hager*].
[18] *SOCAN – Tariff 22.A (Internet – Online Music Services) for the Years 1996 to 2006* (18 October 2007) Copyright Board Decision at para. 109.
[19] *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 (Ch.D.).
[20] *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324 at 335 (Ont. Gen. Div. Ct.).
[21] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2002] 4 F.C. 213 at para. 129 (C.A.).

[92] Granted, *CCH* states that: "[a]lthough the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process".[22] This statement does not seem relevant in this instance; rather, we are inclined to conclude that section 29.1 of the *Act* applies solely to the dealing carried out in the context of criticism itself. The application of the exception for criticism to the overall process leading to the creation of the criticism would result in absurd consequences. A music columnist who copies ten songs onto an iPod and then comments on only one of them in a weekly column could not claim to benefit from the exception for the purpose of criticism without mentioning the source and the author's name of all of the songs, including those not commented on. Instead, it appears to us to be more in keeping with the spirit of the *Act* to treat the ten copies as having been made for the purpose of research – research in contemplation of criticism.

[93] Moreover, Access is wrong to contend that criticism or review necessarily involves a communication *to the public*. It may be that the exception for news reporting does implicitly contain such a requirement. It may even be that the obligation to indicate the source and the author's name implicitly creates a requirement of communication. However, with all due respect to the opposite point of view,[23] we are not of the opinion that this communication must be made to the public. We cannot agree that a student conveying his or her impressions on the Harry Potter series violates J.K. Rowling's rights when writing them to the author but not when communicating them to the entire class or posting them on MySpace.

[94] For the purposes of these proceedings, we are prepared to accept as a fact that copies the study states were made for the purpose of criticism or review are actually copies made for the purpose of research and should be treated as such.

c. Is the Dealing Fair?

[95] Although the parties agree on the factors to take into account to determine whether a dealing is fair, they interpret and apply those factors differently.

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[22] *CCH*, *supra* note 3 at para. 64.
[23] *Hager*, *supra* note 17 at para. 55; J.S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed., (Toronto: Thomson Canada Limited, 2003), at 23-11; Robic-Léger, *Canadian Copyright Act, annotated* (Toronto: Thomson Carswell, 2005), at 29-2.

The purpose of the dealing

[96] *CCH* asks that the real purpose or motive of the dealing be assessed objectively. In our opinion, this is the stage where the relative importance of allowable purposes must be weighed against all of the user's intended purposes.

[97] In *CCH*, the Court insisted on the fact that the Great Library's access policy "provides reasonable safeguards that the materials are being used for the purpose of research and private study".[24] There is no mention whatsoever of multiple purposes. That said, we must acknowledge that a user rarely pursues a single purpose: the purposes of research done by private counsel are first and foremost to defend the client and increase the firm's profits, not to pursue knowledge. In these proceedings, to the extent that the copy is made at the student's request and more than one purpose is indicated on the sticker, the evidence available does not allow us to determine the relative importance of those purposes. In the circumstance, the minute we accept the identification of use noted on the sticker and that one of those uses is research or private study, for the purposes of this case, it follows that the predominant purpose of the dealing is research or private study.

[98] Conversely, with respect to copies of excerpts made on the teacher's initiative for his or her students or at the student's request with instructions to read them, we consider that the teacher's stated purpose must predominate. Most of the time, this real or predominant purpose is instruction or "non-private" study. We attribute a certain degree of importance to the fact that the teacher's role is scarcely comparable to that of staff at the Great Library, the subject of *CCH*. That staff makes copies at the clients' request. A teacher, in deciding what to copy and for whom, just as when directing students' conduct, is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair.

The character of the dealing

[99] In order to analyze the character of the dealing, we must examine the way in which a work is used. Making several copies tends to be less fair than making just one. Keeping a copy tends to be less fair than destroying it after use. The custom or practice in a particular trade or industry, to the extent it is accepted by both parties,[25] may serve as a guide.

[100] Here as well, with respect to a single copy made for the use of the person making the copy, and single or multiple copies made for third parties at their request, it appears to us that the application of that criterion tends to indicate that the dealing is fair. As a general rule, a single copy is made; if there are several, we should, just as we did earlier, take for granted that the

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[24] *CCH*, *supra* note 3 at para. 66.
[25] This necessarily follows from the reference in para. 55, to *Sillitoe*, *supra* note 15.

person requesting the copies acts on behalf of others with the same stated purpose. With respect to copies made on the teacher's initiative for his or her students, we come to the opposite conclusion. This is a matter of multiple copies distributed to the entire class on the teacher's initiative. What is more, the evidence reveals that students usually keep the copy in a binder just as long as they would keep an original: until the end of the school year.

The amount of the dealing

[101] Access submits that in *CCH*, the Court did not analyze the amount of the dealing or available alternatives on the grounds that it was impossible to verify with each user the specific purpose for which they were dealing with the requested copies. That is erroneous, given paragraphs 68 and 69 of the Court's decision. The Court did not carry out that verification simply because it was sufficient to examine these criteria in light of the Great Library's policy. The conduct of those who received the copies was simply not relevant.

[102] At this stage, both the amount of the dealing and the importance of the reproduced work must be considered. The permitted amount may vary according to the stated purpose. The reproduction of an entire work may be fair. In *CCH*, the Court took into account the fact that the Great Library generally set the limit at copying one case, one article, one statutory reference, or at most five per cent of a secondary source. The Court added that repeated requests within a short timeframe for multiple excerpts from the same work could be unfair.[26]

[103] Once again, we conclude that single copies made for the use of the person making the copies and single or multiple copies made for a third party at his or her request tend to be fair. The totality of the evidence satisfies us that teachers generally comply with the conditions of the pan-Canadian licence, which sets limits on how much can be excerpted from a work. The licence is certainly more generous than the Great Library's policy, which generally sets a limit of five per cent of a work, while the pan-Canadian licence allows up to ten per cent. This being said, nothing leads us to conclude that the copies at issue tend to approach the upper limit imposed by the licence. What is more, provided, once again, that these copies are specifically requested by the student, it does not appear to us that this difference is sufficient to render the copies unfair.

[104] With respect to the copies made on the teacher's initiative for his or her students, there are factors weighing on each side. On the one hand, we were not informed of any guidelines. However, it seems that teachers generally limit themselves to reproducing relatively short excerpts from a work to complement the main textbook. On the other hand, in our view, it is

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[26] *CCH*, *supra* note 3 at para. 68.

more than likely that class sets will be subject to "numerous requests for [...] the same [...] series",[27] which would tend to make the amount of the dealing unfair on the whole.

Alternatives to the dealing

[105] The existence of alternatives to dealing with a protected work can have an effect on the fairness of the dealing. When an unprotected equivalent can be used in place of the work, this must be taken into account. It is also useful to attempt to determine whether the dealing was reasonably necessary given the ultimate purpose. In *CCH*, the Court concluded that it would be unreasonable to require all members of the Law Society of Upper Canada to perform all of their research at the Great Library.[28]

[106] With respect to copies made at a student's request, it would not be reasonable to require students to do all their research or private study on site. Similarly, it is not reasonable to require students to use only those works that are in the public domain. It would certainly be possible to teach literary style using Dickens or Leacock, but the exercise is likely to be less relevant than it would be using Margaret Atwood or J.K. Rowling. What captivates younger generations is not always what entranced baby boomers. Moreover, even in theory, it is out of the question to teach physics, mathematics, biology or genetics using textbooks dating back 50 years.

[107] The same reasoning applies in part to copies made by teachers concerning the relevance or obsolescence of material. However, the educational institution has an option that, from a practical standpoint, is not open to the student: buying the original to distribute to students or to place in the library for consultation.[29] The fact that the establishment has limited means does not seem to bar the recognition of this point.

Nature of the work

[108] In *CCH*, the Court found that it is generally in the public interest that access to legal resources not be unjustifiably restricted, at least if a policy exists that puts reasonable limits on access to works.[30] Here, we were not made aware of any such policy. Moreover, access to classroom materials, which are created using private resources, does not raise the same public interest concerns as access to legal resources, which are compiled by private publishers but largely created through using public resources. There is rarely an alternative to the most recent

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[27] *Ibid*.
[28] *Ibid*. at para. 69.
[29] In this respect, we take for granted that the proposition according to which the possibility of obtaining a licence is not relevant to determine the fairness of the dealing is limited to obtaining a licence, and does not apply to acquiring copies.
[30] *CCH*, *supra* note 3 at para 71.

judgment of the Supreme Court; a textbook can always be replaced with other teaching support resources.

Effect of the dealing on the work

[109] Another factor that must be considered is whether the copy competes with the original. Although the burden is normally on the user to prove that he or she qualifies for an exception, it is sometimes up to rights holders to show the consequences of the practice or dealing, especially if they are the only ones to possess the relevant information.[31] That publishers continue to produce new works despite photocopies being made may be a factor to be considered.

[110] The uncontradicted evidence from textbook publishers shows that textbook sales have shrunk by more than 30 per cent in 20 years. Several factors contributed to this decline, including the adoption of semester teaching, decrease in registrations, longer lifespan of textbooks, use of the Internet and other electronic tools, resource-based learning and use of class sets.

[111] We are not able to determine precisely to what extent each factor contributed to this decline. That said, by the Objectors' own admission, schools copy more than a quarter of a billion textbook pages each year, which represents 86 per cent of copies of Access Copyright's repertoire.[32] Moreover, it seems to us that resource-based learning and use of class sets would be impossible without photocopying works from Access Copyright's repertoire. Based on these findings and on all of the testimony, we conclude that the impact of photocopies made in support of these practices, while impossible to quantify, is sufficiently important to compete with the original to an extent that makes the dealing unfair.

[112] This finding is enough to conclude that photocopies made on a teacher's initiative for his or her students have an unfair effect on the works in Access Copyright's repertoire. Nonetheless, we would add an observation.

[113] We are persuaded that even if it were possible to show that each downstream dealing by a student is research-based and fair, the upstream dealings of teachers making copies for their entire class would not be. To begin with, the teacher-student relationship is not the same as that between the Great Library and lawyers. The Great Library is simply an extension of a lawyer's will. A teacher does not merely act on behalf of a student, given that, to a large extent, it is the teacher who instructs the student what to do with the material copied. Moreover, it seems that, even when regarded as facilitation, a systematic practice that competes with the market of the original must not be permitted, regardless of whether downstream dealings fall under the fair

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[31] *Ibid*. at para. 72.
[32] See the evidence referred to in note 5, *supra.*

dealing exception. This is undoubtedly what the Federal Court of Appeal had in mind in the following passage:

> [...] The Law Society has no purpose for copying the Publishers' works other than to fulfill the purpose of requesters. [...] Its only aim and design is to assist users of the Great Library in conducting research or private study, and it can, therefore, be said to have adopted that purpose as their own. [...] Moreover, the otherwise infringing activity is carried out by the Law Society only in response to a patron's request. But for the end user's request, the Law Society would not carry out any of these allegedly infringing activities. [...] [33]

[114] There are two advantages to this approach. First, it helps to "maintain the proper balance between the rights of a copyright owner and users' interests" [34] and avoid restricting them unduly (since both copyright owners' interests and users' rights can be unduly restricted). Second, this point of view seems to be the only one that conforms with article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works* and article 13 of the *Agreement on Trade-related Aspects of Intellectual Property Rights* concluded within the framework of the World Trade Organization. It is not necessary to make an exhaustive analysis of these provisions. That said, it seems self-evident that copies made on a teacher's initiative for his or her students either conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holders. Lately, the Supreme Court has been placing significant emphasis on treaties that Canada has not yet ratified;[35] it seems even more crucial to account for those that have been.

ii. Conclusion

[115] Table 1, attached, breaks down copies based on what should or should not be included in the royalty calculation pursuant to the fair dealing exception. It indicates the volumes of photocopies associated with four categories. At the Board's request, Access provided additional information regarding these categories, based on the photocopied pages analyzed by Access. We have revised the data upwards to account for the unanalyzed portion of photocopied pages.[36]

[116] Category 1 copies are excluded from the royalty calculation because Access agrees to treat them as falling under fair dealing. Category 2 copies are also excluded. For the reasons given at paragraphs 91 to 94, we consider them copies made for the purpose of research or private study,

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[33] *Supra* note 21 at para. 132.
[34] *CCH, supra* note 3 at para. 48.
[35] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at para. 97; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363 at para. 94.
[36] Since Access analyzed 255,009,334 photocopied pages out of a total volume of 270,030,690 pages, the results presented by Access have been revised upwards by 5.89 per cent to account for the unanalyzed photocopied pages (15,021,356).

even if the logging sticker indicates that they were made solely or partially for the purpose of criticism or review.

[117] Category 3 copies are also excluded since they fall under the exception. A single copy made for the use of the person making it, whether or not it was at his or her request, falls under the exception as long as it is made for a purpose that qualifies for the exception, even if it is made for other purposes as well. Such is also the case for single or multiple copies made for third parties at their request, as long they are made for an allowable purpose, even if they are made for other purposes as well. Based on the evidence before us and for the reasons we have given, we find that these copies are fair, even if they are made for multiple purposes. Had there been more evidence, we might have been led to a different conclusion. That said, the inclusion of these copies has practically no impact on the amount of the tariff, as will be seen further on.

[118] Category 4 copies are subject to a royalty. Even when made solely for purposes allowed under the exception, a copy made by a teacher with instructions to read the material, whether or not it was made at a student's request, and a copy made at the teacher's initiative for a group of students are simply not fair dealing. Their main purpose is instruction or non-private study. These copies are kept year-round. The institution could acquire the textbook rather than copy it, particularly since there is every indication that photocopies in general (and particularly those of textbooks, which represent 86 per cent of the activity for which Access claims remuneration), compete with sales of these textbooks.

[119] Our legal analysis does not correlate perfectly with the table we use to break down the copies that do or do not fall under the fair dealing exception. This discrepancy does not concern us, since it is either insignificant or irrelevant.

[120] For example, in the royalty calculation, we include copies made at the request of a *third party* with instructions to read the material, even though our finding is based primarily on reasoning dealing with the teacher-student relationship. Some reproductions made for other parties (co-workers) may have unintentionally been included in these copies. That said, a simple calculation is sufficient to show that, to modify the tariff we are certifying by one cent, half a million pages must be added to, or deleted from, the royalty calculation. The possible margins of error in categories 1 to 3 are significantly smaller and therefore inconsequential.

[121] Secondly, our reasoning with respect to Category 4 applies only to a subset of this category, namely, copies made solely for a purpose that qualifies for the exception. However, if we include these copies in the royalty calculation, we must also include copies made for both a purpose that qualifies for the exception and another purpose. It matters little, therefore, that we are unable to break down copies into these two categories.

[122] In our opinion, it would be unproductive to pursue the analysis further. The linkage between the table and our legal conclusions, although not perfect, is more than adequate.

B. DOES THE EXCEPTION SET OUT IN SUBSECTION 29.4(2) OF THE *ACT* APPLY TO WORKS IN ACCESS COPYRIGHT'S REPERTOIRE?

[123] The relevant provisions of the *Act* read as follows:

> 2 [...]
>
> "commercially available" means, in relation to a work or other subject-matter,
>
> (*a*) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
>
> (*b*) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;
>
> [...]
>
> 29.4(2) It is not an infringement of copyright for an educational institution or a person acting under its authority to
>
> (*a*) reproduce [...] on the premises of the educational institution
>
> [...]
>
> a work or other subject-matter as required for a test or examination.
>
> (3) Except in the case of manual reproduction, the exemption from copyright infringement provided by [...] subsection (2) does not apply if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose referred to in that paragraph or subsection, as the case may be.

[124] Access submits that copies made for examinations trigger remuneration and should be subject to the tariff. 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". The certification of a tariff fulfils these three requirements. The price, which is set by the Board, is necessarily reasonable. The time and effort required to claim the benefit of the tariff are insignificant.

[125] The Objectors argue that, on the contrary, subsection 29.4(3) of the *Act* concerns solely examinations that are published by publishing houses for sale to educational institutions. In their submission, to find otherwise would render the exception nugatory. If the intention had been to not extend the exception to works for which a licence is available, it would have been stipulated, as was done in subsections 30.8(8) and 30.9(6) of the *Act*, that the exception "does not apply [if/where] a licence is available from a collective society [...]".

[126] “Commercially available” must necessarily have the meaning Access ascribes to the expression. It is used only three times, namely, in the provision under examination and in the following provisions:

> 30.1(1) It is not an infringement of copyright for a library, archive or museum [...] to make, for the maintenance or management of its permanent collection [...], a copy of a work [...]
>
> (*a*) if the original is rare or unpublished and is (i) deteriorating, damaged or lost, or (ii) at risk of deterioration or becoming damaged or lost;
>
> (*b*) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
>
> (*c*) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable;
>
> [...]
>
> (2) Paragraphs (1)(*a*) to (*c*) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).
>
> [...]
>
> 32(1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to
>
> (*a*) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
>
> (*b*) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
>
> (*c*) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
>
> [...]
>
> (3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (*a*) of the definition “commercially available”.

[127] There are two components to the definition of “commercially available”. Paragraph (*a*) refers to the acquisition of copies. Paragraph (*b*) refers to the acquisition of licences. The

relevant parts of the wording of subsections 29.4(3) and 30.1(2) of the *Act* are identical; they must be interpreted in the same manner. Subsection 32(3) specifically excludes access to a licence. To interpret subsection 29.4(3), and thus, by extension, subsection 30.1(2), as suggested by the Objectors, would render paragraph (*b*) of the definition meaningless.

[128] Moreover, the Objectors mistakenly rely on the comment in *CCH* that the availability of a licence is not relevant. This comment concerns only fair dealing. The exception for copies made by educational institutions for examinations is a distinct exception. Furthermore, applying this proposal in this context would contradict the very wording of paragraph (*b*) of the definition.

[129] The interpretation that we adopt does not make the exception nugatory. The exception will be available to institutions not only for the use of works that are not part of Access Copyright's repertoire, but also for dealings for which Access offers no licence authorizing use of the work in the appropriate format, such as examinations that must be taken electronically.

C. ARE WORKS OF NON-AFFILIATED RIGHTS HOLDERS WHO HAVE CASHED A ROYALTY CHEQUE PART OF ACCESS COPYRIGHT'S REPERTOIRE FOR THE PURPOSES OF THIS CASE?

[130] Access agrees that it is entitled to collect royalties for works in its repertoire only. It maintains that it represents non-affiliated rights holders as a result of an implied agency relationship. Based on a previous decision of the Board,[37] the Objectors argue that, on the contrary, this notion simply has no place in collective administration. Both Access and the Objectors spent much time arguing whether or not there is implied agency relationship for the copies yet to be made.

[131] It is not necessary to discuss the relevance of every single argument. For 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.

[132] The definition of "collective society" specifically states that a society may be authorized to act by way of appointment as one's agent. The definition does not stipulate that this agency relationship must be explicit. Agency may arise from the conduct of those involved as well as through written agreement. Ratification of the agent's acts may also be implied; it is retroactive

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[37] *NRCC – Tariff 1.A (Commercial Radio) for the Years 1998 to 2002* (13 August 1999) Copyright Board Decision [*NRCC 1.A*].

to the date on which the agent performed the act. Accepting payment for an unauthorized transaction usually implies ratification of the transaction.[38]

[133] 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*. They cannot take proceedings for infringement of copyright against the person who made the copy. As it happens, for the purposes of these proceedings, the parties agree to consider the study data as being representative of photocopying patterns for all of the institutions and throughout the entire period covered by the tariff. The existence of an implied agency relationship, arising from the cashing of the cheque and limited to only those copies that were captured in the study, is sufficient to lead us to include these copies in the calculation of remuneration.

[134] The Objectors erroneously rely on *NRCC 1.A* in support of their arguments. In that case, certain collective societies sought to establish agency by *passive* ratification (in other words, by inaction). Here, by cashing the royalty cheque, non-affiliated rights holders performed an act confirming that Access had the right to authorize reproduction of the rights holder's work for the sole purpose of the copy captured by the volume study.

V. ECONOMIC ANALYSIS

[135] 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.

A. VOLUME OF PHOTOCOPIES

i. Volume Study

[136] As mentioned in paragraph 46, the study sets the total number of photocopies for the 2005-2006 school year at 10,330,149,254. Of this number, there were 7,248,137,928 photocopies of unpublished or unknown documents, leaving 3,082,011,326 photocopies of published documents, from which must be subtracted 2,811,980,636 photocopies of consumables and reproducibles. These calculations are set out in Table 2, attached.

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[38] See among others, G.H.L. Fridman, *The Law of Agency*, 7th ed. (Butterworths, 1996), at 59, 84, 106.

ii. Fair Dealing Exceptions

[137] Photocopied pages that benefit from the exceptions do not trigger remuneration. Access estimates this number to be 807,714, whereas the Objectors estimate it to be approximately 20 million. We estimated that there are 1,649,779 such pages (see Table 1, attached). This is the amount we subtract from the total.

iii. Documents in the Public Domain or on the Exclusion List

[138] Access determined that the equivalent of 1,215,623 photocopied pages are from documents that are in the public domain or on the exclusion list. The Objectors agree. These pages are excluded from the royalty calculation.

iv. Documents Containing Public Domain Material

[139] Based on an analysis of the content of approximately 300 transactions, Access estimates that approximately 0.1 per cent of photocopied pages were of public domain materials included within works that are otherwise part of its repertoire. The Objectors also use this adjustment. We therefore subtract 267,165 pages from the volume triggering remuneration.

v. Unidentified Documents

[140] Access and its experts were unable to identify all of the works reproduced. Circum classifies these photocopied pages into two categories: documents deemed published and unknown documents.

[141] According to Circum, there are three categories of unidentified published documents: documents that may be reproduced without a licence, those that may be reproduced with a licence and those that may not be reproduced, even with a licence. It was not possible to assign each document to a certain category. Nonetheless, Circum maintains that it is sometimes possible to show that a document does not belong to one of the three categories, in which case, it suggests assigning the work equally to each of the other two categories. In the remaining cases, it suggests allocating one third of the works to each of the three categories. Circum thus estimates that 20 million pages of unidentified documents deemed published should trigger remuneration. In the case of unknown documents, Circum posits that the ratio of unknown documents triggering remuneration is the same as that of identified documents, leading it to add 13.5 million pages to the volume triggering remuneration.

[142] The Objectors submit that, on the contrary, it is unlikely that Circum would have been able to determine whether a document was published without the bibliographic information identifying the work. They also claim that assigning the same number of documents to each of

the categories is arbitrary; to do so would be to ignore the fact that 98 per cent of photocopied pages do not trigger remuneration.

[143] Instead, Professor Andersen proposes that all unidentified documents should be treated collectively and broken down in the same manner as identified documents. He estimates that approximately 1.5 per cent of all identified pages photocopied trigger remuneration. By applying this percentage to unidentified documents, he estimates that some 10 million unidentified pages must be added to the royalty calculation.

[144] It seems that the probability that an unidentified document would trigger remuneration can be estimated with greater accuracy. That said, given the seriousness and care with which Access analyzed the copies, we find that it is possible to show that certain unidentified documents have clearly been published. We therefore treat unidentified published documents and unknown documents differently.

[145] The volume of unidentified published documents triggering remuneration is obtained by applying the ratio of pages triggering remuneration among identified published documents, namely, 8.7 per cent, to the volume of published pages photocopied. We therefore subtract 91.3 per cent of the 43.3 million pages originating from unidentified published documents, namely, 39,541,032 pages.

[146] The volume of unknown unidentified documents triggering remuneration is obtained as suggested by Circum: the ratio of pages photocopied triggering remuneration among identified documents, namely, 2.2 per cent, is applied to the volume of unknown documents, adding 11,940,924 pages to the volume triggering remuneration.

vi. Pages Photocopied in Ministries of Education and School Boards

[147] The parties agree henceforth not to impose this tariff on reproductions made in Ministries of Education and school boards, subject to what follows. We therefore subtract 299,677 pages from the volume triggering remuneration.

vii. Ministry Examinations and Distance Education

[148] For the reasons set out at paragraphs 123 to 129, the 6,995,451 pages photocopied for ministry examinations are included in the volume triggering remuneration. Moreover, based on data from the four relevant provinces,[39] Access estimates that 253,921 pages were photocopied for distance education. The Objectors exclude these pages without offering any justification.

[39] Nova Scotia, Manitoba, Saskatchewan and Alberta. Other provinces are not responsible for material given to students for distance education.

These pages should be treated in the same manner as those related to traditional classroom instruction. We therefore add them to the volume triggering remuneration.

viii. Non-Affiliated Rights Holders

[149] For the reasons set out at paragraphs 130 to 134, copies of works owned by non-affiliated rights holders who have cashed their royalty cheque from Access must be included in the royalty calculation. In 2005, the amount sent to non-affiliated rights holders that was not cashed represented approximately 0.1 per cent of all royalties distributed pursuant to the pan-Canadian licence. The volume triggering remuneration is therefore reduced accordingly by 246,248 pages.

ix. Volume Triggering Remuneration

[150] After making the adjustments described above, we obtain a volume of 246,001,462 photocopied pages triggering remuneration. Although these photocopied pages mainly originate from books, they also come from newspapers and magazines.

[151] Access estimates that, of the volume triggering remuneration, 86.4 per cent of the pages came from books, 7.1 per cent from newspapers and 6.5 per cent from magazines. For their part, the Objectors obtained 85.5 per cent, 6.2 per cent and 8.3 per cent, respectively. The discrepancies between the two parties' rates are quite insignificant and result in only a very small variation in the final rate. Nonetheless, we find that Access' apportionment is more accurate since the methodology we use is similar to that of Access, particularly regarding the treatment of unidentified documents deemed published. We therefore assess a volume triggering remuneration of 212,545,263 pages from books, 17,466,104 from newspapers and 15,990,095 from magazines.

B. VALUE OF A PHOTOCOPIED PAGE

i. Determining the Reference Price

[152] Messrs. Audley and Hyatt submit that a fair and equitable tariff should reflect the benefits that educational institutions obtain through the photocopies they make. Further, the amount received by rights holders should reflect the amount they would receive if the "photocopy market" were competitive. The Objectors say that they essentially agree with this approach, although they suggest several downward adjustments to come to a tariff that is fair and equitable.

[153] Experts for both parties agree that no other tariff certified by the Board may be used as a reference price in this case. They also agree to use the retail price of literary works as the reference price to set the tariff.

[154] Messrs. Audley and Hyatt propose to set the average value of a photocopied page separately for books, newspapers and magazines. In all three instances, a sample of works sold in the retail market and included in Access Copyright's repertoire is analyzed to determine the average selling price per page. The price thereby obtained is 16.29¢ for books, 2.8¢ for newspapers and 2.7¢ for magazines. Messrs. Audley and Hyatt then reduce the price per book page by 10.26 per cent to reflect the fact that educational institutions usually receive discounts on the suggested retail price, which reduces the price per book page to 14.6¢.

[155] Messrs. Lyman and Chodorowicz accept this approach but submit that the price obtained must be reduced to better reflect the value of the photocopy compared to the original. To do so, they propose making two adjustments. The first represents the difference in value between multiple-use and single-use formats. The second takes into account the cost of making a photocopy.

[156] We accept the starting point proposed by the parties. However, we make a number of adjustments, as indicated in Table 3, attached.

ii. Creative Contribution in the Retail Price

[157] These proceedings essentially concern protected works included in a book, newspaper or magazine. In Messrs. Audley and Hyatt's opinion, a work and its format must consequently be assessed as a whole. Furthermore, for a book to be publicly available, it is not enough that the publisher makes copies. The publisher must also publicize the book and deliver it to the recipients. They therefore claim that the reference price of one photocopied page should take into account all of the costs incurred by the publisher.

[158] We disagree for the following reasons. 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 rights holders, such as the transportation company that delivers the work on its medium to the recipient.

[159] A useful example is the tariff for the private copying of sound recordings of musical works. To certify this tariff, the Board used as a starting point only a portion of the retail price of prerecorded CDs, corresponding to remuneration for the contribution of authors, performers and producers. This approach ensures that rights holders receive remuneration equivalent to that obtained from sales of prerecorded CDs. The remuneration that pertains to non-creative inputs is therefore eliminated.

[160] The Educational Rights Collective of Canada (ERCC) tariff for the reproduction of television programs by educational institutions is another example in which the Board used as the reference price the retail price of a work in a format similar to that for which the tariff was

certified. In that case, the Board used, with virtually no adjustments, the retail price of videocassettes as the reference price, essentially because to do otherwise "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".[40] The Board concluded that ERCC's tariff must coexist with the existing distribution market and that an excessively low tariff would be a serious competitive threat to the existing market.

[161] The circumstances that led the Board to certify the ERCC tariff are not the same as in this case. Admittedly, as we point out at paragraph 111, we believe that photocopies in educational institutions are able to compete with textbooks to the point of adversely affecting sales. That said, contrary to what the Board concluded regarding the ERCC, we are of the opinion that the competition between textbooks and reprography, although sufficiently detrimental as to make certain instances of reprography unfair, is not so intense that it "threatens existing markets" [41] for textbooks. First, while it is possible, at least theoretically, to replace all prerecorded educational videocassettes with taped copies of television programs, photocopying textbooks would be inconceivable if those same textbooks are no longer published. Second, as we have indicated, photocopying alone does not account for the drop in the volume of sales. Third, the fact that the cost of a reprography licence has varied only marginally over the last few years means that this cost is unlikely to have a significant impact on the volume of sales. Lastly, and contrary to what occurred as regards the ERCC, Access and the Objectors have already concluded several agreements providing for non-trivial royalty payments. If there was intense competition and substitutability between reprographic reproductions and textbooks, this tariff, which increases royalties, would have the effect of stimulating the book industry rather than harming it.

[162] We therefore deduct from the retail price of the book the portion that, in our opinion, is remuneration for anything other than the author's and publisher's creative contributions. To do so, we use information entered into evidence by Access at the Board's request regarding the breakdown of production costs for books, magazines and newspapers.[42] We find that only elements related to the making of a protected work and its "master" must be considered, and all other elements related to subsequent stages in the making should be excluded, such as printing, distribution, marketing and administration costs.

[163] According to data submitted by Access, expenditures associated with paper and printing, invoicing, marketing and administration total 51.6 per cent of revenue for book publishers. In the case of newspapers, costs for production, printing, circulation and distribution, marketing and administration total 65.4 per cent. As regards magazines, a similar proportion rises to 73.08 per

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[40] *ERCC – Educational Rights Tariff, 1999 - 2002* (25 October 2002) Copyright Board Decision at 5-6.
[41] *Ibid*. at 6.
[42] Exhibit Access-23.

cent.[43] These are the proportions we subtract from the starting price for each type of works, with the results set out in Table 3.

iii. Cost of Photocopies

[164] The Objectors submit that costs associated with reprography must be deducted from the reference price. They point out that in the decision certifying the ERCC's first tariff, the Board had made a downward adjustment to take into account the cost of a cassette. The Objectors estimate that the cost of renting a photocopier is 1.1¢ per page and that the cost of paper is 0.5¢. They therefore propose deducting 1.6¢ per page.

[165] Messrs. Audley and Hyatt acknowledge that such an adjustment might be appropriate but believe that the benefits of the licence more than make up for the cost of photocopies. Moreover, they submit that such an adjustment is conceptually problematic since, as the quality of a photocopy (and consequently its cost) increases, royalties would decrease.

[166] Nonetheless, Messrs. Audley and Hyatt have proposed the alternate solution of deducting production and printing costs, which publishers do not incur whenever a page from one of their books is reproduced. They argue that, furthermore, such an adjustment is enough to account for the fact that a photocopy is used only once, whereas a book is used more often.

[167] In our opinion, a deduction would be necessary, if only to avoid double counting. However, as Messrs. Audley and Hyatt suggest, deducting production and printing costs is equivalent to deducting photocopying costs. As we have just eliminated these costs from the royalty calculation, it is not necessary to make another adjustment in this regard.

iv. Single-Use Photocopies

[168] Messrs. Lyman and Chodorowicz submit that there is a fundamental difference in value between disposable and reusable goods. Contrary to books, photocopies are not meant to be used several times. However, nothing seems to indicate that newspapers or magazines are used more often than copies of articles from those newspapers or magazines.

[169] To determine the difference in value between a disposable document and a reusable one, Messrs. Lyman and Chodorowicz analyzed five markets of single-use works. These markets include the resale of textbooks in American and Canadian colleges, resale of elementary and secondary textbooks by Canadian resellers and used books offered on the Amazon.com Web site. For these three markets, Messrs. Lyman and Chodorowicz estimate that the difference between the price initially paid and the price at which the user resells a work is an indicator of the relative

[43] Using net production and printing expenditures of prepress costs.

value of single and multiple uses. The experts also examined literary works sold by Thomson Advantage Books in paperback or loose-leaf formats and submit that the prices of these works are a good approximation of the value of a photocopy. Lastly, Messrs. Lyman and Chodorowicz analyzed works sold in electronic format by Thomson Advantage eBooks. Based on data from these five markets, they determined that a user who has access to a work for a limited time only or who cannot make it available to other users pays approximately half of the retail price of the work. They therefore propose reducing the reference price of a photocopy of a book accordingly.

[170] In Messrs. Audley and Hyatt's view, three of the five markets examined by the Objectors are not suited to this analysis. According to them, the price of works sold in loose-leaf format by Thomson Advantage Books does not reflect the single-use nature but rather the value of a poorer quality edition of the work. Moreover, they believe that electronic versions of Thomson Advantage eBooks are not comparable to photocopied pages since it is not a comparison between works available on paper. Lastly, they maintain that the resale market for elementary and secondary textbooks cannot be used since Messrs. Lyman and Chodorowicz fail to take into account the possibility that resellers may have acquired works from certain wholesalers who pay less than half of the retail price. In that case, since initial users recoup less than what they paid originally, the value of single-use goods is greater than what Messrs. Lyman and Chodorowicz estimate.

[171] Regarding the resale of textbooks in American and Canadian colleges and used books on the Amazon.com Web site, Messrs. Audley and Hyatt submit that unsold books must be taken into account. According to them, users who do not resell their books pay 100 per cent of the retail price for a single use of the work. They estimate that the value of a single use is equal to approximately 85 per cent of the value of multiple uses when these copies are taken into account.

[172] A reusable document is clearly worth more than a disposable document. A hardcover book has a longer lifespan than a photocopy, allowing several students to use it. That said, and as Messrs. Audley and Hyatt claim, this value is taken into account in production and printing costs for books. As we have already excluded these expenditures from the retail price, the adjustment to account for the lower value of single-use documents has already been made implicitly. No other adjustment is needed.

v. Value Added Through Selection of Segments of Works

[173] Messrs. Audley and Hyatt contend it is necessary to take into account the value added of a photocopy as a result of the selection made by the user. They submit, among other things, that it costs approximately 30 per cent more per work to buy a single track than to buy an album on iTunes. They also conducted a market analysis of a number of literary classics and determined that a work sold singly generally costs 60 per cent more than if it had been included in a compilation. The Objectors filed no evidence on this issue and did not specifically adjust for this

value. Their expert, Mr. Chodorowicz, did however acknowledge that the selection of segments of works offers value to the user, a value he submits, that was implicitly included in the objector's assessment.

[174] We agree that a page that is photocopied has value added by the mere fact that it was picked. We do not consider the comparison to literary compilations to be relevant. A compilation is less expensive because several complete works are being purchased at one time. The value added that can be attributed to the choice of the most pertinent excerpt of a work is an entirely different matter.

[175] The difference between the value of a selected musical track and the average value of the tracks on the album is partly a reflection of the fact that, often, one or two tracks from the album are used to market the album, played on the radio and used to promote album sales. Even if one page or section of a book does not serve precisely the same function, from the user's point of view, the selection of this page or section itself offers greater value than the average value of all the pages of the book. The only evidence we have indicates that the value added through selection is 30 per cent. This is the percentage that we use.

vi. Benefits of the Licence

[176] Messrs. Audley and Hyatt submit that access to a blanket licence results in significant savings in transaction costs for educational institutions. Although they do not put forward any quantitative evaluation, they cite a decision of the Board dealing with performing rights royalties for commercial radio stations[44] as an example in which such savings were considered. In that decision, the Board took into account benefits associated with the licence and access to a large repertoire in setting a tariff for low music use radio stations. In setting a lower rate specifically for these stations, the Board needed to consider the benefits derived from access to the repertoire, leading it to an upward correction to the rate of one-quarter of one percentage point.

[177] We find that decision to be irrelevant in this instance. The decision involved users seeking to pay a lower rate than others subject to the same tariff. Here, no one is contemplating a tiered tariff. Moreover, the blanket licence creates benefits for both the collective society and users. For example, it facilitates rights management and royalty collection. As there is no evidence regarding these related benefits, we assume that they are off-setting and make no adjustment.

vii. Indemnity Clause

[178] Agreements that Access has entered into with educational institutions have always included an indemnity clause. Subject to a list of exceptions in the licence, Access assumed the

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[44] *Various SOCAN Tariffs for the Year 1991* (31 July 1991) Copyright Board Decision.

risk of proceedings for copyright infringement by non-affiliated rights holders as long as the institution complied with the terms of the licence. Access does not propose to reintroduce this provision in the tariff, on the basis that it would no longer be necessary for the following reasons.

[179] First, the clause was introduced at a time when Access Copyright's repertoire was much more limited than it is now. Access argues, without supporting evidence, that more than 99 per cent of works reproduced by educational institutions are currently part of its repertoire.

[180] Second, since 1998, the *Act* includes two provisions that limit the possible impact of proceedings against educational institutions. Section 30.3 provides that an institution does not infringe copyright where a copy of a work is made using a machine for the making, by reprographic reproduction, of copies of works in printed form and there is affixed a notice warning of infringement of copyright, as long as there is an agreement or tariff between the institution and the collective society. Section 38.2 adds that a copyright owner who has not authorized a collective society to authorize its reprographic reproduction may recover no more than the amount of royalties that would have been payable to the society.

[181] Third, the indemnity clause has never been used.

[182] The Objectors challenge the assertion that more than 99 per cent of works reproduced by educational institutions are now part of Access Copyright's repertoire because, among other things, many rights holders are still not affiliated with the society. They submit that the absence of such a provision would detrimentally affect them by making them once again vulnerable to proceedings.

[183] For the reasons set out by Access, we also believe that the indemnity clause has no place in this tariff.

C. Royalty Rate

[184] Table 4, attached, indicates the steps for calculating the final royalty rate. The value per page attributed to each type of document, multiplied by the corresponding number of pages photocopied, gives the total value of the photocopied pages for each type. The sum of these values corresponds to the total payment that the educational institutions concerned should make for 2005-2006.

[185] In order that the amount of royalties payable by an institution be proportionate to the number of students registered in that institution, the parties agree to divide the total value of photocopies by the number of FTE students in 2005-2006, and to then express the tariff as an amount per student. We also adopt this approach. The most recent data indicate that the number of FTE students in 2005-2006 was 3,859,715. The resulting rate is $5.16 per FTE student.

D. TOTAL ROYALTIES AND ABILITY TO PAY

[186] Total royalties for 2005-2006 at the rate of $5.16 would be just under $20 million. This amount represents only 0.05 per cent of costs in elementary and secondary education.[45] The education system, as a whole, is perfectly capable of dealing with this increase in royalties in the long term.

[187] In the short term, however, some account must be taken of the fact that the royalties generated by a rate of $5.16 are more than double that which was paid under the rate negotiated in the Pan-Canadian agreement, namely, approximately $9 million. This is a significant increase. Those who hold the licence under the tariff can either be school boards or provincial ministries of education. Both operate under strict financial constraints. Changing budgetary allocations takes time. Running school board deficits, when not all together prohibited, is generally strongly discouraged.

[188] We understand that labour adjudicators are reluctant to account for the ability to pay of public sector agents. However, in the present circumstances, we find that it is only fair and equitable to do so, as we have done in the past for private sector entities.[46] For these reasons, we will apply a discount of 10 per cent for the first four years of the tariff, yielding a FTE rate of $4.64 and total royalties for 2005-2006 at just under $18 million. The full rate of $5.16 per FTE student will apply in 2009.

VI. TARIFF WORDING

[189] The Board's practice with tariffs of first impression is to circulate a draft for discussion. This time, we asked the parties to discuss wording issues on their own. They agreed on the essence of a text that is largely based on the pan-Canadian licence and reads more like a contract than a tariff. Normally, we would have rewritten the document with a view to reflect the difference between these two types of legal instruments. Instead, we decided to start with what the parties submitted, for a number of reasons. Their relationship is a long standing one. The parties share an understanding of what the text means. Overhauling its structure and wording would have required extensive explanations and consultations, resulting in even more delay in certifying a tariff that is due to expire at the end of this year.

[190] We must address a number of issues either because the parties could not reach an agreement or to reflect the change in the nature of the relationship that occurs when a collective society asks for a tariff instead of issuing licences. For example, a tariff leaves nothing on the

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[45] These costs come from Exhibit Access-12.

[46] See e.g. *Pay Audio Services for the years 2003 to 2006* (25 February 2005) Copyright Board Decision and *Satellite Radio Services (8 April 2009) Copyright Board* Decision.

table. Anyone who complies with it cannot be required to do anything more. Consequently, it must regulate all aspects of the ongoing relationship that we consider essential to the effective operation of the tariff. Also, a tariff is a regulatory instrument, not a contract, and is interpreted as such. Its text ought to be as specific as possible, or some of it may be void for uncertainty. It must "spend" the Board's jurisdiction, and avoid sub-delegating decisions to either party.

A. AMBIT

[191] The Objectors want the tariff to target all the needs of those who will rely on it. That approach, though attractive, is not in accord with the approach we used to set the rate. We agree with Access that it would be unfair to licence copies that could not have been captured by the volume study, with the possible exception of modest, accessory uses. Anything else should be reported and paid for separately. Consequently, the tariff does not extend (for example) to programs delivered by persons or institutions that were not targeted in the proposed tariff (penal institutions, First Nations schools).

[192] Access asked that only libraries located on the premises of an educational institution be subject to the tariff. That limitation was not included in the pan-Canadian licence or the proposed tariff, and nothing indicates that off-site library copying is widely used. On the other hand, these copies probably were not captured in the volume study. The tariff will allow off-site library copying but will require that they be specifically identified when an institution reports its copying activities.

B. PROHIBITIONS

[193] Section 4 lists certain "prohibitions". Access wishes to specify that blackline masters are not targeted in the tariff. A provision that "prohibits" a form of use gives the impression that the use infringes copyright. Blackline masters generally come with a permission to copy. The prohibition provision should not mention them. The issue is addressed instead in the notice that users will be required to post next to photocopy machines.

C. ATTRIBUTION

[194] We clarified attribution rules. The pan-Canadian licence required a licensee to ask its employees and agents to act "in accordance with good bibliographic practice". The Objectors opposed any mention of attribution requirements in the tariff. Again, a tariff must flesh out the relationship between collective societies and users as much as possible. Attribution rules can be part of a tariff's terms and conditions. On the other hand, while a tariff can incorporate by reference widely recognized external norms, a reference to "good bibliographic practices" may be too vague to be enforceable.

D. NOTICES

[195] Appendix A of the tariff sets out the text of a notice to be posted next to each photocopy machine. The pan-Canadian licence required licensees to "use best efforts" to inform those who make copies of the terms and conditions of the licence and of their obligation to comply with them. So vague a reference should be avoided in a tariff.

[196] The pan-Canadian licence allowed Access to require licensees to affix a poster without specifying its content. Allowing one party to dictate the content of a notice should be avoided in a tariff. Moreover, a notice is not the appropriate mechanism to inform others about the meaning of concepts such as fair dealing, especially if users have a legitimate disagreement as to that meaning.

E. SURVEYS

[197] Access asked that the tariff allow it to collect data to assist in distributing royalties (bibliographic data) and in setting future tariffs (volume data). Licensees would appoint a single representative for the implementation of the studies. A school that refused to take part in a study would be fined $500. The Objectors asked instead that the Board leave the parties to agree on the terms of the studies. In response, Access argued that both types of surveys are necessary if the tariff is to operate properly. It added that having accepted that individual school boards be licensees, it should not be expected to deal with each one of them when collecting data.

[198] We do not agree with Mr. Whitehead that the information mechanisms Access proposes are unnecessarily costly or intrusive or that the data it wishes to obtain is irrelevant. Many Board tariffs impose reporting obligations for the purposes of distribution. Self-reporting, coupled with an audit provision, is the norm. Granting access to the premises of institutions in order to allow a collective society to conduct its own surveys is no doubt possible: access is allowed under audit provisions as a matter of course. In this instance, we prefer not to proceed this way. Instead, the tariff allows Access to require each institution to provide ten days of data per year, as is done in a variety of other tariffs. Access can ask its experts to select institutions so as to optimize the statistical reliability of the data. It can offer to conduct its own survey; many institutions probably will consent to this, since this may prove less costly. Access also is free to devise reporting forms which, no doubt, most institutions will gladly use.

[199] On the other hand, we are not certain that a tariff should impose participation in a volume study. Such a study is crucial in setting a tariff, but not to implement it. This is better left to an agreement between the parties and, failing this, to the usual discovery mechanisms, at least for the time being.

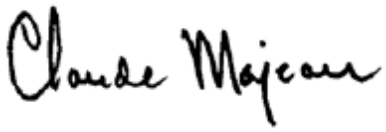
[200] We also do not know whether we can provide a fine for institutions that do not comply with a request for information and, in any event, do not wish to resort to this form of sanction.

Instead, institutions that do not comply will be unable to avail themselves of the tariff until they cure the defect.

[201] We understand why Access wishes to deal with a single person on all survey issues. Having said that, we do not intend to impose such a requirement. Again, we prefer to leave this to the initiative of the parties. Failing an agreement, Access will have to deal with fewer users than other collective societies that deal with hundreds of radio stations or a few thousand retransmission systems.

F. TRANSITIONAL PROVISIONS

[202] Licensees will be allowed to pay additional royalties resulting from the change in rate from the pan-Canadian licence to this tariff in two payments. Part of the delay in certifying the tariff resulted from errors made by Access in collecting and interpreting data. The additional royalties will therefore not attract interest for the last six months of the period for which they would otherwise have been calculated.



Claude Majeau
Secretary General

TABLE 1

VOLUME OF FAIR DEALING EXCEPTION

Categories of Photocopies	Volume	Cumulative Total
1. Single copies made for use of the person making the copy and single or multiple copies made for third parties at their request[1] a. solely for the purpose of private study and/or research	623,585	
2. Single copies made for use of the person making the copy and single or multiple copies made for third parties at their request[1] a. solely for the purpose of criticism and/or review, or b. solely for the purpose of criticism and/or review AND private study and/or research	204,285	827,870
3. Single copies made for use of the person making the copy and single or multiple copies made for third parties at their request[1] a. for the purpose of private study and/or research and/or criticism and/or review i. for at least one purpose other than those allowable under the fair dealing exception	821,909	1,649,779
4. Multiple copies made for use of the person making the copies and	16,861,583	18,511,362

single or multiple copies made for third parties without their request a. for the purpose of private study and/or research and/or criticism and/or review i. for at least one purpose other than those allowable under the fair dealing exception b. solely for the purpose of private study and/or research and/or criticism and/or review

[1] Without instructions to read the material.

TABLE 2

VOLUME OF PHOTOCOPIED PAGES TRIGGERING REMUNERATION

TOTAL NUMBER OF PHOTOCOPIED PAGES	**10,330,149,254**
Minus photocopied pages of unpublished or unknown documents	7,248,137,928
PHOTOCOPIED PAGES OF PUBLISHED DOCUMENTS	**3,082,011,326**
Minus photocopied pages:	
• of consumables or reproducibles	2,811,980,636
• that qualify under the fair dealing exception	1,649,779
• of documents in the public domain or on the exclusion list	1,215,623
SUB-TOTAL	**267,165,288**
Minus photocopied pages:	
• containing public domain material (0.1 per cent of sub-total)	267,165
• of unidentified published documents not triggering royalties	39,541,032
Plus photocopied pages of unknown documents triggering royalties	11,940,924
Minus photocopied pages by ministries and school boards	299,677
Plus photocopied pages:	
• for ministry examinations	6,995,451
• for distance education	253,921
SUB-TOTAL	**246,247,710**
Minus photocopied pages of works of non-affiliated rights holders who have not cashed their royalty cheque (0.1 per cent of sub-total)	246,248
VOLUME OF PHOTOCOPIED PAGES TRIGGERING REMUNERATION	**246,001,462**

TABLE 3

VALUE OF A PHOTOCOPIED PAGE

	Books	**Newspapers**	**Magazines**
AVERAGE RETAIL PRICE, PER PAGE	**16.29¢**	**2.80¢**	**2.70¢**
Minus discount on books for schools (10.26%)	1.67¢	-	-
ADJUSTED SELLING PRICE	**14.62¢**	**2.80¢**	**2.70¢**
Minus portion of costs not corresponding to creative contribution[1]	7.54¢	1.83¢	1.97¢
VALUE OF CREATIVE CONTRIBUTION	**7.08¢**	**0.97¢**	**0.73¢**
Plus value added through selection of segments of works (30%)	2.12¢	0.29¢	0.22¢

VALUE OF A PHOTOCOPIED PAGE	**9.20¢**	**1.26¢**	**0.95¢**

[1] Calculated using the proportions found in paragraph 163.

TABLE 4

FINAL RATE

	Books	**Newspapers**	**Magazines**	**Total**
VALUE OF A PHOTOCOPIED PAGE	**9.20¢**	**1.26¢**	**0.95¢**	
Volume of photocopied pages triggering remuneration	212,545,263	17,466,104	15,990,095	
VALUE OF PHOTOCOPIED PAGES TRIGGERING REMUNERATION	**$19,554,164**	**$220,073**	**$151,906**	**$19,926,143**
Full-Time Equivalent students				3,859,715
FINAL RATE				**$5.16**