

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2013-05-29

Citation File: Reprographic Reproduction, 2010-2015

Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Copyright Act, subsection 66.51

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

**Proposed
Tariffs
Considered** Educational Institutions – 2010-2015

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

Reasons for decision

I. INTRODUCTION

[1] On March 31, 2009 and March 30, 2012, pursuant to subsection 70.13(1) of the *Copyright Act*¹ (the “*Act*”), Access Copyright (Access) filed statements of royalties it proposes to collect for the reproduction, in Canada, of works in its repertoire by educational institutions and persons acting under their authority for 2010 to 2012 and 2013 to 2015. The proposals were published in the *Canada Gazette* as required by the *Act*. Prospective users and their representatives were notified of their right to challenge the proposal. The Ministries of Education of the twelve Canadian provinces and territories outside Quebec and each of the Ontario school boards (the “Objectors”) exercised that right.

[2] On January 18, 2013, after a long judicial saga,² the Board certified the *Access Copyright Elementary and Secondary School Tariff, 2005-2009*. That tariff replaced the one certified on

¹ R.S.C. c. C-42.

² On June 26, 2009, the Board set the tariff at \$5.16 per full-time equivalent (FTE) student: *Access Copyright*

June 26, 2009, covering the same years. By virtue of section 70.18 of the *Act*, the tariff certified in 2009 continued to apply on an interim basis starting January 1, 2010. As of January 18, 2013, and pursuant to the same provision, the tariff certified in 2013 applied on an interim basis on a going forward basis.

[3] Early in December, 2012, counsel for the Objectors notified Access that they would stop paying royalties pursuant to the tariff as of January 1, 2013, as none would be operating under the tariff from that date. On April 8, 2013, when the application under consideration was made, it could be anticipated that the Objectors would not make the first payment required under the tariff certified for 2013, which is due on April 30, 2013.

[4] The decision to cease paying royalties under the tariff supposes one of two things, in respect of the 200 million or more copies that the Board found to trigger a royalty. Either teachers no longer make any such copies, or all such copies are no longer compensable, as a result of recent changes to the *Act* or of recent decisions of the Supreme Court of Canada, or because compensable copies are now licensed through other channels.

[5] The Objectors' decision to do without the tariff may be grounded in part in the conclusions set out in a document entitled Copyright Matters!,³ co-authored by one of the Objectors' counsel. In a nutshell, the document advances the view that anything the 2005-2009 tariff authorized constitutes fair dealing for an allowable purpose. That view relies on an interpretation of decisions of the Supreme Court of Canada which has yet to be tested before a competent forum. Indeed, the decision of the Court in *Alberta (SCC)*⁴ targeted only a small⁵ subset of copies: the positions the Objectors advanced during the redetermination of the matter before the Board clearly reflected this.

[6] On April 8, 2013, pursuant to section 66.51 of the *Act*, Access applied for an interim decision in the form of an approved interim tariff that:

(Educational Institutions) 2005-2009 (26 June 2009) Copyright Board Decision. [*Access K-12 (2009)*]

On July 23, 2010, the Federal Court of Appeal remitted the decision to the Board, to determine whether certain copies made for the purposes of examinations and tests were non-compensable pursuant to section 29.4 of the *Act*: *Alberta (Education) v. Access Copyright* 2010 FCA 199. The Board concluded that they were compensable and left the tariff unchanged in this respect: *Access Copyright (Educational Institutions) 2005-2009 –Redetermination (18 January 2013)* Copyright Board Decision at para. 32. [*Access K-12 (2013)*]

On July 12, 2012, the Supreme Court of Canada concluded that the Board had incorrectly applied the principle of fair dealing to certain copies and remitted the matter to the Board for redetermination: *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37. [*Alberta (SCC)*] As a result, the Board lowered the FTE from \$5.16 to \$4.81: *Access K-12 (2013)* at paras. 5-7.

³ Wanda Noel and Jordan Snell, Copyright Matters! (3d ed.) 2012, Council of Ministers of Education, Canada, Canadian School Boards Association, Canadian Teachers' Federation, 22 pp.

⁴ *Supra* note 2.

⁵ 7 per cent, both in value $[(5.16 - 4.81) \div 5.16]$: *supra* note 2] and number of copies $[16,861,583 \div 246,001,462]$: see *Access K-12 (2009)*, *supra* note 2, Tables 1 and 2].

continues the 2005-2009 tariff certified in 2013 from January 1, 2013 until final tariffs are certified for 2010 to 2015; reduces the certified rate from \$4.81 to \$4.66 per full-time equivalent student, to account for recent amendments to section 29.4 of the *Act*;

requires the Objectors to comply with all the obligations imposed by the tariff relating to record keeping, payments, auditing and sampling;

provides that any payments made in accordance with the interim tariff shall be without prejudice to: a) the right of Access to demand payment of further royalty amounts; and b) the right of Objectors to demand reimbursement of monies paid under the interim tariff, as appropriate, once the final tariff is certified;

provides that any step taken under the interim tariff shall be without prejudice to the positions to be advanced in the proceedings leading to a final certified tariff; and

provides such further and other relief as any party may subsequently request and which the Board, in its discretion, sees fit to grant.

[7] Access claims that it requires interim relief to counteract the Objectors' decision to stop paying royalties. Access expects the decision will reduce its revenues by approximately 45 per cent and will significantly impair its ability to carry out its mandate. Since hearings on the proposed tariffs are scheduled to begin on April 29, 2014, Access does not expect to receive a final certified tariff until the third quarter of 2014 at the earliest. In the interim, Access will suffer the deleterious effects arising from the Objectors' decision to cease paying any royalties.

[8] According to Access, the interim tariff will serve to maintain a relationship that has endured for nearly two decades and the financial *status quo ante* that existed between the parties until the end of December 2012. It will provide continuity and certainty for all parties. The issuance of the requested interim tariff will not adversely affect the Objectors. Those who do not require a licence from Access will not be required to pay anything. Those who do need a licence will be afforded a mechanism to secure it. As for those who need a licence but decide to do without, the interim tariff will provide Access with tariff enforcement remedies under the *Act*.

[9] Access claims that while section 70.18 of the *Act* provides for the permissive continuation of the ability to pay and collect royalties under the 2005-2009 tariff, until a final tariff is certified, it provides no express right to Access to pursue recovery of the royalties, in default of their payment, in a court of competent jurisdiction. Such a remedy only expressly appears in subsection 68.2(1), and only for the period specified in an approved tariff (i.e., in this instance, only to the end of 2009). According to Access, a tariff continued pursuant to section 70.18 is not subject to subsection 68.2(1), but an interim tariff issued by the Board would be.

[10] Access concludes that the existence of a dispute as to the meaning of section 70.18 of the *Act* is in itself sufficient to create a legal void justifying the adoption of an interim tariff. In addition, the fact that, absent an approved tariff, a copyright owner's only resort may be to bring

proceedings for copyright infringement, may, in and of itself, justify the issuance of an interim tariff.

[11] The Objectors oppose the application. They agree that the Board has the power to grant it, but argue that the principles the Board regularly invokes in deciding whether or not to grant such an application are not satisfied. The Objectors take issue with the interpretation Access offers of section 70.18 of the *Act*. By virtue of that section, the 2005-2009 tariff continues to operate on an interim basis; if left undisturbed, it will continue to do so until the Board certifies the final tariff for the relevant period. Access apparently believes that an interim decision may change the Objectors' view on their need to rely on the tariff or that the interim tariff extension pursuant to section 70.18 does not provide it with an effective enforcement mechanism, while an approved interim tariff would provide it with such a remedy. In the Objectors' view, this is wrong and as a result the application is entirely unnecessary. Furthermore, the expectation of Access that it will not receive any royalty payments on April 30, 2013 is speculative, as this date has not arrived yet.

[12] The Objectors did not comment on the rate reduction Access proposes to reflect a recent amendment to section 29.4 of the *Act*.

[13] On May 7, 2013, Access confirmed that, as of the previous day, the royalty instalment payable on April 30, 2013 pursuant to the 2005-2009 tariff had been received from no educational institutions, compared to 82 Ontario school boards and 11 education ministries (excluding Ontario and Quebec) for which the royalty instalment payable on April 30, 2012 pursuant to the same tariff had been received as of May 6, 2012. The Objectors were informed of these numbers and did not comment on them.

[14] To the extent that it seeks to secure enforcement rights that Access does not currently have, the application would accomplish nothing; on that much, we agree with the Objectors. We also conclude that the ancillary measures and declarations sought by Access are redundant. Nothing is added by the Board stating that users subject to a tariff must comply with its terms and conditions, that interim payments may be revisited in the final decision, or that compliance with an interim tariff does not prevent a party from advancing positions that are incompatible with that tariff.

[15] There remains but one reason to adopt a new interim tariff. As a result of recent amendments to section 29.4 of the *Act*, examination copies that were compensable by the sole reason that Access offered a licence no longer attract royalties. The record of the proceedings that led to the certification of the 2005-2009 tariff shows that approximately 15 cents of the rate

of \$4.81 was attributable to such copies.⁶ Access proposes to cease collecting those 15 cents. This is precisely the sort of change in status quo that ought to be reflected in an interim decision: just as an interim tariff was required in *Interim Decision – SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007*⁷ to adjust the royalty rate to account for jurisprudential developments, an interim tariff adjusting the royalty rate set in the 2005-2009 tariff is warranted to account for this legislative development.

A. DECISION

[16] The application for an interim decision is granted in part. The *Access Copyright Elementary and Secondary School Tariff, 2005-2009* is continued as an interim tariff as of January 1, 2013, subject to the following modifications.

[17] The title of the interim tariff shall read as follows:

INTERIM STATEMENT OF ROYALTIES TO BE COLLECTED BY ACCESS
COPYRIGHT FOR THE REPROGRAPHIC REPRODUCTION, IN CANADA, OF
WORKS IN ITS REPERTOIRE - Educational Institutions (2013-2015)

[18] Section 1 of the interim tariff shall read as follows:

1. This tariff may be cited as the *Access Copyright Elementary and Secondary School Interim Tariff, 2013-2015*.

[19] Subsection 7(1) of the tariff is amended by replacing “4.81” by “4.66”.

[20] Sections 15 and 16 are removed from the interim tariff.

[21] Access shall cause anyone who paid royalties pursuant to the *Access Copyright Elementary and Secondary School Tariff, 2005-2009* to be mailed or emailed a copy of this decision no later than on June 28, 2013.



Gilles McDougall
Secretary General

⁶ 6,995,451 photocopied pages for ministry examinations ÷ 246,001,462 photocopied pages triggering remuneration × 5.16 = 15¢ (FTE Rate certified in 2009): see *Access K-12 (2009)*, *supra* note 2, Table 2.

⁷ (24 November 2006) CopyrightBoard Decision.