Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100723

Docket: A-302-09

Citation: 2010 FCA 198

CORAM: **BLAIS C.J.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

THE PROVINCE OF ALBERTA AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE PROVINCE OF MANITOBA AS REPRESENTED BY THE MINISTER OF EDUCATION, CITIZENSHIP AND YOUTH;
THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE MINISTER OF EDUCATION;
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and

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THE ASSOCIATION OF CANADIAN PUBLISHERS
and
THE CANADIAN EDUCATION RESOURCES COUNCIL

Interveners-2

Heard at Montréal, Quebec, on June 8, 2010.

Judgment delivered at Ottawa, Ontario, on July 23, 2010.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BLAIS C.J.
NOËL J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] Under the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act), people can make non-infringing use of copyrighted material provided the use is made for an allowed enumerated purpose and is fair. This practice is known as fair dealing.

[2] The case at bar relates to a tariff approved by the Copyright Board (the Board), which included as remunerable use the photocopying of excerpts from textbooks for use in classroom instruction for students in kindergarten to grade 12. Specifically, the parties accept that the copying at issue refers to "Multiple copies made for the use of the person making the copies and single or multiple copies made for third parties without their request for the purpose of private study and/or research and/or criticism and/or review" (see table at paragraph [15] below under Category 4).

[3] The applicants argue that this use constituted fair dealing under sections 29 and 29.1 of the Act: the copies were made for an allowable purpose and the dealing was fair. Both parties agree that the copies were made for an allowable purpose under the Act. However, the applicants also argue they were made fairly, and that the Board therefore erred by including the copies in the tariff calculation.

[4] In the alternative, the applicants argue that the copying was exempt under section 29.4 of the Act as a “work or other subject-matter as required for a test or examination” where the work is not “commercially available in a medium that is appropriate for the purpose.”

[5] At its core, the fair dealing issue comes down to a review of the Board’s ruling that the dealing was unfair. This is a purely factual question. I see no reviewable error in this finding and accordingly would not allow the application on that ground.

[6] With respect to section 29.4, however, the Board failed to address an important part of the test: whether the works were commercially available in a medium appropriate for the purpose. The application record shows that this argument was squarely before the Board. At paragraph 68 of their legal arguments, the applicants asserted that:

> (t)he requirement that a work be "commercially available" is only a part of the statutory test to be applied in determining whether a particular reproduction falls within the exception in subsection 29.4(2), or within the carve-out from the exception in subsection 29.4(3). The complete test is whether the work or other subject-matter being reproduced in the test or examination is "commercially available in a medium that is appropriate for the purpose" of a test or examination (See application record, volume 3, tab L, at page 654; also applicants’ memorandum of fact and law, at paragraph 101).

[7] While the Board considered whether the works were commercially available, it did not determine the media in which the works were available and whether those media were appropriate. Accordingly, I would allow the application on that ground and remit the matter to the Board for the reasons appearing below at paragraphs [49] and following.

The facts

[8] On 17 July 2009, the Copyright Board of Canada released the corrected version of its Decision *Statement of royalties to be collected by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire*, [2009] C.B.C. No. 6 (the Decision). This is the decision of which the applicants now seek judicial review.

[9] The applicants are the ministries of education of all Canadian provinces and territories outside Quebec, as well as each of the Ontario school boards. The respondent, originally known as CANCOPY, is a not-for-profit organization that represents authors and publishers of copyrighted works. It acquires its repertoire by signing affiliation agreements with copyright holders and administers the right to authorize copying of its repertoire for all of Canada except Quebec.

[10] The intervener-1 represents teachers, librarians, researchers and other academic professionals and staff at Canadian universities. The interveners-2 represent the voice of substantially all of the Canadian publishing industry. Their members market their works directly to the entire educational sector in Canada including the primary, secondary, college and university sectors.

[11] Between 1991 and 1997, the respondent reached royalty agreements with all provinces and territories other than Quebec with respect to the reproduction of its repertoire for use in elementary and secondary schools in Canada. In 1999, the parties signed a five year pan-Canadian agreement,

providing for progressive royalty increases up to 2004. To this point, however, the royalties were not calculated based on the actual number of pages photocopied.

[12] In 2004, the parties were unable to reach a new agreement on a new pan-Canadian license as they could not agree to the terms of a "volume study" to measure the actual number of pages photocopied. The 1999 tariff was therefore extended on a year-to-year basis pending a decision by the Board on a new tariff. Having failed to reach an agreement, the respondent filed its own proposed tariff (Elementary and Secondary School Tariff, 2005-2009) with the Board in accordance with subsection 70.13(2) of the Act:

A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 70.15(1) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it for issuing licences, on or before the March 31 immediately before its proposed effective date	Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 70.15(1), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

[13] The applicants objected to the proposed tariff and sought review before the Board. During the course of proceedings, the parties agreed to the terms of a volume study. It was carried out between February 2005 and March 2006. Data for the volume study were collected by stationing observers next to photocopiers in 894 schools across the country for 10 days. Each time someone made a photocopy, the observer filled out a logging sticker. The content of the logging sticker was agreed upon by all parties. The sticker included the following questions and available answers:

Who made the copies? Please check only one:
- A teacher
- A librarian
- Another staff member
- A student
- Someone else

For whose use were the copies made? Please check all that apply
- The person who made the copies
- Staff
- Student(s)
- Others
  - If staff, student(s), or others, were the copies made at their request?
    - Yes
    - No
    - Undetermined
      - If student(s): Are students instructed to read the material?
        - Yes
        - No
        - Undetermined

For what purpose(s) were the copies made? Please check all that apply
- Administration
- Criticism or review
- Entertainment
- Future reference
- Student test or examinations
- Private study
- Projection in class
- Research
- Student instruction, assignments and class work
- Other purposes, specify
- Undetermined purposes

[14] The parties agreed to accept the volume study results and logging sticker contents as fact and that the decision on whether a copy constituted fair dealing was to be based solely on the information contained on the logging stickers.

[15] The results of the study were as follows, as categorized by the Board:

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 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	16,861,583	18,511,362

1 Without instructions to read the material.

[16] The parties agreed that copies falling into categories 1, 2, and 3 constitute fair dealing. However, the parties differed with respect to category 4, which accounts for the overwhelming majority of copies. The applicants argued that copies falling under category 4 constitute fair dealing, whereas the respondent argued, and the Board agreed, they are not fair dealing and are accordingly remunerable.

Fair Dealing

A. The law

[17] The relevant fair dealing provisions of the Act provide as follows:

29. Fair dealing for the purpose of research or private study does not infringe copyright.	**29.** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur..
29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:	**29.1** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins de critique ou de compte rendu ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :
(*a*) the source; and (*b*) if given in the source, the name of the: (i) author, in the case of a work, (ii) performer, in the case of a performer's performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.	*a*) d'une part, la source; *b*) d'autre part, si ces renseignements figurent dans la source: (i) dans le cas d'une oeuvre, le nom de l'auteur, (ii) dans le cas d'une prestation, le nom de l'artiste-interprète, (iii) dans le cas d'un enregistrement sonore, le nom du producteur, (iv) dans le cas d'un signal de communication, le nom du radiodiffuseur.

[18] The leading case interpreting this provision is *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH*]. That case interpreted the law of fair dealing in the context of the custom photocopy service offered by the Law Society of Upper Canada at the Great Library in Toronto. Under the custom photocopy service, members could request legal materials, which library staff would then photocopy and deliver in person, by mail, or by facsimile.

The Supreme Court ruled that this activity constituted fair dealing for the purpose of research or private study.

[19] In its decision, the Supreme Court held that "the fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right," and so must be given a large and liberal interpretation. "In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively" (*CCH* at paragraph 48). The Court then set out a two step test to determine whether a given activity qualifies as fair dealing: "In order to show that a dealing was fair under section 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair" (*CCH* at paragraph 50).

[20] The second step, whether the dealing is fair, "is a question of fact and depends on the facts of each case" (*CCH* at paragraph 52). At paragraph 53, the Court laid out six non-exhaustive factors to assist a Court's fairness inquiry: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work."

[21] I am also aware that Bill C-32, *An Act to amend the Copyright Act*, 3rd Session, 40th Parliament, 59 Elizabeth II, 2010, section 21 would amend section 29 to state that "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright" (changes underlined). However, this amendment serves only to create additional allowable purposes; it does not affect the fairness analysis. As the parties agree that the dealing in this case

was for an allowable purpose, the proposed amendments to the Act do not affect the outcome of this case and no more will be said about Bill C-32.

B. Decision of the Board

(1) Were the copies made for an allowable purpose?

[22] The Board accepted as fact that a copy was made for an allowable purpose if the logging sticker so indicated. Since the stickers on all copies falling into category 4 indicated the copies were made for an allowable purpose, the Board therefore found that copies falling into category 4 were made for an allowable purpose (Decision at paragraph 87). The Board added, however, that where the logging sticker indicated the purpose of the copy was "criticism or review," it would nevertheless define the purpose as "research or private study" (Decision at paragraph 94). It explained that "a copy is not made for the purpose of criticism unless it is incorporated into the criticism itself." A copy made for a person intending to engage in criticism is made for that person's research, not for criticism (Decision at paragraph 91).

[23] The Board also distinguished the purpose inquiry at the first step of the *CCH* case from that at the second step at paragraph 88 of its reasons:

> [I]n 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 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.

(2) Was the dealing fair?

[24] At this step, the Board considered the six factors suggested by the Court in *CCH* to determine whether a copy for an allowable use is made fairly. The first such factor is the purpose of the dealing. Here the Board took a more detailed look at the copies, inquiring into "the real purpose or motive of the dealing." The Board then found that where more than one purpose is indicated on a logging sticker, where copies are made at a *student's* request, if at least one of the purposes listed on the logging sticker was research or private study, it would accept the predominant purpose of the copy to be research or private study. However, with respect to copies made on a *teacher's* initiative for his or her students, the Board found that "most of the time, this real or predominant purpose is instruction or 'non-private' study." It held that "[a] teacher, in deciding what to copy and for whom … is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair" (Decision at paragraph 98).

[25] With respect to the character of the dealing, the Board found that there were multiple copies distributed to entire classes, and that copies were usually kept by students in their binders for as long as students would ordinarily keep an original, that is, the end of the year. The Board held that this weighed in favour of unfair dealing (Decision at paragraph 100). Addressing the amount of the dealing, the Board found that teachers generally limited themselves to reproducing relatively short excerpts. At the same time, however, the Board found it more than likely that class sets would be subject to numerous requests for the same series of copies, thereby tending to make the dealing unfair (Decision at paragraph 104). The Board also found that there was an alternative to the dealing: schools could buy the originals (Decision at paragraph 107). In terms of the nature of the

work, the Board distinguished this case from *CCH*, noting that in *CCH* the Supreme Court found a public interest in disseminating judicial opinions, whereas in this case, the copies in question were made of private material (Decision at paragraph 108). The Board also examined the effect of the dealing on the work. It cited uncontradicted evidence that textbook sales have shrunk over 30 percent in 20 years. Though it admitted it could not define the exact reason for the decline in sales, it nevertheless concluded that photocopying had had an unfair effect (Decision at paragraph 112).

[26] Having addressed the six factors, the Board then concluded at paragraph 118 of its reasons that category 1, 2, and 3 copies constituted fair dealing, but category 4 copies were unfair and therefore remunerable:

> 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.

C. Analysis

(1) Standard of review

[27] The standard of review of the Board's Decision on fair dealing is reasonableness. In *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 90 [*Dunsmuir*] the Supreme Court ruled that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (at paragraph 51) that "[w]here the question is one of fact, discretion or policy, deference will usually

apply automatically" (*Dunsmuir* at paragraph 53) and that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* at paragraph 54).

[28] With respect to the first step of the *CCH* inquiry—whether the copies were made for an allowable purpose—the parties are in agreement that the Board did not err. The only question before the Court with respect to fair dealing is therefore whether, having been made for an allowable purpose, the copies were made fairly.

[29] The Supreme Court clearly enunciated that whether something is fair "is a question of fact and depends on the facts of each case" (*CCH* at paragraph 52).

[30] The applicants argue that the Decision should be reviewed on the standard of correctness, and cite *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 [*SOCAN*] at paragraph 49 for support:

> There is neither a preclusive clause nor a statutory right of appeal from decisions of the Copyright Board. While the Chair of the Board must be a current or retired judge, the Board may hold a hearing without any legally trained member present. The *Copyright Act* is an act of general application which usually is dealt with before courts rather than tribunals. The questions at issue in this appeal are legal questions. For example, the Board's ruling that an infringement of copyright does not occur in Canada when the place of transmission from which the communication originates is outside Canada addresses a point of general legal significance far beyond the working out of the details of an appropriate royalty tariff, which lies within the core of the Board's mandate.

[31] The intervener-1 cites the decision of this Court in *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers*, 2002 FCA 166, [2002]

4 F.C. 3 at paragraph 105: “as a whole, the scheme of the Copyright Act indicates that, on an application for judicial review, the Court should apply a standard of correctness to the Board's interpretation of those provisions of the Copyright Act that could also be the subject of infringement proceedings in the courts.”

[32] This authority does not sufficiently support the applicants’ or the intervener-1’s argument. First, the *SOCAN* was decided prior to *Dunsmuir*, which put a renewed emphasis on the importance of deference to administrative tribunals when they interpret their own statute. Second, the dispute in the case at bar lacks wide ranging legal significance. The judicial review turns on whether or not a specific type of copying, as revealed in the volume study, qualifies as fair dealing. This is a largely factual inquiry well within the competence of the Board. Accordingly, the appropriate standard of review is reasonableness.

[33] In *Dunsmuir* at paragraph 47 the Supreme Court explained that there are two elements to reasonableness: “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” Therefore, this application can only be allowed if the Board’s reasons are not transparent or intelligible, or do not fall within a range of acceptable outcomes.

(2) Was the dealing for an allowable purpose?

[34] As stated earlier, the parties agree that the copies were made for an allowable purpose and that they therefore pass scrutiny at the first step of *CCH*. The applicants do argue that the Board was wrong to state that a copy cannot be made for the purpose of criticism unless it is incorporated into the criticism itself. However, these remarks are *obiter*, as the Board simply accepted as fact the purposes stated on the logging sticker at paragraph 87 of its reasons:

> 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.

[35] Accordingly, as there is no dispute over the first step of the *CCH* test, I turn to the second step: the assessment of whether the dealing was fair.

(3) Was the dealing fair?

[36] The Board's Decision that category 4 copies do not qualify as fair dealing was reasonable for the following reasons.

(a) The purpose of the dealing

[37] The applicants argue primarily that the Board interpreted the Act overly restrictively, contrary to the requirements of *CCH* cited at [18] above, especially with respect to the purpose of the dealing. I disagree. The essence of the Board's Decision was that when a teacher photocopies copyrighted material for his or her class, that use cannot be private study. As the respondent notes, the applicants' submissions effectively ask the Court to read the word "private" out of "private study."

[38] The applicants argue that the adjective “private” is intended to exclude from fair dealing the commercial use of copyright protected material that has no educational value. I fail to see how the word “private” should be equated with “non-commercial.” “Private study” presumably means just that: study by oneself. If Parliament had wished to exclude only commercial exploitation it could have used words to the effect of “non-commercial” or “not for profit.” A large and liberal interpretation means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear. When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.” Therefore, I believe the Board’s Decision was reasonable.

[39] The applicants argue that their point is assisted by *University of London Press, Ltd.* v. *University Tutorial Press, Ltd.*, [1916] 2 Ch. 601 [*ULP*]. In that case, the University of London Press held the copyright on examinations given to students. The University Tutorial Press republished portions of these examinations for sale in booklets intended to help students. Justice Peterson found this was not private study and therefore not fair dealing because the publications were “intended for educational purposes and for the use of students” as opposed to private study (*ULP* at page 614). The applicants are correct to state that, unlike the teachers in the case at bar, the University Tutorial Press was clearly using the examinations for commercial purposes. However, this is a largely irrelevant distinction. *ULP* does not mention the commercial motives of the users as a relevant factor: it states only that the dealing was unfair because it was for educational purposes, rather than private study. In fact, it is unclear that profit factors into the determination of whether or not a use was “private study” at all. After all, the Supreme Court made clear in *CCH* that research

for profit can still qualify as fair dealing (*CCH* at paragraph 54). In short, there is no reason to believe that the absence of profit renders the applicants' dealing fair.

[40] In making this finding, the Board was entitled to look beyond the fact that the logging sticker might have stated that the copies were made for research or private study. Indeed, *CCH* requires the Board to "make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work" (*CCH* at paragraph 54). The Board was not precluded from finding a different objective purpose at step 2 from the purpose it accepted as fact at step 1. The Board's step 1 inquiry merely checked whether the stated purpose of the applicants was an acceptable one under the Act; it did not purport to ascertain the objective purpose of the dealing.

[41] This approach is consistent with the law in other jurisdictions as well, where this issue has been squarely put before the courts. Though most foreign jurisprudence on the matter relates to whether dealings fall under an allowable purpose—effectively step 1 of the *CCH* test—they nevertheless support the proposition also enunciated in *CCH* that courts must inquire into the true purpose of the dealing. The intentions and motives of the user of another's copyright material are "most highly relevant on the issue of fair dealing, so far as it can be treated as a discrete issue from the statutory purpose" (*Pro Sieben Media AG* v. *Carlton UK Television Ltd.*, [1999] 1 WLR 605 [*Pro Sieben*].

[42] In *Pro Sieben*, the English Court of Appeal took this approach in the context of fair dealing for news reporting:

> It is not necessary for the Court to put itself in the shoes of the infringer of the copyright in order to decide whether the offending piece was published 'for the purposes of criticism or review'. This court should not in my view give any encouragement to the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work or reporting current affairs. To do so would provide an undesirable incentive for journalists, for whom facts should be sacred, to give implausible evidence as to their intentions.

[43] There is also ample jurisprudence on the point from United States courts. For example, in *Rubin* v. *Boston Magazine Co.*, 645 F. 2d 80 – Court of Appeals, 1st Circuit 1981 at 84, a writer for a magazine claimed his use of charts from a scholarly work constituted fair dealing for the purpose of research. The U.S. Court of Appeals for First Circuit disagreed:

> The defendants' claim that their purpose "was to acquaint the community with research" is belied by the format and the contents of the alleged infringing publication. They irrefutably showed that the copyrighted material was used as a quiz to entertain readers of a magazine of general circulation.

[44] Similarly, in *American Medical Colleges* v. *Mikaelian*, 571 F. Supp. 144 – Dist. Court, ED Pennsylvania, 1983 at 152, aff'd 734 F. 2d 3 (3d. Cir. 1984) the U.S. District Court for the Eastern District of Pennsylvania ruled that the use of copyrighted material in medical school standardized test preparation materials is not fair use for the purpose of "teaching, scholarship or research":

> The defendants have merely asserted that they are engaged in "teaching". This naked averment does not suffice to show the applicability of [the fair use provisions in]17 U.S.C. § 107. To be sure, Mikaelian and Multiprep give test preparation courses, and provide instruction in test preparation as part of these courses. However, Multiprep students do not receive a degree, do not become qualified or certified in anything after taking the course, and may not use the course as a prerequisite for further education and training in any educational or vocational endeavor. It is thus at best unclear whether Multiprep's cram course is the type of activity protected by 17 U.S.C. § 107.

[45] The High Court of New Zealand has taken such an approach as well. In *Copyright Licensing Ltd.* v. *University of Auckland* [2002] 3 N.Z.L.R. 76 at paragraph 35, Justice Salmon stated that "[t]he question of purpose in any particular case is one of fact, but I emphasise the need to consider the real purpose of the copying in the context of a fair dealing section. Bona fides must be of crucial importance." International jurisprudence is therefore consistent with the view that the purpose must be examined objectively.

[46] Finally, the Board was also reasonable to take into consideration whether a student requested the copies him or herself or whether the teacher made the copies at his or her own initiative. Contrary to the applicants' submissions, the Board did not require that the person requesting the copy be the person undertaking the private study. Instead, the Board found that since the students in question did not request the photocopies themselves, given the instructional setting, it is likely that the purpose of the photocopying was for the instruction of the students, not for private study. That is an entirely legitimate conclusion based on the facts of the case and does not add any additional requirement. Similarly, the Board was entitled to find that when a student is instructed to read the material, it is likely that the purpose of the copying was for classroom instruction rather than the student's private study.

(b) The other *CCH* factor

[47] The Board's findings with respect to the other *CCH* factors are also reasonable. In terms of the character of the dealing, the applicants point to testimony that students normally destroy or lose photocopies; however, the Board made a finding of fact that students often keep their copies in

binders for an entire school year. In terms of the effect of the dealing, the Board found on the evidence that it was likely that the dealing hurt textbook sales. While the Board admitted there was no conclusive evidence to this effect, it did not act unreasonably in considering the overall decline in sales when conducting its fairness analysis.

(4) Conclusion

[48] I see no reviewable error in the Board's finding that the dealing with Category 4 copies was unfair under the Act and the *CCH* test. It is important to restate that the step 2 fairness inquiry is a factual one and therefore merits a high degree of deference. Furthermore, the six factors outlined by the Supreme Court do not comprise a checklist or necessary or sufficient conditions; they are a non-exhaustive guideline. Therefore, the reasonableness of the Board's fairness Decision must be assessed based on the Board's reasons as a whole. From this point of view, it is clear that the Board came to the conclusion that the applicants' dealing was unfair as it did not properly qualify as "research and private study." This is a legitimate conclusion that was open to the Board based on the evidence before it. The Board's reasons are also comprehensible and transparent, and therefore reasonable.

Section 29.4

A. The law

[49] Section 29.4 of the Act provides a separate exception that allows the reproduction of copyrighted work for educational purposes. This exception does not fall under the category of "fair dealing." Rather, it stands on its own as a separate provision.

29.4 (1) It is not an infringement of copyright for an educational institution or a person acting under its authority

(*a*) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or

(*b*) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution.

Reproduction for examinations, etc.
(2) It is not an infringement of copyright for an educational institution or a person acting under its authority to
(*a*) reproduce, translate or perform in public on the premises of the educational institution, or

(*b*) communicate by telecommunication to the public situated on the premises of the educational institution a work or other subject-matter as required for a test or examination.

29.4 (1) Ne constitue pas une violation du droit d'auteur le fait, pour un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci, à des fins pédagogiques et dans les locaux de l'établissement :

a) de faire une reproduction manuscrite d'une oeuvre sur un tableau, un bloc de conférence ou une autre surface similaire destinée à recevoir des inscriptions manuscrites;

b) de reproduire une oeuvre pour projeter une image de la reproduction au moyen d'un rétroprojecteur ou d'un dispositif similaire.

Questions d'examen

(2) Ne constituent pas des violations du droit d'auteur, si elles sont faites par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci dans le cadre d'un examen ou d'un contrôle :
a) la reproduction, la traduction ou l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur dans les locaux de l'établissement;

b) la communication par télécommunication d'une oeuvre ou de tout autre objet du droit d'auteur au public se trouvant dans les locaux de l'établissement.

Where work commercially available (3) Except in the case of manual reproduction, the exemption from copyright infringement provided by paragraph (1)(*b*) and 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.	Accessibilité sur le marché (3) Sauf cas de reproduction manuscrite, les exceptions prévues à l'alinéa (1)*b*) et au paragraphe (2) ne s'appliquent pas si l'oeuvre ou l'autre objet du droit d'auteur sont accessibles sur le marché et sont sur un support approprié, aux fins visées par ces dispositions.

B. Decision of the Board

[50] The Board found that the section 29.4 exception does not apply to category 4 copies. In the interest of thoroughness, I reproduce its reasons on this point in full:

> [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. Analysis

[51] There are two key phrases in section 29.4 that are relevant to this application: “on the premises” and “in a medium that is appropriate for the purpose.”

(1) Standard of review

[52] The parties submit that the standard of review of the Board’s Decision on section 29.4 is correctness. I agree.

(2) “On the premises”

[53] The applicants argue that the phrase “on the premises” in paragraph 29.4(2)(*a*) is intended to ensure that commercial publishers—for example, companies producing preparatory materials for standardized tests—cannot benefit from the section 29.4 exception, but that the exception is not meant to exclude teachers (applicants’ memorandum of fact and law, at paragraph 107). I fail to see how this proposition supports the applicants’ argument, as all parties agree that paragraph 29.4(2)(*a*) is triggered. The question is whether the exemption in paragraph 29.4(2)(*a*) is negated by subsection 29.4(3).

(3) "In a medium that is appropriate for the purpose"

[54] With respect to subsection 29.4(3), the applicants argue that, while the copied works were commercially available, the Board failed to consider whether they were available in "a medium that is appropriate for the purpose." In this case, the applicants assert that the copied works were not available in an appropriate medium. For example, if a teacher wanted to reproduce a portion of a novel as part of a test, the only appropriate medium would be to photocopy the passage onto the test. According to the applicants, the entire printed book would not be an appropriate medium for the purpose (*Ibidem*, at paragraph 105).

[55] The respondent argues that the applicants confuse the words "medium" and "format." It argues that "medium" in this case refers to the broader category of "printed matter." The smaller category of "textbook" refers to a format, not a medium. Accordingly, a textbook and a photocopy made from it would both be of the same medium, albeit likely of different formats.

[56] Adopting either of these perspectives wholesale leads to absurd consequences. If a photocopy is always the same medium as a book, schools will have to pay for a licence each time a teacher wants to photocopy a three line quotation from an 800 page book. In turn, under paragraph 29.4(1)(*a*) if the teacher instead wants to write the quotation on a chalkboard, the school will not have to acquire a licence. On the other hand, if a photocopy and a book are always different media, then that same teacher can photocopy the first 799 pages of an 800 page book and claim the exemption. Clearly, the determination of whether two works are of the same medium requires a contextual determination on the facts of a given case.

[57] I take no position on whether the category 4 copies were indeed available in a medium appropriate for the purpose, and intend to demonstrate only that the Board's reasons are flawed because they are silent on the meaning to be given to the words "in a format appropriate for the purpose" and on the application of that meaning to the facts of this case.

[58] The Board's reasons can be interpreted in two ways, neither of which is sufficient to ground its Decision.

Interpretation 1: The Board does not address whether the works were available in a "medium appropriate for the purpose"

[59] On their face, the Board's reasons simply do not address whether or not the works were available in an appropriate medium; they only address whether the works were "commercially available." The rules of statutory interpretation create a presumption against tautology: every word in a statute must be given meaning (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008 at 210, citing *R.* v. *Proulx*, [2000] 1 S.C.R. 61 at paragraph 28). Therefore, "commercially available" cannot be interpreted to mean "commercially available in a medium that is appropriate for the purpose."

[60] The Board's limited finding at paragraph 129 of its reasons, cited at paragraph [50] above, that "The exception will be available … for dealings for which Access offers no licence authorizing use of the work in the appropriate format" (emphasis added) cannot be interpreted as a

finding that the works were available in a medium appropriate for the purpose. Accepted rules of statutory interpretation dictate that a word must be presumed to have the same meaning throughout an act and that different words must be presumed to have different meanings (*R.* v. *Zeolowski*, [1989] 1 S.C.R. 1378 at 732; *Peach Hill Management Ltd. v. Canada* [2000] 257 N.R. 193 at paragraph 12 (F.C.A.)). In this case, the Act uses both the words format and medium.

[61] The word format appears on its own in the following provisions:

2 […]"perceptual disability" means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work ***in its original format***, and includes such a disability resulting from:	**2** […] « déficience perceptuelle » Déficience qui empêche la lecture ou l'écoute d'une oeuvre littéraire, dramatique, musicale ou artistique ***sur le support original*** ou la rend difficile, en raison notamment:
(*a*) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,	*a*) de la privation en tout ou en grande partie du sens de l'ouïe ou de la vue ou de l'incapacité d'orienter le regard;
(*b*) the inability to hold or manipulate a book, or	*b*) de l'incapacité de tenir ou de manipuler un livre;
(*c*) an impairment relating to comprehension;	*c*) d'une insuffisance relative à la compréhension.
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	**32.** (1) Ne constitue pas une violation du droit d'auteur le fait pour une personne agissant à la demande d'une personne ayant une déficience perceptuelle, ou pour un organisme sans but lucratif agissant dans l'intérêt de cette dernière, de se livrer à l'une des activités suivantes :

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***;

a) la production d'un exemplaire ou d'un enregistrement sonore d'une oeuvre littéraire, dramatique — sauf cinématographique —, musicale ou artistique ***sur un support destiné aux personnes ayant une déficience perceptuelle;***

(*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

b) la traduction, l'adaptation ou la reproduction en langage gestuel d'une oeuvre littéraire ou dramatique — sauf cinématographique — ***fixée sur un support pouvant servir aux personnes ayant une déficience perceptuelle;***

(*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.***

c) l'exécution en public en langage gestuel d'une oeuvre littéraire, dramatique — sauf cinématographique — ou l'exécution en public d'une telle oeuvre fixée sur ***un support pouvant servir aux personnes ayant une déficience perceptuelle.***

Limitation
(2) Subsection (1) does not authorize the making of a large print book.

Exception
(2) Le paragraphe (1) n'a pas pour effet de permettre la production d'un livre imprimé en gros caractères.

Limitation
(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".

Existence d'exemplaires sur le marché
(3) Le paragraphe (1) ne s'applique pas si l'oeuvre ou l'enregistrement sonore de l'oeuvre ***est accessible sur le marché sur un tel support, selon l'alinéa a) de la définition « accessible sur le marché ».***

30.9 (1) It is not an infringement of copyright for a

30.9 (1) Ne constitue pas une violation du droit d'auteur le fait pour une

broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, ***solely for the purpose of transferring it to a format appropriate for broadcasting, if the undertaking***	entreprise de radiodiffusion de reproduire, en conformité avec les autres dispositions du présent article, un enregistrement sonore ou une prestation ou oeuvre fixée au moyen d'un enregistrement sonore ***aux seules fins de les transposer sur un support en vue de leur radiodiffusion, pourvu que :***
(*a*) owns the copy of the sound recording, performer's performance or work and that copy is authorized by the owner of the copyright;	*a*) elle en soit le propriétaire et qu'il s'agisse d'exemplaires autorisés par le titulaire du droit d'auteur;
(*b*) is authorized to communicate the sound recording, performer's performance or work to the public by telecommunication;	*b*) elle ait le droit de les communiquer au public par télécommunication;
(*c*) makes the reproduction itself, for its own broadcasts;	*c*) elle réalise la reproduction par ses propres moyens et pour sa propre diffusion;
(*d*) does not synchronize the reproduction with all or part of another recording, performer's performance or work; and	*d*) la reproduction ne soit pas synchronisée avec tout ou partie d'une autre oeuvre ou prestation ou d'un autre enregistrement sonore;
(*e*) does not cause the reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.	*e*) elle ne soit pas utilisée dans une annonce qui vise à vendre ou promouvoir, selon le cas, un produit, une cause, un service ou une institution.

[62] The word medium appears on its own in the following provisions:

13. (1) Subject to this Act, the author of a work shall be the	**13.** (1) Sous réserve des autres dispositions de la présente loi, l'auteur

first owner of the copyright therein.

[…]

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or ***subject to limitations relating to territory, medium or sector*** of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less

d'une oeuvre est le premier titulaire du droit d'auteur sur cette oeuvre.

[…]

(4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou ***avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession***, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

38.1 (1) Sous réserve du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), des dommages-intérêts préétablis dont le montant, d'au moins 500 $ et d'au plus 20 000 $, est déterminé selon ce que le tribunal estime équitable en l'occurrence, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur — reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement

than $500 or more than $20,000 as the court considers just.

responsables.

[…]

[…]

Special case
(3) Where
(*a*) ***there is more than one work or other subject-matter in a single medium***, and
(*b*) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement, the court may award, with respect to each work or other subject-matter, such lower amount than $500 or $200, as the case may be, as the court considers just.

Cas particuliers
(3) Dans les cas ***où plus d'une oeuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel,*** le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque oeuvre ou autre objet du droit d'auteur, le montant minimal visé au paragraphe (1) ou (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.

79. In this Part,

79. Les définitions qui suivent s'appliquent à la présente partie.

*"**audio recording medium"*** means a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium;

« support audio » « support audio » Tout support audio habituellement utilisé par les consommateurs pour reproduire des enregistrements sonores, à l'exception toutefois de ceux exclus par règlement.

"blank audio recording medium" means
(*a*) an audio recording medium onto which no sounds have

« support audio vierge » « support audio vierge » Tout support audio sur lequel aucun son n'a encore été fixé et tout autre support audio précisé par règlement.

ever been fixed, and (*b*) any other prescribed audio recording medium;	
80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of (*a*) a musical work embodied in a sound recording, (*b*) a performer's performance of a musical work embodied in a sound recording, or (*c*) a sound recording in which ***a musical work, or a performer's performance of a musical work, is embodied onto an audio recording medium*** for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.	**80.** (1) Sous réserve du paragraphe (2), ne constitue pas une violation du droit d'auteur protégeant tant l'enregistrement sonore que l'oeuvre musicale ou la prestation d'une oeuvre musicale qui le constituent, ***le fait de reproduire pour usage privé l'intégralité ou toute partie importante de cet enregistrement sonore, de cette oeuvre ou de cette prestation sur un support audio.***

[63] Finally, the words medium and format both appear in section 30.1:

30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection (*a*) if the original is rare or unpublished and is	**30.1** (1) Ne constituent pas des violations du droit d'auteur les cas ci-après de reproduction, par une bibliothèque, un musée ou un service d'archives ou une personne agissant sous l'autorité de ceux-ci, d'une oeuvre ou de tout autre objet du droit d'auteur, publiés ou non, en vue de la gestion ou de la conservation de leurs collections permanentes ou des collections permanentes d'autres bibliothèques, musées ou services d'archives : *a*) reproduction dans les cas où l'original, qui est rare ou non publié,

(i) deteriorating, damaged or lost, or (ii) at risk of deterioration or becoming damaged or lost;	se détériore, s'est abîmé ou a été perdu ou risque de se détériorer, de s'abîmer ou d'être perdu;
(*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;	*b*) reproduction, pour consultation sur place, dans les cas où l'original ne peut être regardé, écouté ou manipulé en raison de son état, ou doit être conservé dans des conditions atmosphériques particulières;
(c) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable;	***c) reproduction sur un autre support, le support original étant désuet ou faisant appel à une technique non disponible;***
(*d*) for the purposes of internal record-keeping and cataloguing;	*d*) reproduction à des fins internes liées à la tenue de dossier ou au catalogage;
(*e*) for insurance purposes or police investigations; or	*e*) reproduction aux fins d'assurance ou d'enquêtes policières;
(*f*) if necessary for restoration.	*f*) reproduction nécessaire à la restauration.
Limitation ***(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).***	Existence d'exemplaires sur le marché ***(2) Les alinéas (1)a) à c) ne s'appliquent pas si des exemplaires de l'oeuvre ou de l'autre objet du droit d'auteur sont accessibles sur le marché et sont sur un support et d'une qualité appropriés aux fins visées au paragraphe (1).***

[64] Since the Act uses both the words format and medium, they cannot have the same meaning. Accordingly, even if one interprets the Board's reasons as finding that the works were available in

an appropriate *format*, they nevertheless cannot be understood as a finding that the works were available in an appropriate *medium.*

Interpretation 2: When the Board wrote format it meant medium

[65] It could be the case that when the Board wrote format, it meant medium. This interpretation is bolstered by the fact that the French version of the statute does not distinguish between medium and format. In both cases, it uses the word «support». The French and English versions of legislation are equally authoritative.

[66] However, even assuming that the Board meant medium when it wrote format, it does not discuss what is and what is not appropriate, nor does it make any factual findings based on the evidence before it. It does not discuss the nature of any of the photocopies made from textbooks or discuss how many of them were made for the purposes of examination. It does not refer to the evidence before it regarding the photocopies at all. Simply put, the Board uses the word “format” but does not actually discuss whether or not the works were actually available in an acceptable format.

[67] A weak reference to an appropriate format simply cannot justify a finding under section 29.4 that the works were available in a medium appropriate for the purpose, even if “medium” is interpreted to mean “format.”

Conclusion

[68] In this case, the Board was required to determine whether the category 4 copies qualified as fair dealing and whether they qualified under the exception in section 29.4 of the Act. With respect to fair dealing, the Board laid out the appropriate test from *CCH* and, through clear and comprehensible reasons, came to a justifiable conclusion. I see no reviewable error in respect of this issue.

[69] However, with respect to the section 29.4 exception, the Board failed to address an issue that was essential to the disposition of the matter before it. The issue required that the words "in a medium appropriate for the purpose" be defined and applied to the facts of this case.

[70] This Court could endeavour to fulfill this task. However, it is for the Board, in first instance, to interpret its own statute, with which it has particular familiarity, and to make the appropriate findings of fact.

[71] I would therefore allow the application and remit the Decision to the Copyright Board (a) to determine the meaning of the words "in a medium appropriate for the purpose", as found in subsection 29.4(3); and (b) to assess whether category 4 copies come within the meaning of these words.

[72] In light of the mixed success of the application, I would award no costs.

"Johanne Trudel"

J.A.

"I agree.
Pierre Blais, C.J."

"I agree.
Marc Noël"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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