

## RESETTING THE COPYRIGHT BALANCE: Collective Societies & Tariffs

In light of recent decisions of the Supreme Court of Canada and recent amendments to the *Copyright Act*, the royalties paid to collective societies have become the subject of intense scrutiny and vigorous debate. In sum, changes in the law have led many to believe that the collective societies have been paid and are continuing to seek the payment of royalties for copies when no royalty should be due because the copies were not a “substantial part” of the work or the copies constitute a fair dealing with the work.

### What is a collective society?

A collective society is an organization that collectively administers copyright for a repertoire of works on behalf of the copyright owners as their appointed agent “or otherwise”. Essentially, the society is responsible for negotiating licenses with copyright users for specific purposes and then collecting and distributing the royalties paid.

### What is a tariff?

In the absence of a voluntary written license agreement with a copyright user or class of users, a collective society can propose a tariff to the Copyright Board which, upon approval, will automatically apply to the class of users and rights identified in the tariff. Prior to approval, interested parties may object to the proposed tariff. After considering the evidence and the arguments filed by the parties, the Copyright Board shall “as soon as practical” fix the royalties and related terms and conditions.

## Developments at Supreme Court of Canada

In a series of decisions starting in 2004, the Supreme Court of Canada has reset the traditional balance between owners and users under the *Copyright Act*.

First, in its 2004 decision in *CCH Canadian Limited v. The Law Society of Upper Canada*, the Supreme Court observed that the *Copyright Act* has two objectives that must be kept in proper balance: (1) obtaining a just reward for the creation of original works and; (2) promoting the public interest in the dissemination of such works. To fulfill the latter purpose, users are granted limited rights in a series of exceptions under the *Copyright Act* that effectively “claw back” some of the broad protection granted to owners. To maintain the appropriate balance, the court concluded that these exceptions are more than “loopholes” and should give a “large and liberal interpretation”.

With respect to the test for “fair dealing”, the court identified two steps:

- (1) First, determine whether the dealing is for an eligible purpose under the fair dealing exemption;
- (2) Second, assess whether the dealing is “fair” having regard to the goal(s) of the parties involved, the character of the dealing, the quantity, the availability of alternatives, the nature of the work and the effect of the dealing on the work.

In the light of this analysis, the court determined that single copies of various legal texts as well as judicial decisions together with the headnotes made for the purpose of legal research qualified as “research” under

the fair dealing exemption and no royalty was due.

Then, on July 12, 2012, the Supreme Court released five related copyright decisions which have become known as the “copyright pentalogy”. All five cases involved a collective society and, in three decisions, the rights of copyright owners were further narrowed and the rights of users correspondingly expanded:

- in *SOCAN v. Bell*, it was held that making available to consumers short streamed previews of musical works qualified as “research” by consumers under the fair dealing exemption and no royalties are due from Internet retailers;
- in *Alberta v. Access Copyright*, it was held that the reproduction of brief extracts from texts by teachers for distribution to students qualified as “private study” by the students under the fair dealing exemption and no royalties are due from educational institutions; and
- in *ESA/C v. SOCAN*, it was held that, unlike streaming content via the Internet for immediate viewing, the permanent download of a digital copy of a video game via the Internet for later offline use, did not qualify as a “communication” of the work to the public so no royalties are due from Internet retailers for such transmissions.

In sum, the court recognized that everyday consumer research and student education can qualify as “research” or “private study” for which the fair dealing exception may be available. The court found that it is the purpose of the end user which determines whether a particular use qualifies as fair

dealing and not the purpose of intermediaries such as retailer, teachers or educational institutions. It also applied a technologically neutral approach to determine whether royalties are due when goods are simply delivered via the Internet.

Finally, in 2013, the Supreme Court had the opportunity in *Cinar v. Robinson* to consider allegations of non-literal copying where the defendants copied individual features of a work, like the personality traits of characters, without making a direct copy of any individual element. In this context, the new work is referred to as a “colourable imitation” and the legal question focuses on whether the defendants violated the copyright owner’s exclusive right to make copies of their work “or *any substantial part* thereof”. Such an evaluation traditionally involves both a quantitative and a qualitative analysis of the content copied. While the court acknowledged that copyright protects only the “expression of ideas” in a work rather than the ideas “in and of themselves”, the court observed that:

[A] substantial part of a work is a flexible notion. It is a matter of fact and degree [...]. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

### Legislative Developments

On November 7, 2012, a wide variety of amendments to the *Copyright Act* came into force, including some new exceptions that further expand the rights of users such as:

- a. expanding the “fair dealing” exception which authorizes making limited copies of a work for specific purposes so that

“education, parody and satire” are now considered eligible purposes in addition to “research, private study, criticism or review and news reporting”;

- b. introducing a specific exemption for libraries to make and circulate a digital copy of a work with certain restrictions; and
- c. introducing specific exemptions for educational institutions to permit them:
  - (1) to reproduce or display a work for a test or examination;
  - (2) to give a live performance of a work by students or play a recording of a work on school premises for educational purposes;
  - (3) to record a single copy of a news program and replay it to students for educational purposes; and
  - (4) to provide lessons, including copies of a work, by means of telecommunication to students in remote locations.

### Recent Copyright Board Decision

Most recently, the Copyright Board released a decision on May 22, 2015 in it which applied the above legal developments in the context of setting a new tariff known as the *Access Copyright (Provincial and Territorial Governments) 2005-2014*.

This new tariff was proposed by Access Copyright and sought to set a royalty rate applicable to provincial and territorial governments (except Quebec) for the copying of books, newspapers, magazines, journal and other publications by their employees.

In its lengthy decision, the Copyright Board took into account the new law to make a

number of findings related to substantial copies and fair dealing, including:

### Substantial Copy

- A “substantial portion” of a work is a flexible notion. While expert evidence on the qualitative aspects of a work may be considered in litigation for copyright infringement, it may not be feasible to collect and evaluate information on the qualitative aspects of the works copied in a representative survey conducted for the purposes of setting a tariff. In such circumstances, a pure quantitative measure may be used to determine whether a representative instance of copying in the survey constituted a “substantial” copy of the work for which a royalty would be due.
- Only the amount of “skill and judgment” expressed in the copied portion of a work may be considered to determine whether it is a “substantial” copy of the work. Other criteria considered by courts in the past on this point are no longer considered relevant and should only be considered in the context of assessing whether it qualifies for the fair use exemption:

“To what use a copied portion is put, and for what reason it was copied, cannot *ex post facto* determine whether the portion copied was protected by copyright. A portion of a work is substantial, or not, as soon as the work is created, whether or not it will be copied, and irrespective of the reasons for which it is copied.”

- Each work is protected individually. Consequently, a copy of an individual article from a magazine, newspaper or

journal would constitute a substantial copy of the article even when the same copy does not constitute a substantial part of the magazine, newspaper or journal in which it was published.

### **Fair Dealing – Eligible Purposes**

- All the eligible purposes under the fair dealing exemption are to be given a “large and liberal” interpretation. Moreover, the use of a “large and liberal interpretation” is an interpretative principle that applies to all aspects of the *Copyright Act*.
- In determining whether a copy was made for an eligible purpose under the first part of the fair dealing test, it is not an obstacle that the copy was made for multiple purposes as long as it was done, in part, for a permitted purpose. Even an incidental purpose will satisfy the first part of the fair dealing test. Other purposes may enhance or detract from the fairness of the dealing. However, the merits and effects of those other purposes are only considered under the second part of the test in the fairness analysis.

### **Fair Dealing – Fairness Analysis**

- Fairness is a matter of impression. Under the second part of the fair dealing test, there is flexibility in determining which factors are most germane in a particular case. Moreover, to ensure that a single consideration is not given more weight than it deserves, it should not be evaluated through the lens of multiple factors.
- While it may be demonstrated that a “general practice” qualifies as fair dealing, taking steps to develop a written policy and to affix notices of that policy to

photocopiers does not, on its own, demonstrate such a “general practice”.

- *Number of Copies*: Making a limited number of copies for distribution within an organization *tends* to be fair dealing. Making multiple copies for distribution outside an organization *tends* to be unfair dealing.
- *Portion of the Work*: While bright-line rules with specific numbers may be problematic in assessing fairness, it is fair to conclude in the context of setting a tariff that: (a) the copying of entire works *tends* to be unfair dealing; and (b) copying less than 10% of a book or 12% of a musical work for research or private study is either neutral or *tends* to be fair dealing.
- *Available Alternatives*: Where there are multiple alternatives means available to access the work or the information contained therein, copying the work *tends* to be unfair dealing. Where there are few or no alternatives available, copying the work *tends* to be fair dealing. The availability of a license to copy a work is not relevant to the fairness analysis.
- *Character of the Works*: For works that are, by their nature, intended to be private or to be discarded after use, copying tends to be unfair dealing. The copying of works in the nature of articles published in newspapers and professional or scientific journals is neutral in the fairness analysis.

## Royalty Rate

After considering survey evidence and the above developments in the law, the Copyright Board set a royalty rate of 11.56¢ per employee/year for 2005-2009 and 49.71¢ per employee/per year for 2010-2014 for the making of *paper* copies.

The royalty rate set is substantially less than the \$10.50 to \$11.70 per employee/per year royalty rate that had been sought by Access Copyright and less than rates which had been paid in the past under licenses negotiated with Canadian governments. However, it is important to note that the tariff does not license printing from digital files or making digital copies by scanning, emailing and posting works in a digital format which Access Copyright had sought to have included in the tariff. Unfortunately, the Copyright Board found that Access Copyright did not have authority to seek such a royalty due to restrictions in the scope of the mandate granted to it by its principals, the copyright owners for the works in its repertoire.

The omission of digital copies from the tariff is significant for two reasons. First, the survey evidence disclosed that digital copies are now the most common types of copying done by government employees. If digital copies had been included, the Copyright Board estimated that the royalty rate would have increased to as much as \$2.50 per employee/year. Second, the governments remain liable for copyright infringement for those digital copies in the absence of a license or tariff. Consequently, we can expect more litigation and proposed tariffs to ensure that copyright owners are compensated for those digital copies in the future.

## Conclusion

This recent Copyright Board decision demonstrates very well that the outcome of recent legal developments in our copyright law is that more and more of our copying is being classified as “insubstantial” or “fair dealing”. As a consequence, collective societies and other copyright owners have less and less leverage to negotiate fees and royalties for the use of the works in their repertoire.

At first glance, this appears to be a curious result in a knowledge economy where the consumption of copyright protected works is increasing exponentially. But maybe it is not. As the overall bill increases, it is likely receiving more scrutiny than ever. As a consequence, the courts are being asked to test and rewrite the parameters of copyright law and how copyright protected works can be exploited in this new market.

*Disclaimer: The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*