August 30, 2017

[*CB-CDA 2017-084*]

File: Access Copyright (Elementary and Secondary School Tariff) 2010-2015 – Reconsideration

RULING OF THE BOARD – ADMISSIBILITY OF PORTIONS OF AC-114

I. Introduction

Background

On June 6, 2014, the Board issued a series of technical questions to the Parties. One of these questions asked the Parties to confirm the meaning of certain codes used in the Access Copyright Repertoire Analysis. Access' response to these questions raised the issue that the analysis may be erroneous. Subsequently, in its December 5, 2014 response to the submissions of the Objectors, Access included an analysis of a new repertoire study. The Objectors did not raise any objection to the documents filed in response. This response was given the exhibit identifier AC-114 by the Board.

In its reasons for its decision of February 19, 2016, the Board wrote that Access provided no evidence of the degree the Repertoire Analysis underestimates the actual repertoire.[1]

On review, the Federal Court of Appeal held that the Board, through oversight, overlooked the expert evidence and submissions in exhibits AC-114 and AC-114A.[2] It ordered "the matter […] referred back to the Board for reconsideration of only the issue concerning the impact of the coding errors on Access Copyright's repertoire."[3]

Submissions Sought

On May 18, 2017 in Notice CB-CDA 2017-048, the Board ordered the Parties to make submissions on the issue of admissibility of Exhibit AC-114, or parts thereof. The Board asked the parties to include in their submissions consideration of the following three questions:

> 1. Whether the Board has previously admitted all portions of Exhibit AC-114;
>
> 2. Whether the Order of the Federal Court of Appeal requires the Board to treat the entirety of Exhibit AC-114 as admitted (including whether any evidence that the Board

[1] *Elementary and Secondary Schools, 2010-2015* (19 February 2017) Copyright Board Decision.
[2] *Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16 at para 22.
[3] *Ibid*.

has "through oversight […] overlooked" should be required to be treated as admitted); and

3. If the impugned portions have not yet been admitted, whether the Board should do so now, and any procedural fairness issues arising from admitting or declining to admit all or part of the impugned evidence, and how these may be remedied.

II. Submissions of the Parties

Overview

Broadly speaking, the Objectors argue that the following portions of Exhibit AC-114 have not been admitted, and should not be: paragraphs 2-8 of Access Copyright's letter in Exhibit AC-114, pages 4-7 of Appendix A to Exhibit AC-114, and Appendix B to Exhibit AC-114.

Access argues that the entirety of Exhibit AC-114 has already been admitted, and must be treated as such pursuant to the Order of the Federal Court of Appeal.

Has the Board already admitted the entirety of AC-114?

Access's argues that AC-114, including appendices AC-114A and AC-114B, has already been admitted. First, Access, simply states that "[a]ll the documents tendered by Access Copyright were accepted into evidence by the Board and assigned exhibit numbers."[4]

It further argues that the Objectors have not raised the issue of admissibility and that "[a] party who feels that it has been subjected to procedural unfairness must raise this issue with the first-instance forum in a timely manner."[5]

Lastly, "[h]ad these portions not been part of the Board's evidentiary record, Access Copyright would have been precluded from including those documents in its Rule 306 affidavit because the evidentiary record before the Court of Appeal on judicial review is restricted to the evidence that was before the Board below."[6]

The Objectors, on the other hand, submit that portions of AC-114 are not admissible, and argue that while the "Board accepted Exhibit AC-114 as a whole, […] the Objectors never had an opportunity to dispute Access Copyright's clearly out-of-process submissions on the alleged coding errors."[7] While much of Exhibit AC-114 was in response to the Board's questions of June 6, 2014, other portions "were unsolicited, and they were filed so late in the process that the Objectors were denied the opportunity to respond."[8] They argue that documents improperly filed are not entitled to be considered by the Board simply because they were marked with an exhibit number.

---

[4] Access's Submission, Re: Notice CB-CDA 2017-048, email to the Copyright Board (1 June 2017) at p 2.
[5] *Ibid.*
[6] *Ibid.*
[7] Objectors' Submission, Re: Notice CB-CDA 2017-048, email to the Copyright Board (1 June 2017) at p 7.
[8] *Ibid.*

Whether the Order of the Federal Court of Appeal requires the Board to treat the entirety of Exhibit AC-114 as admitted?

Access submits that when the Court stated that the Board made a reviewable error in not assessing the impact of Access Copyright's correction of the coding errors on the repertoire of Access Copyright discussed in Exhibit AC-114A, it requires the Board "to assess all evidence admitted into the record (as listed in the Board's List of Exhibits) that is relevant to the issue that the Board is required to reconsider. That evidence includes Exhibits AC-114, AC-114A and AC-114B."[9]

The Objectors submit that

> [t]he Federal Court of Appeal's Order does not address the question of admissibility. The issue was not raised before the Court, as it did not form part of Access Copyright's judicial review. It is therefore open to the Board, as the statutory decision-maker, to make this assessment relating to admissibility at any point in its proceedings—even now. The Court's Order imposes no obligation on the Board, either way, regarding this issue.[10]

If the impugned portions have not yet been admitted, whether the Board should do so now, and any procedural fairness issues arising from admitting or declining to admit all or part of the impugned evidence, and how these may be remedied?

Access does not address this question, given that their submissions rely on the position that all portions of the documents have already been admitted.

The Objectors submit that the creation and submission of a new analysis amounts to case-splitting, and that "unfair surprise and prejudice to the other party will often result."[11] Furthermore, "A party cannot sit on a central element of its case expecting that the process will make portions of it unnecessary, only to make up for it in reply when the process unfolds in a manner that it did not hope or expect."[12]

The Objectors also point to the fact that the Board had already, in this matter, ruled to exclude similarly late and out-of-order evidence.

III. Analysis

We agree with the Objectors that the documents submitted by Access in reply to the Board's questions of June 6, 2014, while containing portions that were a properly filed response, also contained portions that were not. As the Objector's submit, that improperly filed content is not entitled to be considered by the Board simply because it was filed with properly filed content, or because such content was given an exhibit number.

That being said, the Objectors were not prevented from objecting to Access' filing of those portions of the documents that they considered to have been improperly filed. As Access

---

[9] *Supra* note 4 at p 4.
[10] *Supra* note 7 at p 8.
[11] *Ibid.*
[12] *Ibid* at p 10.

repeatedly points out, the Objectors did not do so, either before the Board, or at the Federal Court of Appeal. While the Objectors argue that there was no such opportunity, this argument is disingenuous. The Objectors could have raised an objection with the Board without the Board actively soliciting the parties' submissions on this issue. The Objectors would have been aware of this possibility, as they point to Access' own spontaneous objection in this matter to the Objector's "sur-reply."[13]

The Board could have *sua sponte* decided that the impugned portions were improperly filed and would not be considered by the Board. The marking of submitted documents with an exhibit number is essentially automatic. This process does not indicate admissibility. While the Board may, on occasion, address issues of admissibility immediately upon the filing of documents, this is often not the case. In this matter, the Board could have, in its reasons for its decision, explained that it is not considering the impugned evidence because of the improper manner in which it was filed. However, it did not do so.

Rather, as is clear from the ruling of the Federal Court of Appeal, the impugned portions of Exhibit AC-114 were simply overlooked by the Board. Having overlooked this content, the Board could not have turned its mind to the admissibility thereof. Given that the numbering of submitted documents is essentially automatic, and that the Board overlooked these documents, we conclude that the Board has not admitted the entirety of the impugned evidence.

Furthermore, we do not conclude that the ruling of the Court of Appeal had the effect of admitting evidence that has not yet been admitted by the Board. As the Objectors point out, the Court did not address the question of admissibility. However, from the context provided by the Court's reasons, it is possible to conclude that the Court assumed that the overlooked evidence had, in fact, already been admitted.

Does this require the Board to treat the evidence as admitted, even if it had not been? The Court's order is silent on this point, though the context of the reasons does appear to suggest that the Court expects the Board to proceed to testing the weight given to the evidence—and therefore treating the evidence as admitted. However, given our conclusion below, we do not have to make a conclusion on this point.

If the impugned evidence has not yet been admitted, should the Board admit it now? It appears to us that the evidence is *prima facie* relevant to the matter at hand. Generally, the Board prefers to base its decisions on more information than less.

In large part, we agree with the Objectors that Access had numerous opportunities to adduce the impugned evidence and, through its out-of-order filing, was "splitting its case." However, comparably, the Objectors had opportunities (before the Board and potentially at the Federal Court of Appeal), to argue that the impugned evidence was improperly filed. While this latter point does not go towards concluding whether the impugned evidence has already been admitted, it is relevant in determining whether it is appropriate for the Board to now admit the evidence.

We note that the reliability of the impugned evidence has not yet been tested. Without having the evidence tested, the Board cannot establish what weight, if any, to give to it. As such, merely

[13] Objectors' Reply Submission Re: Notice CB-CDA 2017-048, email to the Copyright Board (8 June 2017) at p 2.

admitting the evidence, and not providing other procedural steps, would prevent the Objectors from testing and potentially rebutting this evidence, and would result in the prejudices the Objectors refer to in their submissions.

Therefore, the Board admits the impugned evidence, and sets out the following steps:

1. The Objectors may respond to Exhibit AC-114 by **Monday, October 30, 2017**. This response may include evidence, including expert evidence. During this period, the Objectors may request data from Access related to the issue of coding errors, including data used in Access' repertoire reanalysis. Access will take reasonable steps to provide such data. In the case of any dispute, either party may apply to the Board to resolve the dispute.

2. Access shall file a reply to the Objectors response by **Monday, November 27, 2017**.

3. Any further steps, including cross-examination and closing arguments, will be dealt with by the Board in due course.

Gilles McDougall
Secretary General