

**Educational Program, Work and Other Subject-matter Record-keeping
Regulations**
(SOR/2001-296)

REGULATORY IMPACT ANALYSIS STATEMENT¹
(This statement is not part of the Regulations.)

Description

Sections 29.6, 29.7 and 29.9 of the *Copyright Act* [the "Act"] came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority ["institutions"] can, without the copyright owner's authorization, copy programs and other subject-matter ["programs"] when they are communicated to the public and perform those copies before an audience consisting primarily of students. In a nutshell:

a) institutions can copy and perform news and news commentaries ["news programs"] for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board ["the Board"] in a tariff;

b) institutions can copy other programs and subject-matter ["other programs"] and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, they must pay the royalties and comply with the conditions set by the Board in a tariff.

Pursuant to subsection 29.9 (2) of the *Copyright Act*, the Board may make regulations prescribing the information to be kept by an institution in relation to the making, destruction, performance and marking of copies, prescribing the manner and form in which such records must be kept and copies destroyed or marked and respecting the sending of information to collective societies. These Regulations are made pursuant to this power.

Alternatives

The alternative not to impose any requirements on institutions was considered. However, the information is necessary if collective societies are to learn more about the use being made of the copies and to determine the amount of royalties to be paid as well as to whom they should go.

Benefits and Costs

Records are necessary if a collective society is to operate effectively. Using them, a society can determine whether a program is a news program entitled to a longer exemption period, as well as establish the identity of the copyright owner entitled to receive royalties. Were the Board to approve a transactional licence, the records would also help to verify the amount of royalties owed. The reporting frequency requirements ensure a regular flow of that information and the record retention requirements allow verification.

Institutions will incur costs as a result of these requirements. The Regulations alleviate some of those costs by not requiring institutions to keep a record where a copy of a news program is destroyed within 72 hours of its making.

Making the Regulations entails no costs for the Board, for the Federal Public Administration, for the collective societies or for the rights owners.

Consultation

The Board, through a consultant, conducted a series of meetings with several stakeholders with a view to obtaining a consensus on the elements of the Regulations. The Educational Rights Collective of Canada, the National Film Board of Canada, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada, the Association of Canadian Community Colleges, the Association of Universities and Colleges of Canada, the Canadian Association of University Teachers, the Canadian School Boards' Association, the Canadian Teachers' Federation, the Council of Ministers of Education, Canada and the Ministère de l'Éducation du Québec participated in one or more of those meetings.

A consensus was reached on all key elements of the Regulations, with the exception of the timing of the duty to keep records and mark copies. Institutions argued that the duty to keep records does not arise until the first performance of the copy takes place. For this, they relied on the fact that s. 29.9(1)(a) appears to require that a record be kept only when the institution makes a copy and performs it. Were this the case, the person who makes the copy would be required to record (and hence, recall) all the pertinent details of its making only after the first performance, which could be weeks or months later. In the Board's view, such an approach is simply not practical and could not have been intended by Parliament.

News programs that are copied, performed and destroyed within the one-year exemption period are not subject to any royalty payment. Institutions questioned the usefulness of keeping records of such news programs. Collective societies responded that records are necessary to verify that other programs are not being categorized as news programs. Societies and institutions are currently cooperating to establish informal rules for such categorization, which should alleviate to some extent the societies' concern.

Where practical, institutions should be relieved of producing documentation that will never be used by collective societies for distribution purposes. Consequently, institutions will not be required to record information if a news program is destroyed within seventy-two hours of its making (although they will be required to mark the copy or its container). This time period is sufficiently short to allow recall of the pertinent details if the news program is not destroyed, and sufficiently long to allow performance and destruction on Monday of a copy made the previous Friday. Any copy that is kept beyond that period is subject to the record-keeping requirements.

Based on discussions with interested parties, the Board believes that this measure will relieve institutions from having to keep a record for a significant proportion of the copies made pursuant to section 29.6 of the *Act*.

Comments received following prepublication on March 10, 2001 allowed the Board to identify three issues which required further attention.

First, institutions involved in the field of education asked for a delay of 30 to 60 days between the making of the Regulations and its coming into force, to allow for all measures required to properly apply the Regulations to be put in place. The Educational Rights Collective of Canada did not object to the delay but asked that the Regulations take effect no later than July 1, 2001. In the Board's view, 30 days should be more than sufficient without causing any serious prejudice to copyright holders. However, it is not able to meet the date proposed by the collective society.

Second, it was pointed out that the definition of "collective society" may give rise to some short-term difficulties. The definition is aimed solely at collectives benefiting from a

certified tariff, but no tariff has yet been certified. As a result, some uncertainty might exist as to the reporting obligations befalling educational institutions between the date on which the Regulations are made and the date on which the first tariff is certified. Section 8 of the Regulations was amended so as to postpone until one month after the first tariff is certified the date on which institutions are required to file for the first time the information set out in that section.

Third, comments allowed to correct a discrepancy between the French and English versions of the Regulations.

Compliance and Enforcement

An institution that does not comply with the reporting requirements infringes copyright. Such an infringement triggers a number of well-established remedies. Consequently, other enforcement mechanisms are not required.

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