Court File No: 39222

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY

Appellant
(Appellant)

- and -

CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

Respondent
(Respondent)

Style of cause continued on next page

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Appellant
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YORK UNIVERSITY

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SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE DU DROIT DE REPRODUCTION, THE AUTHORS ALLIANCE, ARIEL KATZ, THE CANADIAN ASSOCIATION OF LAW LIBRARIES, THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, THE CANADIAN FEDERATION OF STUDENTS, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, LE CENTRE DE DROIT DES AFFAIRES ET DU COMMERCE INTERNATIONAL, CHAIRE L.R. WILSON SUR LE DROIT DES TECHNOLOGIES DE L’INFORMATION ET DU COMMERCE ÉLECTRONIQUE, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, THE COPYRIGHT COLLECTIVE OF CANADA, THE CANADIAN MEDIA PRODUCERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DE LA PRODUCTION MÉDIATIQUE, THE INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, THE INTERNATIONAL AUTHORS FORUM, THE INTERNATIONAL PUBLISHERS ASSOCIATION, THE CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD., THE CANADIAN RETRANSMISSION COLLECTIVE, CONNECT MUSIC LICENSING SERVICE INC., LA SOCIÉTÉ DE GESTION COLLECTIVE DES DROITS DES PRODUCTEURS DE PHONOGRAMMES ET DE VIDÉOGRAMMES DU QUÉBEC, THE ASSOCIATION OF CANADIAN PUBLISHERS, CANADIAN PUBLISHERS’ COUNCIL, THE WRITERS’ UNION OF CANADA, CANADIAN ASSOCIATION OF RESEARCH LIBRARIES, THE COPYRIGHT CONSORTIUM OF THE COUNCIL OF MINISTERS OF EDUCATION, CANADA, MUSIC CANADA, CANADIAN MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DE L’INDUSTRIE DU DISQUE, DU SPECTACLE ET DE LA VIDÉO, ASSOCIATION DES PROFESSIONNELS DE L’ÉDITION MUSICALE, CANADIAN INDEPENDENT MUSIC ASSOCIATION, COLLEGES AND INSTITUTES CANADA, AND UNIVERSITIES CANADA

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PART I – OVERVIEW AND FACTS

1. Teachers and students offer submissions from the front lines of education, as both creators and users of copyright-protected expression. Hundreds of thousands of teachers, librarians, researchers, professionals, and students across the country are represented by the Canadian Association of University Teachers and Canadian Federation of Students.

2. These appeals are about a combination of legal options to facilitate the digital transformation of higher education. Teachers and students know fair dealing cannot substitute for all copyright licensing on campus. The choice, however, is not to swap tariff payments for free dealing. To procure the best materials in the most appropriate formats, teachers and students support administrators' shift away from blanket reprography licences toward legal alternatives. Innovative legal options include database subscriptions, transactional licenses, and library repositories.[1] Public domain and open access materials are a major portion of the works teachers and students use.[2] Learning management systems, *i.e.* private course pages let teachers link students to licensed electronic resources and lawful Internet materials.[3]

3. "The evidence of the professors," the trial judge highlighted, "underscored the dual nature of the academic community's relationship with copyright. Academics are users of copyrighted material, but they are also creators of copyrighted material."[4] That fact explains why academic community values—freedom to encourage learning, to disseminate knowledge, to embellish innovation, to openly exchange ideas, and to justly reward the work of others—mirror core copyright principles.[5]

4. The dealings here tend to be fair not because the goals of higher education outweigh the goals of copyright, but because the goals of higher education are the goals of copyright. To achieve those common goals in practice, teachers and students welcome guidance on what they are, or are not, allowed to do with learning materials. Guidelines that maximize lawful use and minimize potential infringements are necessary to operationalize fair dealing.

5. "In a relatively small number of cases," the Court of Appeal acknowledged about York, "some of its copying fell outside its Guidelines."[6] Even so, guidelines are not the ceiling on fair dealing.

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[1] *Canadian Copyright Licensing Agency v York University*, 2017 FC 669, [2018] 2 FCR 43, ¶ 46; ¶¶ 181-182 [FC Reasons].
[2] FC Reasons, ¶ 122(c).
[3] FC Reasons, ¶ 57. See also *Copyright Act*, RSC 1985 c C-42, s 30.04 (works on the Internet).
[4] FC Reasons ¶¶ 187, 67.
[5] *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336, ¶¶ 30-32.
[6] *York University v Canadian Copyright Licensing Agency*, 2020 FCA 77, ¶ 40 [FCA Reasons].

Suggesting that guideline compliance must be better enforced by monitoring or maybe even discipline in order for dealings to be fair misunderstands teachers' and students' goal.[7] Teachers and students are not looking for loopholes to evade copyright liability but, rather, exercising the right to deal fairly with materials our communities create. Stricter guidelines or more compliance may reduce administrators' exposure to legal risk. But compliance with guidelines by colleagues down the hall, in other departments, or university-wide cannot, in principle, limit teachers' or students' underlying legal rights.

PART II – POSITION ON APPELLANTS' QUESTIONS

6. On Access Copyright's appeal, teachers and students submit that licensing tariffs are one option to comply with copyright law, but not the only way. On York University's appeal, teachers and students submit that the fairness of their dealings depends more on the common principles underpinning education and copyright than the mischaracterized motives of their university administrators.

PART III – ARGUMENT

A. Collecting societies' licensing tariffs are not a mandatory way to clear copyright.

7. Teachers and students make two submissions about legal options for copyright licensing, which like all provisions of the *Act* must be interpreted with balance.[8] First, Parliament's purpose for blanket licensing tariffs from collectives was to expand options, not limit choice. Second, had Parliament intended to impose mandatory levies on educators, it would have done so in another statutory context.

1. Parliament's purpose was not to limit academic freedom to choose licensing options.

8. Teachers and students need all legal options the *Copyright Act* provides. The quality of higher education in Canada would suffer with a set menu of mandatorily licensed learning materials.

9. If university administrators must always accept the terms and conditions of licensing tariffs that collective societies may propose, then inevitably teachers and students will have fewer other options. Treating a tariff as mandatory means more human and financial resources must be devoted to maintaining outdated models of administration. Mandatory tariffs mean less investment in direct licensing, stocking libraries, open access initiatives, and other ways to respect copyright.

10. True, a blanket licence does not legally force teachers to use only works falling within a tariff. Teachers and students could, in theory, hope their administrators pay both for better-stocked libraries

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[7] FC Reasons, ¶ 28, 58, 62, 76-82, 186, 244-245, 266, 314.
[8] *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43, ¶ 46.

with flexible digital subscriptions including use-rights, as well as mandatory licensing tariff fees to use what they have already bought. But Parliament did not intend tariffs to layer on duplicative licenses, inefficiency, and needless costs.[9] And teachers and students know that is not how higher education really works. The concerns are not merely about money. On top of "worrisome surveillance, monitoring, disclosure and compliance requirements" of proposed licence terms,[10] mandatory tariffs would, in day-to-day practice, lead to structural pressures on teachers to start or limit the selection of learning materials with works covered by the tariff.

11. Academic freedom comes with a duty to acquire, preserve, and provide students access to the most appropriate learning materials from the entire panoply of resources available. The trial judge mentioned: "Consistent with the principle of academic freedom, instructors choose the materials."[11] But this crucial fact was ignored when interpreting and applying the law. Academic freedom, like related educational purposes, is obviously not a "get out of copyright free" card.[12] Teachers' and students' dealings with learning materials must, however, be free from restrictions resulting from one mandatory approach to copyright administration across post-secondary institutions.

12. "Academic freedom and excellence is essential to our continuance as a lively democracy", this Court has ruled.[13] "Any attempt by government to influence university decisions … could lead to breaches of academic freedom."[14] This Court's affirmation of academic freedom was about university staffing decisions, but the principle also applies to academics' freedom to curate the most suitable learning materials for students. If "the preservation of academic freedom" could be "an objective of pressing and substantial importance" to partly justify limits even on *Charter* rights, as suggested in *McKinney*,[15] it also helps determine the balance in copyright.

13. Mandatory tariffs would, moreover, entrench intermediaries as power brokers in academic publishing, making it harder to fulfil copyright's purpose to prevent others from appropriating the

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[9] *Entertainment Software Association v Society of Composers, Authors, and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231, ¶ 9; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, ¶ 67.
[10] Bita Amani "Access Copyright and the Proposed Model Copyright Licence Agreement: A Shakespearean Tragedy" (2012) 24 *Intellectual Property Journal* 221, pp 228 and 226, 241, 242.
[11] FC Reasons, ¶ 45.
[12] Access Copyright Respondent's Factum, ¶ 70.
[13] *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, pp 286-287.
[14] *McKinney*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, p 273.
[15] *McKinney*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, p 281.

benefits of academic authors' creativity.[16] York University notes that Access Copyright competes with "publishers and vendors who provide licences to reproduce the exact same works."[17] Teachers and students add that Access Copyright competes with us too. Institutional mandates to pay over-inclusive licensing tariffs would be inconsistent with open-access publishing and accessible repositories of scholarly works.[18] That is how academic authors' innovation, creativity and freedom to disseminate works as they choose would be impaired by mandatory tariffs.

2. The statutory context of licensing tariffs contrasts with the scheme of mandatory levies.

14. Access Copyright's core theory about why tariffs would be mandatory is that the *Act* was amended in the 1980s and 1990s to deal with the fact that "Printed works could be copied privately. Detection of unauthorized and uncompensated copying was nearly impossible. … Parliament did not want to stifle technological progress or detract from the benefits of the photocopier, especially in the educational setting. … Its response was to introduce a scheme of collective administration."[19]

15. The theory Access Copyright posits is the textbook theory of private copying levies.[20] Parliament did create a scheme to deal with certain private copying in 1997, specifically Part VIII of the *Act*.[21] But it applies only to the private copying of recorded music, not printed works. One cannot substitute educational licensing in place of levies: *i.e.* It is hard to monitor and enforce reproduction rights in the context of private copying by consumers [students] of recorded music [printed works], so the solution is a mandatory fee to be paid by media importers [educational institutions].

16. If Parliament had wanted to do what Access Copyright suggests, then Part VIII would have been the template. Part VII does something different, as the Court of Appeal correctly explained.

17. Levies are mandatory because Part VIII expressly makes certain persons liable to pay them, York University observes.[22] Other statutory indicia confirm that Part VIII mandatory levies are not like Part VII licensing tariffs. The proper interpretative question is not whether a regulation includes

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[16] *Théberge*, 2002 SCC 34, [2002] 2 SCR 336, ¶ 30.
[17] York University Respondent's Factum, ¶ 4.
[18] See John Willinsky, *John Willinsky on Intellectual Property and Scholarly Publishing*, Slaw.ca, 2021 CanLIIDocs 240, on 2018-01-20.
[19] Access Copyright Appellant's Factum, ¶¶ 3-4.
[20] David Vaver, *Intellectual Property Law*, 2nd ed (Toronto: Irwin Law, 2011), p 259.
[21] Canadian Private Copying Collective v. Canadian Storage Media Alliance, 2004 FCA 424, [2005] 2 FCR 654. See also *AVS Technologies Inc v Canadian Mechanical Reproduction Rights Agency*, A-19-00 (June 14, 200), 2000 CanLII 15571 (FCA), ¶ 7.
[22] FCA Reasons, ¶ 30; York University Respondent's Factum, ¶ 70; *Copyright Act*, s 82(1)(a).

a tariff,[23] but whether all tariffs are regulations. The answer is no. Part VIII contemplates a "tariff" of "proposed levy rates and any related terms and conditions".[24] Part VII contemplates a "tariff" of "proposed royalty rates and any related terms and conditions".[25] Tariffs of levy rates are mandatory regulatory charges[26] while tariffs of royalty rates are optional license fees.[27]

18. A corollary of Access Copyright's theory is that users could be required to pay multiple mandatory tariffs to multiple collectives operating in parallel, even for the same non-exclusive repertoire. Owners of copyright, including academic authors, may authorize other collective societies to act their behalf.[28] Where mandatory payments to multiple collectives are possible, Parliament has solved the logistics problem. In Part VIII, the Copyright Board must designate only one "collecting body" for mandatory levies.[29] If Part VII reprography tariffs were mandatory, Parliament would have created a way to coordinate amongst multiple collectives. Instead, Part VII allows licensees to choose which—if any—collective society's licensing tariff to accept.

B. Fairness must be informed by the goals and practicalities of education.

19. There is no dispute that the dealings at issue in this case are for the allowable purpose of education. The issue is how teachers', students', and administrators' unified educational purpose informs the fairness analysis throughout part two of the fair dealing test.

20. The trial judge mentioned "education" as part of a "multifaceted", "mixed" goal, concluding it was "not a strong factor" given his view of York's goal to avoid the alternative of its previous licence.[30] The Court of Appeal believed it was wrong to consider education at all outside of part one of the test.[31] Access Copyright asks this Court to defer to the trial judge's decision mainly on the basis of standard of review[32] and seems not to defend the Court of Appeal's approach. York submits that the educational

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[23] FC Reasons, ¶ 207, 218.
[24] *Copyright Act*, s 83(3)(a).
[25] *Copyright Act*, s 68.1(1)(b) as amended, formerly s 70.13(1) ("royalties to be collected by the collective society for issuing licences").
[26] *Canadian Private Copying Collective*, 2004 FCA 424, [2005] 2 FCR 654, ¶ 72.
[27] *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615, ¶ 112; see also s 19 for a possible exception of liability to pay "royalties" as "equitable remuneration".
[28] Howard P Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?" (1999) 14 *Intellectual Property Journal* 109.
[29] *Copyright Act*, s 83(8)(b); see also s 70(2)(c), as amended (s 19 royalties in "single payment").
[30] FC Reasons, ¶¶ 272-275.
[31] FCA Reasons, ¶¶ 241, 274.
[32] Access Copyright Respondent's Factum, ¶¶ 91-92

purpose is the context for the fairness assessment, anchored in the student perspective.[33]

21. Teachers and students make two overarching submissions on fair dealing for education. First, the correct legal test recognizes that the goals of education and copyright align to support fair dealing. Second, guidelines are the most practical way to operationalize balanced fair dealing rights.

1. The goals of education and copyright align to support fair dealing.

22. Whether a dealing promotes or undermines balance cannot be resolved by pejoratively dismissing statements about the importance of education as "high-minded".[34] Deliberate consideration of the core values underpinning both copyright and education is required.

23. Teachers and students agree it helps to think about the goal of the dealing, *le but d'utilisation* as put in *CCH*.[35] The trial judge held "Education was a principal goal".[36] The real question, however, is: What is the goal of education? At step one, the question is which allowable purpose is the dealing for? To avoid repetition, the question at step two is why does that purpose matter? Here, education is not the answer but the question. Teachers and students ask this Court to meaningfully assess how the goal, the aim, the endeavour of education advances the purposes of copyright.

24. Teachers and students submit that both this Court and Parliament have recognized education as a common endeavour of administrators, teachers, and students engaged in an inherently dialogic process. This Court's reasons in *Alberta v Access* were clear: Because teachers' and students' purposes are "symbiotic" the Court rejected an approach that "drives an artificial wedge into these unified purposes".[37] Parliament's intent mirrored this Court's in 2012, amending the statute to add the common purpose of education, which must mean something more than research or private study.

25. Instead of exploring the goals and nature of education, the trial judge was sidetracked by the belief that "from York's perspective"[38] the goal of the guidelines was "free" dealing.[39] York University points out the mistake of intermingling purpose with irrelevant alternatives, *i.e.* the

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[33] York University Appellant's Factum, ¶¶ 48-80.
[34] Access Copyright Respondent's Factum, ¶ 77.
[35] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339, ¶ 48.
[36] FC Reasons, ¶ 273.
[37] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345, ¶¶ 23-24.
[38] FC Reasons, ¶ 273.
[39] FC Reasons, ¶ 272.

availability of the licence York previously paid for.[40] But the Court of Appeal was also distracted by efforts to either dichotomize or conflate the purposes of administrators and students. A dozen pages were spent debating whose purpose matters when, only to create a new artificial distinction between cases involving guidelines versus *ad hoc* copying.[41]

26. Teachers and students submit the key question here is not who but why. For the purpose factor, perspective really only matters if a person tries to camouflage demonstrably ulterior motives,[42] like a copy shops selling services to educational institutions or perhaps a private business selling consulting services supposedly to educate others. That is definitely not what motivates public educational institutions.[43] So whether there is one user, two, or three (*i.e.* administrators, students, and teachers too) is beside the point. The point is that there is only one relevant purpose—education.

27. The purpose of education matters legally because the closer the goals of a dealing come to the goals of copyright, the fairer it is. A user's right is strongest when the use creates something new and valuable. The educational dealings at issue in this case are not merely consumptive; they are productive. The creative process of generating physical course packs and digital course pages for education aligns with the goals of copyright in at least two specific ways.

28. First, course packs/pages themselves are new works expressing educators' original skill and judgment. When educators curate learning materials for students, they author new "works of the arts and intellect".[44] Educators select, compile, rearrange, and supplement materials using their own knowledge, aptitude, discernment, opinion, and evaluation.[45] Generating a course pack/page expresses something valuable about what an educator finds important, the essence of academic freedom. Educators' deliberate expression has all the hallmarks of authorial creativity that copyright aims to encourage, making these dealings fairer than impromptu copying or consumer research.[46]

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[40] York University Appellant's Factum, ¶ 78-80.
[41] FCA Reasons, ¶ 233.
[42] *Alberta v Access Copyright*, 2012 SCC 37, [2012] 2 SCR 345, ¶ 20-23.
[43] See, for example, *The York University Act, 1965*, 13-14 Eliz. II, s 4.
[44] *Théberge*, 2002 SCC 34, [2002] 2 SCR 336, ¶¶ 30.
[45] *CCH Canadian*, 2004 SCC 13, [2004] 1 SCR 339, ¶ 16; see also *Robertson v Thomson Corp*, 2006 SCC 43, [2006] 2 SCR 363, ¶ 70.
[46] *Alberta v Access Copyright*, 2012 SCC 37, [2012] 2 SCR 345; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326; Brandon Butler, "Transformative Teaching and Educational Fair Use after Georgia State" (2015) 48:2 *Connecticut Law Review* 475, pp 515-529.

29. Second, course packs/pages enable learners to incorporate and embellish creative innovation in the long-term interests of society as a whole.[47] Students depend on teachers to curate the best educational materials, dealing within the rules of copyright but academically free from undue influence by administrators or others. As Professor Tawfik points out, copyright laws were formed to encourage education and learning, as enlightened societies value individual human fulfillment and socio-economic and cultural development.[48] Education epitomizes the balance between just rewards for creators and the public interest in the encouragement and dissemination of intellectual works.

30. That teachers and students are creators too does not mean they can disrespect the work of others. That would contradict both copyright law and academic community norms. But nor is it true that a licence is always needed to add others' work to course packs/pages. The principles common to copyright and education inform the factors delineating copyright infringement from fair dealing.

31. On the character of these dealings, a teacher's or student's fair dealing right cannot, in principle, be curtailed just because colleagues or other professors at the same institution might also make their own compilations, even if using some of the same materials. The proper analysis of character looks not at aggregate dealings across campus, but at the number and nature of copies that go into each course pack/page. That assessment must be in relation to all the other pages of materials that a teacher assigns and her students buy, not combined with what other teachers do.

32. On the amount (proportion) dealt with, the fact that educators select qualitatively important excerpts of other works does not determine fair dealing rights. That argument is a variation on the notion "frequently trotted out by claimants' lawyers, that 'what is worth copying is prima facie worth protecting'", which Professor Vaver explains, "is too crude to be overtly accepted".[49] Quantitatively, 10% is not the ceiling on fair dealing, but is a common starting point for principled guidance in normal cases, exceptions aside.[50]

33. On the nature of the works dealt with, the same thing can be said about the materials going into compilations as the new expression coming out. Both are generated through "creativity, complex

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[47] *Théberge*, 2002 SCC 34, [2002] 2 SCR 336, ¶¶ 30.
[48] Myra J Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), p 72.
[49] David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), p 148.
[50] Canadian Association of University Teachers, "Guidelines for the Use of Copyrighted Material" (February 2013), p 3.

analytical analysis, skill, perspective, and judgment by authors [and] required substantial research, editorial judgment, and pedagogical expertise and merit". Thus, this factor is neutral not negative.[51]

34. And on alternatives and effects of the dealing, an educator's compilation is not a "colourable imitation" that competes with colleagues' books or other source materials from the academic community but, rather, is "a new and original work".[52] There is no competition because expecting students to buy entire works only part of which is assigned is not realistic, and licensing each little part is not a legally relevant alternative to fair dealing.[53] Finally, in weighing effects, Access Copyright characterizes the cost to students as just a few dollars but the copies at issue and royalties at stake in the tens of millions.[54] If a few dollars is not a significant cost to a student, nor is it significant income for a publisher. If users' fair dealing rights "cost" creators $10 million per year, then not exercising those rights costs students $10 million too. Teachers and students ask this Court to consider only commensurate figures.

2. Guidelines are the most practical way to operationalize balanced fair dealing rights.

35. Guidelines are how copyright and user rights—rooted in the statute and this Court's decisions—are operationalized in day-to-day practice. If fair dealing is to fulfil its role as the fulcrum of copyright and user rights, teachers and students need to know how to deal fairly.

36. Concerns were raised at trial about the effect of copyright enforcement on academic freedom.[55] It is important to be clear: Teachers and students do not submit that academic freedom absolves them of responsibility to comply with copyright law. Academic freedom is a right that comes with responsibilities, including to deal fairly curating the best learning materials in the best formats for students. Teachers and students do submit that proper guidelines are a practically helpful way to implement balanced copyright protection while at the same time respecting academic freedom.

37. This Court has recognized the compelling objective of policies that enhance rather than limit academic freedom.[56] The practical alternatives to guidelines are either stricter institutional controls over the learning materials teachers and students use or an even more hands-off approach that leaves teachers

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[51] FC Reasons, ¶ 333, 338.
[52] *Cinar Corporation v Robinson*, 2013 SCC 73, [2013] 3 SCR 1168, ¶ 40.
[53] *Alberta v Access Copyright*, 2012 SCC 37, [2012] 2 SCR 345, ¶ 31-32.
[54] Access Copyright Respondent's Factum, ¶¶ 30, 38, 49, 54, 76,109, 125.
[55] FC Reasons, ¶¶ 81-82, 184-185.
[56] *McKinney*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, p 281.

and students to struggle on an *ad hoc* basis. (Access Copyright offers blanket licensing as a third option to avoid the "red herring" of academic freedom,[57] but licensing is not a legally relevant alternative.)

38. Without guidelines, "excessive control by holders of copyright" would "create practical obstacles to proper utilization" of learning materials.[58] Teachers who are unaware or just risk averse may underutilize fair dealing rights, to the prejudice of students, or overstep fair dealing, to the prejudice of other authors. In this light, it would be perverse if universities were legally better off allowing *ad hoc* approaches to copying instead of guiding teachers, librarians, and students into best practices.

39. On the other hand, stricter controls over teachers' and students' use of learning materials would limit academic freedom. The issue is not merely monitoring what teachers and students do, although surveillance itself can chill academic freedom. Another serious problem is suggesting, as the trial judge did, that disciplinary actions to enforce compliance with institutional guidelines might be necessary or appropriate.[59] That logic ignores the legal principle that a person who authorizes an activity does so only so far as it in accordance with the law.[60] University administrators are, therefore, justified in presuming that teachers and students want to and generally do comply with copyright.

40. Finally, it is not York's guidelines that require enforcement. It is the law enacted by Parliament and interpreted by this Court. Guidelines in various forms,[61] including university teachers' own "very divergent" copyright guidelines,[62] put the law into practice. But fundamentally, imperfect enforcement of any institutional guidelines cannot make the dealing of a teacher or student unfair.

PART IV – COSTS

41. CAUT and CFS do not seek costs in this matter and ask that costs not be awarded against them.

PART V – REQUEST FOR ORAL ARGUMENT

42. CAUT and CFS have been granted five minutes to present oral arguments.

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[57] Access Copyright Respondent's Factum, ¶ 44.
[58] *Théberge*, 2002 SCC 34, [2002] 2 SCR 336, ¶¶ 30.
[59] FC Reasons, ¶ 244.
[60] *CCH Canadian*, 2004 SCC 13, [2004] 1 SCR 339, ¶ 43;
[61] See Lisa Di Valentino, *Laying the Foundation for Copyright Policy and Practice in Canadian Universities* (Doctor of Philosophy, University of Western Ontario, 2016), ch 5.
[62] Samuel E Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), p 226, n 63, citing Canadian Association of University Teachers, "Guidelines for the Use of Copyrighted Material" (February 2013).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th of April, 2021.

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PART VI – NOT APPLICABLE
PART VII – TABLE OF AUTHORITIES

	Authority	*Reference in Argument*
	Cases	
1	*Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345.	¶¶ 24, 26, 28, 34
2	*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615.	¶ 17
3	*CCH Canadian*, 2004 SCC 13, [2004] 1 SCR 339.	¶¶ 23, 28, 39
4	*Cinar Corporation v Robinson*, 2013 SCC 73, [2013] 3 SCR 1168.	¶ 34
5	*Entertainment Software Association v Society of Composers, Authors, and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231.	¶ 10
6	*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100.	¶ 10
7	*Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43.	¶ 5
8	*McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229.	¶¶ 12, 37
9	*Robertson v Thomson Corp*, 2006 SCC 43, [2006] 2 SCR 363.	¶ 28
10	*Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326.	¶ 28
11	*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336.	¶¶ 3, 13, 28, 29, 38
	Legislation	
12	*Copyright Act*, RSC 1985 c C-42. *Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42.	¶¶ 2, 17, 18
13	*The York University Act, 1965*, 13-14 Eliz. II.	¶ 26
	Secondary Sources	
14	Bita Amani "Access Copyright and the Proposed Model Copyright Licence Agreement: A Shakespearean Tragedy" (2012) 24 *Intellectual Property Journal* 221.	¶ 10
15	Brandon Butler, "Transformative Teaching and Educational Fair Use after Georgia State" (2015) 48:2 *Connecticut Law Review* 475.	¶ 28

16	Canadian Association of University Teachers, "Guidelines for the Use of Copyrighted Material" (February 2013).	¶ 32, 40
17	Lisa Di Valentino, *Laying the Foundation for Copyright Policy and Practice in Canadian Universities* (Doctor of Philosophy, University of Western Ontario, 2016).	¶ 40
18	Howard P Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?" (1999) 14 *Intellectual Property Journal* 109.	¶ 18
19	Myra J Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010).	¶ 29
20	Samuel E Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).	¶ 40
21	David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000).	¶ 15
22	David Vaver, *Intellectual Property Law*, 2nd ed (Toronto: Irwin Law, 2011).	¶ 32
23	John Willinsky, *John Willinsky on Intellectual Property and Scholarly Publishing*, Slaw.ca, 2021 CanLIIDocs 240.	¶ 13