

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

B E T W E E N:

YORK UNIVERSITY

APPELLANT
(Appellant)

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY
(“ACCESS COPYRIGHT”)

RESPONDENT
(Respondent)

AND BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY
(“ACCESS COPYRIGHT”)

APPELLANT
(Respondent)

- and -

YORK UNIVERSITY

RESPONDENT
(Appellant)

(Style of Cause continued on following page)

**FACTUM OF THE INTERVENER, SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS (SOCAN)**

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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(Style of Cause continued)

- and -

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**FACTUM OF THE INTERVENER, SOCIETY OF COMPOSERS, AUTHORS
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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. SOCAN's predecessor was the first performing rights organization in Canada and SOCAN remains the only collective society in Canada that administers performing rights in musical works. In 1936, Parliament introduced a statutory scheme to regulate the collective administration of performing rights to benefit both owners and users of copyright-protected music, with the ultimate goal of furthering the public interest in having access to musical works, while ensuring that creators and rights holders are fairly compensated for their works. The legislative provisions at issue in this appeal are part of a statutory licensing scheme that grew out of the 1936 performing rights regime, which was strengthened in 1988 to meet the needs of all participants in the collective administration regime.
2. As a not-for-profit corporation and a collective society, SOCAN collects royalties pursuant to certified tariffs and distributes those royalties to its members and to foreign copyright collectives for distribution to their members. SOCAN relies on the tariff enforcement provisions in the *Copyright Act* to administer the rights it controls on behalf of its members. Tariffs with enforceable terms further the goals of copyright law: promoting the creation and dissemination of creative works and obtaining a just reward for the authors and owners of those works.
3. The decision under appeal threatens to disrupt the collective administration system by allowing users to "opt out" of the system, effectively binding one party (the collective society) but not the other (the user) to the terms of tariffs considered and approved by the Copyright Board of Canada (the "Board"). The result would be an unbalanced system that fails to achieve Parliament's goals.

Statement of Facts

4. SOCAN administers the performing rights of its more than 160,000 songwriters, music publishers, composers and visual artists in Canada. Through reciprocal agreements with more than 100 foreign copyright collectives (representing over 200 countries), SOCAN collects and distributes royalties domestically and internationally for the use of copyright-protected musical works in Canada. SOCAN owns and/or administers the performing

rights in virtually all musical works in current use in Canada. SOCAN also administers tariffs for reproduction rights, following SOCAN's 2018 acquisition of SODRAC.

5. SOCAN collects royalties from approximately 120,000 music users across Canada and distributes these royalties to rights holders, including SOCAN's direct members as well as affiliated foreign collective societies. SOCAN's core functions rely on effective and efficient collection of royalties – and its statutory right of tariff enforcement – to ensure that rights holders are compensated fairly for uses of their works.
6. SOCAN collects royalties pursuant to tariffs certified by the Board. SOCAN administers more than 50 certified tariffs – the largest suite of tariffs among Canadian collective societies – for a variety of uses (restaurants, gyms, concert venues, broadcasters, digital services, etc.).
7. The *Copyright Act* establishes a statutory licensing scheme¹ that applies to the uses of the rights set out in these certified tariffs. By operation of the statute, users may engage in the uses covered by a tariff and, in doing so, become bound to the tariff terms, including payment of the specified royalties. SOCAN cannot prohibit the use of works in its repertoire by a user who complies with the terms of a certified tariff. Where a certified tariff is in place, the *Act* allows SOCAN either to recover unpaid royalties in court or to pursue other civil remedies such as damages for infringement or an injunction.²
8. The decision below guts the statutory enforcement mechanisms by restricting the obligation to pay royalties to those users who have “taken” a licence. On the Federal Court of Appeal's construction, a collective society could only recover unpaid royalties in situations where the user had offered to pay royalties (or had made partial payment) and then failed to pay the full amount owing. This interpretation reads the *Copyright Act* too narrowly and undermines the collective administration system by debilitating tariff enforcement.

¹ *Copyright Act*, RSC 1985, c C-42, sections [67 to 68.2](#) in the pre-2019 *Act* and sections [67 to 76.1](#) in the 2019 *Act*

² See section [68.2\(1\)](#) in the pre-2019 *Act* and sections [73 and 73.1](#) of the post-2019 *Act*

PART II – RESPONSE TO QUESTIONS IN ISSUE

9. The *Copyright Act* does not allow users to unilaterally “opt out” of a certified tariff once they have engaged the rights covered by that tariff. When a user has engaged in the rights covered by a certified tariff without paying the required royalty, SOCAN may seek an order from a court of competent jurisdiction requiring the user to pay.

PART III – ARGUMENT

The Collective Administration System Benefits Both Rights Holders and Users

10. SOCAN, through its predecessors, has existed since the beginning of collective rights administration in Canada. In response to the advent of collective administration for performing rights, Parliament instituted sweeping changes to the *Copyright Act* to correct what it saw at the time as inefficient market conditions brought on by the potential for collective societies to exert their monopoly power and disrupt the marketplace.
11. In order to regulate the “inevitable monopoly”³ in performances of musical works, Parliament implemented a regulatory system that obliged performing rights societies to publish their royalties in the form of certified tariffs. These tariffs were intended to abrogate the sole rights granted by the *Act* and substitute a statutory licensing scheme⁴ “for the convenience of the owner and the user.”⁵ As a result, collective societies and copyright users “have a business relationship that is forced on them by statute.”⁶
12. Collective administration is an innovation that brings significant value to rights holders, users, and the public at large. For rights holders, collective administration allows individual rights holders to overcome the transaction costs, market power imbalance, and monitoring difficulties that are inherent in negotiating licences with users on an individual basis. In particular, collective administration allows rights holders to efficiently collect royalties for

³ Hon. J. Parker, [*Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights*](#) (Ottawa, ON: JO Patenaude, 1935) [*Parker Report*] at 19

⁴ [*Vigneux v. Canadian Performing Right Society Ltd.*](#), [1943] SCR 348 at 353

⁵ [*Parker Report*](#) at 19

⁶ [*Rogers Communications Canada Inc. v. Society of Composers, Authors and Music Publishers of Canada*](#), 2021 FC 207 at para. 131

high-volume, low-revenue uses. For users of copyright-protected works, tariffs obviate the need to negotiate transactional licences with each rights holder. Where a certified tariff is in place, a user has the right to use a vast repertoire of works simply by complying with the tariff terms.

13. The benefits of collective administration apply to all rights and all types of works, not just to the rights for musical works administered by SOCAN. Because of the efficiencies gained, there is a public interest in maintaining an effective system for the collective administration of copyright, but the system depends on enforceable tariffs. Parliament's goals for collective administration are negated if each user can choose to "opt out" of a certified tariff. In addition, simplified enforcement further reduces transaction costs and promotes access to copyright-protected works.

Enforceable Tariffs Function Like Statutory Licences

14. The *Copyright Act's* collective administration regime guarantees efficient and predictable access for licensees while mandating fair compensation for rights holders. The regime creates efficiency by providing a public, quasi-judicial process before the Board that results in certified tariffs that are binding on both users and rights holders.
15. Each certified tariff sets out the conditions under which the rights and works covered by the tariff may be used. Each certified tariff is mandatory; the user becomes bound to the terms of the tariff by engaging in the use of the right. By complying with the terms of the tariff, the user has the right to use the works in the collective's repertoire. A collective society whose rights are the subject of a certified tariff cannot prohibit the use of its works by anyone who has paid the royalty set out in the tariff. The rights holder, in turn, is entitled to enforce the terms of the tariff on those users who engage in the use of the right without fulfilling the mandatory terms of the certified tariff, including payment of royalties and the provision of reporting data.
16. The decision under appeal mistakenly assumes that a licence must be a contractual agreement. In the context of the *Copyright Act*, a licence is simply permission to engage in one of the copyright owner's exclusive rights. The statutory licences implemented by the collective administration system do not require a contractual agreement; a certified tariff

operates independently to allow the user to use the works and the collective to collect the approved royalties.

17. The term “take a licence” as used by the Federal Court of Appeal is inapt: a user who engages in the use of a work covered by a certified tariff cannot refuse to “take” a licence any more than the collective society can refuse to “give” a licence to a user who has paid the applicable royalty.

Tariff Enforcement Under the *Copyright Act*

18. Parliament intended for rights holders to have the option to choose from alternative enforcement mechanisms such as an action for infringement or an application to enforce the mandatory terms of a tariff. In its 1988 amendments, Parliament clarified the remedial provision for collective societies by enacting section 68.2, which is at the centre of this appeal.
19. Section 68.2(1) refined the language of the previous remedial section – which allowed collective societies to “sue for **or collect**” outstanding royalties – and spelled out Parliament’s intent to give collective societies both the right to sue for damages and the right to collect unpaid royalties in court.
20. The right to recover unpaid royalties is “without prejudice to any other remedies” available to the collective society, including a civil action for damages for infringement pursuant to section 34. Collective societies have the option either to enforce the terms of the certified tariff by recovering royalties from non-paying users or to seek a civil remedy such as damages for infringement.
21. In the present appeal, the decision below views these remedial provisions as *limiting* the rights that collective societies would otherwise exercise “at common law”⁷ or “independently of the *Act* (1936).”⁸ This view is at odds with the purely statutory nature of copyright. When the *Copyright Act* provides that collective societies may collect royalties

⁷ [York University v. Canadian Copyright Licensing Agency](#), 2020 FCA 77 [FCA Decision] at para. 54

⁸ [FCA Decision](#) at para. 95

or “in default of their payment, recover them in a court of competent jurisdiction,” the *Act* is defining the remedial options available to collective societies.

Collective Administration Depends on Enforceable Tariffs

22. When faced with a non-paying user whose use of SOCAN’s repertoire falls within the ambit of a certified tariff, SOCAN may choose to enforce the terms of the tariff and recover the outstanding royalties or to seek a civil remedy related to infringement. The relationship between these two remedies is akin to the remedies of specific performance and damages for breach of contract.
23. In the course of SOCAN’s long history, it has engaged in hundreds of enforcement actions. In a significant portion of these, SOCAN has proceeded before the courts to enforce its rights on the basis of s. 68.2(1) (and now s. 73 and 73.1) alone. SOCAN is routinely awarded orders granting recovery of unpaid royalties pursuant to these sections.
24. Where appropriate, SOCAN seeks both types of remedies as alternatives. In fact, in *SOCAN v. Kicks Roadhouse Inc.* (the decision mentioned by the Federal Court of Appeal in the decision under appeal, which was not a default judgment case), SOCAN sought and was granted an alternative order for *either* an award of damages *or* the royalties payable under the tariff pursuant to s. 68.2.⁹ The Federal Court of Appeal overlooked the second remedy granted by the court in its discussion of *Kicks Roadhouse*.¹⁰
25. Without enforceable tariffs, licensing at scale becomes impractical and inefficient. SOCAN’s “general licensing” tariffs (bars, restaurants, clubs, etc.) cover tens of thousands of small establishments across the country. This class of music user is broad, but the royalty payable by each user is low. The purpose of certified tariffs is to establish a level playing field for all users. If every bar, restaurant, and club across the country could “opt out” of the tariff regime, SOCAN would be forced to negotiate licence terms with each user individually, and the efficiencies gained from collective administration would evaporate.

⁹ [*Society of Composers, Authors and Music Publishers of Canada v. Kicks Roadhouse Inc.*](#), 2005 FC 528 at para. 27

¹⁰ [FCA Decision](#) at para. 197

SOCAN would face the additional administrative burden and increased cost of tracking and enforcing tens of thousands of separate licence terms. Increases of this magnitude in administrative costs would result in reduced payments to rights holders. Enforceable tariffs prevent this from happening.

26. Additionally, tariff requirements extend beyond royalty payments. For example, many tariffs require users to report on music usage. SOCAN relies on this reporting data to distribute royalties. If SOCAN's remedial options are restricted to infringement actions, it will be deprived of this reporting data and the accuracy of SOCAN's distributions will be affected.

The Decision Under Appeal is Inconsistent with the *Copyright Act* as a Whole

27. The decision under appeal introduces a number of interpretive contradictions when examining the *Copyright Act* as a whole. The following section sets out the inconsistencies identified by SOCAN. The appellant and the other interveners have identified other inconsistencies.
28. First, the Federal Court of Appeal's construction of s. 68.2(1) strips the phrase "without prejudice to any other remedies" of its meaning. Indeed, the decision below ignores this phrase altogether and offers no insight into the purpose behind its inclusion in this remedial provision.
29. The "other remedies" wording in the introductory phrase of s. 68.2(1) necessarily refer to the civil remedies set out in Part IV of the *Act*. However, section 68.2(2) states that SOCAN cannot bring an action for infringement (a Part IV remedy) where a person has "paid or offered to pay the royalties specified in an approved tariff".
30. On the Federal Court of Appeal's construction, section 68.2(1) would only apply where a user offers to pay the royalty but then later refuses.¹¹ In the situation the court envisions, no "other remedies" would be available to SOCAN by operation of s. 68.2(2), and the phrase "without prejudice to any other remedies" therefore adds nothing. The correct

¹¹ [FCA Decision](#) at para. 169

reading is that s. 68.2(1) simply means what it says: in addition to the other remedies available to it (such as an action for infringement), SOCAN can recover unpaid royalties in court.

31. Second, the decision under appeal is inconsistent with the statutory damages multiplier set out in s. 38.1(4). This subsection acts as an incentive to users to comply with applicable tariffs by applying a multiplier to the “applicable royalties” payable if a user refuses to pay and the collective has to take steps to enforce. By concluding that an infringer who did not “take” a licence is not bound to the terms of the tariff, the decision under appeal raises the question of what the “applicable royalties” would be for the purposes of s. 38.1(4).
32. If the Federal Court of Appeal’s decision stands, it is possible that s. 38.1(4) would not be engaged in circumstances where a user has “opted-out” of a tariff since there would be no “applicable royalties” because the user had not agreed to pay them. It would be an absurd result if s. 38.1(4) applies to users who have *agreed* to pay royalties but then declined, but not to users who *refuse* to comply with the tariff altogether.
33. Finally, the recent 2019 amendments to the *Copyright Act* further reinforce the view that Parliament’s intent is to equip collective societies with enforceable tariffs. The 2019 amendments bolster the option of collecting royalties in a court of competent jurisdiction with the ability to apply to a court for an order directing any party to comply with the terms and conditions set out in a certified tariff.¹²
34. Sections 73 and 73.1 of the 2019 *Act* fall under the heading “Effects Related to Tariffs and Fixing of Royalty Rates – Permitted Acts and Enforcement.” Section 73 – titled “Effect of fixing royalties” – mirrors the language in former s. 68.2(1). Section 73.1 further permits a collective society to “apply to a court of competent jurisdiction for an order directing a person to comply with any terms and conditions that are set out in an approved tariff or that are fixed by the Board.” Like in the 1988 amendments, Parliament has again confirmed its intention to empower collective societies to enforce their tariffs in court.

¹² *Copyright Act*, RSC 1985, c C-42, [s 73.1](#)

Why Have Tariffs If They Are Not Enforceable?

35. The tariff enforcement option is a necessary element of the collective administration system. Section 68.2(1) completes the enforcement scheme set out in the *Copyright Act* and it provides a backstop to collective societies' enforcement and negotiation efforts. Without enforceable tariffs, the costs and burden on SOCAN could increase significantly. It will become difficult to collect royalties efficiently, thereby impacting the millions of rights holders SOCAN represents in Canada and around the world through affiliated societies from being fairly compensated for their works.
36. SOCAN joins Access Copyright and the Collective Societies Coalition in their submission that the Federal Court of Appeal's decision will discourage collective societies from expending the effort and cost involved in the tariff certification process.
37. Proceedings before the Board typically involve multiple parties, require complex economic evidence, entail hundreds of hours of legal work, and result in substantial financial expenditures. SOCAN has invested significant resources, in terms of time and costs, to propose, certify and maintain all of its tariffs over many decades. In some cases, the path to certification of a tariff has taken years, with proceedings coming to this Court and then sent back to the Copyright Board.
38. The tariff certification process also provides users and groups of users with full rights of participation. Users may file objections and make submissions before the Board. However, if a user who is dissatisfied with the outcome of a certification proceeding can simply "opt out" of the tariff terms, SOCAN is on no better footing with that user than if no tariff was certified. Indeed, SOCAN's footing is arguably worse because SOCAN cannot "opt out" of the effect of a certified tariff.
39. It simply defies logic to suggest that Parliament would devise a complex system for tariff certification, and create, equip and fund a Board to oversee the process, but make the outcome of that process non-binding on users. The entire process of tariff proposal, public notice, objection, hearing, adjudication, and certification seems redundant and surplus if users can simply "opt out" if dissatisfied with the result, but collective societies cannot. If

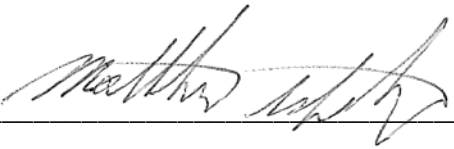
direct enforcement of tariffs is unavailable to collective societies, it will call into question the very purpose of the Board's tariff-setting process.

40. The result would be an unbalanced system that fails to achieve Parliament's goals of encouraging the creation and the dissemination of works and the just reward for the creators of those works.

PART IV – COSTS

41. SOCAN does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

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



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Matthew Estabrooks

Counsel for the Intervener, SOCAN

PART VII – TABLE OF AUTHORITIES & LEGISLATION

<u>Case Law</u>	Paragraph References
<i>Rogers Communications Canada Inc. v. Society of Composers, Authors and Music Publishers of Canada</i> , 2021 FC 207	11
<i>Society of Composers, Authors and Music Publishers of Canada v. Kicks Roadhouse Inc.</i> , 2005 FC 528	24
<i>Vigneux v. Canadian Performing Right Society Ltd.</i> , [1943] SCR 348	11
<i>York University v. Canadian Copyright Licensing Agency</i> , 2020 FCA 77	21, 27
<u>Secondary Sources</u>	
Hon. J. Parker, <i>Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights</i> (Ottawa, ON: JO Patenaude, 1935)	11
<u>Statutes, Regulations, Legislation</u>	
<i>Copyright Act</i> , RSC 1985, c C-42, ss. 67-68.2 (pre-2019) <i>Loi sur le droit d'auteur</i> , LRC 1985, c C-42, ss. 67-68.2	7, 27-32
<i>Copyright Act</i> , RSC 1985, c C-42, ss. 67-76.1 (post-2019) <i>Loi sur le droit d'auteur</i> , LRC 1985, c C-42, ss. 67-76.1	7, 33-34