SCC No. 39222

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

B E T W E E N:

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

APPELLANT
(Appellant)

- and -

YORK UNIVERSITY

RESPONDENT
(Respondent)

(Style of Cause continued on following page)

FACTUM OF THE INTERVENERS, CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD., CANADIAN RETRANSMISSION COLLECTIVE, CONNECT MUSIC LICENSING SERVICE INC. and SOCIÉTÉ DE GESTION COLLECTIVE DES DROITS DES PRODUCTEURS DE PHONOGRAMMES ET DE VIDÉOGRAMMES DU QUÉBEC

(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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PART I – OVERVIEW OF INTERVENER POSITION

1. The purpose of collective administration is to facilitate an efficient, functioning marketplace for the exchange of copyright-protected works. Collective administration under the *Copyright Act*[1] both provides individual creators with increased market power *and* acts as a check on the market power of collective societies, as necessary. This balancing of market power is required for an efficient, functioning marketplace. Tariffs approved by the Copyright Board of Canada (the "**Board**") serve this purpose and are useful only if they are enforceable against users.

2. Canadian Musical Reproduction Rights Agency Ltd. ("**CMRRA**"), Canadian Retransmission Collective ("**CRC**"), CONNECT Music Licensing Service Inc. ("**CONNECT**") and Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec ("**SOPROQ**", and collectively with CMRRA, CRC and CONNECT, the "**Collective Societies Coalition**") represent and administer the copyrights of tens of thousands of diverse creators and rightsholders across cultural industries from both French and English Canada as well as worldwide, including songwriters, composers, independent recording artists, music publishers, record labels, film and television producers and broadcasters.

3. The Collective Societies Coalition takes no position on the merits of this appeal. Rather, its aim is to provide this Court with a cross-sector perspective on Canada's collective administration regime under the *Copyright Act*, and to preserve the integrity and effectiveness of the collective administration of copyright. The economic rationale, the legal framework and amendments to the *Copyright Act* made in 2018, all demonstrate that the purpose of collective administration is to facilitate a functioning, efficient marketplace.[2]

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[1] R.S.C., 1985, c. C-42 (the "***Copyright Act***").

[2] The decision under appeal was brought under the version of the *Copyright Act* that existed prior to the amendments set out in the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27 [the "***Budget Implementation Act***"]. The section numbers in this factum refer to the version of the *Copyright Act* as it appeared prior the amendments coming into force on April 1, 2019, except where expressly provided that reference is made to the *Copyright Act* as it appears following the amendments on April 1, 2019 [the "**2019 *Act***"].

PART II – QUESTION IN ISSUE

4. The Collective Societies Coalition's submissions address the issue raised by the Appellant, the Canadian Copyright Licensing Agency ("**Access Copyright**"), namely whether the Respondent, York University ("**York**"), can "opt out" of paying royalties specified in a Board-approved tariff that covers the copying of works in Access Copyright's repertoire.

PART III –ARGUMENT

The Purpose of the Collective Administration Is to Ensure an Efficient, Functioning Marketplace

5. The purpose of the collective administration of copyright is to ensure an efficient, functioning marketplace for the exchange of copyright-protected works. From an economic perspective, copyright protection allows "market transactions to take place, without fear of free-riding happening to an extent that creators could no longer expect to capture a fair reward for their efforts."[3] Copyright thereby incentivizes the creation and dissemination of original works.[4] However, without government intervention, marketplaces for creative works often cannot reliably generate efficient economic outcomes and are prone to failure.[5] In a failed marketplace, creators

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[3] Dr. Richard Watt, "Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights," *World Intellectual Property Organization* (2016), online: WIPO < https://www.wipo.int/> ["**Watt**"] at p. 29. See also William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law", 18 Journal of Legal Studies 325 (1989), online: Harvard University < https://www.harvard.edu/>: "Copyright protection—the right of the copyright's owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place." Christian Handke, "The Economics of Collective Copyright Management" (April 24, 2013), online: https://ssrn.com/abstract=2256178 ["**Handke**"] at p. 5; Zijian Zhang, "Rationale of Collective Management Organizations: A Economic Perspective," 10 Masaryk U. J.L. & Tech. 73 (2016), online: Masaryk University Journal of Law and Technology < https://journals.muni.cz/mujlt/index> ["**Zhang**"], at pp. 80-81.

[4] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 SCR 336, at para. 30: "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."

[5] Zhang at pp. 77, 80-81.

have little incentive to create, reducing the availability of new and original content for society as a whole.[6]

6. Even with copyright protection, individual creators often "do not possess the capacity to consider all the uses of their works because these uses occur in considerable numbers, at different places, and at different times."[7] In addition to the costs of negotiating and licensing, creators must monitor and enforce compliance of licensees, as well as identifying and dealing with unauthorized users.[8] The high transaction costs associated with bargaining, monitoring, and enforcement make the individual exercise of copyright difficult:

> On the one hand, authors find it impossible to negotiate terms with every user who intends to use their works. On the other hand, monitoring costs are prohibitively high. Once they find infringement, the cost of enforcement can be much higher than the royalty that they receive. **With large number[s] of users and works involved, individual exercise of copyright cannot cover the costs of original creation, therefore, authors may find creation unmotivated, thus leading to the decrease of works supply**. [9]

7. The individual exercise of copyright is particularly challenging when a creator must negotiate with a user that holds significant market power. An individual songwriter has virtually no market power when negotiating with a large multinational online music service, such as YouTube, Amazon Music or Apple Music.[10] Similarly, if a creator detects infringement, the costs of enforcement are often much higher than the royalty due (and the pockets of the infringer much deeper). This imbalance of market power means that creators are forced to choose between enforcement costs that exceed potential revenues, inadequate compensation for the use of their work or no payment at all.

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[6] Handke at p. 5; Zhang at pp. 80-81.
[7] Martin Miernicki, *Collective Management of Copyrights between Competition, Regulation, and Monopolism - A Comparison of European and U.S. Approaches to Collective Management Organizations*, Nomos Verlagsgesellschaft Mbh & Co (December 31, 2017) ["**Miernicki**"] at p. 25.
[8] Handke at p. 6.
[9] Zhang at p. 74 [emphasis added].
[10] Handke at p. 7.

8. Users may face similar hurdles with the individual exercise of copyright. It can be impractical to identify, locate and negotiate with each rightsholder for every work needed for a user's service. This problem can be magnified by the fractional nature of copyright: each individual work may engage multiple rights, each of which may in turn be held by one or more discrete rightsholders.[11]

9. For creators and users alike, these issues quickly compound when uses involve large numbers of works.[12] "Thus, if copyright was solely managed individually, it would in many instances be virtually impossible to maintain a functional licensing system."[13]

The Role of the Collective Administration of Copyright in Addressing Marketplace Inefficiencies

10. Collective administration addresses efficiency issues for both creators and users by reducing the relatively high transaction costs associated with the individual exercise of copyright. Collective administration centralizes the search, bargaining, monitoring and enforcement costs associated with copyright transactions, and exploits economies of scale to lower the per-transaction cost to a level that enables a functioning marketplace.[14]

11. Collective societies hold a greater market power than the individual creators they represent.[15] This enhanced market position is particularly important in light of technologies that have made the mass reproduction and dissemination of copyright-protected works commonplace.[16] Today, collective societies help to balance the interests of creators against a marketplace where it can be "virtually impossible"[17] for them to individually manage their rights.

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[11] Miernicki at p. 26.
[12] Zhang at p. 86: "If the transaction costs are so high that they exceed the benefit of contracting, then the reasonable person will choose not to carry out this transaction. … both sides in the contract have to make sure that their potential cooperative benefits exceed the costs accrued."
[13] Miernicki at p. 24.
[14] Watt at p. 29: "Collective management is an economically efficient organization of the supply side of the market, since it allows a given set of works to be licensed to users at the lowest possible cost (including the cost of risk)." See also Watt at p. 17; Miernicki at p. 27; Handke at pp. 5-6; Zhang at p. 86.
[15] Handke at p. 5.
[16] Zhang at p. 91.
[17] Miernicki at p. 24.

12. Even so, a collective society's improved bargaining position is not always sufficient on its own to overcome the transaction costs of negotiating or enforcing against large, multinational users, including social media giants such as Facebook, user-generated content platforms like YouTube, or cable companies that are subsidiaries of large, vertically-integrated telecommunications companies. "Collecting societies often trade with commercial users who enjoy some market power themselves. … Today, many markets for Internet-based services seem prone to dominant, multinational firms such as Amazon, Google or Apple with its iTunes store."[18]

The Legal Construct Reflects the Economic Theory

13. The *Copyright Act* provides individual creators, collective societies and users with regulatory tools to "right" these types of market imbalances in support of an efficient, functioning marketplace for the exchange of copyright-protected works. Enforceable tariffs are an integral part of that balancing act.

14. The *Copyright Act* allows creators to band together as a "collective" to negotiate[19] and enforce their rights *and* establishes a system of oversight - the Board - to guard against potential abuses of market power. In the 1988 and 1997 amendments to the *Copyright Act*, Parliament allowed the collectivization of rights under sections 3, 15, 18 and 21 (defined in the decision under appeal as the "**General Regime**"),[20] and created the "**Retransmission Regime**" under section 31.[21] At that time, Parliament expanded collective administration to address certain marketplace inefficiencies associated with the individual exercise of copyright and comply with Canada's obligations under the Canada-U.S. Free Trade Agreement.[22]

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[18] Handke at p. 7.

[19] Under ss. 70.5 of the *Copyright Act* (s. 76 of the 2019 *Act*), licence agreements filed with the Board by collective societies operating under the General Regime are exempt from the conspiracy provision (s. 45) of the *Competition Act*, R.S.C., 1985, c. C-34.

[20] Access Copyright, CMRRA, CONNECT and SOPROQ operate under the General Regime.

[21] CRC operates under the Retransmission Regime.

[22] *Free Trade Agreement between Canada and the United States of America*, T.S. 1989 No. 3 [the "**FTA**"], art. 2006.

15. While the decision under appeal[23] applies only to the General Regime, the Retransmission Regime illustrates how collective administration in the *Copyright Act* serves to foster an efficient, functioning marketplace.

16. The Retransmission Regime grants copyright owners a right of remuneration for any retransmission by cable or satellite providers (BDUs) of programs contained in free, over-the-air, distant broadcast signals.[24] Parliament - and the negotiators of the FTA - recognized that the scale and complexity of the uses covered under the regime would in no way be conducive to individual negotiations.[25]

17. The Retransmission Regime compensates copyright owners while authorizing BDUs to deliver retransmitted signals within Canada. Program owners cannot negotiate licenses for, or prohibit the retransmission of, signals, and instead are compelled to license the use in exchange for royalties set by the Board under a tariff. In lieu of marketplace negotiations, the Board weighs the competing interests of users and creators and sets a "fair and equitable" tariff.[26]

18. In this instance, and in the General Regime, the Board furthers the copyright balance – as an expert arbiter, it incentivizes dissemination of works while guaranteeing a "just reward" to incentivize creation where the market cannot realistically do so.[27]

Tariffs Are Only Useful Regulatory Tools if They Are Enforceable

19. Unlike the Retransmission Regime, where rightsholders and the collective societies representing them are compelled to file tariffs in order to be paid, tariffs are optional for collective societies operating under the General Regime. Any collective society under the General Regime

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[23] *York University v. Canadian Copyright Licensing Agency*, 2020 FCA 77 (the "**Decision**").
[24] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 SCR 489 ["***Reference***"] at paras. 51-59.
[25] *Legislative Summary LS-437E, Bill C-11: An Act to Amend the Copyright Act*, Parliamentary Research Branch, Law and Government Division (10 October 2002), online: Library of Parliament < https://lop.parl.ca>, at p. 4. See also *Reference* at paras. 74-75.
[26] See *Copyright Act* ss. 31(2)(d) and 66.91 and 2019 *Act* s. 66.501. See also *Retransmission Royalties Criteria Regulations*, DORS/91-690, s. 2, and FTA art. 2006.
[27] *Théberge* at para. 30.

has the right to enter into any type of licence agreement, for whatever price and terms with any user as the collective society sees fit.[28]

20. If the parties cannot agree on terms, either party's recourse is to apply to the Board to fix the royalty rates or related terms and conditions under section 70.2 (fixing of royalties in individual cases).[29] However, unlike the fixing of royalties in individual cases, only a collective society can trigger a tariff.[30]

21. The finding in the Decision that tariffs and licences are simply "different ways of doing the same thing"[31] ignores the legal reality that collective societies operating under the General Regime do not need to file a tariff unless they are unable to reach agreement with users. A tariff must mean - and accomplish - something that a negotiated licence does not.

22. The tariff process administered by the Board under the General Regime is useful primarily when there is disagreement or uncertainty with users on price or other licence terms or where users do not agree that a licence is required. The *collective society* requires the authority of the Board to act as the final arbiter of those disputes by settling terms of use and determining a fair and equitable royalty rate in an approved tariff. Without Board intervention instigated by the collective society, the marketplace for the proposed uses of the copyright-protected works would fail.

23. An unenforceable tariff is an ineffective (and frankly, useless) market tool. If unenforceable, an approved tariff serves little purpose other than to limit the potential price that the collective society could charge a willing user. Even then, a willing user could leverage the unenforceability of a tariff to negotiate royalties lower than the "fair and equitable" rates set by the Board. Why would a collective society ever choose to file if the tariff-setting process only "exists to limit the market power of collective societies"[32]? Given their options under the General

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[28] *Copyright Act* s. 70.12; see also 2019 *Act* ss. 67(1) and 67(3).
[29] *Copyright Act* s. 70.2; see also 2019 *Act* s. 71.
[30] See *Copyright Act* ss. 67.1(1), 70.13, and 71(1). See also 2019 *Act* ss. 67(1) and 67(2).
[31] The Decision at para. 178.
[32] The Decision at para. 191.

Regime, no collective society would, acting rationally, ever file a proposed tariff with the Board. The entire regime would be superfluous.

24. Instead, tariffs approved by the Board in the General Regime are tools used to balance out the market power of *users* who are unwilling to license the use of copyright-protected works from collective societies at the rates and on the terms proposed. To do so, tariffs must be enforceable against users that decline to operate under them.

Amendments to the Copyright Act in 2018 Further Illustrate the Role of Collective Administration

25. In 2018, Parliament amended the *Copyright Act* to, *inter alia*, harmonize the tariff process as between different collective administration regimes,[33] with Parliament "maintaining differences between them only where necessary" [34] and clarified the Board's oversight role and function.[35]

26. These amendments did not fundamentally re-write collective administration under the *Copyright Act*. Instead, the amendments doubled down on the framework of the General Regime by giving performing rights societies (and others) the ability to enter into agreements with users.[36] Notably, performing rights societies are no longer required to file tariffs with the Board.

27. Giving collective societies the option to file tariffs or enter into voluntary licences without Board intervention (as has always been the case in the General Regime) is not indicative of a regime designed solely to curb the market power of collective societies.

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[33] Prior to the 2018 amendments, collectives such as CMRRA, CONNECT and SOPROQ were subject to ss. 70.1 – 70.4 (i.e., the General Regime), whereas performing rights collectives were subject to ss. 67 - 68.2; by contrast, now almost all collective societies are subject to the same framework under 2019 *Act* ss. 67 - 70.1.

[34] *Budget Implementation Act*, summary.

[35] *Budget Implementation Act*, s. 296, 297; see also the 2019 *Act* ss. 66 - 66.91.

[36] 2019 *Act* ss. 67(1) and 67(3). Compare to *Copyright Act* s. 67.1 and s. 70.13.

The Decision Results in Illogical Practical Consequences

28. Finally, pursuing tariffs before the Board is a costly, lengthy[37] process with uncertain results. Allowing users to "opt-out" of Board approved tariffs and requiring individual creators to launch infringement proceedings while their collective society prosecutes a tariff would be an expensive, inefficient and unjust use of resources.

29. While the Decision did not consider the Retransmission Regime,[38] additional illogical consequences follow if tariffs are not enforceable under that regime. Copyright owners operating under the Retransmission Regime are locked into the tariff process, cannot block retransmissions of signals and may not enter into agreements directly with BDUs.[39] Collective societies must be appointed to file tariffs with the Board to set royalty rates.[40] To be paid at all, copyright owners must engage with the Board tariff process.

30. If a BDU refused to pay the required royalties under an approved retransmission tariff because such a tariff was not enforceable, the only recourse would be for vast numbers of individual program owners to bring infringement actions against that BDU. In addition, because the royalties due for retransmissions must be set by the Board,[41] collective societies operating under the Retransmission Regime would still be required to pursue tariffs before the Board contemporaneously with their members' infringement actions.

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[37] See Vancise, William J., International Literary and Artistic Association (ALAI) Symposium: The Copyright Board of Canada: Which Way Ahead?, May 25, 2016, Ottawa, Ontario, Copyright Board of Canada: < https://cb-cda.gc.ca/>: "… it frequently takes more than 3 years from a tariff proposal until the time the matter is ready for a hearing by the Board".

[38] The Decision expressly acknowledged that collective societies operating under sections 19 or 81 are outside the scope of the Decision (at para. 130). Although the Retransmission Regime is similarly distinct from the General Regime, the Decision included no similar statement with respect to the Retransmission Regime.

[39] See *Copyright Act* ss. 71 - 76 and 2019 *Act* ss. 67(2) and 67(3).

[40] See *Copyright Act* s. 76 and 2019 *Act* s. 75.

[41] *Copyright Act* s. 31(2)(d).

31. As with the General Regime, allowing users to reject a fair and equitable tariff approved by the Board and forcing creators into parallel litigation would be an inefficient and unjust use of resources. This is precisely the type of marketplace inefficiency that the collective administration of copyright was designed to solve.

Conclusion

32. The Decision suggests that Parliament's intent with the General Regime, and again in its 2018 amendments to the *Copyright Act*, was to create pointless redundancies in the system. The Decision discourages collective societies operating under the General Regime from pursuing tariffs before the Board and renders the Board and tariffs under the General Regime of little utility. Particularly given all the challenges of the individual exercise of copyright described above, Parliament's intent in enacting the General Regime (and expanding it to performing rights and other collective societies in 2018), cannot have been to create *additional* inefficiencies in the marketplace.

33. Instead, the 2018 amendments, like the 1988 and 1997 amendments, reflect that the purpose of collective administration under the *Copyright Act* is to ensure an efficient, functioning marketplace for copyright-protected works. Tariffs approved by the Copyright Board are useful and serve this purpose only if they are enforceable against users to whom those tariffs apply.

PART IV – COSTS

34. The Collective Societies Coalition 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.

As agent for:
Stohn Hay Cafazzo Dembroski Richmond LLP
Erin Finlay

Max Rothschild

Counsel for Canadian Musical Reproduction Rights Agency Ltd., Canadian Retransmission Collective, CONNECT Music Licensing Service Inc., and Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec

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Case Law:	Paragraph(s)
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York University v. Canadian Copyright Licensing Agency, 2020 FCA 77.	15, 21, 23, 29, 32
Secondary Sources:	
Christian Handke, "The Economics of Collective Copyright Management," (April 24, 2013), SSRN.	5, 6, 7, 10, 11, 12
William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Leg. Stud. 2.	5
Martin Miernicki, *Collective Management of Copyrights between Competition, Regulation, and Monopolism - A Comparison of European and U.S. Approaches to Collective Management Organizations*, Nomos Verlagsgesellschaft Mbh & Co (December 31, 2017).	6, 8, 9, 10, 11
Legislative Summary LS-437E, Bill C-11: An Act to Amend the Copyright Act, Parliamentary Research Branch, Law and Government Division (10 October 2002).	16
Vancise, William J., International Literary and Artistic Association (ALAI) Symposium: The Copyright Board of Canada: Which Way Ahead?, May 25, 2016, Ottawa, Ontario, Copyright Board of Canada.	28
Dr. Richard Watt, "Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights," World Intellectual Property Organization (2016).	5, 10
Zijian Zhang, "Rationale of Collective Management Organizations: A Economic Perspective," 10 Masaryk University Journal of Law and Technology 73 (2016).	5, 6, 9, 10, 11

Statutes, Regulations, Legislation:	
Budget Implementation Act, 2018, No. 2, S.C. 2018, c. 27, summary, Subdivision H (ss. 280-302), ss. 296, 297. *Loi no 2 d'exécution du budget de 2018*, L.C. 2018, ch. 27, sommaire, sous-section H (art. 280-302), art. 296, 297.	3, 25
Competition Act, R.S.C., 1985, c. C-34, s. 45. *Loi sur la concurrence*, L.R.C. (1985), ch. C-34, art. 45.	19
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Free Trade Agreement between Canada and the United States of America, T.S. 1989 No. 3, art. 2006.	14, 16, 17
Retransmission Royalties Criteria Regulations, DORS/91-690, s. 2. *Règlement sur les critères applicables aux droits à payer pour la retransmission*, DORS/91-690, art. 2.	17