SCC No. 39222

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)

(Style of Cause continued on following page)

FACTUM OF THE INTERVENERS, INTERNATIONAL AUTHORS FORUM, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS and INTERNATIONAL PUBLISHERS ASSOCIATION

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

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(Style of Cause continued)

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SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE DU DROIT DE REPRODUCTION (COPIBEC), AUTHORS ALLIANCE and ARIEL KATZ, CANADIAN ASSOCIATION OF LAW LIBRARIES, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and CANADIAN FEDERATION OF STUDENTS, SAMUEL-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CENTRE DE DROIT DES AFFAIRES ET DU COMMERCE INTERNATIONAL et 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, COPYRIGHT COLLECTIVE OF CANADA, CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD., CANADIAN RETRANSMISSION COLLECTIVE, CONNECT MUSIC LICENSING SERVICE INC., and SOCIÉTÉ COLLECTIVE DE GESTION DES DROITS DES PRODUCTEURS DE PHONOGRAMMES ET DE VIDÉOGRAMMES DU QUÉBEC, CANADIAN MEDIA PRODUCERS ASSOCIATION and ASSOCIATION QUÉBÉCOISE DE LA PRODUCTION MÉDIATIQUE, INTERNATIONAL AUTHORS FORUM, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, and INTERNATIONAL PUBLISHERS ASSOCIATION, ASSOCIATION OF CANADIAN PUBLISHERS, CANADIAN PUBLISHERS' COUNCIL and WRITERS' UNION OF CANADA, CANADIAN ASSOCIATION OF RESEARCH LIBRARIES, COPYRIGHT CONSORTIUM OF THE COUNCIL OF MINISTERS OF EDUCATION, CANADA, MUSIC CANADA, CANADIAN MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DE L'INDUSTTIE DU DISQUE, DU SPECTACLE ET DE LA VIDEO, PROFESSIONAL MUSIC PUBLISHERS ASSOCIATION and CANADIAN INDEPENDENT MUSIC ASSOCIATION, COLLEGES AND INSTITUTES CANADA and UNIVERSITIES CANADA

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PART I – OVERVIEW OF THE INTERVENERS' POSITION

1. The International Authors Forum ("IAF"), the International Federation of Reproduction Rights Organisations ("IFRRO"), and the International Publishers Association ("IPA") (collectively, the "Interveners") advocate before courts, governments, and international organizations to ensure that domestic copyright laws comply with international law. With this objective in mind, the Interveners wish to put the present appeal in the context of Canada's international copyright treaty obligations and examine how the interpretation of section 29 of the *Copyright Act*[1] advanced by York University ("York") falls short of meeting these obligations.

2. The *Berne Convention for the Protection of Literary and Artistic Works* (the "Berne Convention"),[2] like other multilateral conventions dealing with intellectual property rights, reflects a policy consensus amongst signatory states that the grant of certain exclusive rights over intellectual creations serve important public policy objectives. Copyright serves to remunerate creators for the labour of their minds, but it is also an economic lever that corrects market deficiencies and fosters growth in cultural and scientific industries.[3] To fulfil these objectives, the balance between the rights of creators and the interests of users cannot be a zero-sum game. In this context, collective management models are flexible tools to provide both access to works and compensation for the creators as required under international treaties.

3. Under Canada's international obligations as a party to the *Berne Convention*, the *Agreement on Trade Related Aspects of Intellectual Property Rights* ("TRIPS Agreement), and the *WIPO Copyright Treaty,* exceptions to infringement of copyright must be compliant with the "Three-Step Test".[4] This test is intended to guide the drafting and interpretation of statutory exceptions and limitations to authors' rights. These treaties stipulate that exceptions must (1) be confined to

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[1] *Copyright Act*, R.S.C., 1985, c C-42.
[2] *Berne Convention for the Protection of Literary and Artistic Works,* September 9, 1886, as last revised at Paris on July 24, 1971, 1161 UNTS 30 [*Berne Convention*].
[3] *Théberge v. Galerie d'Art du Petit Champlain inc*., 2002 SCC 34 at paras 30-32 [*Théberge*]; William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J Leg Stud 325 at 326; Daniel J Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5:1&2 UOLTJ 1 at 12 [Gervais, "Making Copyright Whole"].
[4] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, April 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 UNTS 299, 33 I.L.M 1197 (1994) (entered into force 1 January 1995) arts 9, 13 [*TRIPS Agreement*]; *WIPO Copyright Treaty*, 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002), art 10; *Berne Convention*, art 9(2).

certain special cases; (2) not conflict with the normal exploitation of the work; and (3) not unreasonably prejudice the legitimate interests of authors or right holders. Failing to meet any one of these criteria is sufficient to breach Canada's international obligations. Canadian copyright exceptions must comply with this test.

4. The "guidelines" proposed by York effectively displace a collective management licensing model in favour of a blanket exception, without reference to the specific circumstances of any particular incident of copying and without any compensation to right holders. York's proposed interpretation both brings the fair dealing exception into conflict with the normal exploitation of published literary and artistic works through collective licensing and results in an unreasonable prejudice to publishers and authors, contrary to the Three-Step Test.

5. This appeal addresses issues with important implications for the Canadian educational sector and the ability of reproduction rights organisations ("RROs") to continue to play their role in making quality educational materials available in Canada. Collective management organisations ("CMOs"), such as RROs, ensure that users can access a broad variety of works and that creators receive compensation. This arrangement is consistent with the policy objectives of copyright.

PART II – POSITION ON QUESTIONS IN ISSUE

6. The submissions of the Interveners aim to put the present appeal in the context of Canada's treaty obligations and international norms governing copyright exceptions. The fair dealing analysis must recognize the role played nationally and internationally by collective rights management licenses in balancing competing interests and fulfilling the objectives of copyright legislation.

PART III – ARGUMENT

A. <u>The Objectives of the Copyright Treaties and the *Copyright Act*</u>

7. The protection of authors' rights is at the centre of the *Berne Convention*. Its preamble states: "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works…"[5]

[5] *Berne Convention*, preamble.

8. The emphasis on authors' economic rights in international copyright treaties, as well as the inclusion of copyright in trade agreements, underscores the recognition of the economic and cultural value of fostering the creation of original works.[6] This is significant in two ways. First, the recognition of authors' rights serves the public interest by contributing to economic and cultural growth. This is clearly applicable in the educational publishing sector. Growth in creative industries is encouraged where creators' contributions to society are valued and where creators can thrive. Second, it means that any exception to exclusive rights must be scrutinized from the point of view of its impact on the rights of creators if the public policy objectives of domestic copyright legislation are to be respected.

9. Canadian and foreign courts have recognized that remunerating authors advances public policy goals. Justice Binnie commented in *Théberge* that "it would be "self-defeating" to undercompensate creators for the right of reproduction.[7] The United States Supreme Court stated in *Twentieth Century Music Corp. v. Aiken* that "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[8]

10. The public interest in paying copyright holders for use of their works must inform the interpretation of legislated exceptions to infringement of copyright. The *Copyright Act* is more

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[6] See e.g. *EU Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2001/29/EC, Recital 9, which states "Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large."

[7] *Théberge* at para 31.

[8] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). See also *Mazer v. Stein*, 347 U. S. 201, 219 (1954): "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985): "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

than a "marketplace framework".[9] It is also a "cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation".[10] Fair dealing exceptions should be viewed through this lens.

11. To do otherwise is to subscribe to a binary view of copyright, whereby the interests of right holders can only be advanced at the expense of users, and *vice versa*. Daniel Gervais cautions against this approach, noting that "there is a very important and substantial middle ground […], an area comprising compulsory licenses and collective management, in which right holders have, *de jure* or *de facto*, lost the ability to say no (that is, control uses), but not the right to be paid for some uses of their works."[11] Ysolde Gendreau explains that "[i]t would be fallacious to pretend that the monetary implications of exceptions can be explained only in terms of one category of payers and one class of users".[12]

B. Any Interpretation of the Fair Dealing Provision Must Comply with the Three-Step Test

(i) The Three-Step Test

12. The Three-Step Test provides that reproduction of literary and artistic works is permitted in (1) certain special cases; (2) provided that such reproduction does not conflict with a normal exploitation of the work; and (3) provided that such reproduction does not unreasonably prejudice the legitimate interests of the right holder.[13]

13. The Three-Step test was first introduced and formulated in the context of author's rights in Article 9(2) of the *Berne Convention* and its purpose was to "serve as a counterweight to the formal recognition of a general right of reproduction" that was added to the treaty at the same time.[14]

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[9] *Copyright Modernization Act*, S.C. 2012, c.20, preamble [*Copyright Modernization Act*].
[10] *Copyright Modernization Act*, preamble.
[11] Daniel J Gervais, The Internet Taxi: Collective Management of Copyright and the Making Available Right, 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) 376 at 389 [Gervais, "The Internet Taxi"].
[12] Ysolde Gendreau, "Walking the copyright tightrope" in Paul Torremans, ed, *Research Handbook on Copyright Law* (Edward Elgar Publishing, 2017) 1 at 12.
[13] *TRIPS Agreement*, art 13.
[14] Christophe Geiger, Daniel J Gervais & Martin Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law" (2014) 29:3 A U Intl L Rev at 583.

The test guides the crafting and interpretation of exceptions and limitations to authors' rights under domestic laws[15].

14. The test also appears in the *WIPO Copyright Treaty* and is part of Canada's obligations under trade agreements, including the *TRIPS Agreement*.[16] The *WIPO Copyright Treaty*, the *TRIPS Agreement*, and the *Berne Convention* are not simply "persuasive authorities"; rather, they are binding internationally.[17] Failure to comply with the test has given rise to trade disputes and sanctions.[18] In addition, the *CETA Implementation Act* reiterates the legislator's intent to comply with the test.[19] This Court has used international treaties in the past to inform its analysis, including in copyright and other intellectual property cases.[20] There is a presumption that federal and provincial legislation are meant to comply with international law.[21]

(ii) The Three Conditions of the Three-Step Test

15. The Three-Step Test has become a cornerstone of exceptions in international copyright law.[22] In 2000, it was interpreted by a World Trade Organization ("WTO") dispute settlement panel in a dispute concerning two exceptions enacted by the United States in respect of the performance of musical works.[23] The WTO panel observed that the test creates a "hierarchy of analysis" where

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[15] Gervais, "Making Copyright Whole" at 23-25; Max Planck Institute for Innovation and Competition, "Declaration, A Balanced Interpretation of the "Three-Step Test" in Copyright Law" (2008) at 3-4.
[16] *Berne Convention* art 9(2); *TRIPS Agreement*, arts 9, 13; *WIPO Copyright Treaty*, art 10. The test appears in equivalent phrasing in all three treaties.
[17] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para 32;.
[18] *United States – Section 110(5) of the US Copyright Act, Award of the Arbitrators (2001),* WTO Doc WT/DS160/ARB25/1 at 34
[19] *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act*, S.C. 2017, c.6, s 3 [*CETA Implementation Act*]; *Comprehensive Economic and Trade Agreement*, Canada and European Union, 30 October 2016, art 20.7 (entered into force provisionally 21 September, 2017).
[20] See e.g. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, 2004 SCC 45* at para 150 [*SOCAN*]*; Théberge* at paras 6, 116.
[21] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014), ch 18 at §18.5; *SOCAN* at para 150.
[22] Gervais, "Making Copyright Whole" at 24-25.
[23] *United States – Section 110(5) of the US Copyright Act (2000),* WTO Doc WT/DS160/R [WTO Panel Report].

each criterion constitutes a threshold to be crossed before the analysis of the next.[24] The failure to comply with any one of the three conditions results in an exception being disallowed.[25]

Condition 1. Confinement of exceptions to certain special cases

16. In the WTO case, the panel clarified that an exception must be "clearly defined" and "limited in its field of application or exceptional in its scope", both in a quantitative and qualitative sense.[26]

17. A blanket judicial approval of "guidelines" for fair dealing, without reference to the specific circumstances of any particular incident of copying, and which is intended to apply to all literary and artistic works without distinction, would not be exceptional in scope. In his reasons, Justice Phelan noted that the amount of the dealing represented "mass copying of books, texts, articles, entire artistic work, or portions of collections" and "multiple copying of those materials into coursepacks or digital formats".[27] The proposed exception is not "clearly defined" or limited in its scope of application.

18. Were York's guidelines deemed appropriate, the fair dealing analysis would be stripped of its qualitative component. All works would be treated according to the same quantitative guidelines, without regard to their nature or whether a particular work was created for the very purpose of being used in an educational or academic context. This would not be compliant with the Three-Step Test.

19. Open-ended exceptions, such as fair dealing in Canada and fair use in the United States, can be compliant with the Three-Step Test. However, this requires that courts interpret and apply these exceptions in a way that is consistent with the test. To do so, courts must assess the fairness of any instance of dealing by considering the relevant factual circumstances, and then carefully considering the applicability of the common law fair dealing factors.

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[24] Jane C Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions", Revue international du droit d'auteur, 2001 (187) at 12.
[25] WTO Panel Report at 6.97.
[26] *Ibid* at 6.108-6.109; Gervais, "Making Copyright Whole" at 25-26.
[27] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 at para 261 [*Trial Decision*].

Condition 2. No conflict with a normal exploitation of the work

20. With respect to the second step of the test, the WTO panel observed that the "normal exploitation" must mean something less than the full use of the exclusive rights.[28] A conflict arises if the excepted use "enters into economic competition with the ways that right holders normally extract economic value from that right to the work […] and thereby deprive them of significant or tangible gains."[29]

21. An exception will not comply with the Three-Step Test if it covers a form of exploitation that has acquired considerable or practical importance.[30] Where a market is already established, the right holder can easily meet the burden of proof.[31] In the present case, when York no longer considered itself bound by the interim tariff agreed upon with Access Copyright, right holders were deprived of the normal exploitation of the work because, as observed by Justice Phelan, York tried to "obtain for free what it had previously paid for".[32]

22. The Interveners stress that the licensing activities carried out by CMOs, including RROs, are a "normal exploitation" of works and must be recognized as such in the context of the "fairness" analysis. The exceptions under review by the WTO panel targeted revenue streams from the licensing of musical works by CMOs that was acknowledged as a normal exploitation of musical works. In *Cambridge University Press v. Albert*, the United States 11th Circuit held in applying the American fair use exception that the market harm resulting from users' substitution of free copying for the obtaining of a digital license "strongly disfavors fair use".[33]

Condition 3. No unreasonable prejudice to the legitimate interests of the right holder

23. In construing the third step of the test, the prejudice "reaches an unreasonable level if an exception (…) causes or has the potential to cause an unreasonable loss of income to the copyright owner."[34] The WTO panel stated that economic prejudice to right holders should be assessed primarily on

[28] WTO Panel Report at 6.167.
[29] WTO Panel Report at 6.183.
[30] Gervais, "Making Copyright Whole" at 27.
[31] Gervais, "Making Copyright Whole" at 29-31.
[32] *Trial Decision* at para 272.
[33] *Cambridge University Press v. Albert*, 906 F.3d 1290 (11th Cir, 2018) at 24.
[34] WTO Panel Report at 6.229.

the basis of the economic effect of the exception in the relevant country.[35] Prejudice may flow from a conflict with the normal exploitation of the work, but it can also arise without such a conflict.

24. In his reasons, Justice Phelan noted that an aggregate volume of 17.6 million exposures were copied in 2013 under York's guidelines.[36] This amounted to 360 pages copied per student per year.[37] Justice Phelan concluded that "the Guidelines have caused and will cause material negative impacts on the market for which Access would otherwise have been compensated for York's copying"[38] and, further, that there would likely be long-term impacts of York's guidelines "on investment, content, and quality" of educational materials.[39]

25. From an international law perspective, the scale of activity contemplated by York's guidelines creates an "unreasonable prejudice". Compensation of right holders is warranted for this copying. The third step does contemplate the possibility that a prejudice may be made "reasonable" provided the right holder is sufficiently and equitably compensated.[40]

26. A prejudice to the interest of right holders is not necessarily economic.[41] Exceptions are necessary to maintain balance in copyright law; however, such exceptions should not be interpreted in such a way as to undermine the objectives of copyright law.

C. Implications for Canada's Creative Industries

27. The question raised of whether fair dealing must be assessed from the perspective of the "ultimate user" or from the perspective of York is not consequential to whether the proposed exception meets the Three-Step Test. The test is focused on the relevant exception's interference with the normal exploitation of a work and on any unreasonable prejudice to the interests of right holders.[42]

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[35] WTO Panel Report at 6.221.
[36] *Trial Decision* at para 303.
[37] Factum of the Respondent Access Copyright at para 9.
[38] *Trial Decision* at para 353.
[39] *Trial Decision* at para 351.
[40] Ginsburg at 15-16.
[41] WTO Panel Report at 6.223-6.226.
[42] In the United Kingdom and Ireland, the legislation provides that fair dealing cannot apply if it involves making multiple copies of substantially the same material for the same purpose: *Copyright, Designs and Patents Act 1988* (UK), c 48, s 29(3)(b).

The overarching concern is to preserve copyright policy objectives by assessing the extent to which the exception limits the copyright owner's exclusive rights. Whether the death comes by a thousand cuts (by the ultimate users) or by one swift blow (by the institution making the copy), the result would be the same: the exception would curtail innovation and investment in the Canadian educational publishing sector and in publishing at large.

28. Canada's trade partners, as well as commentators, have raised concerns about recent developments in Canadian copyright law. Specifically, the broad scope given to educational and research exceptions has caused Canada to be out of step with international norms and out of sync with the practices of its trade partners.[43] This has had a corresponding serious negative impact on the Canadian educational publishing industry.[44]

29. Scholars have recognized that the copyright balance calls for moderate solutions and that RROs facilitate arriving at such solutions. In the words of Daniel Gervais, "[i]t is patently false to say that collective management is the opposite of fair dealing. This is a clear error in logic. The opposite of fair dealing is infringement. In the presence of a CMO licensing scheme, this does not happen."[45]

30. By granting leave to appeal in this case, this Court has recognized that the interpretation of the education exception is a matter of public importance. It is vital to acknowledge that a strengthening of copyright owners' rights does not necessarily prejudice the users' interests. Where intellectual creation can thrive, both users and right holders ultimately benefit. This appeal gives this Court an opportunity to ensure that the Canadian fair dealing law is clarified in line

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[43] Mihály J. Ficsor, "Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test" (2018) at paras 1-14, online: http://copyrightseesaw.net/en/papers?page=2.; Office of the United States Trade Representative, *2020 Special 301 Report*, Washington, 2020 at 79 [*2020 Special 301 Report*]; European Commission, *Report on the protection and enforcement of intellectual property rights in third countries*, Bruxelles, 2020 at 47-48; Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 UOLTJ 315 at 322; Guiseppina D'Agostino, "Fair Dealing After CCH" report prepared for the Department of Heritage, June 2007 at 7.

[44] *2020 Special 301 Report*, Washington, 2020 at 79 ["The United States remains deeply troubled by the ambiguous education-related exception (…) which has significantly damaged the market for educational publishers and authors."].

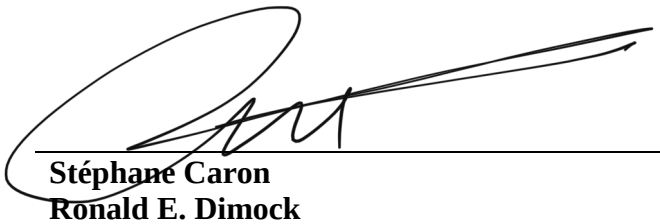
[45] Gervais, "The Internet Taxi" at 377.

with long-established goals of international intellectual property principles, which in turn will sustain Canada's creative industries and the supply of educational works for students.

PART IV – COSTS

31. The Interveners, IAF, IFRRO and IPA, do not seek costs and submit 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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