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)

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 INTERVENERS, MUSIC CANADA, CANADIAN MUSIC PUBLISHERS ASSOCIATION, ET AL. ("MUSIC INDUSTRY ASSOCIATIONS")

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Since the 2004 decision of this Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*,[1] fair dealing has played an increasingly prominent role in balancing the interests of creators and users in the creative industries.

2. The balance in each case is contextual. It requires a case-by-case examination of whether a particular dealing or course of dealings is fair. A full appreciation of the dealing is necessary to determine how it fits within the policy objectives of the *Copyright Act*,[2] which include ensuring a just reward for creators and promoting both the creation and the dissemination of works of the arts and intellect.[3] Ultimately, fair dealing is a "matter of impression," and courts should not be unduly constrained in their ability to form that impression based on the particular facts of each case. It is important to avoid an approach that artificially restricts or distorts the fair dealing analysis, presumptively tilting the balance too far in favour of one interest or result over another.

3. These concerns are heightened when considering an institutional fair dealing policy. To form an accurate impression in a case of this kind, the analysis cannot be approached so narrowly that it compromises the integrity of the assessment or obscures the true nature of the dealing. All relevant considerations must be taken into account in arriving at a full appreciation of the dealing. That means looking at the dealing from the perspective of the institution that instituted the policy and seeks to rely on it, not just from the perspective of end users to whom it ostensibly applies. It means reviewing the quality, not just the quantity, of the material used. And it means assessing how the policy is implemented and followed in practice, including measures taken to achieve compliance, not just reviewing the language of the policy and imagining the hypothetical dealings that would result *if* end users were to abide by it.

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[1] 2004 SCC 13, [2004] 1 SCR 339 at para 48 [*CCH*].
[2] RSC 1985 c C-42.
[3] *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336, at para 30.

4. Although the facts of this case are unique, any decision of this Court on fair dealing will have repercussions for the creative industries. It is crucial to view the analysis through that lens, with a careful eye to unintended consequences outside the field of education.

PART II – RESPONSE TO QUESTIONS IN ISSUE

5. The Music Industry Associations' interest in this appeal is not in the resolution of the underlying dispute, which will be determined on the facts and evidence. Their concern is with the broader implications of this Court's decision and in preserving the integrity of the fairness analysis, including the correct approach to assessing fairness in the context of an institutional fair dealing policy.

PART III – ARGUMENT

i. The correct approach to perspective is context- and fact-specific

6. The Music Industry Associations agree with York that fair dealing is contextual.[4] They disagree with York on how that contextual approach extends to the question of whose perspective is relevant to the analysis.

7. The correct approach to perspective is guided by who seeks to rely on fair dealing and findings of fact about the dealing itself. The concept of perspective must remain flexible enough to ensure a full appreciation of the dealing or course of dealings at issue. Put differently, the *dealing*, not the dealer, must be the focal point of the analysis. A preoccupation with perspective, at the expense of other relevant considerations, can artificially limit the analysis, distorting the balancing act that is at the heart of every fair dealing determination and obscuring the actual dealing under review. It also runs contrary to the basic notion of fair dealing, which is always "a matter of impression."[5]

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[4] Factum of the Appellant, York University, ("York Factum") at para 69.
[5] *CCH*, *supra* note 1 at para 52, quoting *Hubbard v Vosper*, [1972] 1 All ER 1023 (CA), p 1027; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 at paras 37, 39 [*Alberta (Education)*]; *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196, 26 BCLR (5th) 300 at para 279; *Allen v Toronto Star Newspapers Ltd* (1997), 36 OR (3d) 201, 152 DLR (4th) 518 (Ont SCJ);

8. Presumptively focusing on one perspective to the exclusion of all others narrows the analysis even further, exacerbating the problem. Yet that is precisely what York proposes to do. The analysis it urges on this Court presupposes that the relevant perspective is *always* that of the end user—in this case, the student—even when it is the institution that seeks to rely on fair dealing to validate its own copying practices under a policy of its own device. That obscures the bigger picture and risks distorting the overall impression of the dealing.

9. In the music industry, approaching every fair dealing analysis from the perspective of the end user would put a thumb on the scale of fairness and enable commercial services to insulate their interests from scrutiny. Consider, for example, a file sharing platform that sought to increase its subscriber base, and its revenue, by facilitating the exchange of music between its users, then tried to avoid paying for music used on its service by adopting a policy that purported to require subscribers to use that music only for the allowable purposes of private study or review. Following York's logic, the service's purely commercial purpose would be ignored, as a matter of law, in favour of the purposes of its consumers. The service could impermissibly "hid[e] behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair. . . ."[6] Viewing the dealing through that narrow lens could skew the entire fairness analysis, restricting the court's examination of considerations like the aggregate amount of music used by the platform and the effect of that use on the market for the music.

10. When considering the fairness of a dealing, the starting point must instead be the perspective of the user who seeks to rely on the policy, with the perspectives of others involved considered as well to the extent they are relevant. In the example just cited, this would allow fairness to be analyzed as a "matter of impression," as the law intends, by allowing the court to consider the matter from *both* relevant perspectives: the perspective of the platform and the perspective of its end users. York's approach, by contrast, would limit the court's ability to form an accurate impression by treating the platform's

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Canadian Copyright Licensing Agency (Access Copyright) v York University, 2017 FC 669, [2018] 2 FCR 43 at para 356 [*Access v York FC*].

[6] *Alberta (Education)*, *supra* note 5 at para 22.

perspective—and its reliance on the policy primarily to avoid paying royalties for the use of music—as if it were irrelevant as a matter of law.

11. In the *Copyright Act*, Parliament chose not to define what is "fair." For that reason, this Court has consistently embraced a contextual approach to fair dealing, resisting overly formalistic attempts to exclude relevant considerations from the analysis. At the fairness stage, where the "analytical heavy-hitting" takes place, matters of impression and questions of fact, guided by a non-exhaustive list of factors (which may not even arise in every case), are the key drivers of each fairness assessment. Those considerations are necessarily rooted in the facts and circumstances of the particular dealing at issue in each case.[7]

12. This contextual approach has extended to matters of perspective. The perspective in *Alberta (Education)* was guided by the fact that it was not an institutional "guidelines" case[8] and the finding that the purpose of the teachers who made the copies in that case was the same as that of the students for whom they made them: the students' research and private study. It would have been open to the Court to make a different determination about the teachers' purpose if the facts supported it.[9] Unlike in the current case, however, the evidence in *Alberta (Education)* suggested that there was no ulterior purpose at play.

13. Even these matters of context and fact did not restrict the fairness analysis to the student's perspective. In considering alternatives to the dealing, for example, this Court considered matters that were clearly relevant to the institution's perspective, including that the teachers photocopied short excerpts for the purpose of *complementing* existing textbooks and that, under those circumstances, it was not a viable alternative for a school to buy sufficient copies of every text for every student.[10] Similarly, this Court considered the institution's

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[7] *CCH*, *supra* note 1 at para. 52; *Alberta (Education)*, *supra* note 5 at paras 37, 39; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 at para 27, 32 [*SOCAN v Bell*]; *Access v York FC*, *supra* note 5 at para 252.
[8] *Access v York FC*, *supra* note 5 at paras 288, 323–324; *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77, 448 DLR (4th) 456 at paras 232–233 and 290 [*York v Access FCA*].
[9] *Alberta (Education)*, *supra* note 5 at para 22; *York v Access FCA*, *supra* note 5 at para 230.
[10] *Alberta (Education)*, *supra* note 5 at para 32.

perspective when it determined that the aggregate number of pages copied was relevant to the character of the dealing.[11]

14. In *CCH*, this Court assessed the fairness of the Law Society's general practice of copying under the Access to Law Policy. Its approach to perspective was informed by the context and findings of fact. Since the Law Society had invoked fair dealing to justify its institutional practice of copying in accordance with the Access to Law Policy, it was incumbent on the Law Society to demonstrate that its own dealings were research-based and fair. Like *Alberta (Education)*, this Court accepted as a fact that the Law Society shared the purposes of its patrons and that the sole purpose of the dealing was research. There was no other purpose for the copying.[12]

15. These contextual matters and findings of fact had important implications for the fairness assessment. The fact that this was an institutional claim of fair dealing meant that it was appropriate for the Court to consider the dealings from the Law Society's point of view.[13] But the fact that the institution and its users shared the same purpose—research—also meant that, when the Court assessed whether there were alternatives to the dealing, it was reasonable to consider alternatives from the perspective of the requesting lawyers.[14]

16. In *SOCAN v Bell Canada*, this Court also determined that the music previews at issue were for a singular purpose, consumer research, and that the services that provided them were simply facilitating that research, not advancing any unfair ulterior purpose.[15] Still, that did not mean that the fairness analysis focused on the consumer perspective alone. To the contrary, the Court emphasized that "whether multiple copies of works are being widely distributed"—which is necessarily viewed from the perspective of the institution, not the

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[11] *Alberta (Education)*, *supra* note 5 at para 29.
[12] *CCH*, *supra* note 1 at paras 51, 63–64.
[13] *Ibid* at paras 66–69, 71.
[14] Under alternatives to the dealing, the Court considers whether the dealing was reasonably necessary to achieve the ultimate purpose.
[15] *SOCAN v Bell*, *supra* note 7 at paras 34–36.

end user—must be considered when examining the character of the dealing.[16]

17. Like the cases before it, perspective in the case under review should turn on its own context, including that York invoked fair dealing to obtain a declaration that its institutional practice of copying in accordance with the Fair Dealing Guidelines was fair, as well as the lower court's findings of fact, including that York had a separate purpose to the dealing.[17] In these circumstances, ***the institutional perspective cannot be ignored.***

18. This contextual approach to fair dealing helps ensure a just result. It ensures a fulsome appreciation, as a matter of impression, of the fairness of the dealing and avoids the artificiality that would arise from automatically narrowing the analysis to a single relevant perspective. A narrower analysis runs the risk of obscuring the true nature of the dealing.

ii. Fairness and the amount of the dealing are not purely quantitative matters

19. York argues that it would be impractical for it to draft a blanket fair dealing policy that applies to all users and all possible uses without bright-line, quantitative thresholds. Regardless of whether that is so, it is clear that viewing the amount of the dealing in purely quantitative terms will often be incompatible with the holistic assessment of the dealing as a "matter of impression."

20. The amount of the dealing factor considers the proportion of the excerpt used in relation to the work as a whole.[18] The importance of the work allegedly infringed should be considered and the amount taken may be more or less fair depending on the purpose.[19] In *SOCAN v Bell Canada*, this Court correctly noted that the amount of the dealing considers the quantity of material used. But that does not mean it is a purely arithmetical exercise. In fact, it is impossible to consider the *importance* of the work allegedly infringed without considering the *content* of the portion taken—that is, the *quality* of that portion—and the

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[16] *Ibid* at para 42.
[17] *Access v York FC*, *supra* note 5 at paras 272–273, 275; *York v Access FCA*, *supra* note 5 at paras 215, 236, 240–241, 280–281.
[18] *SOCAN v Bell*, *supra* note 7 at para 41; *Alberta (Education)*, *supra* note 5 at para 29; *Access v York FC*, *supra* note 5 at para 290; *York v Access FCA*, *supra* note 5 at para 277.
[19] *CCH*, *supra* note 1 at para 56.

purpose for which it was used. For example, an excerpt that includes the most memorable riff or hook of a song might raise different fairness considerations from an excerpt of equal duration that uses a less valuable portion of the same song, even if they are used for the same purpose. For that reason, lower courts routinely consider what the excerpt contained, quantitatively and qualitatively, when considering whether the amount of the dealing tends toward fairness.[20]

21. Prior court decisions about the amount of the dealing have also led some stakeholders astray, taking a contextual observation made in one case and attempting to apply it in another as if it were a bright-line rule. Courts must be wary of plucking an amount that tended towards fairness in one case and applying it an entirely different case without any meaningful evidence to show that it tends toward fairness in that case as well.

22. For example, in *SOCAN v Bell Canada*, this Court did not disturb the Copyright Board's finding that 30-second previews of music, which amounted on average to 12.5% of the underlying works as a whole, were a "modest" dealing when compared to purchasing the entire four-minute work for repeated listening.[21] But that finding of fact amounts to nothing more than an observed arithmetical relationship between the works at issue and the portions used, rooted in the unique context of that case. There was no determination that the percentage used would be "modest," much less fair, in any other context.

23. The Copyright Board's decision that the amount of the dealing was "modest" was expressly tied to its finding that the previews helped users to decide whether to purchase the work (i.e., the purpose of the dealing).[22] Indeed, the evidence in that case was that previews were a marketing tool to help consumers decide whether to purchase a download.[23] The Board

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[20] *Warman v Fournier*, 2012 FC 803, 104 CPR (4th) 21 at para 33; *United Airlines, Inc v Cooperstock*, 2017 FC 616, 147 CPR (4th) 251 at para 129; *Wiseau Studio, LLC et al v Harper et al*, 2020 ONSC 2504, 174 CPR (4th) 262 at paras 187–189.
[21] *SOCAN v Bell*, *supra* note 7 at paras 39–41.
[22] *Re Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works [Tariff No. 22 A (Internet—Online Music Services) 1996–2006]* (2007), 61 CPR (4th) 353 (Copyright Board) at para 113.
[23] *Ibid* at paras 18, 101.

accepted that previews were long enough for a user to do her research but short enough and of a sufficiently degraded quality that it could not replace the work.[24] No copy existed after the preview was heard and the file was deleted automatically from the user's computer.[25] It is these types of contextual considerations that informed this Court's analysis of the amount of the dealing at issue and, in turn, the fairness of that dealing.

24. A different set of facts would almost inevitably lead to a different conclusion about the fairness of the amount of the dealing. In another context, with different users, different uses, and different safeguards, 12.5% of a work could be a considerable amount of music. If the work were a 20-minute sonata, it would mean two-and-a-half minutes of music, not 30 seconds. Even a much shorter portion—just a few notes or words—could comprise the most recognizable hook, melody, or lyric, the very core of what makes the song valuable. And there would be nothing "modest" about using the same 30 seconds of music in a 30-second TV commercial for an online music service, as opposed to a preview made available to help users decide what to purchase through the service itself.

25. This Court should be wary of an approach to this factor that proceeds on an assessment of quantity alone without regard for considerations as fundamental as what has actually been taken. Similarly, it should not endorse the proposition that a quantitative relationship observed in one case is readily transferable to another. Outside the context in which the decision was made, the use of a percentage is arbitrary unless the evidence in the later case establishes that the amount of the dealing is fair in those new circumstances.

iii. The fairness of a fair dealing policy cannot be determined without considering how it is implemented and applied

26. York argues that, since it only sought a declaration that reproductions made in accordance with its Fair Dealing Guidelines constituted fair dealing, this Court can restrict its fairness assessment to the four corners of the document, disregard evidence about the dealings that

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[24] *Ibid* at para 111.
[25] *SOCAN v Bell*, *supra* note 7 at para 38.

actually occur because or in spite of that document, and still properly arrive at a conclusion about the fairness of York's dealing.[26]

27. It is impossible to assess the fairness of copying in accordance with a policy in a vacuum. Such an approach grossly misrepresents the actual dealing and asks the Court instead to perpetuate a fiction. In assessing the fairness of a policy, its language may be relevant, but so is its implementation, including the existence and efficacy of safeguards to ensure that the policy is applied as intended, and of reasonable oversight to ensure that there is an appropriate level of compliance with the policy. Focusing only on the words of a policy artificially restricts the nature and scope of the actual dealing, which necessarily comprises not only the policy as it reads on paper but also the *practices* followed in relation to it.

28. In the music industry, rights holders regularly encounter digital services, platforms, and Internet intermediaries who engage in or facilitate infringement on a commercial scale but seek to avoid responsibility by pointing to empty disclaimers or unenforced terms of use that warn their users against infringing copyright. Unless those policies are enforced, with effective safeguards to prevent infringement and to address it when it occurs, infringement continues to run rampant. It would distort the concept of fairness beyond recognition to allow a service to avoid responsibility for infringing activity simply by invoking a policy that purports to prohibit that conduct even if the policy is observed mainly in the breach.

29. This Court made clear in *CCH*, which also involved copying in accordance with an institutional policy, that the dealing comprises both the policy and the practice. In that case, the Court held that an institution that seeks to rely on a policy as the basis for a fair dealing defence, rather than establishing that all individual dealings were fair, must show that "their own ***practice and policies*** were research-based and fair" (emphasis added).[27] In other words, a policy that would appear to require fair dealing *in theory* is not sufficient unless it also reflects how the institution conducts itself *in practice*.

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[26] York Factum at paras 102–107.
[27] *CCH*, *supra* note 1 at para 63.

30. To assess the fairness of copying under the policy, this Court considered not only the language of the Law Society's policy, but also the way it worked in practice, including the existence of safeguards to ensure that the copying was actually fair.[28] It also observed that there was no evidence that the practice differed from the policy. For example, the ***policy*** contemplated that the Great Library would provide single copies of works for specific purposes allowed under the *Copyright Act*. There was no basis to conclude that the ***practice*** was different from the policy in that regard: there was no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession.[29]

31. Ultimately, as York points out in its factum, this Court granted the Law Society a declaration similar to the one sought by York—namely, that the Law Society did not infringe copyright when the Great Library made a single copy of certain material in accordance with the Access Policy.[30] However, this Court did so only after determining that both the policy and the practice were fair.

32. An institutional user cannot simply introduce a policy and then rely on its existence alone to dodge its legal responsibilities to copyright owners. This does not mean that the institution is necessarily liable for any and all infringement that occurs in violation of the policy. However, it does require the institution to take responsibility for the general pattern of conduct that arises out of the policy and to take reasonable care, whether through safeguards, compliance measures, or both, to ensure that the policy, even if ostensibly fair on paper, is no less fair in practice.

PART IV – COSTS

33. The Music Industry Associations do not seek costs and submit that the ordinary rule that costs are not awarded against an intervener should apply.

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[28] *CCH*, *supra* note 1 at paras 66, 73.
[29] *Ibid* at para 67.
[30] York Factum at para 105; *CCH*, *supra* note 1 at para 76; *Access v York FC*, *supra* note 5 at paras 259, see also 262–263.

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

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PART VII – TABLE OF AUTHORITIES & LEGISLATION

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