

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)

**FACTUM OF THE INTERVENER,
COLLEGES AND INSTITUTES CANADA**

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

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PART I. OVERVIEW

1. Colleges and Institutes Canada (“CICan”) submits this Factum pursuant to this Court’s Order of March 29, 2021, in which the Court granted leave to intervene in this appeal.

2. CICan is the national voice of Canada’s publicly-supported colleges, institutes, cégeps and polytechnics (hereafter referred to as “colleges”). It intervenes in this appeal on behalf of its member colleges, of which it currently represents 135 member institutions in Canada.

3. CICan sought leave to intervene in this appeal on the grounds that it was involved in the development of the Fair Dealing Guidelines adopted by the education sector, including the Fair Dealing Policy that served as the model for the York University Fair Dealing Guidelines (“Guidelines”). Thus, CICan is in a position to address the Court on questions relating to the support that the Fair Dealing Guidelines have in law and with respect to the copying thresholds that the Guidelines enumerate. It is also in a position to explain how the Guidelines are necessary to guide educational copying in practice.

4. The education system in Canada comprises three sectors: elementary and secondary schools, colleges and institutes, and universities. Generally speaking, in terms of copyright law and public policy, the interests of elementary and secondary schools are represented by the Copyright Consortium of the Council of Ministers of Education, Canada, the interests of colleges and institutes are represented by CICan, and the interests of universities are represented by Universities Canada. These three organizations collaborated to develop the common set of Fair Dealing Guidelines that are at issue in this appeal.

5. As directed in the Court’s Order granting leave to intervene in this appeal, CICan has discussed its intervention with a number of its friends, and fellow interveners,

including the Copyright Consortium of the Council of Ministers of Education, Canada so as to avoid duplication in their respective submissions.

6. CIGan's submissions focus on the importance and fairness of the Fair Dealing Guidelines. It will (1) outline that the thresholds in the Guidelines are fair (briefly, as this is the subject of the Factum of the Copyright Consortium of the Council of Ministers of Education, Canada), (2) explain the importance of having Guidelines to guide instructors, and (3) respond to some common critiques of the fairness of the Guidelines.

PART II. QUESTION IN ISSUE

7. A key issue in this appeal relates to the application of the fairness factors from the student's perspective in light of the educational purpose of the dealings.

8. CIGan submits that the Guidelines are fair and necessary so that fair dealing is applied evenly across the Canadian education sector.

PART III. ARGUMENT

a) The Guidelines are Fair

9. First, CIGan submits that the Guidelines adopted by the Appellant, York University, are fair. These Guidelines are the result of collaboration among CIGan, the Council of Ministers of Education, Canada, and Universities Canada, and describe copying for students that should be permitted in educational institutions pursuant to the fair dealing user right.

10. The Factum of the Copyright Consortium of the Council of Ministers of Education, Canada, sets out a detailed explanation of how the thresholds set out in the Guidelines are directly supported by Canadian copyright law and CIGan adopts and supports these arguments.

11. Specifically, CIGan notes that the Guidelines are consistent with several decisions of this Honourable Court and the Federal Court of Appeal, including *CCH Canadian Ltd. v. Law Society of Upper Canada* (“CCH”),¹ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (“Alberta”),² *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* (“SOCAN v Bell”)³ and *Canadian Copyright Licensing Agency (Access Copyright) v. Canada* (“Access Copyright v. Canada”).⁴

12. These Guidelines are not “arbitrary” but rather are based in case law, including from this Court.

b) The Importance of Having Guidelines to Create Clear Rules for Instructors

13. CIGan also submits that having such Guidelines in place is not only practical but necessary. As the Copyright Consortium of the Council of Ministers of Education, Canada mentions at the end of its Factum, educators are not lawyers and so, as a practical matter, cannot reasonably be expected to know and apply fair dealing case law themselves.⁵ Instructors at all types of educational institutions need clear and consistent guidance on what they can and cannot copy in an easily understandable format. Each instructor that makes a copy for a student simply cannot be expected to engage in a fair dealing analysis that would require them to have a deep understanding of Canadian copyright law.

14. The Federal Court of Appeal has endorsed such bright line rules in similar copyright matters. In *Access Copyright v. Canada*,⁶ another matter involving a tariff set by the Copyright Board, the Federal Court of Appeal approved such a bright line rule and explained that, in its absence, employees would reach widely different conclusions about what is and is not permissible copying:

¹ 2004 SCC 13 [“CCH Canadian Ltd.”].

² 2012 SCC 37 [“Alberta”].

³ 2012 SCC 36 [“SOCAN v. Bell”].

⁴ 2018 FCA 58 [“Access Copyright v. Canada”].

⁵ Factum of the Council of Ministers of Education, Canada at para. 32.

⁶ *Access Copyright v. Canada*, *supra* note 4.

[128] There is much to be said for the Board's adoption of a bright-line rule. It provides guidance to government employees concerning what copying is permitted because it is insubstantial. The respondents other than British Columbia suggest the following (at para. 107 of their memorandum) and I agree:

In the absence of the bright line rule adopted by the Board, individual government employees would obviously reach widely varying conclusions as to what is, and is not, a substantial part of a published work. One employee, for example, could consider 1% of a work to be substantial while another could set that threshold at 5%. To avoid such different, and likely conflicting, interpretations as to what the term "substantial" means, [we submit] that the bright line rule established by the Board is entirely reasonable.⁷

15. CIGan submits that such bright line rules are not only practical but necessary to ensure that fair dealing is applied consistently across the Canadian education sector. These Guidelines ensure that the copies that instructors make for their students are within the fair dealing user right.

c) Responding to some Common Critiques of the Guidelines

16. Having explained the provenance of the Guidelines and the importance of having such Guidelines, CIGan will now respond to several common critiques of the Guidelines: (1) the allegation that the Guidelines are a "get out of copyright free card", (2) "The Hockey Sweater" example, and (3) the claim that educational institutions pay for utilities, faculty, and food, but not for copying.

⁷ *Access Copyright v. Canada*, *supra* note 4 at para. 128.

(1) The Guidelines are not a “get out of copyright free card”

17. In its Memorandum of Argument, Access Copyright depicts the Guidelines as an attempt to create a “blanket exception” for the purposes of educational copyright, and for copyright law to not apply to education.⁸

18. With respect, this is not at all what the education sector in Canada seeks.

19. Access Copyright also notes that Parliament declined to grant the education sector a blanket exemption for its copying.⁹ Again, the education sector respects this decision and does not pretend otherwise.

20. Rather, the education sector respects its obligations under the *Copyright Act*, which include, *inter alia*, the fair dealing user right in section 29. The fair dealing user right is consequently, and inarguably, an integral part of copyright law in Canada. Access Copyright cannot wish away the fair dealing user right simply because it does not align with the interests of its members.

21. The education sector respects its copyright obligations. Indeed, it spends millions of dollars per year in licenses to educational publishers.

22. But, just as it respects its obligation to license certain works, it also recognizes the validity of the fair dealing user right and relies on its rights thereunder where appropriate.

23. As a result, the education sector in Canada, including CICA, clearly does not seek a “blanket exemption” with regards to copyright. The education sector accepts the entirety of its rights and obligations under the *Copyright Act*, including its obligation to license materials where necessary, as well as its fair dealing user rights where appropriate.

2) The Hockey Sweater example

24. Access Copyright uses some unlikely and extreme examples to attack the Guidelines as a whole. For instance, it uses the example that the Guidelines permit the

⁸ Memorandum of Argument of Access Copyright at paras. 71-74.

⁹ Memorandum of Argument of Access Copyright at paras 70-71.

copying of a story, such as *The Hockey Sweater*, from an anthology in order to argue that the Guidelines contain arbitrary distinctions and are therefore not fair.¹⁰

25. With such an argument, Access Copyright attempts to use an exceptional and unusual situation in order to attack the Guidelines as a whole. However, this exceptional and unusual scenario should not be the basis on which practical and usable guidelines, which aptly describe fair dealing limits for the education sector, are found unfair.

26. There will always be examples that do not fit squarely within a particular rule. These should not force us to operate without such rules altogether.

27. In any case, case law has found that it is possible to deal fairly with a whole work.¹¹ In *CCH Canadian Ltd.*, this Honourable Court found that making a single copy of one article, reported decision, case summary, statute, or regulation was fair.¹²

28. Similarly, in the Copyright Board's decision setting the tariff for Provincial and Territorial Governments, 2005-2014, the Board found that copying an entire newspaper, journal, or magazine article can be fair.¹³ It also found that an entire article copied for the purpose of research or private study may have tended toward unfairness but not strongly.¹⁴

29. Overall, Access Copyright's use of extreme and unlikely examples both inflates the spectre of a highly unlikely scenario and ignores case law establishing the fairness of the copying of short excerpts.

¹⁰ Memorandum of Argument of Access Copyright at para. 103.

¹¹ *CCH Canadian Ltd.*, *supra* note 1 [at para. 56.](#)

¹² *Ibid* at para. 68.

¹³ Decision of the Board, *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, Provincial and Territorial Governments, 2005-2014, (22 May 2015)

¹⁴ *Ibid* at para. 339-340.

3) The claim that educational institutions pay for utilities, faculty, and food and not for copying

30. Regarding Access Copyright's claim that educational institutions pay for utilities, faculty, food, and other expenses, but not for copying, respectfully, this is an argument better suited to the question of the mandatory or voluntary nature of tariffs and not whether York University's Guidelines are fair.

31. As outlined above in response to Access Copyright's suggestion that the education sector in Canada seeks a "blanket exception" and special status further to the fairness analysis, the education sector is not asking for any such special treatment—it simply desires the recognition of its existing rights under the fair dealing user right, which is an integral part of the *Copyright Act*.

32. Access Copyright's analogy to utilities, faculty, and food is inapt. Unlike the goods and utilities that Access Copyright cites, copyright is a right created by statute and thus only has the features that Parliament grants to it. Integral to this right, in Canadian copyright law, is users' rights with which creators' rights are delicately balanced.

33. Further, members of CICan and other educational institutions do pay for their copying activities where required by the *Copyright Act*.

34. Importantly, many of the cases upon which the education sector relied in order to create the Guidelines came from other sectors. In the educational context, however, copying has the additional benefit of being directly aligned with the purpose of copyright—disseminating knowledge and encouraging innovation.

35. *SOCAN v. Bell*, was about the amount of a song that could be copied and be considered fair dealing.¹⁵

¹⁵ *SOCAN v. Bell*, *supra* note 3.

36. *CCH*, although it resulted from copying in a library, was not in the education sector but rather involved lawyers making copies of legal resources in order to advise their clients for commercial purposes.¹⁶

37. *Access Copyright v. Canada* involved copying by government employees and so, similarly, was not in the education sector.¹⁷

38. Many sectors make use of copyright-protected works and the education sector simply asks that this right that applies to all of them, also to apply to it. The education sector is the sector in which fair dealing user rights are most intrinsic to its mission.

39. Ultimately, CIGan and its allied interveners in the education sector simply want their fair dealing user right, which is inherent in the *Copyright Act*, to be recognized and respected. The Fair Dealing Guidelines are a necessary instrument that ensures that instructors' copying activities stay within this right—they are not an attempt to expand beyond the rights provided by the *Copyright Act* and by case law.

40. In conclusion, CIGan submits that the Guidelines are based in Canadian case law, are necessary, and do not seek to exempt the education sector from its rights and obligations under the *Copyright Act*. CIGan and the education sector in Canada only ask for the recognition of their rights to rely on the fair dealing user right where appropriate.

Dated at OTTAWA this 26th day of April, 2021.

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¹⁶ *CCH Canadian Ltd.*, *supra* note 1.

¹⁷ *Access Copyright v. Canada*, *supra* note 4.

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1. <i>Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)</i> , 2012 SCC 37	11
2. <i>Canadian Copyright Licensing Agency (Access Copyright) v. Canada</i> , 2018 FCA 58	11, 14
3. <i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , [2004] 1 SCR 339, 2004 SCC 13	11, 27,36
4. Decision of the Board, <i>Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire</i> , Provincial and Territorial Governments, 2005-2014, (22 May 2015)	28
5. <i>Society of Composers, Authors and Music Publishers of Canada v. Bell Canada</i> , 2012 SCC 36 .	35

PART V. STATUTES AND REGULATIONS

STATUTORY PROVISIONS

1. *Copyright Act*, [RSC 1985, c C-42](#)