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
(Respondent)

- and -

YORK UNIVERSITY

RESPONDENT
(Appellant)

(Style of Cause continued on following page)

FACTUM OF THE APPELLANT, (REPLY TO INTERVENERS re: Tariff)
THE CANADIAN COPYRIGHT LICENSING AGENCY
("ACCESS COPYRIGHT")

(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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INTERVENERS

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Overview

1. The central question on this appeal is whether York can both use works within Access Copyright's repertoire without authorization, and also decline to pay the tariff certified by the Copyright Board. Access Copyright's position is the *Act* reflects Parliament's intention that if York copies without permission, it must pay the tariff. Four interveners have made submissions to the contrary. This factum is Access Copyright's response to those interveners.

Authors Alliance/Ariel Katz Stray from the Record and Mis-state the Law

2. There are several problems with the Authors Alliance/Ariel Katz submission. First, they dismiss findings made by the trial judge about the plight of creators as mere "rhetoric,"[1] when they were based on actual expert evidence in the record. Second, they try to substitute that evidence for Professor Katz' unsworn, untested academic writings. These submissions are not based on the record to which parties and interveners are held, and are of therefore no assistance to the Court.

3. Third, Authors Alliance/Ariel Katz are arguing against a straw man. Access Copyright's argument is not premised on Parliament's use of the word "tariff." Rather, its argument is that section 68.2(1) of the *Act*, interpreted in its context, and Parliament's clear purpose, makes tariffs enforceable against unauthorized users of repertoire works. Any different interpretation is both contrary to the legislative history, and gives s. 68.2(1) no legislative purpose. Any suggestion that its purpose is merely to give jurisdiction to the Federal Courts to enforce licence agreements requires a tortured reading of the statute, contrary to principles of interpretation.

4. Finally, the Authors Alliance/Ariel Katz interveners misapply the "irresistible clearness" principle.[2] This principle is that the legislature is presumed not to depart from the *common law* or the "general system of laws" without "irresistible clearness." There is no principle that amendments to existing statutes must be irresistibly clear in order for those amendments to be effective. On the contrary, the effect of the amendments is determined on the basis of ordinary principles of statutory interpretation, and does not require extraordinary language. In this case,

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[1] Authors Alliance/Ariel Katz' Factum, paras. 8, 30
[2] Authors Alliance/Ariel Katz' Factum, para. 28

the legislative history confirms Parliament's intention to deal with a market failure that undermined the copyright balance between creators and users.[3]

Canadian Association of Research Libraries

5. CARL has ignored the rules for interveners by questioning whether the Copyright Board can issue tariffs with retroactive effect.[4] This issue has not been raised by any party. It is not properly before the Court, and Access Copyright respectfully asks that the Court not address it.

6. Otherwise, CARL's assertions are neither new nor instructive. Its "train passenger"[5] analogy illustrates why tariffs should be enforceable. No one is *forced* to take the train: they can ride the bus, rent a car, buy a bicycle or stay home. But they can't both take the train and refuse to pay the fare. For the past 10 years, York has been riding the train for free.

7. While CARL makes reference to "double payment" or "unnecessary payment for use of material that is already licensed,"[6] this mis-states both the facts and the law. Access Copyright has always maintained that institutions could successfully defend any enforcement proceeding by showing that the copies were otherwise authorized and therefore do not trigger the tariff. York tried this at trial, but it failed to provide the evidence required to prove its case. Access Copyright is not asking institutions to pay twice. It is asking that they pay once, which they have refused to do.

8. CARL's other complaint seems to be less about the requirement to pay the tariff, and more about the specific tariff set by the Board. It bears repeating that the *Act* does not require any specific form of tariff. Instead, it leaves that to the expertise of the specialized tribunal to whom Parliament delegated the job of tariff-setting. Arguing about the form of tariff, rather than its enforceability, is a collateral attack that this Court should not permit. This is particularly true

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[3] See reports referenced at paras. 31-32 of Access Copyright's Factum and Parliament's response at paras. 33-40 of Access Copyright's Factum.

[4] CARL's Factum, paras. 11-12
[5] CARL's Factum, para. 13
[6] CARL's Factum, para. 13

when both York and a number of interveners that support it objected to the tariff, but abandoned their objections and withdrew from the tariff-setting proceedings.

9. CARL also incorrectly argues the copyright owners affiliated with Access Copyright suffer no prejudice if, as a consequence of the Federal Court of Appeal's decision, they can "simply sue the institution and proceed through the courts as any another (*sic)* copyright owner or exclusive licensee has done for centuries."[7] But, as Access Copyright has already explained, Parliament recognized that the costs of detection and litigation dramatically outweigh any damage awards that might be made. The general regime of collective administration was enacted to cure this failure.[8]

10. Finally, CARL argues that *CBC v. SODRAC*[9] applies to this case. But there are numerous reasons why CARL is incorrect. The Court in *SODRAC* was not discussing s. 68.2(1) under the tariff regime, but rather a different section under the distinct arbitration regime. Moreover, even the issue of whether arbitration awards are mandatory was raised by an intervener and not fully argued by the parties. The Court certainly did not have the benefit of the extensive legislative history, or the pre-1988 reports lamenting the difficulties of enforcing copyright in an era of mass reproduction.

Universities Canada

11. Contrary to Universities Canada's submission, Access Copyright has never suggested that users must either "reach an agreement with a collective society… or pay the tariff-specified royalties."[10] Access Copyright has always recognized that users may also negotiate individual licences or not use the works at all. However, they do not have the option York is seeking in this appeal: using the works without authorization and not paying the tariff.[11]

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[7] CARL's Factum, para. 18
[8] Access Copyright's Factum, paras. 19-20, 31-33, 40
[9] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 (CanLII), [2015] 3 SCR 615; CARL's Factum, paras. 8-9
[10] UC's Factum, para. 10
[11] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 (CanLII), para. 220 ("*FC Decision*")

12. At paragraph 14 of its factum, UC selectively misquotes from this Court's jurisprudence on the subject of copyright. The Court in *Vigneux* appreciated that, while copyrights grant a monopoly, the monopoly is for a valid purpose. The full quote (with the portions UC omitted in bold) from *Vigneux* and *Hanfstaengl* is:

> Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, **and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic**. **The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws**. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.

13. *Vigneux* is therefore entirely consistent with Access Copyright's argument about the need to maintain the balance underlying the *Act*, and a complete answer to UC's claims that the objective of the Copyright Board is to protect users from collectives. On the contrary, the Board's mandate is to regulate the balance of market power between copyright owners and users,[12] and to set fair tariffs that give effect to both the need to provide for a just reward, and the need to encourage creation and dissemination of works.

14. Much of UC's submission, like CARL's, is largely a collateral attack on the tariff set by the Board. But the time and place to argue about the structure of a tariff is not in this Court, years after the Board has set it, but rather at the Board in its tariff-setting process. UC tried this, when it applied to the Copyright Board to vary the Interim Tariff and instead impose a transactional licence. But the Board declined to grant it because UC admitted that such a licence can be "undermined by onerous record keeping provisions **that, in a university setting, are impractical or impossible to meet.**"[13] In other words, while UC was advocating for a

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[12] *Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190 (FCA), para. 14; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166 (CanLII), para. 75

[13] Decision of the Copyright Board *Re: Reprographic Reproduction, 2011-2013, Interim Statement of Royalties to be collected by Access Copyright (Post-Secondary Educational Institutions)*, 2011, 92 C.P.R. (4th) 434, (Application to Vary: Transactional Licences) at para. 23

transactional per use model, it was, at the same time, acknowledging that keeping track of what was being digitally copied in its 97 member universities was either "impractical or impossible." The Federal Court of Appeal dismissed UC's application for judicial review.

15. UC cannot explain how a transactional (per use) rather than blanket (per user) tariff would work when university administrators have no idea what works are being copied and posted to learning management systems (LMSs). Certainly, in this case, York[14] made no effort to monitor, track or record which works were copied. A transactional tariff only works if universities overhaul their internal processes.

16. UC submits that making tariffs enforceable against users gives Access Copyright a "reduced incentive to propose reasonable rates or flexible structures."[15] But this is exactly what the Copyright Board – an expert specialized tribunal – regulates. Its job is to ensure that the tariff royalties it sets are reasonable. And UC and its members have full participation rights in the Board's process. But instead of using those rights, UC and all its members withdrew from the proceedings.[16]

17. UC asserts that "users are only fully protected from the market power of collectives if they have a realistic choice as to whether to deal with a collective at all, and if they can instead make alternate arrangements, such as direct licences with copyright owners or relying on their right of fair dealing."[17] Access Copyright has always acknowledged, and both the Copyright Board[18] and the Federal Court[19] have confirmed, that users indeed have those choices. What UC continuingly fails to explain is how, given that record-keeping of digital copying by university faculty and staff is "impractical or impossible" (or, as in York's case not attempted at all),

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[14] Evidence of P. Lynch at 735 (line 18) to 744 (line 4), Appeal Book Electronic Version ("**A.B.E.V.**"), Tab 225, pp. E-73242-51; *FC Decision* at paras. 28, 58, 62, 76-79, 245, 266
[15] UC's Factum, para. 29
[16] Access Copyright's Factum, paras. 57, 59
[17] UC's Factum, para. 16
[18] Decision of the Copyright Board *Re: Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be collected by Access Copyright (Post-Secondary Educational Institutions*), 2011, 92 C.P.R. (4th) 434, para. 50
[19] *FC Decision*, para. 220

institutions will have the necessary information to seek these direct permissions if there is no accessible record of what was copied?

18. Finally, UC's submission is particularly surprising since in 2012, it negotiated a model licence[20] with Access Copyright, and recommended that its members, outside of Quebec, accept it.[21] Some did. Others, including York, did not. UC itself stated that the negotiated blanket (per user) fee of $26/FTE[22] "provide[d] the best possible outcome for universities, their students and faculty…, provide[d] access to a new range of digital materials, and ensured that the administrative burden on institutions is minimized."[23]

Canadian Association of University Teachers/Canadian Federation of Students

19. CAUT/CFS submits that "mandatory tariffs mean less investment in direct licensing, stocking libraries, open access initiatives and other ways to respect copyright."[24] But there is nothing in the record to support this assertion. CAUT/CFS is simply catastrophizing.

20. Similarly, CAUT/CFS asserts, without evidence, that "over-inclusive licensing tariffs"[25] make universities pay "to use what they have already bought"[26] as well as "public domain and open access materials" which it asserts are "a major portion of the works that teachers and students use."[27] But neither of these assertions is supported on the record. York tried and failed to prove that the works that were *actually copied* by its teachers were licensed, but ultimately abandoned this claim. Similarly, While York *did* lead evidence that public domain and open access materials were available for its teachers and students to use, the joint survey evidence of what was *actually copied* at York (and included in its internal coursepacks and posted to a LMS) revealed that of the total of 1812 copied excerpts captured in the sample surveys, only 10 were open access.[28]

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[20] Trial Exhibit P-14, A.B.E.V., Tab 64, pp. E-24891-904
[21] Trial Exhibit P-64, A.B.E.V., Tab 144 , pp. E-52852-3
[22] "FTE" refers to "full time equivalent student"
[23] Trial Exhibit P-62, A.B.E.V., Tab 142, pp. E-52847-9
[24] CAUT/CFS' Factum, para. 9
[25] CAUT/CFS' Factum, para. 13
[26] CAUT/CFS' Factum, para. 10
[27] CAUT/CFS' Factum, para. 2
[28] Evidence of P. Lynch at 778 (lines 2-26), A.B.E.V., Tab 225, p. E-73285

21. CAUT/CFS also submit that requiring an educational institution to pay an approved tariff in some way impairs their academic freedom.[29] A tariff that requires payment for unauthorized copying of a published work in no way restrains a teacher in the choice of which educational resource to use (and copy) for a course. In fact, a blanket (per user) licence they bemoan is the perfect answer to any concerns about academic freedom, since it does not distinguish between different materials according to price.

22. CAUT/CFS and CARL compare the private copying levies in Part VIII to the tariff regime in Part VII, without appreciating a key distinction.[30] Part VIII uses the language "right to receive remuneration" because the manufacture or importation of blank media is not infringing any copyrights. As a result, the "right to receive remuneration" is necessary in Part VIII to give rights in the first place. But users who make unauthorized copies of a copyrighted work are infringing that copyright. No separate "right to remuneration" is required in Part VII, because that infringement means the user requires the authorization to copy by the tariff.

23. Finally, CAUT/CFS also submit that "users could be required to pay multiple mandatory tariffs to multiple collectives operating in parallel" and "[i]f Part VII reprography tariffs were mandatory, Parliament would have created a way to coordinate amongst multiple collectives."[31] But there is no need for this. When Parliament created the general regime, multiple collectives administering the same rights (*i.e.*, PROCAN and CAPAC, predecessors of SOCAN) were operating in parallel, in a manner regulated by the Copyright Board. Access Copyright and Copibec have been operating in parallel for decades, by coordinating between them. But if that coordination ended, the Copyright Board could regulate the respective repertoire shares as between them to ensure there would be no overlap in payment by users.

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[29] CAUT/CFS' Factum, paras. 11-12
[30] CAUT/CFS' Factum, paras. 16-17; CARL's Factum, para. 16
[31] CAUT/CFS' Factum, para. 18

May 6, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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for:

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TABLE OF AUTHORITIES

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