

**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)

- and -

**AUTHORS ALLIANCE and ARIEL KATZ**

Proposed Interveners

AND BETWEEN:

**YORK UNIVERSITY**

Appellant (Appellant)

- and -

**THE CANADIAN COPYRIGHT LICENSING AGENCY  
("ACCESS COPYRIGHT")**

Respondent (Respondent)

- and -

**AUTHORS ALLIANCE and ARIEL KATZ**

Proposed Interveners

**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENERS, AUTHORS  
ALLIANCE AND ARIEL KATZ**

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**MOTION FOR LEAVE TO INTERVENE**

Pursuant to Rules 47, 55, 56, 57 and 59 of the *Rules of the Supreme Court of Canada*,  
SOR/2002-156, as amended

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## PART I - OVERVIEW AND STATEMENT OF FACTS

### A. OVERVIEW

1. Authors Alliance and Professor Ariel Katz seek leave to intervene in this appeal. Authors Alliance is a non-profit organization representing the interests of authors who want to serve the public good by sharing their creations broadly. It has engaged in important advocacy efforts regarding fair use and authors' rights, before Courts, legislatures, and other policy-making bodies, in Canada, the United States, and internationally. It has a useful perspective to add to this appeal.

2. Professor Ariel Katz is a tenured Associate Professor at the University of Toronto Faculty of Law, a founding member of Authors Alliance, and a scholar who studies the law and its relationship to technology, with specific expertise in copyright law, competition law, and the collective administration of copyrights. Professor Katz has assisted this Court in previous interventions, including in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* on the issue of fair dealing and *CBC v SODRAC* on the issue of mandatory tariffs, both of which are issues in this appeal. He also authored a key academic article cited by the Federal Court of Appeal below. He too has a useful perspective to contribute to this appeal.

3. This appeal addresses two primary issues: (a) whether tariffs set by the Copyright Board are mandatory vis-à-vis users; and (b) whether copying of course materials in accordance with the "Fair Dealing Guidelines for York Faculty and Staff" adopted by York University in 2012 constitutes fair dealing under the *Copyright Act*.

4. The Proposed Intervenors will bring a unique and helpful perspective to the Court if granted leave to intervene. They propose to make two submissions:

- (a) First, they intend to submit that when the Copyright Board approves the tariff proposed by a collective like Access Copyright, that tariff cannot be imposed on users. Rather, they will submit that the purpose of setting collectives' tariffs is to prevent collectives from abusing their monopoly power by regulating the maximum fees that they can charge.

- (b) Second, they intend to submit that the issue of fair dealing cannot properly be addressed in proceedings by a copyright collective like Access Copyright, because that copyright collective is not a copyright owner, and therefore has no standing to seek a declaration of infringement (to which the defense of fair dealing is raised). For similar reasons, there was no *lis* between York University and Access Copyright regarding copyright infringement or lack thereof that could justify the grant of a declaratory judgement.

## B. STATEMENT OF FACTS

5. Authors Alliance is a non-profit organization founded in May 2014 that advances the interests of authors who want to serve the public good by sharing their creations broadly. Authors Alliance creates resources to help authors understand and enjoy their rights and promotes policies that make knowledge and culture available and discoverable.<sup>1</sup> Authors Alliance has nearly 2,000 members, including academic authors across Canada and the United States.<sup>2</sup>

6. Authors Alliance has submitted *amicus* briefs to the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Eleventh Circuit in support of fair use and authors' rights, namely in *Authors Guild v Google Books*, 804 F.3d 202 (2d Cir. 2015) and *Cambridge University Press v Albert*, 906 F.3d 1290 (11th Cir. 2018).<sup>3</sup> Authors Alliance has also been an active participant in advocacy efforts worldwide, including in Canada.<sup>4</sup> Among other things, it has made submissions to the House of Commons' Standing Committee on Industry, Science and Technology on issues of copyright reform.

7. Professor Ariel Katz is an Associate Professor at the Faculty of Law of the University of Toronto who studies the law and its relationship to technology, with specific expertise in copyright

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<sup>1</sup> Affidavit of Brianna Schofield affirmed March 4, 2021 (“AA Affidavit”) at para 5, Motion Record (“MR”), Tab 2.

<sup>2</sup> AA Affidavit at para 6, MR, Tab 2.

<sup>3</sup> AA Affidavit at paras 7-9, MR, Tab 2; Amicus Briefs in *Authors Guild v Google Books*, 804 F.3d 202 (2d Cir. 2015) and *Cambridge University Press v Albert*, 906 F.3d 1290 (11th Cir. 2018), Exhibits B and C to AA Affidavit, MR, Tabs 2B and 2C.

<sup>4</sup> List of Authors Alliance's educational and advocacy initiatives, Exhibit D to AA Affidavit, MR, Tab 2D.

law, competition law, and the collective administration of copyrights, and who assisted this Court in previous interventions, including in:<sup>5</sup>

- (a) *Alberta (Education) v Access Copyright*, where the majority opinion reached in that appeal was consistent with the arguments made in the Centre for Innovation Law and Policy factum, which Professor Katz directed at the time;<sup>6</sup>
- (b) *CBC v SODRAC* on the issue of mandatory tariffs, where the majority again reached a conclusion that reflected the submissions made by Professor Katz and his co-intervener, McGill University’s Centre for Intellectual Property Policy;<sup>7</sup> and
- (c) *Keatley Surveying Ltd v Teranet Inc* on the issue of Crown copyright and the public domain in the context of official documents and public records.<sup>8</sup>

8. Furthermore, an article Professor Ariel Katz published in 2015 entitled “Spectre: Canadian Copyright and the Mandatory Tariff – Part I” was also expressly acknowledged by the Federal Court of Appeal for its value in assisting the court in its decision.<sup>9</sup>

9. Professor Katz is also a leading international authority on the regulation of copyright collectives. His work in the field has been cited by this Court and by the Supreme Court of Israel, and it has influenced policy makers from the European Union, to the United States, to Australia.<sup>10</sup> He has also provided expert testimony to the Ontario Superior Court on comparative copyright law matters, to a court in Germany on issues of copyright ownership and standing to sue under Canadian law, and made several written submissions and testified before two parliamentary committees during the statutory review of the *Copyright Act* in 2019.<sup>11</sup>

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<sup>5</sup> Affidavit of Ariel Katz affirmed March 5, 2021 (“**AK Affidavit**”) at paras 8-11, MR, Tab 3.

<sup>6</sup> *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012 SCC 37](#); AK Affidavit at para 8, MR, Tab 3.

<sup>7</sup> *CBC v SODRAC*, [2015 SCC 57](#) at paras 101-113; AK Affidavit at para 9, MR, Tab 3.

<sup>8</sup> *Keatley Surveying Ltd. v Teranet Inc.*, [2019 SCC 43](#); AK Affidavit at para 10, MR, Tab 3.

<sup>9</sup> AK Affidavit at para 11, MR, Tab 3.

<sup>10</sup> AK Affidavit at para 18, MR, Tab 3.

<sup>11</sup> AK Affidavit at para 18, MR, Tab 3.

10. Professor Katz's interest in and commitment to advancing public policy, especially in the areas of intellectual property and competition policy, extend beyond his scholarship. He has participated as an objector in the proceedings before the Copyright Board of Canada, during which the Board issued the Interim Tariff that Access Copyright wishes to impose on York University and is the subject of the present appeals.<sup>12</sup>

## **PART II - STATEMENT OF ISSUES**

11. The only issue raised by this motion is whether the Proposed Interveners, Authors Alliance and Professor Ariel Katz, should be granted leave to intervene in this appeal.

## **PART III - STATEMENT OF ARGUMENT**

12. Pursuant to Rules 55, 56 and 57 of the *Rules of the Supreme Court of Canada*, Authors Alliance and Professor Ariel Katz should be granted leave in the circumstances of this case. They have an interest in the case, and they will bring a useful and distinct perspective to the issues raised in this appeal.<sup>13</sup>

### **A. THE PROPOSED INTERVENERS HAVE AN INTEREST IN THE CASE**

13. Authors Alliance's interest in this appeal stems from its members' desire to see their works reach the largest possible audience and have the greatest possible impact and use, especially by users at educational institutions like York University. Overbroad restrictions on the use of scholarly works would frustrate these objectives.

14. In particular, the enforcement of tariffs proposed by copyright collectives and approved by the Copyright Board against educational institutions who choose to comply with their copyright obligations without obtaining a licence from a copyright collective would impact Authors Alliance's members, as mandatory tariffs for academic institutions do not help all authors and may, in fact, harm many of them. If copyright collectives can impose themselves and their business

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<sup>12</sup> AK Affidavit at para 19, MR, Tab 3.

<sup>13</sup> *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 56, 57; *R v Finta*, [\[1993\] 1 SCR 1138](#) at 1142.



model on readers as a matter of law, this may imperil the development of alternative business models that would be more amenable to the interests of Authors Alliance's members.<sup>14</sup>

15. The issue that this appeal raises regarding fair dealing will also impact many of Authors Alliance's academic author members – such as Professor Katz – who are primarily motivated to produce scholarly work in an effort to share and advance knowledge. Academic authorial goals of sharing knowledge and insights, as well as of enhancing their reputations, will be impacted by this Court's decision on fair dealing.<sup>15</sup>

16. In addition to his interest as an academic author, Professor Katz has an interest in this appeal as a researcher and teacher. Professor Katz is concerned about the burdens that mandatory tariffs would impose on him, his colleagues, and his students. In particular, he is concerned that universities may be compelled to comply with the terms of Board-approved tariffs that not only require them to pay unnecessary royalties, but also subject them – and every instructor, student, and staff member – to various terms and conditions that, apart from the tariffs, are not required by law, including intrusive and onerous reporting and auditing requirements.<sup>16</sup>

17. Finally, Professor Katz has an interest because Access Copyright routinely represents that several of the works in which he retains copyright are included in its repertoire. Access Copyright purports to have the legal authority to grant licences and collect licence fees for their use, despite the fact that Professor Katz has never authorized it to act on his behalf.<sup>17</sup>

**B. THE PROPOSED INTERVENERS WILL BRING A USEFUL AND DISTINCT PERSPECTIVE TO THE ISSUES RAISED IN THIS APPEAL**

18. The Proposed Interveners are uniquely positioned to highlight the public interest at stake in the appeal due to their commitment to facilitating increased access to works of authorship, and their extensive expertise in copyright law, the collective administration of copyrights, authors'

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<sup>14</sup> AA Affidavit at para 14, MR, Tab 2.

<sup>15</sup> AA Affidavit at para 15, MR, Tab 2.

<sup>16</sup> AK Affidavit at para 13, MR, Tab 3.

<sup>17</sup> AK Affidavit at para 15, MR, Tab 3.

rights, fair use and fair dealing, in general and in the context of educational institutions in particular.

19. While this appeal is concerned with mandatory tariffs and the law of fair dealing in the context of educational institutions, the legal questions that arise have a much broader impact. There is no entity with a mission similar to that of Authors Alliance likely to intervene in and address the interests of authors in disseminating and sharing their work broadly. There is no other party or proposed intervener who has studied the collective administration of copyrights and the law of fair dealing as deeply, and who could assist this Court in providing as broad and deep legal, historical, and economic perspective on the current issues, as Professor Katz.

20. The Proposed Interveners will take the record as they find it and will not supplement it. Further, they will endeavour to work with other interveners to avoid duplicative arguments. They will also abide by any schedule set by the Court. Therefore, granting the Proposed Interveners leave will not prejudice any party.

### **C. THE NATURE OF THE PROPOSED LEGAL ARGUMENT**

21. The Proposed Interveners propose to make two general submissions in their intervention, which were not covered in the materials of Access Copyright and York University filed to-date in this Court:<sup>18</sup>

- (a) First, they intend to submit that when the Copyright Board approves the tariff proposed by a collective like Access Copyright, that tariff cannot be imposed on users. Rather, they will submit that the purpose of setting collectives' tariffs is to prevent collectives from abusing their monopoly power by regulating the maximum fees that they can charge.
- (b) Second, they intend to submit that the issue of fair dealing cannot properly be addressed in proceedings by a copyright collective like Access Copyright, because that copyright collective is not a copyright owner, and therefore has no standing to seek a declaration of infringement (to which the defense of fair dealing is raised).

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<sup>18</sup> AK Affidavit at para 22, MR, Tab 3; AA Affidavit at para 17, MR, Tab 2.

For similar reasons, there was no *lis* between York University and Access Copyright regarding copyright infringement or lack thereof that could justify the grant of a declaratory judgement.

**(i) *The enforceability of Board-approved tariffs***

22. The Proposed Interveners will support the legal position that when the Copyright Board approves a tariff proposed by a collective, that tariff cannot be imposed on users, but will do so with different arguments than the parties. The Proposed Interveners will submit that the purpose of the regulation of collectives' tariff is to prevent collectives from abusing their monopoly power by regulating the maximum fees that they can charge and the fairness of their related terms and conditions. This position is consistent with the legislative history of the tariff scheme.

23. The Proposed Interveners will submit that in recent years, copyright collectives have promoted the view that once the Board certifies the tariffs they propose, those tariffs – including the payment of the royalties specified therein and compliance with their related terms and conditions – become mandatory on users if the user makes a single unauthorized reproduction from the copyright collective's repertoire. This theory underlies this case. Under this view, the Board proceedings constitute, in effect, an *enforcement* mechanism, resulting in an approved schedule of fees that can be imposed on users who do not wish to obtain a licence from the copyright collective.<sup>19</sup>

24. This view, characterized as the “mandatory tariff” theory, has since been rejected by this Court in *CBC v SODRAC*, and by the Federal Court of Appeal in the decision that gave rise to this appeal.

25. The Proposed Interveners will submit that the mandatory tariff theory lacks any basis in law. Established case law debunks it, standard principles of statutory interpretation contradict it, and the legislative history discredits it. They will demonstrate how construing the *Act* in accordance with the “mandatory tariff” theory will practically cause collectives to evade the

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<sup>19</sup> *Access Copyright – Educational Institutions Tariff (2010-2015), Interim Decision of the Board* (29 May 2013), at paras 8, 11. Online: <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366750/index.do>>

regulatory scheme that Parliament established, and effectively coerce users into entering licence agreements with copyright collectives. Users enter into such agreements not because they determine that the collective offers the most cost-effective way of securing licences, but because if they fail to enter a voluntary licence agreement with the collective, they could be required to pay substantially higher amounts in the form of retroactive royalty payments that would be imposed on them pursuant to Board-approved tariffs.

26. The Proposed Interveners will draw upon the existing scholarship of Professor Katz, who has studied this question deeply, particularly in a research paper he published in 2015, which was used to inform the lower court’s decision in this case.<sup>20</sup> He concluded that the “mandatory tariff” theory was based on a deeply flawed interpretation of the *Copyright Act* and runs afoul the *Act* itself and established case law. The Proposed Interveners will draw on this article and supplement it with arguments and recent caselaw not covered in the article, particularly as it relates to the “practical challenges, conceptual puzzles, procedural nightmares, and constitutional headaches” associated with the suggestion that tariffs are mandatory.<sup>21</sup>

27. The Proposed Interveners will also illustrate what is at stake for universities and academic authors if the “mandatory tariff” theory holds. The mischief for these stakeholders arises because of the spectre of disproportionate (and potentially retroactive) liability: a single unauthorized reproduction, which might after the fact be held to exceed the scope of fair dealing, could obligate an institutional user to pay a copyright collective millions of dollars annually and retroactively, in addition to the licence fees that the institution has already paid to secure permissions from other sources. The disproportionate liability issue is potentially exacerbated by the Copyright Board’s notoriously long delays in holding hearings and rendering decisions.<sup>22</sup> The Proposed Interveners will submit that the *Copyright Act* does not support such an outcome, that such an outcome is

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<sup>20</sup> AK Affidavit at para 24, MR, Tab 3; Ariel Katz. “Spectre: Canadian Copyright and the Mandatory Tariff - Part I”, (2015) 27(2) Intellectual Property Journal 151-211; See *York University v Access Copyright*, [2020 FCA 77](#) at para 32.

<sup>21</sup> AK Affidavit at para 24, MR, Tab 3.

<sup>22</sup> Howard Knopf, “EXCESS COPYRIGHT: More on Recent and Current Developments at and Concerning the Copyright Board of Canada”, online <[http://excesscopyright.blogspot.ca/2014/11/more-on-recent-and-current-developments\\_28.html](http://excesscopyright.blogspot.ca/2014/11/more-on-recent-and-current-developments_28.html)>.

harmful to many academic authors, and that Parliament could not have intended to bring it about. Yet, this is the view that copyright collectives promote, and which would be the consequence if the decision below is overturned.

**(ii) *The issue of fair dealing cannot properly be addressed in proceedings by a copyright collective such as Access Copyright***

28. The Proposed Interveners will also make submissions on the issue of fair dealing. The Proposed Interveners will suggest that, as a matter of law, the issue of fair dealing should not be addressed in legal proceedings by a copyright collective who does not own the copyright in the works included in its repertoire, and therefore has no standing to seek a declaration of infringement (to which the defence of fair dealing is raised). The Proposed Interveners will submit that for similar reasons, there can be no *lis* between a user (like York University) and a copyright collective (like Access Copyright) regarding copyright infringement or lack thereof, the existence of which could justify the grant of a declaratory judgment.

29. The Proposed Interveners will suggest that the adjudication of these issues in such circumstances may be prejudicial to both defendants and copyright owners. It can lead to incorrect outcomes without the correct parties and without an adequate factual record. It deprives defendants of important procedural and evidentiary safeguards. It may also be injurious to copyright owners who, by not assigning their copyrights to a collective such as Access Copyright, have chosen to retain full autonomy with respect to the enforcement of their copyrights and views on what constitutes fair dealing for their works. The Proposed Interveners will suggest that conventional rules of standing should be applied to avoid such difficulties.

30. The Proposed Interveners will also explain how, as a result, the lower court reached findings on fair dealing that, if upheld by this Court, will weaken this Court's previous important precedents on this matter.

31. The Proposed Interveners respectfully request to be granted leave to file a factum not exceeding 15 pages. Although this request exceeds the normal page limits for an intervener factum, there are effectively two separate appeals that raise numerous important issues, and the Proposed Interveners will be able to be more useful to the Court if granted the additional pages.

**PART IV - SUBMISSION ON COSTS**

32. The Proposed Interveners seek no costs and ask that none be awarded against them.

**PART V - ORDER**

33. The Proposed Interveners seek an Order:


- (a) Granting leave to intervene in this appeal pursuant to Rule 55 of the *Rules of the Supreme Court*;
- (b) Permitting them to file a joint factum of not more than 15 pages in length;
- (c) Permitting them to oral argument at the hearing of the appeal for not more than five minutes; and
- (d) Directing that no costs be payable to them or awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of March, 2021.



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## PART VI - LIST OF AUTHORITIES

|    | Authority   | Cited in Paras. | Paras. cited |
|----|---|-----------------|--------------|
| 1. | <i>Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)</i> , <a href="#">2012 SCC 37</a> | 2, 7(a)         |              |
| 2. | <i>CBC v SODRAC</i> , <a href="#">2015 SCC 57</a>   | 2, 7(b), 23     | ¶101-113     |
| 3. | <i>Keatley Surveying Ltd. v. Teranet Inc.</i> , <a href="#">2019 SCC 43</a>                                       | 7(c)            | ¶10          |
| 4. | <i>R v Finta</i> , <a href="#">[1993] 1 SCR 1138</a>  | 10              | p. 1142      |
| 5. | <i>York University v Access Copyright</i> , <a href="#">2020 FCA 77</a>   | 25              | ¶32          |

|    | Secondary Sources   | Cited in Paras. | Paras. cited |
|----|---|-----------------|--------------|
| 1. | <i>Access Copyright – Educational Institutions Tariff (2010-2015), Interim Decision of the Board</i> (29 May 2013). Online: <a href="https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366750/index.do">https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366750/index.do</a>   | 22              | ¶8, 11       |
| 2. | Ariel Katz. “Spectre: Canadian Copyright and the Mandatory Tariff - Part I”, (2015) 27(2) <i>Intellectual Property Journal</i> 151-211. Online: <a href="https://tspace.library.utoronto.ca/bitstream/1807/100285/1/Spectre%20IPJ%2027.2%20Katz%20FINAL.pdf">https://tspace.library.utoronto.ca/bitstream/1807/100285/1/Spectre%20IPJ%2027.2%20Katz%20FINAL.pdf</a> | 25              |              |
| 3. | Howard Knopf, “EXCESS COPYRIGHT: More on Recent and Current Developments at and Concerning the Copyright Board of Canada”, online: <a href="http://excesscopyright.blogspot.ca/2014/11/more-on-recent-and-current-developments_28.html">http://excesscopyright.blogspot.ca/2014/11/more-on-recent-and-current-developments_28.html</a>                              | 26              |              |



## PART VII - STATUTORY PROVISIONS

|    | <b>Statutes, Regulations, Rules, etc.</b>                  | <b>Cited in<br/>Paras.</b> | <b>Section,<br/>Rule,<br/>Etc.</b> |
|----|--|----------------------------|------------------------------------|
| 1. | <i>Rules of the Supreme Court of Canada</i> , SOR/2002-156 | 10                         | <a href="#">55, 56,<br/>57</a>     |
|    | <i>Règles de la Cour suprême du Canada</i> (DORS/2002-156) | 10                         | <a href="#">55, 56,<br/>57</a>     |