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)

AND BETWEEN:

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, AUTHORS ALLIANCE AND ARIEL KATZ

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 CANADA; CANADIAN MUSICAL REPRODUCTION RIGHTS AGENTCY 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, 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 AND STATEMENT OF FACTS

1. In 2004, then Chief Justice McLachlin, writing for a unanimous Court, rendered its landmark decision in *CCH v LSUC*, a decision that has taken its place in the international pantheon of foundational copyright law decisions.[1] In *CCH*, and in two subsequent decisions, this Court affirmed that that fair dealing is a users' right, as integral to copyright law as the rights of copyright owners, and therefore should be given a large and liberal interpretation.[2]

2. According to the author of a leading U.S. copyright treatise:

> What Judge Leval, Chief Justice Beverley McLachlin, and the early common-law judges who created fair use understood is that copyright is a system; it is not a thing, it is not a property right. Copyright is a means to an end, the end being to encourage learning. All learning is a community experience, and one that takes place over generations, over decades, over centuries. For any system to function, it must take into account, in a meaningful, liberal way, the manner in which humanity proceeds. In the case of copyright, this means that fair use must be viewed as an integral part of the system, and not a begrudging exception to a Hobbesian state of nature where ruthless enforcement of exclusive rights as private property is the ideal.[3]

3. The vision that Access Copyright urges the Court to adopt not only relegates the right of fair dealing to a "begrudging exception", but also hopes to transform a regulatory scheme designed to ensure the public benefits of collective administration (when they exist) into a ruthless enforcement mechanism contrary to Parliament's intent.

4. Authors Alliance has nearly 2,000 members, including many academic authors, from the United States, Canada, and other countries. Authors Alliance and Professor Ariel Katz (together, "Authors Alliance") ask this Court to consider the interests of authors who want to serve the public good by sharing their creations broadly and who support copyright rules that prioritize dissemination of their works over excessive restrictions on their use.

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[1] *CCH v Law Society*, 2004 SCC 13 [*CCH*].
[2] *Society of Composers, Authors and Music Publishers of Canadian v Bell Canada*, 2012 SCC 36 at paras 15, 27; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 19.
[3] William F. Patry, *Patry on Copyright, vol 4* (Thomson Reuters, 2021) (loose-leaf) at §10:2, AA & AK, Book of Authorities ("BOA"), Tab 8.

PART II - STATEMENT OF INTERVENERS' POSITION

5. Authors Alliance urges this Court not to assume that the positions put forward by Access Copyright represent those of authors or creators as a whole.

6. On the fair dealing issue, Authors Alliance submits that the decision of the FCA undermines the robustness of the fair dealing doctrine as affirmed by this Court in *CCH*, *Bell*, and *Alberta (Education)*. Further, in the absence of specific allegations of copyright infringement by plaintiffs who own the copyrights, the lower courts should not have dealt with the issues of infringement and fair dealing. Unfortunately, the lower court's willingness to deal with these issues without the proper plaintiffs led them to consider an irrelevant record and resulted in a misguided approach to fair dealing that undermines users' rights and the interests of many authors.

7. The only real question which could settle a live controversy between the parties is whether approved tariffs are mandatory vis-à-vis users. Authors Alliance agrees with the FCA that they are not, and construing them as such will result in troubling and incoherent consequences.

PART III - STATEMENT OF ARGUMENT

A. ACCESS COPYRIGHT DOES NOT REPRESENT INTERESTS OF ALL AUTHORS

8. Authors are not a monolith. Most works used for research and teaching in universities are academic works created by academic authors.[4] Access Copyright does not reflect the views, interests, and values of all authors—and certainly not all academic authors. This Court, like courts elsewhere, should recognize these divergent interests[5] and not be swayed by Access Copyright's rhetoric on the plight of creators in which its submissions are infused.[6]

9. Authors Alliance embodies the balance between protection and dissemination that copyright law seeks to achieve. Authors Alliance seeks to advance the interests of authors who want to serve the public good by sharing their creations broadly. Strong users' rights and a diversity

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[4] See John Willinksy & Catherine Baron, "What Should Students Pay for University Course Readings? An Empirical, Economic, and Legal Analysis" (Stanford University, 2021), SciELO preprints.1694 [Unpublished] [*Willinsky*].

[5] See e.g., *Authors Guild, Inc. v Google Inc.*, 770 F Supp 2d 666 at 679-80 (SDNY 2011).

[6] Ann Bartow, "Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely" (1998) 60:1 U Pitt L Rev 149 at 151-52, BOA, Tab 2.

of approaches to licensing and dissemination further this goal, while a feeble fair dealing doctrine or mandatory tariffs stymie it.

10. Authors Alliance's members achieve their goal of broad dissemination in myriad ways. Even when their works are published under conventional "all rights reserved" models, their members' interests are best served with a robust application of users' rights, like fair dealing, that does not unduly interfere with their dissemination goals, particularly in educational contexts.

11. Fair dealing can facilitate engagement with works that users would otherwise forego due to the cost or difficulty of licensing, allowing authors to reach new readers without interfering with the normal market for their works. Fair dealing also helps authors build reputation because the uses it enables signal that the author has made significant contributions to his or her field. Even for non-academic authors (and even for small publishers), the benefits of wide readership and the signals they send often generate greater economic gains than the gains from royalties.[7]

12. Access Copyright implies that it represents the interests of all creators by overstating its rights and repertoire. Access Copyright claims that "York's faculty and staff copied 17.6 million unauthorized pages." In so doing, Access Copyright implies that every copy relevant to York's fair dealing guidelines in either coursepacks or LMS originates from its repertoire and is not otherwise licensed to York. Further, Access Copyright's assertions about the breadth of its repertoire are not supported by any evidence and are highly suspect.[8]

13. Recent decisions of the Copyright Board have confirmed that there was no basis for Access Copyright's assertion that its repertoire includes all published works, without regard as to whether there is any relationship between it and the rights holder. Based on those assertions, Access Copyright has collected royalties for the use of works that are not owned by any of its affiliates, and distributed it among its affiliates. [9] When Access Copyright and its affiliates complain that the amount of royalties they receive has shrunk following many educational institutions' decision to

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[7] See Eli MacLaren, "Copyright and Poetry in Twenty-First-Century Canada: Poets' Incomes and Fair Dealing" *Literary History*, Spec. issue of Canadian Literature 233 (Summer 2017): 10-27.
[8] Howard P. Knopf, "Copyright Collectivity in the Canada Academic Community: An Alternative to the Status Quo?", (1999) 114 IPJ 109 at 120-122, BOA, Tab 4.
[9] Access Copyright - Tariffs for Post-Secondary Educational Institutions, 2011-2017, CB-CDA 2019-082 at paras 126-155. See also Access Copyright - Tariff for Provincial and Territorial Governments, 2005-2014, CB-CDA decision dated 2015-05-22 at paras 117-149.

forego Access Copyright licences, they largely complain about the loss of those payments to which they have never been legally or even morally entitled.[10]

14. Moreover, since Access Copyright is not an assignee or exclusive licensee of the copyrights owned by its affiliates, even works in its repertoire can and are licensed in alternative ways. The record showed that York licensed much of the material used by faculty by other means such as library consortia who license directly from publishers.[11] The literature indicates that this licensing approach is common amongst universities generally. By the second decade of the twenty-first century, "[s]cholarly publishing had largely moved to cloud-based online access through institutional licensing from publishers to university libraries, and with a small but growing proportion of open access materials."[12] Photocopying made the works that university libraries purchased more usable and hence more valuable, and publishers developed business models that allowed them to appropriate this additional value either directly or indirectly.[13]

B. THE ROBUST APPROACH TO FAIR DEALING IN CCH MUST BE RE-AFFIRMED

15. Authors Alliance supports York's position that the robust approach to fair dealing in *CCH* must be re-affirmed and agrees that the courts below misapplied the *CCH* framework in its fair dealing analysis.[14] As other interveners will be addressing many of these problems, Authors Alliance's submissions will highlight how many of errors made below are a symptom of two related problems: (1) Access Copyright's lack of standing to seek any remedy for any alleged copyright infringement; and (2) the bifurcation of issues related to alleged unauthorized copying of any specific works to Phase II of the action. As a result, the fair dealing questions were determined in the abstract, without being anchored in any analysis of any specific instance of

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[10] House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 42-1, No 141 (3 December 2018) at 1540 (Ariel Katz).
[11] Factum of the Appellant, York University at paras 23-27.
[12] *Willinsky*, *supra* at 2. See also Bita Amani, "Access Copyright and the Proposed Model Copyright License Agreement: A Shakespearean Tragedy" (2012) 24 IPJ 221 at 226, BOA, Tab 1; Lisa Macklem & Samuel Trosow, "Fair Dealing, Online Teaching and Technological Neutrality: Lessons from the COVID-19 Crisis" 32 IPJ 215 at para 242, BOA, Tab 6.
[13] Liebowitz, S.J., "Copying and Indirect Appropriability: Photocopying of Journals" (1985) 93:5 J Polit Econ at 945–957, BOA, Tab 5; Ariel Katz, "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge" (2016) 13 J Law Policy Inf Soc 81 at 119.
[14] Factum of the Appellant, York University at paras 2-7.

alleged infringement. The analysis of the sixth *CCH* fairness factor, the effect of the dealing on the work, provides a clear example where the courts below went astray.

(i) Errors in assessing the effect of the dealing on the work

16. The effect of the dealing addresses whether the reproduced work is likely to compete with the market for the original work.[15] This factor is intended to consider the market impact of the defendant's action with respect to the plaintiff's work on the sales of that particular work. Since copyright infringement interferes with the owner's legal interest in her work, the fair dealing inquiry examines the defendant's actions and their impact *on that work*, not on other works. In the university context, if a teacher includes a chapter from a monograph in a coursepack, the "effect of the dealing" factor inquires as to how the reproduction of that chapter affects the sales of that monograph. If the owner of the copyright in the monograph sues and can prove that sales of the monograph have declined as a result of the reproduction of the chapter, then the dealing may be found to be less fair. Evidence regarding impact on the sales of *other works* is irrelevant.

17. Nevertheless, the courts below based their decision precisely on this type of evidence. Although the FCA recognised that evidence on the effect of the dealing was general and not specific to York's actions,[16] the FCA still accepted the trial judge's findings about the effect of the dealing. It should not have done so. This case concerns the production of physical and digital "coursepacks",[17] namely "bound compilation[s] of materials selected by the instructors [which] often contain a course outline or syllabus, course notes, and course materials such as excerpts from books, journal articles, and other miscellaneous materials."[18] Access Copyright maintains that they often comprise "journal articles, short stories, poems, and essays from … anthologies."[19] Coursepacks are not copies or excerpts from textbooks, and Access Copyright never argued otherwise. Therefore, in analyzing the "effect of the dealing" the only relevant question had to be how the copying of any journal article, essays, or book excerpt affected the market for the specific journal article, essay, or book.

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[15] *CCH supra* at paras 59-60.
[16] *York University v Access Copyright*, 2020 FCA 77 at para 298.
[17] Factum of the Respondent, Access Copyright at para 7.
[18] *Access Copyright v York University*, 2017 FC 669 at para 47.
[19] Factum of the Respondent, Access Copyright at para 39.

18. Despite this, the trial judge's finding of harm focus on the decrease in the sales of textbooks, which he attributed in part to an increase in the use of coursepacks. Even if that causality were correct, it is irrelevant because the textbooks are not the works that were copied. Similarly, the trial judge found harm resulting in a decrease in the royalties that Access Copyright distributes to publishers and authors, without any analysis and any record showing that the publishers and authors who receive smaller royalties from Access Copyright are those whose works were copied in the coursepacks. Nor could any such findings be made, because the evidence presented in this phase of the action focused on aggregate numbers of copies made and not on any particular works.

19. Access Copyright's assertion that the trial judge identified the *Hockey Sweater* as "regularly copied from an anthology" is unsupported—that was an example used by counsel in argument and not a finding of fact. This misstatement is exemplary of the problem with the trial court's approach: an abstract consideration of fair dealing rather than the fact-driven analysis required by *CCH*. If bad facts make bad law, then no facts make dreadful law.

(ii) No standing and no lis

20. Access Copyright had no standing to sue for copyright infringement, yet asks the Court to make any findings of infringement.[20] Even if York had infringed any copyright, it would only be answerable to the owner of the copyright, but not to Access Copyright. Therefore, there was no *lis* between York and Access Copyright regarding copyright infringement or lack thereof, hence no "live controversy" which could justify considering the declaration that York sought in the counterclaim.[21]

21. As a non-exclusive licensing agent for its affiliates, Access Copyright had no standing to sue over matters of infringement. Issues like standing that form the backdrop of this litigation are not new issues.[22] The *Act* and the case law are clear that a non-exclusive licensee or agent has no

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[20] *York University v Access Copyright*, 2020 FCA 77 at para 205; *Tele-Metropole v Bishop*, 80 NR 302.
[21] *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99 at para 11.
[22] *R v Mian*, 2014 SCC 54 at para 34.

standing to initiate legal proceedings to protect and enforce copyrights.[23] Once Parliament has spoken, a person who does not meet the statutory criteria has no standing.[24]

22. Technically, the cause of action in this case was not copyright infringement per se. Access Copyright did not plead under Sections 3(1), 27(1) or 27(2), but rather Section 68.2(1), on the theory that that section entitled it to compel York to pay royalties under the tariff. However, even under its theory, it could only enforce the tariff if infringement had occurred. Access Copyright asked the Court to make findings of infringement (of at least 87 works in Schedule B of its pleading), without joining the owners of the copyrights in those works as parties. This should not be permitted. Enforcement of a copyright by someone other than the owner may be prejudicial to users and copyright owners alike, which is why the legal owner is always a necessary party.[25] It can expose a user to several actions, with respect to the same act, brought by different plaintiffs. It can deprive users of important procedural and evidentiary safeguards such as the requirement of a plaintiff in a copyright infringement action to prove ownership of copyright in the works alleged to be infringed and that it has been used without the consent of the owner.[26] It may also be injurious to owners by interfering with their autonomy to decide how best to protect their interests.

23. In the present case, ignoring such established rules on standing has also caused to courts below to go astray and make findings about infringement and fair dealing based on aggregate findings and general assumptions, without connecting those findings to any record regarding instances of specific works being copied. Authors Alliance urges this Court not to endorse the Federal Court's out-of-context adjudication of fair dealing or its approach to the *CCH* factors.

C. TARIFFS ARE VOLUNTARY, NOT MANDATORY

24. Authors Alliance supports the FCA's finding that approved tariffs bind copyright collectives but cannot be imposed on users. Its submissions: (i) discuss the concept of a "business

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[23] *Copyright Act*, RSC 1985, c C-42, ss 41.23(1) & 89 as they appeared on 14 November 2014.
[24] *Jeffrey Rogers Knitwear Productions Ltd v RD International Style Collection Ltd*, [1986] F.C.J. No. 957 at para 22.
[25] *Copyright Act*, RSC 1985, c C-42, s 41.23(2). See also *Performing Right Society Ltd v London Theatre of Varieties Ltd*, [1923] All ER Rep Ext 794 at 799.
[26] *Harmony Consulting Ltd. v G.A. Foss Transport Ltd.*, 2012 FCA 226 at paras 28-32.

affected with a public interest;" and (ii) highlight some of the incoherent and difficult outcomes of the mandatory tariff theory.

(i) The concept of a "business affected with a public interest"

25. In describing the statutory scheme and its rationale, Duff CJ in *Vigneux* considered it a matter of "first importance" to note Parliament's recognition that copyright collectives were "engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation."[27] Duff CJ did not make a banal statement on the public interest, but anchored his analysis in a broader historical context.

26. The concept of a "business affected with a public interest" was the common law foundation for the regulation of various public utilities and common carriers,[28] from which more elaborate regulatory schemes grew. It was based on imposing on private entities "affected with a public interest", typically those enjoying a legal or natural monopoly, a duty to provide their service to all who wished to use the service on fair, reasonable, and nondiscriminatory terms.[29]

27. As regulatory schemes became more sophisticated, the common law duty was supplemented with requirements to advertise or file with a regulator "tariffs" setting out such prices, terms, and conditions under which the service must be provided to anyone willing to pay.[30] Found in diverse sectors, such as airline travel; rail freight; oil and gas pipelines; or telecommunications, such tariffs require the regulated service providers to provide service to anyone who wishes to receive it, but the tariff cannot be imposed on third parties.[31]

28. Access Copyright hinges its argument on the 1997 statutory changes that introduced the word "tariff".[32] However, as the FCA explained, not only did Parliament use the word in the

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[27] *Vigneux v Canadian Performing Right Society Ltd.*, [1943] SCR 348 at 353.
[28] See *Munn v Illinois*, 94 US 113 (1877) at 125-27.
[29] Ariel Katz, "The Chicago School and the Forgotten Political Dimension of Antitrust Law" (2020) 87 U Chi L Rev 413 at 427. See also Richard A. Epstein, "The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates" (2013) 38 J S Ct Hist 345 at 346, BOA, Tab 3.
[30] See e.g., *ABB Inc. v Canadian National Railway Company*, 2020 FC 817 at paras 31-33.
[31] *Goderich-Exeter Railway Company Limited v Shantz Station Terminal Ltd.*, 2020 ONCA 560 (CanLII) at para 67.
[32] Factum of the Appellant, Access Copyright at paras 35 & 37.

marginal note of the pervious legislation, the word itself, which appears in other similar regulatory contexts, says nothing about who has to pay the tariff and when.[33] Indeed, an ordinary meaning of the word *tariff* in English or *tarif* in French is an advertised price, or "simply ... a list of tolls or rates."[34] It is derived from the Arabic word *ta'rif(a)*, which is based on the word '*arrafa*' and means 'notify'.[35] In 1997, Parliament simply replaced the phrase "statements of all fees, charges, or royalties" etc. with the more elegant word "tariff". If Parliament intended to flip that regulatory scheme on its head and allow monopolists to impose themselves on users, such intention should have been communicated with "irresistible clearness" as this Court has explained numerous times.[36]

(ii) The troubling and incoherent consequences of mandatory tariffs

29. Finally, the mandatory tariff theory gives rise to troubling and incoherent consequences, as Prof Katz describes in Spectre II. In this factum, Authors Alliance will focus on how mandatory tariffs may benefit some creators while harming others.

30. Access Copyright maintains that granting it greater powers will serve the interests of local creators, small and medium size publishers, and generally promote cultural quality and diversity.[37] Despite the rhetoric, history shows that more than once collective societies have abused their monopolistic position and played a role in marginalizing various creators.[38]

31. For example, in Canada during the 1930s, the Canadian Performing Right Society was a jointly-owned subsidiary of Britain's PRS and U.S. ASCAP, and its rules did not allow Canadian

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[33] *York University v Access Copyright*, 2020 FCA 77 at para 143.
[34] *Saskatchewan Power Corporation et al. v TransCanada Pipelines Ltd. et al.*, [1981] 2 SCR 688 at 701. See also *Promech Sorting Systems B.V. v Bronco Rentals & Leasing Ltd.*, 1994 CanLII 16668 (MB QB), at para 14, rev'd on other grounds, 1995 CanLII 11033 (MB CA).
[35] Oxford English Dictionary Online: "tariff, n.", Oxford University Press, BOA, Tab 7. See also e.g., *Trésor de la langue Française informatisé* (Université de Lorraine, 2021) sub verbo "tariff".
[36] *Rawluk v Rawluk*, [1990] 1 SCR 70 at para 36; *Goodyear Tire & Rubber Co. of Canada Ltd. v T. Eaton Co.*, [1956] SCR 610 at para 6.
[37] Factum of the Appellant, Access Copyright at para 64.
[38] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff — Part II" (2015) 28 IPJ 39 at 51 [*Spectre*].

composers and publishers to join.[39] In the U.S., ASCAP's rules excluded music genres typical to America's marginalized communities such as jazz, blues, country, folk, and Latin music. These practices began to change only after, as a result of ASCAP overplaying its monopoly hand, broadcasters sponsored the creation of a competing collective, BMI, which attracted many musicians that ASCAP had excluded.[40]

32. These exclusionary effects stem from at least three reasons. First, the economics of collective societies are such that beyond a certain point, adding more members could mean dividing essentially the same pool or rents among a larger number of members.[41] This creates an incentive to exclude some creators or allow those with greater control over the governance of the collective to devise discriminatory distribution rules. Second, the greater is the collective's market power, the higher the price it may charge, leaving users with smaller budgets for works sold or licensed by others. Third, with an "all-you-can-eat" blanket licence, the marginal cost of any additional use of a work from the collective's repertoire is zero. As a result, users who obtain the blanket licence tend to maximize the use of works from the collective's repertoire and reduce the use of other content. These problems exist even if tariffs are voluntary, but are compounded if tariffs are mandatory. [42]

PART VI - SUBMISSION ON COSTS

33. Authors Alliance seek no costs and submit that no costs should be awarded against them.

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

Sana Halwani | Paul-Erik Veel | Jacqueline Chan

LENCZNER SLAGHT LLP
Counsel for the Interveners, Authors Alliance and Ariel Katz

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[39] The Honorable James Parker, *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies* (Ottawa, ON: JO Patenaude, 1935) at 19.
[40] Ariel Katz & Eden Sarid, "Who Killed the Radio Star? How Music Blanket Licensing Distorts the Production of Creative Content in Radio" (2021) 71 Am U L Rev at 14-5 [unpublished], [*Radio Star*].
[41] *Spectre*, *supra* at 52.
[42] *Spectre*, *supra* at 47, 50-52; *Radio Star*, *supra; Broadcast Music Inc v CBS*, 441 US 1 at 32-3 (1979).

PART VII - LIST OF AUTHORITIES

	Authority	Cited in Paras.	Paras. cited
1.	*ABB Inc. v Canadian National Railway Company*, 2020 FC 817 (CanLII)	27	31-33
2.	Access Copyright - Tariff for Provincial and Territorial Governments, 2005-2014, CB-CDA decision dated 2015-05-22	13	117-149
3.	Access Copyright - Tariffs for Post-Secondary Educational Institutions, 2011-2017, CB-CDA 2019-082	13	126-155
4.	*Access Copyright v York University*, 2017 FC 669	17	47
5.	*Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, 2012 SCC 37	1	19
6.	*Authors Guild, Inc. v Google Inc.*, 770 F Supp 2d 666, 2011 U.S. Dist. LEXIS 29126 (SDNY 2011)	8	p. 679-80
7.	*Broadcast Music, Inc. v Columbia Broadcasting System, Inc.*, 441 US 1, 1979 U.S. LEXIS 84	32	32-33
8.	*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13	1, 16	56
9.	*Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99	20	11
10.	*Goderich-Exeter Railway Company Limited v Shantz Station Terminal Ltd.*, 2020 ONCA 560 (CanLII)	27	67
11.	*Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610	28	6
12.	*Harmony Consulting Ltd. v G.A. Foss Transport Ltd.*, 2012 FCA 226 (CanLII)	22	28-32
13.	*Jeffrey Rogers Knitwear Productions Ltd. v R.D. International Style Collections Ltd.*, 19 C.P.R. (3d) 217, [1986] F.C.J. No. 957	21	22
14.	*Munn v Illinois*, 94 US 113, 1876 U.S. LEXIS 1842	26	125-127

	Authority	Cited in Paras.	Paras. cited
15.	*Performing Right Society Ltd v London Theatre of Varieties Ltd*, [1923] All ER Rep Ext 794	22	p. 799
16.	*Promech Sorting Systems B.V. v Bronco Rentals & Leasing Ltd.*, 1994 CanLII 16668 (MB QB); rev'd on other grounds, 1995 CanLII 11033 (MB CA)	28	14
17.	*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, 1990 CanLII 152 (SCC)	28	36
18.	*R v Mian*, 2014 SCC 54	21	34
19.	*Saskatchewan Power Corporation et al. v TransCanada Pipelines Ltd. et al.*, [1981] 2 SCR 688	28	p. 701
20.	*Society of Composers, Authors and Music Publishers of Canadian v Bell Canada*, [2012] 2 SCR 326, 2012 SCC 36	1	15, 27
21.	*Tele-Metropole v Bishop*, 80 NR 302, [1987] F.C.J. No. 1181	20	
22.	*Vigneux v Canadian Performing Right Society Ltd.*, [1943] SCR 348, 1943 CanLII 38 (SCC)	25	p. 353
23.	*York University v Access Copyright*, 2020 FCA 77	17, 20, 28	143, 205, 298

	Secondary Sources	Cited in Paras.	Paras. cited
1.	Amani, B., "Access Copyright and the Proposed Model Copyright License Agreement: A Shakespearean Tragedy" (2012) 24 IPJ 221, **BOA, Tab 1**	14	p. 226
2.	Bartow, A., "Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely" (1998) 60:1 U Pitt L Rev 149, **BOA, Tab 2**	8	p. 151-52
3.	Epstein, R.A., "The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates", 38 J S Ct Hist 345 (2013), **BOA, Tab 3**	26	346

	Secondary Sources	Cited in Paras.	Paras. cited
4.	House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 42-1, No 141 (3 December 2018) at 1540 (Ariel Katz)	13	1540
5.	Katz, A., & Sarid, E., "Who Killed the Radio Star? How Music Blanket Licensing Distorts the Production of Creative Content in Radio", (2021) 71 Am U L Rev [unpublished]	31	p. 14-15
6.	Katz, A., "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge" Ecosystem of Knowledge (August 22, 2016). 13(1) I/S: *A Journal of Law and Policy for the Information Society* 81 (2016)	14	p. 119
7.	Katz, A., "Spectre: Canadian Copyright and the Mandatory Tariff — Part II" (2015) 28 IPJ 39	30, 32	47, 50-52
8.	Katz, A., "The Chicago School and the Forgotten Political Dimension of Antitrust Law" (2020) 87 U Chi L Rev 413	26	427
9.	Knopf, H.P., "Copyright Collectivity in the Canada Academic Community: An Alternative to the Status Quo?", (1999) 114 IPJ 109, **BOA, Tab 4**	12	p. 120-122
10.	Liebowitz, S.J., "Copying and Indirect Appropriability: Photocopying of Journals" *Journal of Political Economy*, Vol. 93, No. 5 (Oct., 1985), pp. 945-957, **BOA, Tab 5**	14	
11.	Macklem, L., & Trosow. S., "Fair Dealing, Online Teaching and Technological Neutrality: Lessons from the COVID-19 Crisis" *Intellectual Property Journal* 32 I.P.J. 215, **BOA, Tab 6**	14	242
12.	MacLaren, E., "Copyright and Poetry in Twenty-First-Century Canada: Poets' Incomes and Fair Dealing" in *Literary History*, Canadian Literature 233 (Summer 2017)	11	10-27
13.	Oxford English Dictionary Online: "tariff, n.", Oxford University Press, **BOA, Tab 7**	28	
14.	Parker, James, Report of His Honour Judge Parker, a Commissioner appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to Order in Council no. 738, dated March 22nd, 1935, *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian*	31	19

	Secondary Sources	Cited in Paras.	Paras. cited
	Performing Rights Society, Limited, and Similar Societies (Canada. Privy Council Office, Ottawa: J.O. Patenaude, King's Printer, 1935)		
15.	*Trésor de la langue Française informatisé* (Université de Lorraine, 2021) sub verbo "tariff"	28	
16.	William F. Patry, *Patry on Copyright, vol 4* (Thomson Reuters, 2021) (loose-leaf) at §10:2, **BOA, Tab 8**	2	§10:2
17.	Willinksy, J., and Baron, C., "What Should Students Pay for University Course Readings? An Empirical, Economic, and Legal Analysis", SciELO Preprints.1694 [unpublished]	8, 14	

STATUTORY PROVISIONS

	Statutes, Regulations, Rules, etc.	Cited in Paras.	Section, Rule, Etc.
1(a)	*Copyright Act*, RSC 1985, c C-42, ss 41.23(1) and 89, Version of document from 2014-08-13 to 2014-12-08	21	41.23(1) & 89
1(b)	*Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42, art. 41.23(1) & 89, Version du document du 2014-08-13 au 2014-12-08	21	41.23(1) & 89
2(a)	*Copyright Act*, RSC 1985, c C-42, as amended, s. 41.23(2)	22	s. 41.23(2)
2(b)	*Loi sur le droit d'auteur,* L.R.C. (1985), ch. C-42, art. 41.23(2)	22	art. 41.23(2)