



SUPREME COURT OF CANADA

CITATION: York University v.
Canadian Copyright Licensing
Agency (Access Copyright),
2021 SCC 32

APPEALS HEARD: May 21, 2021
JUDGMENT RENDERED: July 30,
2021
DOCKET: 39222

BETWEEN:

York University
Appellant

and

Canadian Copyright Licensing Agency (“Access Copyright”)
Respondent

- and -

**Société québécoise de gestion collective du droit de reproduction (COPIBEC),
Authors Alliance, Ariel Katz, Canadian Association of Law Libraries,
Canadian Association of University Teachers, Canadian Federation of
Students, Samuelson-Glushko Canadian Internet Policy and Public Interest
Clinic, Centre de droit des affaires et du commerce international, Chaire L. R.
Wilson sur le droit des technologies de l’information et du commerce
électronique, Copyright Collective of Canada, Canadian Musical
Reproduction Rights Agency Ltd., Canadian Retransmission Collective,
CONNECT Music Licensing Service Inc., Société de gestion collective des
droits des producteurs de phonogrammes et de vidéogrammes du Québec,
Canadian Media Producers Association, 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, 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’industrie du disque, du spectacle et de la vidéo, Professional**

**Music Publishers Association, Canadian Independent Music Association,
Colleges and Institutes Canada and Universities Canada**
Intervenors

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de phonogrammes et de vidéogrammes du Québec, Association of Canadian
Publishers, Canadian Publishers’ Council, Writers’ Union of Canada,
Canadian Association of Research Libraries, Music Canada, Canadian Music
Publishers Association, Association québécoise de l’industrie du disque, du
spectacle et de la vidéo, Professional Music Publishers Association, Canadian
Independent Music Association and Universities Canada**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR Abella J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,
JUDGMENT: Brown, Rowe, Martin and Kasirer JJ. concurring)
(paras. 1 to 108)

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York University

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Canadian Independent Music Association and
Universities Canada**

Intervenors

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2021 SCC 32

File No.: 39222.

2021: May 21; 2021: July 30.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Tariffs — Enforcement — Fair dealing — Declaratory relief — Collective society obtaining certification of interim tariff for post-secondary educational institutions — University refusing to pay royalties under interim tariff for its copying activities — Collective society bringing enforcement action — University bringing counterclaim seeking declaration that copying conducted within its fair dealing guidelines protected by fair dealing rights — Whether collective society can enforce royalty payments set out in tariff against user who chooses not to

be bound by licence on the approved terms — Whether declaratory relief sought by university should be granted — Copyright Act, R.S.C. 1985, c. C-42, ss. 29, 68.2(1).

Access Copyright (“Access”) is a collective society who licences and administers reproduction rights in published literary works on behalf of creators and publishers. From 1994 to 2010, a licence agreement permitted professors at York University (“York”) to make copies of published works in Access’s repertoire and set the applicable royalties. As licence renewal negotiations were underway, the relationship between Access and York deteriorated, resulting in Access filing a proposed tariff with the Copyright Board for post-secondary educational institutions. Unsure that it would be able to reach an agreement with York before the expiry of its licence, Access applied to the Board for certification of a tariff on an interim basis, generally matching the pre-existing licence agreement, to operate until the Board approved a final tariff. The Board granted Access’s request for an interim tariff. York initially paid the approved royalties, but eventually informed Access that it would not continue as a licensee.

Access sought enforcement of the interim tariff in the Federal Court, and York counterclaimed for a declaration that any copying conducted within its fair dealing guidelines was protected by fair dealing rights under the *Copyright Act*. The trial judge found that the interim tariff was enforceable against York and that neither its guidelines nor its actual practices constituted fair dealing. The Federal Court of Appeal allowed York’s appeal on the tariff enforcement action, holding that Board approved tariffs are voluntary for users, but dismissed its appeal on the fair dealing

counterclaim. Access appeals to the Court on the tariff issue, and York appeals from the dismissal of its fair dealing counterclaim.

Held: The appeals should be dismissed.

The tariff is not enforceable against York. Section 68.2(1) of the *Copyright Act* does not empower Access to enforce royalty payments set out in a Board approved tariff pursuant to s. 70.15 against a user who chooses not to be bound by a licence on the approved terms. Section 68.2(1) does not provide a collective infringement remedy. A collective society is required to provide licences pursuant to the terms of an approved tariff, but the licence cannot be forced on a user. A user is entitled to obtain its rights through other means and, if the user makes an unauthorized use, the appropriate remedy is an action for infringement. While Access's inability to initiate infringement actions as a non-exclusive licensee may cause it difficulties, this is the consequence of its freely chosen contractual arrangements with its members.

The text, legislative context, purpose and supporting jurisprudence confirm this interpretation. As a collective society that administers a licensing scheme in respect of reproduction rights applicable to its repertoire of published works, Access operates within the *Copyright Act*'s general regime for collective administration (ss. 70.1 to 70.6). Once a tariff is approved under s. 70.15(1), the resulting legal consequences are established by ss. 70.15(2) and 70.17. Section 70.15(2) says that s. 68.2(1), which is found in the *Copyright Act*'s separate regime for the collective administration of performing rights and communication rights, applies "with such modifications as the

circumstances require”. Section 68.2 provides that a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction. Section 70.17 states that “no proceedings may be brought for the infringement of a right . . . against a person who has paid or offered to pay the royalties specified in an approved tariff”.

The text of s. 68.2(1) is silent on who the collective society may collect royalties from and on what conditions. Where Parliament sees fit to create a mandatory duty to pay, it generally does so with clear and distinct legal authority showing that this was its intent. There is no such language creating a duty to pay approved royalties to a collective society that operates a licensing scheme anywhere in the *Copyright Act*. Concluding otherwise would read words into the provision that are not found anywhere in the text of the *Copyright Act*.

With respect to the legislative context, the combined effect of ss. 68.2(1) and 70.17 creates a dichotomy between users who choose to be licensed pursuant to the terms of a Board approved tariff, and those who choose not to acquire a licence. Copyright infringement constitutes an unauthorized exercise of the owner’s exclusive right and a licence constitutes an authorization to make a particular use that would otherwise be infringing. It is therefore elementary that a person cannot simultaneously be an infringer and a licensee. A person who has paid or offered to pay the royalties under s. 70.17 has become a licensee and may accordingly be liable for defaulted payments under s. 68.2(1). But a person who has not paid or offered to pay is not

licensed and may only be liable for infringement. Section 68.2(1) thus ensures that a collective society has a remedy for defaulted payments from voluntary licensees and that actions for recovery can be brought in Federal Court.

The object of the statutory scheme governing collective administration is the protection of users, and this purpose has persisted through various amendments to the *Copyright Act*. The first regime regulating any form of collective society in Canada was created in response to the emergence of early performing rights societies who had acquired control of the vast majority of “popular musical” compositions. Regulating collective societies was deemed necessary by Parliament and was done by vesting the Board with price-setting powers to protect users from the potentially unfair exertion of the new societies’ market power. Though an approved statement of royalties put a cap on what the societies could charge for a licence, it did not bind an unwilling user to the terms of a licence. Empowering a society to foist a licence on an unwilling user would be discordant with the protective purpose of the regime. Users are therefore entitled to choose whether or not to accept a licence on Board-approved terms.

It would be inappropriate to entertain York’s request for declaratory relief in these proceedings. In light of the conclusion that the interim tariff is not mandatory and is therefore unenforceable against York, there is no live dispute between the parties. This is not an action for infringement, since Access has no standing to bring such an action. Furthermore, the copyright owners who do have standing are not parties to these proceedings and have not had the opportunity to advance arguments about the impact of York’s activities on their copyrighted works. Assessing fair dealing guidelines in the

absence of a genuine dispute between proper parties would anchor the analysis in aggregate findings and general assumptions without a connection to specific instances of works being copied.

However, the reasoning of the Federal Court and Federal Court of Appeal on the fair dealing issue is not endorsed. It is well-established that the party invoking fair dealing must prove first that the dealing was for an allowable purpose and, second, that it was fair. Six non-exhaustive factors provide a framework for assessing fairness, which is ultimately a question of fact: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work. At the second step, the Federal Court and Federal Court of Appeal approached the analysis from an institutional perspective only, leaving out the perspective of the students who use the materials. This error tainted the analysis of several fairness factors. The purpose of copying conducted by university teachers for student use is for the student's education. Funds saved by proper exercise of the fair dealing right go to this core objective, and not to some ulterior commercial purpose. Ultimately, the question in a case involving a university's fair dealing practices is whether those practices actualize the students' right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the *Copyright Act*. In the present case, by focusing on the institutional nature of the copying, the nature of fair dealing as a user's right was overlooked and the fairness assessment was over before it began.

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Guy Pratte and John C. Cotter, for the appellant/respondent York University.

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Jeremy de Beer, for the interveners the Canadian Association of University Teachers and the Canadian Federation of Students.

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Ysolde Gendreau, for the interveners 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.

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John E. Callaghan, for the intervener the Copyright Collective of Canada.

Erin Finlay, for the interveners the Canadian Musical Reproduction Rights Agency Ltd., the Canadian Retransmission Collective, CONNECT Music Licensing Service Inc. and Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec.

Erin Finlay, for the interveners the Canadian Media Producers Association and Association québécoise de la production médiatique.

Stéphane Caron, for the interveners the International Authors Forum, the International Federation of Reproduction Rights Organisations and the International Publishers Association.

Brendan van Niejenhuis, for the interveners the Association of Canadian Publishers, the Canadian Publishers' Council and the Writers' Union of Canada.

Howard P. Knopf, for the intervener the Canadian Association of Research Libraries.

Wanda Noel, for the intervener the Copyright Consortium of the Council of Ministers of Education, Canada.

Casey M. Chisick, for the interveners Music Canada, the Canadian Music Publishers Association, Association québécoise de l'industrie du disque, du spectacle et de la vidéo, the Professional Music Publishers Association and the Canadian Independent Music Association.

J. Aidan O'Neill, for the intervener Colleges and Institutes Canada.

David Kent, for the intervener Universities Canada.

The judgment of the Court was delivered by

[1] These appeals raise issues of fundamental importance to the rights and liabilities of Canadian universities and their students under the *Copyright Act*.¹

Background

[2] Access Copyright is a collective society under the *Copyright Act*. It licences and administers reproduction rights in published literary works throughout Canada, with the exception of Quebec, on behalf of creators and publishers who own the copyright in those works. Access Copyright is not an assignee or an exclusive licensee of the copyright held by its members, which means that Access Copyright does not have the right to sue for infringement of its members' copyright and that Access Copyright's members are free to licence their rights to users directly or through intermediaries other than Access Copyright.

[3] York University is the third largest university in Canada. It consists of 11 faculties providing undergraduate, graduate, and professional programs and courses taught primarily at 2 campuses in Toronto. At the time of the trial, York had over 3,000 full and part-time faculty and over 45,000 full-time equivalent students. York was established by the government of Ontario through the *York University Act, 1959*,

¹ Unless otherwise stated, the provisions referenced throughout these reasons are to the version of the *Copyright Act*, R.S.C. 1985, c. C-42, in force at the time of trial and judgment, prior to the coming into force of the *Budget Implementation Act, 2018*, No. 2, S.C. 2018, c. 27, which amended certain parts of the collective administration regime.

S.O. 1959, c. 145, and continued under the *York University Act, 1965*, S.O. 1965, c. 143. Its statutory objectives are “the advancement of learning and the dissemination of knowledge” and “the intellectual, spiritual, social, moral and physical development of its members and the betterment of society” (s. 4 of the *York University Act, 1965*).

[4] Those who teach at York University select and make available copies of published works, including works falling within Access Copyright’s repertoire, to students enrolled in courses for educational purposes. Learning materials are distributed through two main methods: course packs and the learning management system. A course pack is a compilation of printed materials, printed internally at York or through external printshops. The learning management system is an online platform through which instructors can make course materials available to their students electronically.

[5] From 1994 to 2010, Access Copyright and York maintained a steady legal relationship pursuant to the terms of a licence agreement which permitted professors at York to make copies of published works in Access Copyright’s repertoire and set the applicable royalties. By 2010, the royalties payable to Access Copyright under the licence consisted of an annual blanket fee of \$3.38 per full-time equivalent student in addition to \$0.10 per page copied into a course pack for sale or distribution to students. Access Copyright would collect these royalties and distribute payments to its members, and conduct any usage monitoring incidental to the licence. The agreement between Access Copyright and York reflected a “model licence” negotiated by the Association

of Universities and Colleges of Canada, and all members of the AUCC were likewise licensed by Access Copyright.

[6] The relationship between Access Copyright and York deteriorated as licence renewal negotiations were underway in 2010, with the acrimony eventually culminating in the appeals before this Court. Access Copyright says that York started freely using materials it was obliged to pay for and that it failed to negotiate in good faith. York responded that the precipitating factors were based on legitimate decisions to obtain usage rights from sources other than Access Copyright and to make more complete use of its legal entitlement to fair dealing.

[7] Unsure that it would be able to reach an agreement with York before the expiry of its licence in January 2011, Access Copyright filed a proposed tariff with the Copyright Board of Canada in March 2010 for post-secondary educational institutions covering the years 2011-2013. The proposed tariff contemplated an increase in the annual blanket fee to \$45 per full-time equivalent student for use of the works within Access Copyright's repertoire, without a per page rate. This would have amounted to a flat annual fee of over two million dollars payable by York.

[8] Access Copyright's view was that Board approval of a tariff would create a mandatory legal relationship between Access Copyright and York (and other universities), effectively supplanting the voluntary licensing agreement that had set out the parties' rights and liabilities for the preceding 16 years. In Access Copyright's view, the full amount of the approved royalties would be payable by York as soon as York

made a single infringing use of a work within Access Copyright's repertoire, regardless of whether or not York agreed to be bound by a licence on the approved terms.

[9] Access Copyright's proposed tariff was published in the *Canada Gazette*. Just over 100 individuals and institutions filed objections.

[10] In light of the rapidly approaching licence expiry date, Access Copyright applied to the Copyright Board in October 2010 asking it to certify a tariff on an interim basis, generally matching the pre-existing licence agreement, to operate from January 1, 2011 until the Board approved a final tariff. On December 23, 2010, the Board granted Access Copyright's request for an interim tariff, based on the previous licence agreement royalty rate of \$0.10 per page for course packs and \$3.38 per full-time equivalent student (*Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be Collected by Access Copyright (Post-Secondary Educational Institutions) (Re)* (2011), 92 C.P.R. (4th) 434).

[11] After the interim tariff took effect on January 1, 2011, York initially paid the approved royalties. But in July 2011, prior to the start of the academic year, York informed Access Copyright that it would not continue as a licensee. York claimed that its copying activities involving Access Copyright's repertoire constituted fair dealing and, in any event, the interim tariff was not enforceable against it.

[12] A hearing was held by the Board in January 2016. York and some other universities had withdrawn from the proceedings in April 2012 and were not

represented at the hearing. On December 6, 2019, the Board approved final tariffs for the years 2011-2017 (*Statements of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, CB-CDA 2019-082 (online)). The royalties for universities were fixed at a blanket rate of \$24.80 per full-time equivalent student from 2011-2014 and \$14.31 per full-time equivalent student from 2015-2017.

[13] In its decision, the Board did not comment on whether the tariffs created a mandatory legal relationship between Access Copyright and universities who do not sign a licensing agreement.

[14] Access Copyright went to the Federal Court to enforce the interim tariff for copying activities engaged in by York and its employees from September 1, 2011 to December 31, 2013. Access Copyright identified cases of copying conducted by 5 professors involving 87 works within Access Copyright's repertoire. It claimed that this copying was not licensed or exempted by the concept of fair dealing. Accordingly, it said, York was liable to pay, in full, the royalties set out in the interim tariff. York said that the tariff was not enforceable against it because, among other reasons, York had not agreed to be bound by its terms.

[15] York counterclaimed for a Declaration that any copying conducted within its "Fair Dealing Guidelines for York Faculty and Staff", issued November 13, 2012, was protected by the fair dealing rights in ss. 29, 29.1 and 29.2 of the *Act*.

[16] At the Federal Court, the Case Management Judge bifurcated the trial into two Phases. Phase I included all issues relating to whether the interim tariff was enforceable against York; whether York was responsible for the copying activities of the five professors; and York's counterclaim that it was entitled to a Declaration that "any reproductions made that fall within the guidelines set out in York's 'Fair Dealing Guidelines for York Faculty and Staff (11/13/12)' . . . constitute fair dealing". The amount of unauthorized copying and York's quantum of liability under the tariff was to be determined at Phase II, if necessary. These appeals arise solely from Phase I of the trial.

[17] The trial judge found that the interim tariff was enforceable against York and that neither its Fair Dealing Guidelines nor its actual practices constituted fair dealing (2017 FC 669, [2018] 2 F.C.R. 43).

[18] The Federal Court of Appeal allowed York's appeal on the tariff enforcement action but dismissed its appeal on the fair dealing counterclaim. The court held that Board approved tariffs are voluntary for users. If a user who chooses not to be licensed under a tariff makes an unauthorized use of a work, the remedy is an infringement action which Access Copyright does not have standing to assert because it does not own the copyright in any of the works and is not an exclusive licensee or an assignee. While this disposed of the dispute between the parties, the court went on to evaluate York's appeal on the fair dealing counterclaim. It concluded that York could not establish that all copying within its Guidelines is fair and refused to issue the Declaration (2020 FCA 77, 174 C.P.R. (4th) 1).

[19] For the following reasons, I agree with the Federal Court of Appeal that the tariff is not enforceable against York University. But I would not grant York's requested Declaration, nor endorse the fair dealing analysis conducted by the Federal Court and the Federal Court of Appeal.

Analysis

[20] The question on Access Copyright's appeal is whether s. 68.2(1) of the *Copyright Act* empowers Access Copyright to enforce royalty payments set out in a Copyright Board approved tariff against a user who chooses not to be bound by a licence on the approved terms. More specifically, the issue is whether Access Copyright can extract from York the royalties set out in the interim tariff despite the fact that York chose not to be bound by a licence. While this appeal only concerns the interim tariff, it is common ground that the effect of an interim tariff and a final tariff is the same.

[21] As a collective society that administers a licensing scheme in respect of reproduction rights applicable to its repertoire of published works, Access Copyright operates within the *Act*'s regime for "Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21", known as the "general regime" (ss. 70.1 to 70.6).

[22] Pursuant to s. 70.12, a collective society operating in the general regime may, "for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses", either (a) file a proposed tariff with the Board or (b) enter

into agreements with users. A collective society that chooses to file a proposed tariff does so under s. 70.13, which permits it to “file with the Board a proposed tariff . . . of royalties to be collected by the collective society for issuing licences”. In this case, Access Copyright filed a proposed tariff with the Board setting out the royalties it proposed to collect for issuing reproduction licences to post-secondary educational institutions.

[23] When a collective society files a proposed tariff with the Board, s. 70.15(1) requires the Board to “certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs”. Here, the Board approved an interim tariff in response to Access Copyright’s proposal.

[24] The Board’s power to modify and approve a collective society’s proposed tariff is one of three sources of the Board’s supervisory and price-setting authority over a collective society’s royalties in the general regime. The Board may also fix royalties when a collective society and individual user are unable to agree on terms and one party applies to the Board (ss. 70.2 to 70.4), or alter royalties if the parties make an agreement without Board intervention that is then filed with the Board (ss. 70.5 to 70.6).

[25] Once a tariff is approved under s. 70.15(1), the resulting legal consequences are established by ss. 70.15(2) and 70.17.

[26] Section 70.15(2) says that s. 68.2(1), which is found in the *Act*'s separate regime for the collective administration of performing rights and communication rights, applies "with such modifications as the circumstances require":

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

[27] Of related relevance is s. 70.17, which states:

70.17 Subject to section 70.19, no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid or offered to pay the royalties specified in an approved tariff.

[28] The issue in this case is one of statutory interpretation, which, as this Court has repeatedly said, is an exercise in discerning legislative intent by looking at the grammatical and ordinary meaning of the text in the context of the statute's scheme and objectives.

[29] Access Copyright argues that s. 68.2(1), incorporated by reference in s. 70.15(2), means that any person who makes an otherwise unauthorized use of a work captured by an approved tariff is liable to be sued for royalties, regardless of whether the user agrees to be bound by a licence on the approved terms. This is known as the "mandatory tariff" theory. In this case, that means that any use of a work in Access Copyright's repertoire that was not separately licensed or authorized by fair dealing would trigger York's liability to pay the full annual blanket rate of \$3.38 per full-time

equivalent student (and by extension the substantially higher rates approved under the final tariffs), in addition to the per-page rate applicable to course pack copies. A single unauthorized use would result in liability to pay six figure annual fees under the interim tariff, and over one million dollars per year under the 2011-2014 final tariff.

[30] York rejects the mandatory tariff theory. In its view, s. 68.2(1) only grants a collective society the right to collect defaulted payments from a user who has agreed to be bound by a licence on the approved terms. A collective society is required to provide licences pursuant to the terms of an approved tariff, since s. 70.17 immunizes a person who pays or offers to pay the royalties from an infringement action. But the licence cannot be forced on a user. A user is entitled to obtain its rights through other means and, if the user makes an unauthorized use, the appropriate remedy is an action for infringement (see generally Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff — Part I” (2015), 27 *I.P.J.* 151 (“Spectre I”), and Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff — Part II” (2015), 28 *I.P.J.* 39 (“Spectre II”). While Access Copyright’s inability to initiate infringement actions in respect of its repertoire may cause it difficulties, this is the consequence of its freely chosen contractual arrangements with its members. Section 68.2(1) does not provide a collective infringement remedy. I agree.

[31] The analysis starts with the text of s. 68.2(1). The provision is silent on who the collective society may collect royalties from and on what conditions. Access Copyright argues nonetheless that its “plain meaning” is that a Board approved tariff is mandatory. Access Copyright reads words into the provision, positing that a collective

society may sue for unpaid royalties against a user who makes a use of a work within the society's repertoire when the use is not separately licensed or exempted by fair dealing, conditions that are found nowhere in the text of the *Act*.

[32] Where Parliament sees fit to create a mandatory duty to pay, it does so with "clear and distinct legal authority showing that this was Parliament's intent" (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 S.C.R. 615, at para. 107, per Rothstein J.). Under s. 19, for example, a performer is "entitled . . . to be paid equitable remuneration" and a user is "liable to pay royalties". Under s. 81, eligible authors, performers and makers have a "right to receive remuneration" from manufacturers and importers of blank media, and s. 82(1) prescribes a corresponding duty to pay, stating that manufacturers and importers are "liable . . . to pay a levy to the collecting body". There is no such language creating a duty to pay approved royalties to a collective society that operates a licensing scheme anywhere in the *Act*.

[33] Turning to the legislative context, the combined effect of ss. 68.2(1) and 70.17 creates a dichotomy between users who choose to be licensed pursuant to the terms of a Board approved tariff, and those who choose not to acquire a licence but may be liable for damages for infringement.

[34] Copyright infringement constitutes an unauthorized exercise of the owner's exclusive right (s. 27), and a licence constitutes an authorization to make a particular use that would otherwise be infringing (Elizabeth F. Judge and Daniel J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 146; *Eli Lilly*

& Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, at para. 49, per Iacobucci J.). It is therefore “elementary” that a person cannot simultaneously be an infringer and a licensee (*Composers, Authors and Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, at p. 254). In the context of the provisions at issue in this case, a person who has paid or offered to pay the royalties under s. 70.17 has become a licensee and may be liable for defaulted payments under s. 68.2(1). A person who has not paid or offered to pay is not licensed and may be liable for infringement.

[35] Section 68.2(1) ensures that a collective society has a remedy for defaulted payments from voluntary licensees and that actions for recovery can be brought in Federal Court (see *Sandholm Holdings Ltd.*, at pp. 249-50).

[36] This Court’s decision in *SODRAC* provides direct support for this interpretation of ss. 68.2(1) and 70.17. *SODRAC* involved the effect of ss. 70.2 to 70.4 of the *Act*, which apply when a collective society and a specific individual user are unable to agree on licensing royalties. Either party may apply to the Board (s. 70.2(1)), and the Board “may fix the royalties and their related terms and conditions in respect of a licence” (s. 70.2(2)). Unlike a general tariff proposed under s. 70.13 and approved under s. 70.15, the Board’s royalty fixing role in this context is limited to the specific parties before it. If the Board fixes royalties, then s. 70.4 sets out the legal consequences:

70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the

royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.

[37] Interpreting s. 70.4, Rothstein J. held that royalties fixed by the Board pursuant to s. 70.2 are not binding on the user. The Board does not have the “power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed” (*SODRAC*, at para. 108). A user who does not accept a licence but engages in a protected use “will remain liable for infringement” (*ibid.*).

[38] In reaching this conclusion, Rothstein J. observed that the text of s. 70.4 is permissive, showing that “a user whose copying activities were the subject of a s. 70.2 proceeding *may* avail itself of the terms and conditions established by the Board as a way to gain authorization to engage in the activity contemplated in the Board proceeding” (para. 106 (emphasis in original)). Section 68.2(1) does not itself specify that a user “may” avail itself of the tariff terms. But read alongside s. 70.17, the combined effect creates the same voluntary trigger for acquiring a licence. Under s. 70.17 a user can acquire a licence and immunize themselves from infringement proceedings if they have “paid or offered to pay the royalties”. This is identical to s. 70.4, where a user “may . . . subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme *and on paying or offering to pay the royalties*, do the act”. Paying or offering to pay is a permissive act triggering licence acquisition in both cases.

[39] As matter of legislative coherence, it would be incongruous if royalties fixed in the context of licence negotiations between a collective society and a specific user were voluntary, but those set in a general tariff were mandatory.

[40] Access Copyright argued in the alternative that pursuant to s. 68.2(1) Board approved royalties operate as a remedy for infringement against a user who has not accepted a licence. But there is nothing in the legislation to suggest that Parliament intended that Board approved tariffs operate as pre-determined infringement damages. Parliament is well aware of how to create a statutory damages scheme. It did so in s. 38.1, which was enacted in 1997 at the same time as key collective administration amendments. Section 68.2(1) could not have been meant to silently create a second statutory damages scheme, where “amounts are predetermined by the Board, and then imposed without regard to the actual circumstances of the case and without any proportionality to either the user’s behaviour or copyright owners’ actual damage” (“Spectre II”, at p. 58).

[41] Access Copyright also identifies various provisions throughout the *Act* which it says support the mandatory tariff theory and are inconsistent with the voluntary tariff theory. It observes that s. 70.12 creates a distinction between royalties set out in a tariff (s. 70.12(a)) and those reached by agreement (s. 70.12(b)), and argues that this means royalties set out in a tariff must be binding without an agreement. But nothing about the possibility of the parties reaching a mutual agreement in subs. (b) suggests that the licence terms fixed by the Board in response to a proposed tariff under subs. (a) must be mandatory on users. Section 70.12 simply offers collective societies in the

general regime a degree of flexibility that does not exist in the performing rights regime, where collective societies are required to file proposed tariffs.

[42] It also argues that s. 70.191, which says that an approved tariff “does not apply where there is an agreement between a collective society and a person authorized to do an act”, supports the mandatory tariff theory. If tariffs are optional, Access Copyright says, there would be no need to provide that a tariff does not apply when there is an agreement, because the user could simply “opt out” of the tariff. But this overlooks the purpose of s. 70.191, which is to prevent both a collective and a user from abandoning an agreement after a tariff is approved. This is consistent with the voluntary tariff theory. A user is free to choose whether or not to accept a licence, but a tariff does not permit a user to abandon its agreements.

[43] Finally, Access Copyright isolates ss. 38.2, 30.02 and 30.3, which provide certain benefits to educational institutions and are tied to the existence of an approved tariff, and argues that these benefits would not exist if the tariff were optional.

[44] But none of these provisions provide support for the mandatory tariff theory. Section 38.2 says that a copyright owner who has not authorized a collective society to authorize reprographic reproduction of the owner’s work may recover, in proceedings against an educational institution, a maximum of the royalties that would have been payable under any agreement entered into with the collective society or a tariff certified by the Board under s. 70.15. This provision puts a cap on the damages an owner can recover against an educational institution in respect of reprographic

rights. It is premised on the assumption that the Board will set fair and equitable royalties, but it does not suggest that such royalties are mandatory.

[45] Section 30.02 exempts educational institutions from infringement in respect of digital reproduction of works, but this benefit is contingent on the acceptance of a licence. It applies only if the educational institution “has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society’s repertoire”. Accordingly, it does not support Access Copyright’s argument.

[46] Section 30.3(1) says that an educational institution does not infringe copyright when copies are made using a self-service photocopier installed by the institution, provided that a notice warning of copyright infringement is posted. This exemption applies if at least one triggering condition is met, including that “a tariff has been approved in accordance with section 70.15” (s. 30.3(2)(c)) or “a collective society has filed a proposed tariff in accordance with section 70.13” (s. 30.3(2)(d)). York argues that s. 30.3, properly interpreted, means that the educational institution can only take advantage of the exemption if it has in fact accepted a licence under an approved or proposed tariff. In my view, it is neither necessary nor prudent to come to a firm conclusion about the proper interpretation of s. 30.3 in this case. It is enough to observe that the provision does not generate by inference the “clear and distinct legal authority” required to impose the burdens of a licence on a non-consenting user (*SODRAC*, at para. 107).

[47] Turning to legislative purpose, the objects of the statutory scheme governing collective administration are best understood in their historical context.

[48] The story of collective administration of copyright in Canada begins in the early 20th century. Canada's first domestic copyright legislation was the *Copyright Act, 1921*, S.C. 1921, c. 24, which followed the British *Copyright Act, 1911* (U.K.), 1 & 2 Geo. 5, c. 46. The 1921 *Act* did not provide for the collective administration of copyright. The first regime regulating any form of collective society in Canada was created in the 1930s in response to the emergence of early performing rights societies, who had acquired control of the vast majority of popular musical and dramatico-musical compositions and were therefore able to exercise monopolistic power (*Vigneux v. Canadian Performing Right Society, Ltd.*, [1943] S.C.R. 348 (“*Vigneux (1943)*”), at p. 352, per Duff C.J., dissenting, but not on this point; *Vigneux v. Canadian Performing Right Society, Ltd.*, [1945] A.C. 108 (P.C.)).

[49] In the *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies* (1935) (“*Parker Report*”), Judge James Parker recognized that these societies had benefits for copyright owners and users, but regulation was necessary:

Competition no longer exists. A monopoly, or super-monopoly, has arisen. No one quarrels with the author, composer and publisher pooling their rights and placing them in a central bureau for the purpose of collecting a fair fee for the same and of preventing infringement thereof. It is an inevitable monopoly existing for the convenience of the owner and the user; but it should not be exercised arbitrarily and without restraint. [p. 19]

[50] When the *Parker Report* was published, Parliament had already made amendments requiring performing rights societies to file with the Minister at the Copyright Office lists of works within their repertoire and statements of proposed licence royalties, and permitting the Minister to conduct an investigation and revise royalties that were contrary to the public interest (see *The Copyright Amendment Act, 1931*, S.C. 1931, c. 8, and *An Act to amend The Copyright Amendment Act, 1931*, S.C. 1935, c. 18). Judge Parker recommended further amendments, including the creation of a tribunal to approve tariffs. His rationale was as follows:

The position now is that the Society, having a monopoly of the performing rights in copyright music, has also the right to impose whatever fees it chooses. Where other monopolies have existed, it has been found necessary to have some independent body analyse and pass on the tariffs of fees that may be charged, e.g. freight rates, express rates, telephone rates, etc. If the Society can continue to dictate its own terms, and pursue a policy of greatly increasing those terms, then finally the community will be prevented from listening to its music. [p. 49]

[51] Parliament adopted Judge Parker's recommendations in *An Act to amend The Copyright Amendment Act, 1931*, S.C. 1936, c. 28. Following these amendments, the Copyright Appeal Board was required to approve a performing rights society's proposed statement of royalties with any necessary modifications. Sections 10B(8) and 10B(9) of the *Copyright Act*, R.S.C. 1927, c. 32, set out the effect of an approved statement. These provisions are the earliest predecessors to ss. 68.2(1) and 70.17 respectively:

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully

sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

(9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

[52] The cases interpreting these provisions and their subsequent iterations held that an approved statement of royalties put a cap on what the societies could charge for a licence but did not bind an unwilling user to the terms of a licence. The regime qualified the rights of the societies by vesting a “statutory license” in favour of “everybody who pays or tenders” the approved fee (*Vigneux (1943)*, at p. 353, per Duff C.J.; see also p. 364, per Rinfret J.). Users were entitled to choose whether or not to accept a licence on the Board-approved terms (*Maple Leaf Broadcasting Co. v. Composers, Authors and Publishers Assn. of Canada Ltd.*, [1954] S.C.R. 624, at p. 630, per Cartwright J.).

[53] Strayer J. made the point most clearly in *Performing Rights Organization of Canada Ltd. v. Lion D’Or (1981) Ltée* (1987), 16 F.T.R. 104. Users could choose to accept a licence, failing which they could be liable as an infringer:

It will be noted that [s. 50(9), which was equivalent to s. 10B(8) of the 1936 amendments] deals only with the enforcement of licences: the subsection refers to the amounts which the society

“may . . . sue for or collect *in respect of the issue or grant by it of licences . . .*”

I take this to mean that if a person performing these works refuses to take out a licence then s. 50(9) has no application. . . . If the society wishes to recover for use of the performing rights, it must then bring an action for infringement of copyright. [Emphasis in original, para. 9.]

[54] This was consistent with the purpose of the regime, enacted as Parliament became “aware of the necessity of regulating the exercise of the power acquired by” performing rights societies (*Vigneux (1943)*, at p. 352, per Duff C.J.). It would be discordant with this purpose to empower a society to foist a licence on an unwilling user.

[55] Until 1988, the *Copyright Act* only dealt with the collective administration of performing rights. It did not contain any provisions concerning other rights. A new regime, known now as the “general regime”, was created by amendments in 1988 and 1997 (*An Act to amend the Copyright Act and to amend other Acts in consequence thereof*, R.S.C. 1985, c. 10 (4th Supp.), formerly S.C. 1988, c. 15; *An Act to amend the Copyright Act*, S.C. 1997, c. 24). The heart of the debate about statutory purpose and the corresponding disagreement as to the correct interpretation of the relevant provisions turns on the 1988 and 1997 amendments.

[56] Prior to these amendments, the *Act* was subject to a number of studies and reports which found that technological change had made it easier for users to access information and harder for individual creators to control unauthorized reproduction. Expanding collective administration beyond performance rights was one proposed solution, as a 1984 *White Paper on Copyright* observed:

Organized exercise of copyright is needed for two major reasons:

- changing technological circumstances, which have greatly expanded opportunities for unauthorized reproduction and use of copyright-protected material;
- the high costs of transactions, which may be so great as to make it impracticable for copyright owners to negotiate individually with users, such as in the case of photocopying, access to copyright material by educational users, or use of musical works by radio stations.

In those circumstances, it may be in the interest of all parties to provide cooperative mechanisms for the enforcement of rights and the collection of fees.

(Consumer and Corporate Affairs, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act* (1984) (“1984 White Paper”), at pp. 61-62)

[57] Access Copyright’s core argument is that, unlike the user-protection purpose of the 1936 amendments, the 1988 and 1997 amendments expanding collective administration were meant to protect copyright owners and that Parliament intended to make approved tariffs binding in furtherance of this purpose. Owners would otherwise be required to enforce their copyrights against institutional copiers through individual infringement actions, an illusory protection.

[58] This argument, with respect, conflates two distinct statutory purposes: the purpose for expanding collective administration to rights beyond public performance; and the separate purpose for regulating the collective societies that emerged from the expanded regime. While Parliament expanded collective administration to protect copyright creators and owners, it simultaneously vested the Board with price-setting powers to protect users from the potentially unfair exertion of the new societies’ market

power. The Board's power to approve a collective society's proposed tariff is a part of its regulatory price-setting role.

[59] It is undeniable that a significant reason for expanding the collective administration regime was to protect creators, who experienced difficulties asserting their rights amidst technological change. They were interested in acting collectively but were concerned that without regulation and protection from prosecution for conspiracy, new collective societies would run into competition law problems (see, e.g., *1984 White Paper*, at pp. 62-63). As a result, Parliament amended the *Act* to sanction and govern collective administration for rights beyond public performance, making room for new collective societies to form as and when market forces demanded.

[60] This brought many benefits for copyright owners. By facilitating the users' ability to clear large numbers of copyrights through a single source and reducing transaction costs, collective societies made it easier to acquire rights and, as a corollary, for owners to be paid. As the Collective Societies Coalition intervening in this appeal noted, the "purpose of collective administration is to facilitate an efficient, functioning marketplace for the exchange of copyright-protected works" (see also *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, at para. 11, per Abella and Moldaver JJ.).

[61] Collective societies were also able more effectively to monitor the use of works within their repertoire and, in some cases, to assist copyright owners with infringement actions, as was the case when Access Copyright funded the litigation

leading to this Court’s decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (“Spectre I”, at fn. 70). As the Federal Court of Appeal aptly observed in its reasons:

The assumption underlying Access Copyright’s argument . . . is that effective enforcement requires mandatory tariffs. With respect, this is not self evident. The advantage of collective societies is that they allow rights holders to pool their resources to enable them to economically enforce their rights. This advantage exists even in the absence of mandatory tariffs. [para. 203]

[62] And collective societies could initiate infringement actions in respect of their repertoire if they are in fact exclusive licensees or assignees of the copyright, which Access Copyright is not (see s. 41.23 of the current *Copyright Act*; see also *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20).

[63] Collective societies are also able to assert a stronger bargaining position than individual copyright owners. A particular collective society’s strength will depend on the value they are able to offer to users and the extent to which they can position themselves as the sole or main source for acquiring rights. This was the case for the performing rights societies that Parliament looked to as a viable model for other collectives. As Judge Parker said in 1935, “unless the user obtains a licence to perform the repertoire of Canadian Performing Right Society, he has no other supply” (p. 19). And in the ensuing decades the situation remained much the same. The absence of meaningful alternatives to dealing with a performing rights society made their tariffs “effectively mandatory even if *de jure* they were not” (“Spectre I”, at p. 158).

[64] But a collective society's market power and effectiveness at achieving its goals is not guaranteed by the *Copyright Act*. Nothing in the *Act* is designed to prop-up collectives that have become less valuable to users and/or rights-holders. As Professor Daniel J. Gervais explains:

... Canadian rightsholders may create a new Collective Management Organization if they are dissatisfied with an existing one. In fact, *users* themselves could do the same, as was suggested by a well-known author in the area of reprography. [Emphasis in original.]

("Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2002), 1 *C.J.L.T.* 21, at p. 26; see also Department of Canadian Heritage, *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective* (2001), at p. 26; Howard P. Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?" (1999), 14 *I.P.J.* 109.)

[65] If a collective society does not have a large enough repertoire or other sources emerge to provide better value, users may find that the collective is not "the most cost-effective way to obtain licences", and might prefer to "negotiate with the right-holders directly, or through other intermediaries" ("Spectre I", at p. 159).

[66] This takes us to the purpose of a tariff certified by the Board setting licensing royalties pursuant to s. 70.15, which is one of three ways in which the Board may become involved in setting fair prices in the general regime. In addition to its tariff approval power, the Board may fix royalties when a collective society and individual user are unable to agree on terms and one party applies to the Board (ss. 70.2 to 70.4). And even when the parties make an agreement without Board intervention, the collective society will only be immunized from prosecution under the *Competition Act*,

R.S.C. 1985, c. C-34, if it files the agreement with the Board, following which the Board may examine the agreement and, after hearing from the Commissioner of Competition and the parties, alter the royalties (ss. 70.5 to 70.6). Given that licensing royalties are always subject to the possibility of Board scrutiny one way or another, a collective society may see benefits of efficiency in obtaining the Board's advance approval of a general tariff that applies to many users.

[67] Operating together, these price-setting powers of the Board protect users from the potential exertion of unfair market power by collective societies. This was clearly the purpose of the 1936 amendments empowering the Copyright Appeal Board to approve statements of royalties. Government reports and legislative history show that this purpose persisted through the 1988 and 1997 amendments.

[68] In the debates on the 1988 amendments, the Hon. Flora MacDonald, Minister of Communications and sponsoring Minister of the amendments, explained that the proposed system “has been in operation for about 50 years for musical performances and is working well”, and that the existing system should be expanded to other areas of copyright (*House of Commons Debates*, vol. VI, 2nd Sess., 33rd Parl., June 15, 1987, at p. 7109). She acknowledged that collective administration was beneficial for copyright owners, but went on to provide a caution based on the lessons of the early performing rights societies, observing that collective societies can “achieve such a dominant bargaining position that the interests of potential customers are not sufficiently safeguarded” (*House of Commons Debates*, vol. VI, 2nd Sess., 33rd Parl., June 26, 1987, at p. 7667).

[69] The government reports leading to the amendments are to the same effect. A Sub-Committee Report on the Revision of Copyright observed that the “system presently used with respect to the performing rights in musical works” served as a well-working model for an expanded collective administration regime (House of Commons, Sub-committee of the Standing Committee on Communications and Culture on the Revision of Copyright, *A Charter of Rights for Creators* (1985), at p. 85). And the 1984 *White Paper* suggested that “[t]o protect the public from possible excesses by copyright societies, they would be subject to the control of the revised Copyright Appeal Board” (p. 62).

[70] Access Copyright argues that Parliament demonstrated its intent to make Board approved tariffs mandatory when it amended the predecessor to s. 68.2(1) in 1988 by removing the words “in respect of the issue or grant by it of licences”, which Strayer J. had relied on in *Lion D’Or* to conclude that a user could choose whether or not to accept a licence. This would have been a perplexing way for Parliament to express its intent to make such a radical change in the law, particularly given that the statutory context continued to clearly demonstrate that approved tariffs were part of a copyright licensing scheme. Collective societies that administer traditional copyright, as opposed to equitable remuneration rights, do so by operating a “licensing scheme” (s. 2 “collective society” (a)). When a collective society works in the general regime, it operates a “licensing scheme” (s. 70.1). And when a collective society proposes a tariff under s. 70.12(a), it does so to set out “by licence” royalties and terms and conditions of use.

[71] Access Copyright's interpretation of s. 68.2(1) is not only unsupported by the purpose of the Board's price-setting role, it is, respectfully, also in direct conflict with that purpose. Instead of operating as a part of a scheme designed to control collective societies' potentially unfair market power, Access Copyright's interpretation would turn tariffs into a plainly *anti-competitive* tool, boosting collective societies' power to the detriment of users.

[72] The legal consequence of Access Copyright's mandatory tariff theory would be that a user would be liable to pay royalties in full as soon as it became responsible for any infringing use of a work within a collective society's repertoire. Under the final 2011-2014 Access Copyright tariff for post-secondary educational institutions, for example, York would be liable to pay \$24.80 for each of its 45,000 full time equivalent students, totalling over one million dollars per year, as soon as it made a single infringing use within Access Copyright's repertoire. For a university that attempts to clear its copyright obligations using alternative licences and fair dealing, a single infringing use — one that was not authorized by fair dealing or independently licensed — could thereby become a tripwire making the university liable to pay the full royalties in a tariff. This "Sword of Damocles", as the intervener the Canadian Association of Research Libraries aptly put it, renders a university's freedom to clear its copyright obligations without involving Access Copyright completely illusory.

[73] It is, with respect, no answer to say that the Board can set fair and flexible payment structures. The Board is in the business of setting general tariffs for a large category of users and is inherently limited in its ability to direct itself to each user's

unique needs. Moreover, on Access Copyright's theory, in order to ensure it does not find itself responsible for an exorbitant licence fee that takes no account of its individual circumstances, a user would be forced to invest significant resources into participation in Board proceedings whenever a collective society proposed a tariff. As Access Copyright points out, the tariff-setting process is time consuming and expensive. Forcing all users potentially caught by the ambit of a tariff to participate in a Board hearing would limit users' ability to obtain their rights from other sources and, in turn, limit the competitiveness of other sources as against established collectives. That is the antithesis of the purpose of s. 68.2(1).

[74] The source of Access Copyright's grievance, it seems to me, stems not so much from the voluntary nature of an approved tariff, but from the fact that Access Copyright cannot initiate infringement actions on behalf of its members. To the extent that this is a problem, it has nothing to do with s. 68.2(1) and is largely outside the scope of this appeal. But it is important to recall that Access Copyright chooses to operate on the terms of a non-exclusive licence that does not give it the right to sue for infringement in respect of the rights it administers. Nothing compels Access Copyright and its members to operate this way.

[75] The preceding review of the text, legislative context, purpose and supporting jurisprudence all lead, in my respectful view, to the conclusion that s. 68.2(1) does not make tariffs approved by the Copyright Board pursuant to s. 70.15 mandatory against users who choose not to be licensed on the approved terms.

[76] It is of course open to Parliament to amend the *Copyright Act* if and when it sees fit to make collective infringement actions more readily available. But under the existing relevant legislation in this appeal, an approved tariff is not binding against a user who does not accept a licence.

[77] I would therefore dismiss Access Copyright's appeal. This brings us to York's appeal from the dismissal of its counterclaim seeking declaratory relief.

[78] In response to Access Copyright's action to enforce the interim tariff at the Federal Court, York filed a counterclaim seeking a Declaration that "any reproductions made that fall within the guidelines set out in York's 'Fair Dealing Guidelines for York Faculty and Staff (11/13/12)' . . . constitute fair dealing".

[79] York's counterclaim was connected to its defence to Access Copyright's action to enforce the interim tariff. The fairness of copying under York's Guidelines was only a live issue between the parties if the tariff was enforceable against York.

[80] Having found that the interim tariff was enforceable, the trial judge assessed York's fair dealing counterclaim. He found that the Guidelines were not fair either in their terms or their application and refused to grant the Declaration. The Court of Appeal found that the tariff was not enforceable and, therefore, "York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action" (para. 206). But the Court of Appeal nonetheless considered York's appeal from the

trial judge's refusal to issue a Declaration that its Guidelines were fair. It agreed with the trial judge that the Guidelines were unfair and dismissed York's request for a Declaration.

[81] York's appeal to this Court seeks the Declaration from this Court that was denied by the Federal Court and the Federal Court of Appeal.

[82] In my view, it is not appropriate to entertain York's request for declaratory relief in these proceedings. This Court recently stated the test for when declaratory relief may be granted in *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99, per Abella J.:

The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties. [Citation omitted; para. 11.]

Daniels drew on *Solosky v. The Queen*, [1980] 1 S.C.R. 821, where Dickson J. stated that declaratory relief is a remedy availing to "persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined" (p. 830). And most recently in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the Court emphasized that "[f]airness requires that the parties affected by declaratory relief be heard" (para. 42, per Wagner C.J. and Abella and Karakatsanis JJ.).

[83] In light of the conclusion on Access Copyright's appeal that the interim tariff is not mandatory and is therefore unenforceable against York, there is no live dispute between the parties. This is not an action for infringement, since Access Copyright has no standing to bring such an action. And the copyright owners who do have standing to bring an infringement action in respect of York's copying activities are not parties to these proceedings and, as a result, have not had the opportunity to advance arguments or adduce evidence about how York's Guidelines interact with and affect their copyrighted works. The undesirable consequence of assessing fair dealing guidelines in the absence of a genuine dispute between proper parties is that the analysis is inevitably anchored in aggregate findings and general assumptions without a connection to specific instances of works being copied. All of this makes consideration of the Guidelines in this case inappropriate.

[84] It is true that in *CCH*, the Court granted a declaration to the Law Society that it "does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy" (para. 76). But it did so in the context of a live infringement action brought by proper parties, and where the Law Society relied on its "practices and policies" to show that its dealings were fair (para. 63).

[85] There is no doubt, as York argued, that guidelines are important to an educational institution's ability to actualize fair dealing for its students. As Professor Samuel E. Trosow writes, a "general lack of understanding about basic copyright rights

and obligations” serves as a “serious impedimen[t] . . . to the realization of fair dealing as a substantive users’ right” in the educational context (“Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing”, in Michael Geist, ed., *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (2010), 541, at p. 542). Institutionalized guidelines can help overcome this impediment.

[86] But the usefulness of guidelines in theory does not provide the Court with a sound basis for entertaining declaratory relief without a live dispute between the parties or when those whose rights are at stake are not privy to the proceedings.

[87] While I therefore agree that the requested Declaration should not be granted, this should not be construed as endorsing the reasoning of the Federal Court and Federal Court of Appeal on the fair dealing issue. There are some significant jurisprudential problems with those aspects of their judgments that warrant comment.

[88] In commenting on those errors, it is important to emphasize that our reasons do not decide the issue of fair dealing, which can only be determined in a factual context. Rather, the objective is to correct some aspects of the reasoning from the courts under review which, respectfully, depart from this Court’s jurisprudence. While correcting the errors committed by the Federal Court and Court of Appeal favours the position argued before this Court by York, these reasons address only some of the factors that make up the fair dealing analysis, an analysis that requires consideration of facts and factors not addressed here.

[89] The main problem with their analysis was that they approached the fairness analysis exclusively from the institutional perspective. This error tainted their analysis of several fairness factors. By anchoring the analysis in the institutional nature of the copying and York's purported commercial purpose, the nature of fair dealing as a user's right was overlooked and the fairness assessment was over before it began.

[90] This Court's modern fair dealing doctrine reflects its more general "move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace" (*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326 ("SOCAN"), at para. 9, per Abella J.). The Court is "at the vanguard in interpreting copyright law as a balance between copyright rights and user rights", and its understanding of fair dealing is no exception (Myra J. Tawfik, "The Supreme Court of Canada and the 'Fair Dealing Trilogy': Elaborating a Doctrine of User Rights under Canadian Copyright Law" (2013), 51 *Alta. L. Rev.* 191, at p. 195). Fair dealing is "[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*" (*SOCAN*, at para. 11).

[91] Accordingly, to understand and apply fair dealing doctrine requires first understanding the copyright balance. Copyright law has public interest goals. The relationship between members of the public and copyrighted works is not merely the "consequence of the author-work relationship" (Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* 1, at p. 6). Put differently, the public benefits of our

system of copyright are much more than “a fortunate by-product of private entitlement” (pp. 14-15, cited in *SOCAN*, at para. 9).

[92] Instead, increasing public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own, is a primary goal of copyright. “Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole” (*Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, at para. 32, per Binnie J.).

[93] But it is also true that just rewards for copyright creators provide necessary incentives, ensuring that there is a steady flow of creative works injected into the public sphere. As Binnie J. put it, “[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them” (para. 31). A proper balance ensures that creators’ rights are recognized, but authorial control is not privileged over the public interest.

[94] Ultimately, owners’ rights and the public interest should not conflict with one another. As Professor Tawfik explains, copyright law has long been an “integrated system that encouraged creators to generate knowledge, industry to disseminate it and users to acquire it and, hopefully, reshape it into new knowledge” (“History in the Balance: Copyright and Access to Knowledge”, in Geist, *From “Radical Extremism”*

to “*Balanced Copyright*”, 69, at p. 70). Creators’ rights and users’ rights are mutually supportive of copyright’s ends.

[95] In terms of the proper role of fair dealing and other exceptions to copyright in this normative framework, Professor Michael Geist explains that:

The core of fair dealing is fairness — fairness to the copyright owner in setting limits on the use of their work without permission and fairness to users to ensure that fair dealing rights can be exercised without unnecessarily restrictive limitations.

(“Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use”, in Michael Geist, ed., *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), 157, at p. 181)

Or, as Professor Craig puts it:

Fundamentally, copyright policy assumes that the restriction of the public’s use of works through the creation of private rights can further the public’s interest in the widespread creation and distribution of works. The limits to these private rights, defined by fair dealing and other exceptions — and circumscribed by the boundaries of the public domain — are therefore essential to ensure that the copyright system does not defeat its own ends.

(“Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32”, in Geist, *From “Radical Extremism” to “Balanced Copyright”*, 177, at p. 179)

[96] The resulting judicial framework for fair dealing was set out in *CCH*, where McLachlin C.J. set out a two-step test for assessing fair dealing under s. 29 of the *Act*, which states:

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

The party invoking fair dealing must prove first that the dealing was for an allowable purpose and, second, that it was fair. Six non-exhaustive factors provide a framework for assessing fairness, which is ultimately a question of fact: the purpose of the dealing; the character of the dealing (which concerns the number of copies made or distributed and whether the copies are retained or destroyed after use); the amount of the dealing (which concerns the proportion of the work dealt with and the importance of that part); alternatives to the dealing; the nature of the work; and the effect of the dealing on the work (para. 53; see also *SOCAN*, at para. 13; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, at para. 12, per Abella J.).

[97] It was common ground in this case that York's teachers make copies for their students for the allowable purpose of education at the first step of the analysis.

[98] But at the second step, where fairness is assessed, the Federal Court and Federal Court of Appeal approached the analysis from an institutional perspective only, leaving out the perspective of the students who use the materials. Both perspectives should be taken into account.

[99] In the educational context, instructors are facilitating the education of each of their individual students who have fair dealing rights (*Alberta (Education)*, at paras. 22-23). However, courts are not required to completely ignore the institutional

nature of a university's copying practices and adopt the fiction that copies are only made for individual isolated users. When an institution is defending its copying practices, its aggregate copying is necessarily relevant, for example, to the character of the dealing and the effect of the dealing on the work (see, e.g., *CCH*, at paras. 55 and 72; *SOCAN*, at para. 42; *Alberta (Education)*, at paras. 30 and 33).

[100] In this case, as in *Alberta (Education)*, “the key problem is in the way the [trial judge] approached the ‘purpose of the dealing’ factor” in the fairness analysis (para. 15). In fact, both the Federal Court and the Federal Court of Appeal erred in an almost identical fashion to the Copyright Board in *Alberta (Education)*. There, the issue was whether copies of short excerpts of textbooks and other literary works made by secondary school teachers and provided to students as assigned reading constituted fair dealing for the purpose of “research or private study”. The case arose prior to the enactment of the *Copyright Modernization Act*, S.C. 2012, c. 20, which added “education” as a permissible purpose. The Board found that the copies were for the permissible purpose of research or private study at the first stage of the analysis, but the predominant purpose at the second stage was “instruction”, which fell outside of research or private study.

[101] This Court rejected the Board's approach in a passage that is directly apposite to the present appeal:

... fair dealing is a “user's right”, and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If . . . the copier hides

behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.

In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. . . . [T]hey are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. [paras. 22-23]

And in *SOCAN*, the Court similarly explained that the "predominant perspective" when assessing the purpose of the dealing was "that of the ultimate users of the previews" (para. 34).

[102] In other words, contrary to the Federal Court of Appeal's view, in the educational context it is not only the institutional perspective that matters. When teaching staff at a university make copies for their students' education, they are not "hid[ing] behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair".

[103] It was therefore an error for the Court of Appeal, in addressing the purpose of the dealing, to hold that it is only the "institution's perspective that matters" and that York's financial purpose was a "clear indication of unfairness" (paras. 238 and 241). Funds "saved" by proper exercise of the fair dealing right go to the University's core objective of education, not to some ulterior commercial purpose (see Lisa Macklem and Samuel Trosow, "Fair Dealing, Online Teaching and Technological Neutrality:

Lessons From the COVID-19 Crisis” (2020), 32 *I.P.J.* 215, at p. 238). The purpose of copying conducted by university teachers for student use is for the student’s education. But in every case, all relevant facts must be taken into account in order to determine the fairness of the dealing.

[104] And the trial judge’s criticism of York’s Guidelines on the basis that different portions of a single work could be distributed to different students, such that an author’s entire work could end up being distributed in the aggregate, is also contradicted by *SOCAN*, which held that “[s]ince fair dealing is a ‘user’s’ right, the ‘amount of the dealing’ factor should be assessed based on the individual use, not the amount of the dealing in the aggregate” (para. 41; see also *Alberta (Education)*, at para. 29).

[105] And while it is true that “aggregate dissemination” is “considered under the ‘character of the dealing’ factor” (*SOCAN*, at para. 42; see also *CCH*, at para. 55; *Alberta (Education)*, at para. 29), as this Court cautioned in *SOCAN*, “large-scale organized dealings” are not “inherently unfair” (para. 43). In *SOCAN*, where copies could easily be distributed across the internet in large numbers, this Court warned that focussing on the “aggregate” amount of dealing could “lead to disproportionate findings of unfairness when compared with non-digital works” (para. 43). By extension, the character of the dealing factor must be carefully applied in the university context, where dealings conducted by larger universities on behalf of their students could lead to findings of unfairness when compared to smaller universities. This would be discordant with the nature of fair dealing as a user’s right.

[106] At the end of the day, the question in a case involving a university's fair dealing practices is whether those practices actualize the students' right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the *Act*. Since we are not deciding the merits of the fair dealing appeal brought by York, there is no reason to answer the question in this case.

[107] In light of these reasons, I would dismiss York's appeal from the dismissal of its counterclaim but, in the circumstances, without costs.

[108] I would dismiss Access Copyright's appeal with costs.

Appeals dismissed.

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