



Access Copyright Tariffs Confirmed Not Mandatory: A Positive Outcome for Universities and their Libraries

April 22, 2020 - Yesterday, the Federal Court of Appeal released its long-awaited [decision](#) in the *York University v. The Canadian Copyright Licensing Agency (Access Copyright)* appeal. CARL and the broader library community represented by CFLA were largely pleased with the ruling and its legal rationale.

On the key issue of the case—whether York was obliged to pay royalties to Access Copyright pursuant to the interim tariff—the Court found in favour of the appellant, York. The Court clearly ruled that Access Copyright’s Copyright Board tariffs are not mandatory. This constitutes a major victory for universities, upholding their right to choose whether to obtain a licence from Access Copyright or comply with their copyright obligations through other legal means. “I conclude that a final tariff would not be enforceable against York because tariffs do not bind non-licensees. If a final tariff would not be binding, the conclusion can hardly be different for an interim tariff” (para. 204) .

The decision is not as favourable for universities, libraries, and their users with respect to the second element of the case, fair dealing. The counterclaim by York—that all their copying, by having been compliant with their own guidelines, was fair dealing under the *Copyright Act*—was dismissed. The Court found that York had not adequately demonstrated that application of the guidelines ensured that all of its dealings were fair.

The ruling made clear that Access Copyright cannot sue for copyright infringement. The decision states that “Acts of infringement do not turn infringers into licensees so as to make them liable for the payment of royalties. Infringers are subject to an action for infringement and liability for damages but only at the instance of the copyright owner, its assignee or exclusive licensee.” (para. 205). The Court further concluded that “...the validity of 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).

An excellent analysis of the legislative history and the purpose of the statute underpins the Court’s decision. Although CARL was not an intervener in the case, we are pleased to see that many of the arguments we had put forward in our [motion for leave to intervene](#) were ultimately reflected in the analysis. We were additionally

pleased to note the Court's reliance and favourable comment on Prof. Ariel Katz's influential "[Spectre: Part I](#)" article.

Overall, Canadian libraries applaud the Federal Court of Appeal's decision on the non-mandatory nature of the tariffs and its comprehensive legislative analysis. The two parties, if they choose, now have 60 days to file an application for leave to appeal to the Supreme Court of Canada.