File No. 39222

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

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 inside cover page**

CONDENSED BOOK OF THE INTERVENER CANADIAN ASSOCIATION OF RESEARCH LIBRARIES ("CARL")

(Pursuant to Rule 45 of the Rules of the Supreme Court of Canada)

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**Continuation of style of cause*

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Tab 1: *York University v. Canadian Copyright Licensing Agency,* 2020 FCA 77 (CanLII), <https://canlii.ca/t/j6lsb>

D. *Conclusion*

[204] As a result, 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.

[205] 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. In the course of the hearing before this Court, Access Copyright candidly admitted that, given its agreement with its members, it cannot sue York for infringement in the event that some or all of the copies made by York are infringing copies. However, Access Copyright claims the right to enforce the tariff against non-licensee infringers; yet if the tariff is not mandatory then there can be no right to enforce it.

[206] As a result, 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. Therefore, I would allow York's appeal from the judgment of the Federal Court with costs, set aside the Federal Court's judgment, and dismiss Access Copyright's action with costs.

…

[225] In the course of coming to this conclusion, the Supreme Court relied on *CCH* and commented that "[t]he Court did not focus its inquiry on the library's perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research": *SOCAN* at para. 29. With respect, this is inconsistent with the position taken by the Court in *CCH* on the question that it asked itself at paragraph 63 – "… can the law society rely on its general practice to establish fair dealing?" – which the Court answered in the affirmative. The rest of the Court's analysis focussed on the General Library's policy and practice.

[226] The relevant passage from *CCH* that the Court relied upon in *SOCAN* reads as follows:

> The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism . . . may be provided to users of the Great Library." When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of

> research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the Copyright Act. [my emphasis]
>
> (*CCH* at para. 64)

[227] The only reference to users in this paragraph is found in the Court's recognition that the custom photocopy service helps to ensure that legal professionals in Ontario can access the material necessary to carry on their practice. Any institutional fair dealing policy must necessarily have end users in mind since institutions *per se* do not conduct research or private study. The Court's analysis of the Great Library's policy was predicated on the proposition that, as the copier, the Great Library could rely on its policy to bring itself within fair dealing. With respect, I am of the view that the Court's characterization of this element of the analysis in *CCH* was *per incuriam*.

(2) The Board May Not Compel a User to Agree to the Terms of a Licence Against the Will of the User

[101] CBC argues that, while the Board may fix the royalties to be paid under the statutory licensing procedure created by s. 70.2 of the *Copyright Act*, the Board may not set the other terms or structure of that licence. Specifically, CBC takes issue with the Board's decision to impose an interim licence on a blanket basis, such that CBC pays for access to the entire SODRAC repertoire, rather than on CBC's preferred transactional basis, whereby CBC would pay only whenever it actually used a work from the SODRAC repertoire. A blanket licence grants access to SODRAC's entire repertoire for its duration, and thus reduces CBC's ability to control its licensing costs. Under a transactional licence, by contrast, CBC may choose in any given situation whether it wishes to license a particular work or forego making use of SODRAC music. CBC argues that if the collective organization and the user disagree over the model a licence is to take — blanket or transactional — the Board lacks the power to compel the execution of a licence.

[102] SODRAC counters that the Board has the power to issue licences in either blanket or transactional form, and should have this power in all proceedings under s. 70.2. To hold otherwise, it argues, would be "to make the Board's remedial jurisdiction under section 70.2 dependent upon the consent of a user, [and] would be at odds with its mandate to resolve disputes": R.F., at para. 133.

[103] Though CBC first raised this issue in the context of the Board's Interim Licence Decision, the dispute relates generally to the Board's power to structure licences, whether interim or not: Does the Board's power to set the terms of a licence include the power to bind the parties to those terms?

[104] I do not read the *Copyright Act* to necessitate that decisions made pursuant to the Board's licence-setting proceedings under s. 70.2 have a binding effect against users. Section 70.2(1) itself provides that where a collective organization and a user cannot agree on the terms of a licence, either party may apply to the Board to "fix the royalties and their related terms and conditions". This grant of power speaks of the Board's authority to set down in writing a set of terms that, in its opinion, represent a fair deal to license the use of the works at issue. It says nothing, however, about whether these terms are to be binding against the user.

[105] The statutory context supports the conclusion that licences crafted pursuant to s. 70.2 proceedings are not automatically binding on users. Section 70.4 of the Act provides:

> **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.

[106] This provision makes it clear 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. The language of s. 70.4 does not, of its own force, bind the user to the terms and conditions of the licence.

[107] The conclusion that Board licences established pursuant to s. 70.2 are not binding on users comports with the more general legal principle that "no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority": *Gosling v. Veley* (1850), 12 Q.B. 328, 116 E.R. 891, at p. 407, as approved and adopted in *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 77, and *Attorney-General v. Wilts United Dairies, Ltd.* (1921), 37 T.L.R. 884 (C.A.), at p. 885. To bind a user to a licence would be to make it liable according to its terms and conditions should it engage in the covered activity. In the absence of clear and distinct legal authority showing that this was Parliament's intent, the burdens of a licence should not be imposed on a user who does not consent to be bound by its terms.

[108] SODRAC's framing of the issue is not entirely wrong: the Board does have the power under s. 70.2 to "fix the royalties and their related terms and conditions". That is, the Board may decide upon a fair royalty to be paid should the user decide to engage in the activity at issue under the terms of a licence. However, this power does not contain within it 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. Of course, should the user then engage in unauthorized copying regardless, it will remain liable for infringement. But it will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence.

[109] The matter is complicated considerably by the fact that the Board's statutory licence decisions have, in recent years, taken on an increasingly retroactive character. CBC's statutory licence in this case provides an example: the licence covers the period from November 2008 to March 2012, but the Board's final decision was issued on November 2, 2012, after the term of the licence had expired. In situations like these, the Board may issue interim licences that seek to fill the legal vacuum before the final decision is ready, but this leaves a user to operate based on assumptions about how their ultimate liability for actions taken during the interim period will be evaluated.

[110] Should a user engage in copying activity under an interim licence, and then find itself presented with a final licence whose terms it would not voluntarily assume, the user is left in a difficult position: accept the terms of an undesirable licence, or decline the licence and retroactively delegitimize the covered activity engaged in during the interim period, risking an infringement suit. This dilemma may mean that a user who operates under an interim licence has no *realistic* choice but to assume the terms of the final licence.

[111] While I find this possibility troubling, I do not find that this result would detract from the more general proposition that there is no legal basis on which to hold users to the terms of a licence without their assent. The licence is not *de jure* binding against users, even if the particulars of a specific proceeding, and a user's decision to engage in covered activity during an interim period, may mean that the user does not *de facto* have a realistic choice to decline the licence.[2]

[112] I conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users. However, this case does not require this Court to decide whether the same is true of collective organizations. It may be that the statutory scheme's focus on regulating the actions of collective organizations, and the case law's focus on ensuring that such organizations do not devolve into "instruments of oppression and extortion" (*Vigneux v. Canadian Performing Right Society, Ltd.*, [1943] S.C.R. 348, at p. 354, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128) would justify finding that the Board does have the power to bind collective organizations to a licence based on the user's preferred model — transactional or blanket — on terms that the Board finds fair in view of that model. However, this issue was not argued in this case.

[113] I find that licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline.

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[2] During the hearing before this Court, counsel for the interveners the Centre for Intellectual Property Policy and Ariel Katz briefly raised concerns regarding the Board's power to issue retroactively binding decisions in general. That issue was not squarely before this Court in this case, and I do not purport to decide broader questions concerning the legitimacy of or limits on the Board's power to issue retroactive decisions here.

Tab 3: *Copyright Act* R.S.C. 1885, c. C-42

Effect of fixing royalties

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.

Marginal note: Proceedings barred if royalties tendered or paid

(2) No proceedings may be brought against a person who has paid or offered to pay the royalties specified in an approved tariff for

(a) the infringement of the right to perform in public or the right to communicate to the public by telecommunication, referred to in section 3;

(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or

(c) the recovery of royalties referred to in section 19

…
70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,

(a) file a proposed tariff with the Board; or

(b) enter into agreements with users.

1997, c. 24, s. 46.

….
Fixing of Royalties in Individual Cases

Marginal note: Application to fix amount of royalty, etc.

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions

…

Effect of Board decision

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.

R.S., 1985, c. 10 (4th Supp.), s. 16; 1997, c. 24, s. 47.

…

Marginal note: Liability to pay levy

82 (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and

(b) shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

Marginal note: No levy for exports

(2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.