File Number: 33800

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

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA
Appellant
(Applicant on Judicial Review)

- and -

BELL CANADA, MUSIC CANADA, APPLE CANADA INC., ROGERS COMMUNICATIONS INC., ROGERS WIRELESS PARTNERSHIP, SHAW CABLESYSTEMS G.P., TELUS COMMUNICATIONS INC., ENTERTAINMENT SOFTWARE ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA and **CMRRA/SODRAC INC.**
Respondents
(Respondents on Judicial Review)

- and -

FEDERATION OF LAW SOCIETIES OF CANADA and **CANADIAN LEGAL INFORMATION INSTITUTE/INSTITUT CANADIEN D'INFORMATION JURIDIQUE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC)**
Interveners

FACTUM OF THE INTERVENERS, THE FEDERATION OF LAW SOCIETIES OF CANADA and CANADIAN LEGAL INFORMATION INSTITUTE/INSTITUT CANADIEN D'INFORMATION JURIDIQUE

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PART I – THE FACTS & OVERVIEW

A. Overview

1. Fair dealing has been described as "a window on equity in what would otherwise be a mere black and white situation". This Court is again being asked to peer through the fair dealing window and describe the landscape. The concept of fair dealing cannot be defined by rigid rules or delineated by bright lines but instead "should be interpreted liberally".

> Industry Canada, Information Highway Advisory Council, *Copyright and the Information Highway: Final Report of the Copyright Sub-Committee* (Ottawa: Supply and Services Canada, 1995) at 27.
>
> *CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13 at para 51 ("*CCH*").
>
> David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2d ed (Toronto: Irwin Law, 2011) at 234.

2. The meaning of "research" in fair dealing under the *Copyright Act* should not be restrictive. Research can be done anywhere and by anyone – legal research can done by a lawyer in a rigorous fashion in a library or by an Internet-savvy person using a laptop in a Wi-Fi enabled coffee shop. Nor does research necessarily lead to the creation of new copyrighted material. Often successful research is simply accessing information to answer a question – "do I want to buy this recording?" or "do I need a bill of sale to transfer my car?" Much research is begun simply to find an answer and not to create a work.

> *Copyright Act, R.S.C. 1985, c. C-42 ("Copyright Act").*

3. It is surely no coincidence that the scope of the fair dealing user right is most prominently defined in the *CCH* decision in which this Court applied the fair dealing user right to ensure access to legal materials. Without access to the law there can be no knowledge of the law. Restrictions on the access to legal materials by narrowing the scope of research and fair dealing may result in unfair and unequal access to justice by the Canadian public. The interveners rely upon the principle of fair dealing as one of the ways to help achieve the fundamental goal of providing public access to justice. The interveners therefore seek to have this Court apply the research fair dealing provision of the *Copyright Act* in a manner which supports that goal.

B. The Interveners' Interest in the Appeal

4. The Federation of Law Societies of Canada (the "Federation") is the umbrella organization of the 14 governing bodies of the legal profession in Canada, which together regulate the approximately 100,000 lawyers in Canada and the 3,500 notaries in Quebec in the public interest. The Federation's member law societies discharge their obligations, in part, by

providing members of the legal profession and the public with free access to a comprehensive collection of legal materials, both electronic and otherwise.

5. As the representative of the regulators of the legal profession in the public interest, the Federation's interest includes open access to legal information. This both ensures access to justice and that members of the legal profession have access to the material required to provide a high quality of service to the public. These interests are longstanding and were fundamental to the Federation's prior intervention to this Honourable Court in the *CCH* case.

6. The Canadian Legal Information Institute/Institut Canadien d'Information Juridique ("CanLII") provides a convenient method of online access to Canadian legal information for the general public and members of the legal profession. CanLII is a not-for-profit corporation created and funded by the Federation. The digital collection of legal information offered by CanLII is widely available to the public and is not limited to members of the legal profession.

7. The Federation, its member law societies and CanLII view access to legal information as essential to the goal of improving access to justice by all members of the Canadian public, and submit that the extent of such access affects the rule of law and the administration of justice. As national public interest organizations that rely upon the principle of fair dealing to further their goals of providing access to legal information and facilitating access to justice, the Federation and CanLII have a direct and significant interest in the issues raised in this appeal.

8. Users of CanLII will also be directly affected by the issues in this appeal in that the resulting decision may have a substantial effect on the ability of the public and members of the legal profession to review and research legal materials and to submit copies of these materials to courts, tribunals and other bodies determining legal rights. Any such restrictions may affect the standard of legal services offered by members of the legal profession and, overall, may affect the administration of justice. Further, restrictions on the access to legal materials and information may result in unfair and unequal access to justice by the public. These concerns bear directly on the responsibilities of the Federation, its member law societies and CanLII.

C. The Decision of the Court and Board Below

9. The Copyright Board in this matter considered whether the way in which certain services provide on-line previews constitutes "fair dealing for the purposes of research". The Board noted that the Supreme Court made it clear in *CCH* that "research is not limited to non-

commercial or private contexts" and employed the factors set out in *CCH* to hold that the use of previews was "fair" under s. 29 of the *Copyright Act*.

Copyright Board Decision dated October 18, 2007 at paras 109, 116, Appellant's Record at 42, 44.

10. The Federal Court of Appeal held that the word "research" in s. 29 of the *Copyright Act* does not have "restrictive qualifiers" and that the legislator "opted not to qualify it so that the term could be applied to the context in which it was used, and to maintain a proper balance between the rights of a copyright owner and users' interests". The Federal Court of Appeal stated that it would not be unreasonable to give the word "research" its primary and ordinary meaning and found that the Board's application of a contextual interpretation of the concept of research was not unreasonable or in error. In determining whether specific acts amount to "research", the Federal Court of Appeal stated that the acts must be considered "from the point of view of the person for whom they are intended: the consumer of the subject-matter of the copyright."

Federal Court of Appeal Decision at paras 18-22, Appellant's Record at 83-84

11. The Federal Court of Appeal accepted the Board's analysis of the six factors that determine whether a dealing is fair, and commented only on the third factor of fair dealing – the amount of the dealing. The Court stated that the length of the preview relative to the work as a whole, and the user's objective, are relevant considerations in this determination.

Federal Court of Appeal Decision at paras 24-28, Appellant's Record at 85-86

PART II – THE ISSUES

12. This appeal raises the following issues of importance to the Federation and CanLII:

1. *What is Research?* The appellant argues that "research" in s. 29 of the *Copyright Act* means a narrow set of activities that are part of "authorship" in "the creative process". Such an approach would unduly restrict access and use of copyrighted legal material by the public and members of the legal profession, and thus unduly minimize the scope of beneficial user rights;

2. *What is Fair Dealing?* The appellant argues that fair dealing be tied to a "transformative work", a principle borrowed from U.S. copyright law, and that the

amount of the dealing ought to be considered in the aggregate. Such a holding would lead to an unwarranted unbalancing of rights as between owners and users of copyrighted material, and offend the media neutrality principle. Moreover, such an interpretation of the *Copyright Act* and its fair dealing provisions would lead to a limiting of access to legal materials that would be contrary to constitutional, administrative law, and common law principles that support access to justice for all persons.

PART III – STATEMENT OF ARGUMENT

Issue 1: What is Research?

13. The meaning of "research" in the *Copyright Act* in the context of fair dealing should be neither formal nor technical. In the 2004 *CCH* decision, this Court considered the principle of fair dealing as set out in s. 29 of the *Copyright Act* and unanimously held that research "must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained" and that "research is not limited to non-commercial or private contexts".

CCH, supra at para. 51.

14. The Copyright Board and the Federal Court of Appeal correctly followed this Court's principled approach in *CCH* and interpreted the purpose of "research" in s. 29 liberally to maintain a proper balance between the rights of copyright owners and the interests of users.

15. This Court has repeatedly held that copyright should strive to maintain a balance between creator's rights and user's rights. User rights are important for both encouraging the creation and dissemination of works; and for balancing and limiting the scope of the monopolizing rights granted by copyright law to the owner.

CCH, supra at para. 10.
Théberge v. *Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34at para. 30 ("*Théberge*").
Robertson v. Thompson Corp., 2006 SCC 43 at para. 69 ("*Robertson*").

16. The balancing and limiting of the copyright monopoly serves to support the creation and dissemination of works. However, there are other societal interests that are met by the user rights found in the *Copyright Act*. Such an interpretation is made clear by the structure of the *Copyright Act* itself. For example, "research" is coupled with "private study" in s. 29 and it is clear that private study is not concerned with the public dissemination of new works. Therefore the statutory purpose of the private study user right is an interest that is different from creation

and dissemination of new works – for example, intellectual growth or the experience of the consumer in accessing the work.

17. A contextual and purposive approach to construction therefore suggests that "research", when paired with "private study" in the *Copyright Act*, has a meaning that necessarily extends beyond the creation and dissemination of works goal of copyright. As is set out further below, such an interpretation is also consistent with the absence of "authorship" in the six factors listed in *CCH* as being relevant to fair dealing. This Court omitted any reference to a requirement that the fair dealing be part of an "act of authorship". A formal or technical meaning of "research", such as that proposed by the appellant, limits research to being associated with "authorship" and would lead to a less robust user focus, which will disturb the balance of owner and user rights expressed in the statute and in the jurisprudence, including *CCH*.

18. "Research" as used in s. 29 ought not to be restricted by the imposition of requirements not found in the *Copyright Act* (for example, restricting the word to mean an activity that "fuels the creative process"). Legal research may be conducted for many reasons, not all of them tied to "creative" processes. As Professor David Vaver states, research may simply involve searching or investigating a subject:

> "Research" may involve investigating or closely studying a subject. It is what lawyers do when they search for and copy legal texts, judgments, and other material to advise clients and use in arguing cases. It also applies to any form of searching, including that carried on by the general public"
>
> David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks,* 2d ed (Toronto: Irwin Law, 2011) at 239-240.

19. For example, this Court accepted in *CCH* that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums" falls within the meaning of research under s. 29 of the *Copyright Act*. However not all of these activities lead to the "creation of new works" or "acts of authorship". Conversely, the list of activities held by this Court in *CCH* to fall within "research" was not exhaustive. Access to legal materials provided by CanLII and the Federation goes beyond the scope of these specific activities. Indeed, part of the mandate of CanLII is to provide public non-lawyer access to legal materials; research activities of the public are not necessarily for giving opinions, arguing cases or preparing briefs.

20. There is a societal interest in individuals having public access to legal materials, such as jurisprudence and legal articles, and the end use of such materials may have nothing whatsoever to do with the creative process.

21. Members of the public may conduct research to obtain legal information as an end in itself, for example to determine what the law says with respect to obtaining a variance on the zoning for a building to be used for club meetings. This would not constitute research for the purposes of authorship, nor is it necessarily the type of "research" that goes into a document that is to be submitted to the courts, tribunals, or other bodies determining legal rights. Yet the context of the use (for example, a club may be deciding whether to buy a parcel of land) may take the research beyond "private study". Use of legal materials for research purposes does not always have a more formal and rigorous aspect. Such a formal and rigorous interpretation of research will limit the types of permitted use of copyrighted material available to the public and members of the legal profession, and will minimize the types of beneficial user rights that the *CCH* case confirmed.

Issue 2: What is Fair Dealing?

Fair dealing and access to works

22. Fair dealing may relate to (amongst other things): (a) copying by incorporation into a new work; or (b) copying to obtain access to a work.

23. As Professor David Vaver states, as it concerns incorporation into a new work, fair dealing "acknowledges the collaborative and interactive nature of cultural creativity, recognizing that copyright-protected works can be copied, transformed, and shared in ways that actually further copyright's purpose". In consequence, "fair dealing should be interpreted liberally to fulfil free expression imperatives, even where the right overlaps or occupies part of the ground covered by other user rights".

> David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2d ed (Toronto: Irwin Law, 2011) at 234.

24. Furthermore, fair dealing, as held by this Court in *CCH*, also pertains to ***access*** to copyrighted materials (in *CCH* legal materials were copied on request without any necessity that the materials were to be used in a new, "transforming" work). In that context, this Court held that more than being simply a defence, fair dealing is better understood as a user's right that must not

be interpreted too restrictively in order to maintain the proper balance between the rights of a copyright owner and users' rights.

CCH, supra at para. 48.
Théberge, supra at paras. 30-31.
Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 at para. 40.

25. Just as, with respect to the "research" definition, the hurdle of requiring "an act of authorship" is not part of the statutory scheme, neither is authorship a limitation properly applicable to the notion of fair dealing as a whole. The fact pattern in *CCH* makes clear that this Court did not require, either explicitly or implicitly, "the person claiming the [fair dealing] exemption to be engaged in an act of authorship". Such a reading would overlook the importance of the fair dealing right as it pertains to access to materials. Although some U.S. cases, as cited by the appellant, do focus on transformative use, not all U.S. cases include such a restricting requirement. For example, in *Sony Corporation of America v. University City Studios*, the U.S. Supreme Court found fair use for time-shifting of a television program. The television viewer was certainly not engaged in "an act of authorship" when he or she sat down to watch a pre-recorded favourite show after work (i.e. engaged in permissible "time-shifting" of copyrighted works). If this Court were to impose the requirement that fair dealing be tied to a "transformative work" in Canadian copyright law, there would be an unwarranted unbalancing of rights as between owners and users of copyrighted material.

Sony Corporation of America v. University City Studios, Inc. 464 U.S. 416 (1984).

Extent of the dealing in fair dealing

26. If fair dealing is a user right, the right ought to be measured as against the extent of use made by a particular user – a consumer-centered approach. The availability of the user right ought not to be subject to the vagaries of the popularity of the material being accessed by the user. If, to the contrary, this Court accepts that the number of aggregate acts of the facilitator is relevant (rather than the consumer's actions) the scope of activities of organizations such as the Federation and CanLII that have a national mandate to provide information to the public would be put in jeopardy. Moreover, such an approach would undermine a technological neutral interpretation of fair dealing.

Media neutrality applies to fair dealing

27. Arguments that the *CCH* decision provides insufficient guidance in the digital era (and that the decision is therefore subject to review or limitation) fail to appreciate the principle of media neutrality which anchors the *Copyright Act*. That principle of media neutrality makes it inappropriate to draw legally significant distinctions between "the dissemination of works over the Internet, which allows for widespread distribution of content" and the facts in C*CH*, which dealt with "a restricted number of photocopy machines located at one physical location and fax machines under the control of the librarians."

Appellant's factum, para 110.

28. *CCH* should not be "read down" to a narrow decision dealing only with photocopiers, fax transmissions and "legal research in a library". Rather, the legal principles in *CCH* ought to similarly apply to electronic delivery of information (including legal information and materials).

29. Such a narrowing, either factual or definitional, of *CCH* is likely to have negative repercussions for the users of CanLII, for example, including the public and thousands of members of the legal profession. An alteration of the *status quo*, including a finding that the "large and liberal" standard of fair dealing is not applicable to digital works on the Internet, would only be to the detriment of users and would create a likelihood of constrained access to digital materials.

30. This Court has held that media neutrality "means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones". Online electronic services, such as those offered by CanLII, are the digital equivalent of photocopy services offered by a physical library, and the principle of fair dealing should be applied equally to both situations, as well as to more technologically advanced, or different, electronic contexts. The current "large and liberal" standard that is applied to fair dealing should continue to have a broader application than strictly to works in a physical format (i.e. photocopies) so as to continue to include works in a digital format in conformity with the principle of media neutrality.

Robertson, supra at para. 49.

Fair dealing to be interpreted with constitutional, administrative, and common law principles

31. Fundamental to the rule of law is the maintenance of fair, equal and unfettered access to the law. Access to legal materials is closely linked to procedural fairness and the ability of a party or legal counsel to make argument before a court or tribunal. The necessity of effective

access to decided cases and commentary is particularly apparent in the common law system, which is premised upon the principle of *stare decisis*. The doctrine that one ought to adhere to the decided cases of equivalent and higher courts presupposes meaningful access to those cases. Without sufficient and proper access, the common law system simply cannot function.

32. Fair dealing, for the purpose of research, is a user right the importance of which is manifest in the context of access to legal materials. An interpretation of research in particular, or of fair dealing in a broader sense, that ties access to legal materials to a creative process or a systematic research program is unduly restrictive and could lead to interference with access to justice.

Summary: Interpretation of s. 29

33. The interveners therefore ask this Court to consider the following principles when interpreting s. 29 of the *Copyright Act*:

(a) A formal or technical meaning of "research" leads to a less robust user right in s. 29, and will change the balance between owner and user rights in the statute.

(b) "Research" is not qualified in s. 29. Legal research, for example, can be carried out in many different ways for many different purposes.

(c) A contextual interpretation of "research" includes consideration of the pairing in s. 29 of "research" with "private study", which latter activity is not directed to public dissemination of works.

(d) Fair-dealing as a whole supports user rights relating both to copying to obtain *access* to works as well as copying for *incorporation* into a new work. In the legal context, access to materials is an important right.

(e) The perspective of the user is of importance in determining whether the extent of dealing is fair in the analysis of the fair dealing user right.

(f) Fair dealing should be considered in a technologically neutral manner to ensure that there is sufficient flexibility to include access to works, such as legal materials, over the Internet.

(g) Shrinking the scope of the fair dealing provisions by imposing bright line restrictions puts at risk meaningful access to legal materials. The preservation of effective access to legal materials is a matter of fundamental importance pursuant to constitutional, administrative and common law principles.

PART IV – SUBMISSION ON COSTS

34. The interveners have raised no new issues. The Federation and CanLII therefore submit that no additional costs or disbursements should be occasioned by the Federation or CanLII as a result of their intervention.

PART V – ORDER SOUGHT

35. CanLII and the Federation seek an order dismissing this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF AUGUST, 2011

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PART VI – TABLE OF AUTHORITIES