

August 31, 2020

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Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

Attention: David Power, Deputy Registrar

Dear Sir:

Re: File No. 39222 (FIRST APPLICATION) – *York University v. The Canadian Copyright Licensing Agency* (“Access Copyright”)

Reply of York University pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156

These submissions are provided on behalf of York University (“York”) in reply to the Response of Access Copyright delivered on August 21, 2020, which responded to York’s application for leave to appeal to this Court from the Federal Court of Appeal Decision.¹

Access Copyright’s Response asserts that the fair dealing issues raised by York were “manufacturer[ed]”.² That is clearly incorrect given that the first issue York raises (the proper perspective from which the fair dealing analysis should be conducted) responds to the Federal Court of Appeal’s comment that this Court’s jurisprudence on that question is internally inconsistent, and that this Court’s most recent word on the issue is *per incuriam*.³

Access Copyright’s answer is that the Federal Court of Appeal’s comment was “*obiter*” and “perhaps went further than necessary”, and it argues that the Federal Court of Appeal was correct about how to reconcile this Court’s jurisprudence.⁴ Access Copyright’s argument is flawed on the merits, but more importantly it discounts the significance of the Federal Court of Appeal holding that this Court’s jurisprudence is inconsistent and wrong. It is a matter of public importance for this Court to confirm that its jurisprudence is not *per incuriam* and ought to be followed.

¹ Capitalized terms not otherwise defined have the meanings given to them in the Memorandum of Argument of York University dated June 19, 2020: *Leave Application of York University filed June 19, 2020 (File No. 39222 – First Application)* (“York LA”), Vol. II, Tab 3.

² Memorandum of Argument of Access Copyright dated August 21, 2020 (“Access Copyright Response”), para. 5: *Response of Access Copyright to the Leave Application of York* (“Access RLA”), p. 2.

³ Federal Court of Appeal Decision, para. 227 [York LA, Tab 2-C], regarding *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.

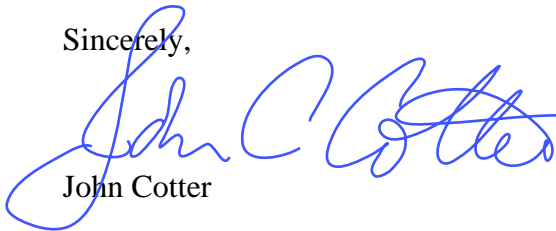
⁴ Access Copyright Response, para. 47: *Access RLA*, p. 13.

Access Copyright's Response itself makes the case for the public importance of the fair dealing issues raised in York's leave application. Access Copyright makes sweeping statements regarding the copyright practices of post-secondary and K-12 educational institutions generally.⁵ Implicit in these statements is Access Copyright's recognition that the fair dealing issues are not limited to the immediate parties but apply to the educational sector more broadly. That point was confirmed in York's leave application, including through the 25 letters of support filed by educational institutions and other organizations across Canada.⁶

Access Copyright's concluding argument regarding the "education sector's copyright bait-and-switch" particularly makes the case for public importance. Access Copyright alleges that "York and the entire education sector baited Parliament" in their support for adding "education" as an allowable fair dealing purpose under s. 29 of the *Copyright Act*, R.S.C., 1985, c. C-42.⁷ This allegation is inflammatory and completely ignores the impact of this Court's copyright pentology of nearly a decade ago in 2012 (which was released after the Parliamentary submissions) on fair dealing in the education sector.⁸ In any event, and importantly for York's leave application, this confirms that York's Fair Dealing Guidelines are based on model guidelines or policies which have been adopted more broadly in the post-secondary and K-12 education sectors, and that it is a matter of public importance for this Court to address the fair dealing guidelines at issue. This is not limited to York but is, as Access Copyright puts it, an issue affecting the "entire education sector".

York respectfully requests that leave to appeal ought to be granted, with costs in the cause.

Sincerely,



John Cotter

c. Arthur B. Renaud, Asma Faizi, and Guy Régimbald (for Access Copyright)

⁵ E.g., Access Copyright Response, paras. 11, 70-74; *Access RLA*, pp. 4, 20-21.

⁶ Affidavit of Susan Ann Trimble sworn June 19, 2020, Exhibits 1 to 25: *York LA*, Vol. II, Tab 4-I.

⁷ Access Copyright Response, para. 74: *Access RLA*, p. 21.

⁸ E.g., *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.