



GEORGIA STATE AND YORK UNIVERSITY

Defendants with a common purpose



Start with Georgia State

- Four decisions so far
 - *2012 & 2016 from the district (trial) court*
 - *2014 & 2018 from 11th Circuit Court of Appeals*
- A lot has already been established:
 - *Fair use is applicable to copying for classroom distribution*
 - *1976 Classroom Copying guidelines are not applicable*
 - *Case-by-case analysis is appropriate*
 - *Non-profit, educational purpose favors fair use, even when not transformative*
 - *Reasonable availability of a digital license can be considered in fair use analysis*

Parallels and differences with *York* case

- Overarching goal to establish how fair use/fair dealing apply to educational copying.
- Differing positions on how “amount” should be judged.
- Six factor test for fair dealing from *CCH v. Law Society* is very similar to four factors of fair use.
- GSU plaintiffs are rights holders, not CRO.
- *York* case starts with availability of blanket license.
- No U.S. parallel to issue of interim tariff.
- No Canadian parallel to GSU’s sovereign immunity defense.
- *York* case at much earlier stage!

Reflections on *York* case

- Two parts of York decision – that interim tariffs are mandatory and that guidelines not fair dealing – both seem wrong to me.
 - *Ariel Katz's* argues that York chose wrong argument on tariff
- Strong case that trial court ignored SCC precedents on fair dealing.
 - *Michael Geist* outlines these problems
- Earlier stages; appeal was heard March 5 in Federal Court of Appeal.

GSU is MUCH older

- Began in 2008
- First trial court decision found that only 5 excerpts out of 76 were infringing.
- Circuit Court of Appeals reversed and remanded, with instructions on proper analysis for fair use.
- Trial court, trying to apply instructions, found only 4 instances of infringement!
- Appeals court reversed and remanded again last year.
- Seems that result will have to be more instances that are not fair use.

What we know

- Earlier decisions clearly establish that there is room for fair use for copying course materials.
- Proper to look case-by-case. Not assessing guidelines, but specific uses.
- Non-profit education is a favored purpose.
- Remaining disagreements are about specific application of 2nd, 3rd and 4th factors:
 - *Nature of the work*
 - *Amount used*
 - *Impact on market for original*

Remaining issues

How fair use works in this case

- Relevant to Copyright Review in Canada, there is no evidence that fair use is destroying publishing in the U.S., even as it gets realigned in the digital age