

Court File No. A-259-17

FEDERAL COURT OF APPEAL

BETWEEN:

YORK UNIVERSITY

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	SEP 22 2017
Taina Wong	
TORONTO, ON	
Appellant	

seal

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY  
("ACCESS COPYRIGHT")

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU**

by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-

represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Date September 22, 2017 Issued by **TAINA WONG**  
**REGISTRY OFFICER**  
**AGENT DU GREFFIER**  
(Registry Officer)

Address of  
local office: 180 Queen Street West, Suite 200  
Toronto, Ontario  
M5V 3L6

TO: **THE CANADIAN COPYRIGHT  
LICENSING AGENCY**  
56 Wellesley Street West, Suite 320  
Toronto, ON M5S 2S3

Arthur B. Renaud / Jessica Zagar  
Tel: 416.868.1620 (ext. 294 / 255)  
Fax: 416.868.1621  
a.b.renaud@gmail.com /  
jzagar@accesscopyright.ca

Solicitors for the Respondent

**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the Judgment of the Honourable Justice Phelan (the “Trial Judge”) dated July 12, 2017 in Docket No. T-578-13 (the “Judgment”) by which the Federal Court granted judgment in Phase I of the action of Access Copyright seeking relief to enforce the *Access Copyright Interim Post-Secondary Education Institutions Tariff 2011-2013* (the “Interim Tariff”) and dismissed the counterclaim of York University (“York”) seeking declaratory relief.

**THE APPELLANT ASKS** that this appeal be allowed with costs in this Court and the court below, that the Judgment be set aside, that the action of Access Copyright be dismissed, and that this Court grant the declarations sought by York in the court below, including that:

- (a) any reproductions made that fall within York’s “Fair Dealing Guidelines for York Faculty and Staff (11/13/12)” dated November 13, 2012 (the “Fair Dealing Guidelines”) constitute fair dealing pursuant to sections 29, 29.1 or 29.2 of the *Copyright Act*, RSC 1985, c C-42; and
- (b) in any event, the Interim Tariff is voluntary, not mandatory, and York may elect whether or not to operate under the Interim Tariff.

**THE GROUNDS OF APPEAL** are as follows:

**I. Introduction**

1. Generally stated, this appeal relates to the following independent issues:
  - (a) The scope of fair dealing for the purposes of education - a user's right under the *Copyright Act*. In particular, whether copies of extracts of published works (e.g. a chapter from a book) made for students' education are fair dealing, and therefore not infringing copies, or whether compensation must be paid to rights holders for such copies.
  - (b) Whether an interim tariff granted by the Copyright Board of Canada under its interim decision making power is an approved tariff, and mandatory and enforceable on an institution that does not consent to be bound by its terms.

**II. Fair Dealing**

2. The Trial Judge erred in concluding that reproductions falling within York's Fair Dealing Guidelines do not constitute fair dealing pursuant to sections 29, 29.1 and/or 29.2 of the *Copyright Act*. Specifically, he misconstrued the second part of the test for fair dealing (i.e., whether the dealing was fair) and/or altered that legal test in the course of its application. These errors included the following:

- (a) failing to recognize that fair dealing is a user's right of students enrolled at York; and

- (b) conflating the fairness factors enumerated by the Supreme Court of Canada and relying on the same considerations to support conclusions under multiple factors.

### **III. Interim Tariff**

3. The Trial Judge erred in holding that:

- (a) the Interim Tariff is mandatory and enforceable against York;
- (b) an approved tariff is mandatory and binding on any person to whom it pertains; and
- (c) the defence that the Interim Tariff is not mandatory and enforceable was a collateral attack on the Copyright Board's Interim Tariff decision.

### **IV. Procedural Fairness**

4. The Trial Judge denied York procedural fairness by rendering judgment on matters outside the scope of the Phase I trial, contrary to the Orders of the Case Management Judge dated July 30, 2014 and May 9, 2016 which bifurcated the issues, and in particular by:

- (a) declaring (in paragraph 1 of the Judgment) that York was obligated to pay royalties to Access Copyright under the Interim Tariff;
- (b) ordering (in paragraphs 2 and 4 of the Judgment) that York pay the royalties specified in the Interim Tariff for certain periods, together with pre- and post-Judgment interest on all royalty amounts; and

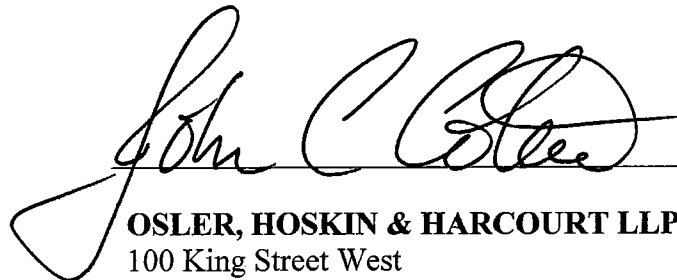
- (c) ordering (in paragraph 3 of the Judgment) that Access Copyright may apply for an injunction prohibiting York from, among other things, reproducing or authorizing reproduction of all copyright-protected works falling within the Interim Tariff (the term of which ended on December 31, 2013).

**V. Further Grounds**

5. York relies on: the provisions of the *Copyright Act*, including those noted above and Part VIII; sections 27(1)(a), 27(2)(b), and 52(b) of the *Federal Courts Act*, RSC 1985, c F-7; and the *Federal Courts Rules*, SOR/98-106.

6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

September 22, 2017



**OSLER, HOSKIN & HARCOURT LLP**  
100 King Street West  
1 First Canadian Place  
Suite 6200, P.O. Box 50  
Toronto, ON M5X 1B8

John C. Cotter  
Tel: 416.862.5662  
Fax: 416.862.6666  
jcotter@osler.com

Solicitors for the Appellant