

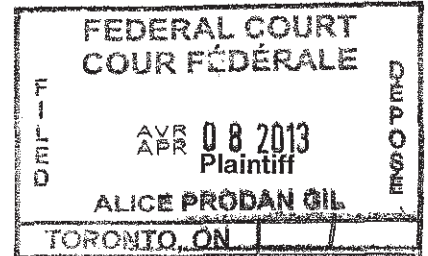
* See full copy in Amex BAF

Court File No. ~~22~~ T-578-13

FEDERAL COURT

BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY
("ACCESS COPYRIGHT")



-and-

YORK UNIVERSITY

Defendant

STATEMENT OF CLAIM

(Filed April 8, 2013)

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, **WITHIN 30 DAYS** after this statement of claim is served on you.

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 DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

April 8, 2013

ALICE PRODAN GIL
REGISTRY OFFICER
AGENT DU GREFFIER

Issued by:

(Registry Officer)

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

TO: YORK UNIVERSITY
Office of the Counsel
1050 York Research Tower
4700 Keele Street
TORONTO, ONTARIO
M3J 1P3

THE PLAINTIFF CLAIMS:

- a) a declaration that the defendant, York University, and persons acting under its authority and control, namely professors, teachers, researchers, librarians, instructors, demonstrators, research assistants and teaching assistants (hereinafter "Educators") and students, have, as and from September 1, 2011, reproduced and authorized the reproduction of copyright – protected works, in whole or substantial part, the reproduction and authorized reproduction of which obliges the defendant to pay royalties to the plaintiff under the *Access Copyright Interim Post-Secondary Educational Institutions Tariff, 2011-2013* (the "*Approved Tariff*");
- b) payment by the defendant of the royalties specified in *the Approved Tariff* for the periods specified therein;
- c) an injunction prohibiting the defendant and all persons under it authority and control from:
 - i) reproducing or authorizing the reproduction, in whole or substantial part, of all copyright-protected works falling within the *Approved Tariff*; and
 - ii) selling, renting, distributing, exposing or offering for sale or rental, or exhibiting in public the copies arising from such reproduction or authorized reproductionuntil all royalty amounts owing under the *Approved Tariff*, inclusive of interest, have been paid in full;
- d) a mandatory Order, under section 44 of the *Federal Courts Act*, requiring the defendant to preserve, in all their material forms, all copies, records of reproduction and all records of subsequent dealing in such copyright- protected works and otherwise abide by the terms of the *Approved Tariff*;
- e) an Order, under Rule 384 of the *Federal Courts Rules*, that this proceeding continue as a specially managed proceeding;
- f) pre-judgment interest, in accordance with section 36(1) of the *Federal Courts Act*, on all royalty amounts owing under the *Approved Tariff*, beginning on the payment due dates specified in the *Approved Tariff*;
- g) post-judgment interest, in accordance with section 37(1) of the *Federal Courts Act*,

- h) costs of this action on a substantial indemnity basis in lieu of the amounts fixed in the Federal Courts Tariff B or, in the alternative, costs fixed or assessed at the highest column of Tariff B plus 50%; and
- i) such other and further relief as this Honourable Court deems just.

THE PARTIES

1. The plaintiff, The Canadian Copyright Licensing Agency ("Access Copyright"), is a collective society pursuant to section 70.1 of the *Copyright Act*. The plaintiff was incorporated in 1988 as a not-for-profit corporation under the *Canada Corporations Act*.
2. The plaintiff maintains offices at 1 Yonge Street, Suite 800, Toronto, Ontario, M5E 1E5.
3. The plaintiff has entered into agreements with creators and publishers ("affiliates") in Canada of books, folios, magazines, newspapers, journals and other periodicals. These agreements authorize the plaintiff, *inter alia*, to exercise and manage their affiliates' reproduction rights through collective licensing.
4. The plaintiff has entered into bilateral agreements with extra-jurisdictional reproduction rights organizations ("RROs") under which the plaintiff is authorized to collect and remit royalties for the reproduction in Canada of copyright-protected works first published in countries other than Canada that fall within the repertoire of copyright-protected works of such foreign RROs. The plaintiff has entered into such agreements with, among others, The Copyright Licensing Agency Limited ("CLA") in the United Kingdom and the Copyright Clearance Center, Inc. ("CCC").
5. Since 1988, the plaintiff has, in accordance with the authority referred to in paragraphs 4 and 5, operated a licensing system in relation to a repertoire of copyright-protected works created or published by its affiliates and in relation to the repertoires of the contracting RROs (hereafter, all these separate repertoires will be collectively referred to as "Repertoire"). Pursuant to this licensing system, the plaintiff has entered into licence agreements with, among others, individual universities and colleges. Such licensing agreements have permitted the reproduction and subsequent dealing with such works, pursuant to negotiated copying limits, by the contracting institutions.
6. The plaintiff has, since 1988, received royalties from this licensing system, and distributed monies, net of its expenses, to its affiliated creators, publishers and foreign RROs.

7. The defendant, York University, was incorporated under the *York University Act, 1959* and continued under the *York University Act, 1965* by the Legislative Assembly of Ontario. The defendant provides post-secondary and post-graduate education in Ontario. The defendant employs and contracts with Educators to provide such education services to undergraduate and graduate students. There are no fewer than 2000 Educators and 55,000 such students enrolled at York University as at the date of this pleading.

HISTORICAL DEALINGS BETWEEN THE PARTIES

8. The plaintiff and the defendant entered into a licence agreement in 1994. The defendant was granted a licence to reproduce and subsequently deal with copyright-protected works in the Repertoire in accordance with the copying limitations and other terms and conditions contained in the licence agreement. These terms and conditions were modified from time to time and the agreement was extended by mutual consent to the end of December 2010. During 2010, the defendant advised the plaintiff that it would not continue the licensing arrangement beyond 2010.

TARIFF APPLICATIONS

9. The plaintiff filed a proposed tariff under section 70.13 of the *Copyright Act* on March 30, 2010 to fix the terms and conditions of the permitted reproduction of works within the Repertoire for the period January 1, 2011 to December 31, 2013. The proposed tariff was published in the *Canada Gazette* on June 12, 2010. Objectors filed their objections to the proposed tariff on or before August 11, 2010. The Copyright Board has scheduled the hearing of the tariff proceedings to begin on February 11, 2014. The Copyright Board will certify the tariff thereafter. The terms of the certified tariff will supersede the terms of the *Approved Tariff*.
10. On or about October 13, 2010, the plaintiff applied, under section 66.51 of the *Copyright Act*, for an interim decision in the form of an interim tariff to continue the existing model licensing regime from January 1, 2011 until the Board certifies a tariff in the tariff proceedings.
11. The Copyright Board issued an interim tariff, a copy of which is attached hereto as Schedule "A", on or about December 23, 2010, the terms of which were amended on April 7, 2011 and September 8, 2011 (the "*Approved Tariff*").

12. The plaintiff filed a certified copy of the *Approved Tariff* concurrently with this pleading under Rule 424(2) of the *Federal Courts Rules* and section 66.7(2) of the *Copyright Act*. The *Approved Tariff* is thus enforceable in the same manner as an Order of the Federal Court.
13. The *Approved Tariff* became effective on January 1, 2011 and will continue until at least the end of December, 2013. The *Approved Tariff* does not obligate any person to pay royalties to the plaintiff unless that person is making or authorizing the making of non-exempted reproductions of copyright-protected works within the Repertoire.
14. The defendant operated under the *Approved Tariff* until August 31, 2011. Effective September 1, 2011, the defendant represented to the plaintiff that it was no longer making or authorizing the making of any non-exempted reproductions of copyright-protected works within the Repertoire. The defendant asserted that the terms of the *Approved Tariff* were not applicable to its activities. No further royalties were paid by the defendant to the plaintiff for any period subsequent to that date. Thus, as and from September 1, 2011, all acts of reproduction of copyright-protected works within the Repertoire by Educators and the defendant's students have been unlicensed and not in accordance with the terms and conditions of the *Approved Tariff*.

ACTS OF REPRODUCTION AFTER AUGUST 31, 2011

15. The plaintiff claims that the defendant is, and has been since January 1, 2011, obligated to comply with the terms of the *Approved Tariff* if, subsequent to that date, one Educator made or authorized the making of a non-exempted reproduction of one copyright-protected work within the Repertoire.
16. As particularized in Schedule "B" herein, more than one Educator has, on and after September 1, 2011, reproduced, in whole or substantial part, and authorized the reproduction by students and third party copy-shops, in whole or substantial part, of more than one copyright-protected work within the Repertoire.
17. The Educators who have carried out these activities were, to the plaintiff's present knowledge, F. Elavia, V. Patroni, B. Luk, A. Porter and J. Nitzan. The copied versions of said copyright-protected works resulting from such reproduction and authorized reproduction were possessed by the Educators and third party copy-shops for the purposes of sale, offering or exposing for sale, distribution or exhibition in public. The said copied versions have been sold, offered or exposed for sale, distributed and exhibited in public by said Educators and said third party copy-shops.

18. Each separate act of reproduction, authorized reproduction and further dealing enumerated in paragraphs 17 and 18 above has been undertaken without the consent or permission of the plaintiff, any of the plaintiff's affiliates, CLA, CCC, any other foreign RRO or any copyright owner in such copyright-protected works.
19. Each such separate act of reproduction and subsequent dealing triggered the payment of royalties under the *Approved Tariff*, the default in payment of which entitles the plaintiff to recover them from the defendant under section 68.2(1) of the *Copyright Act*.
20. To the extent the plaintiff, in order to secure the relief requested herein, is required to establish further such acts of reproduction or authorized reproduction by the Educators, it is not possible, without this Court's assistance or the discovery provisions of the *Federal Courts Rules*, for the plaintiff to know and plead further acts of reproduction and authorization of reproduction by the Educators beyond those particularized herein. The plaintiff relies on all the defendant's acts of reproduction and authorization of reproduction that may be uncovered during the course of these proceedings, to the extent further such acts must be demonstrated to secure the relief requested herein.
21. To the extent the defendant seeks to rely on any statutory exemption in the *Copyright Act* to excuse the acts of reproduction, authorized reproduction and further dealing particularized herein, the evidentiary and legal burden is on the defendant to establish, on a balance of probabilities, that all such individual acts of reproduction, authorized reproduction and further dealing are exempted from the payment of royalties under the *Approved Tariff*.

"FAIR DEALING" GUIDELINES

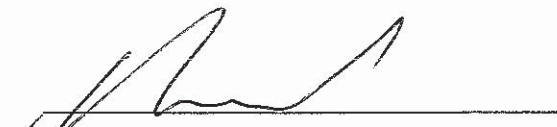
22. The defendant has published "Fair Dealing Guidelines for York Faculty and Staff (11/13/12)", a copy of which is attached to this pleading as Schedule "C". Such guidelines authorize and encourage Educators and students to reproduce a substantial part of copyright-protected works, including works within the Repertoire. Such authorized and encouraged acts of reproduction trigger an obligation upon the defendant to pay royalties under the *Approved Tariff* and otherwise abide by its terms and conditions.
23. The arbitrary and purely mathematical extent and systematic, recurring nature of the reproduction and dealing with copyright-protected works authorized and encouraged by such guidelines is not encompassed within the "fair dealing" exemption under the *Copyright Act*.

24. In any event, such guidelines are incapable of any effective, reliable or consistent enforcement by the defendant. All such purported "fair dealing" limits have been and will be regularly exceeded by the acts of reproduction and authorized reproduction by the Educators and the defendant's students.
25. Thus, none of the acts of reproduction, authorized reproduction and subsequent dealing by the Educators authorized and encouraged by these guidelines are exempted from the application of the *Approved Tariff*.

INTEREST, COSTS & PLACE OF TRIAL

26. The cause of action pleaded herein has arisen in the Province of Ontario. The laws relating to pre-judgment and post-judgment interest in force in Ontario apply to these proceedings.
27. The plaintiff claims costs on a substantial indemnity basis. The defendant knew, or ought to have known, at all material times that the Educators were engaged in acts of reproduction and authorized reproduction of copyright-protected works that triggered a royalty under the *Approved Tariff*. The defendant's refusal to pay royalties under the *Approved Tariff* as and from September 1, 2011, was and is unjustified. The plaintiff ought to be fully compensated for all its out-of-pocket expenditures incurred in these proceedings.
28. The plaintiff proposes that the trial of this action take place in Toronto.

DATED AT TORONTO, ONTARIO, THIS ^{08th} DAY OF APRIL, 2013



Arthur B. Renaud
Jacqueline Tsai
Barristers & Solicitors
Access Copyright
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