



Copyright Board of Canada
Suite 800 - 56 Sparks Street
Ottawa, Ontario K1P 5A9

January 17, 2023

Re: Notice of Grounds for Objection

Proposed Tariff: Access Copyright Post-Secondary Educational Institution Tariff – 2024-2026

1. The Canadian Association of University Teachers (“CAUT”) is a federally incorporated non-profit organisation located in Ottawa and founded in 1951. CAUT is the national voice for academic staff, librarians, researchers and other academic professionals and general staff at 122 universities and colleges across Canada. CAUT defends academic freedom and works actively in the public interest to improve the quality and accessibility of post-secondary education in Canada.
2. The Canadian Federation of Students (“CFS”) is a federally incorporated non-profit organisation founded in 1981 to provide students with an effective and united voice, provincially and nationally. CFS is the national voice for students and Canada’s largest student organisation, uniting more than one-half million students in all ten provinces. The CFS and its predecessor organisations have represented students in Canada since 1927.
3. This Notice of Grounds for Objection is filed jointly by CAUT and CFS.

Preliminary Issues

4. The members of CAUT and CFS together constitute the population who will be affected most by Access Copyright’s proposed Post-Secondary Institution Educational Institution Tariff – 2024-2026 for reproduction of works in academic institutions (the “Proposed Tariff”). Post-secondary students and teachers use works subject to copyright in their studies and teaching. Students will be the population that bears the burden of paying the levies the tariff will impose in the form of increased student fees. Academic staff will bear the burden of the reporting and auditing provisions of the Tariff – provisions that conflict with academic freedom – a cornerstone of post-secondary education in Canada.
5. Teachers and students are also authors. Their work – authored in academic settings, published in academic journals and other texts and subsequently read to further the studies of others – constitutes much of the content that teachers and students access during academic study.

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6. As both creators and users of academic works, CAUT and CFS members may offer unique perspectives to the Copyright Board's understanding of the merits and demerits of Access Copyright's Proposed Tariff.
7. CAUT and CFS observe at the outset that the Proposed Tariff is not mandatory in nature: *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32. However, we are aware of lobbying efforts by Access Copyright to statutorily deprive institutions of the right to opt for the rights clearance mechanisms that work best for them, and to amend the Act to include a statutory damages regime, potentially based on a multiple of the tariff rate set by the Copyright Board.
8. Similarly, we observe that Access Copyright claims the Proposed Tariff has been filed with the recognition that "policy, legal or regulatory changes" may prompt it to make such "modifications" as "may be appropriate or necessary", and "reserves the right to propose such changes ... as may be justified." CAUT and CFS observe that while Access Copyright may withdraw entitlements it claims under the tariff, it cannot and should not attempt to claim new entitlements for acts not contemplated in the Proposed Tariff without presenting affected stakeholders the opportunity to object and exercise full participatory rights in any proceeding before the Board.
9. CAUT and CFS observe that the Board may at some future point be requested to admit new objectors to proceedings. CAUT and CFS request flexibility on the part of the Board to ensure that entities affected by these changes may participate in this proceeding. CAUT and CFS similarly reserve the right to request from the Copyright Board a change in its status in this proceeding at some future point from objector to intervener.

1. Grounds for why the Board should not approve the proposed tariff despite any alteration of royalties or levies or fixation of terms or conditions

10. CAUT and CFS observe that the Proposed Tariff's definition of "copy" includes matters that are not reproductions for the purposes of the Act. Both "(h) projecting an image using a computer or other device" and "(i) displaying on a computer or other device" involve no production of a durable copy. Many of the other matters captured by the definition of "copy" similarly fail to address the production of durable copies, and so involve no reproductions. To the extent that computer-related reproductions occur, these will be captured by the "temporary reproductions"

exception in s. 30.71 of the Act as temporary and essential parts of technological processes necessary to facilitate non-infringing uses.

11. The definition of “copy” also purports to cover “communication to the public” or “making available” of a repertoire work, and authorization of the defined activities. To the extent that these activities involve anything other than reproduction rights – the making of a durable copy of a work – the terms should be struck entirely from the Proposed Tariff. Access Copyright derives no agency or right from its authors to administer performance or authorization rights under the *Copyright Act*.
12. The dealings captured by Access Copyright’s definitions also raise technological neutrality issues, purporting to characterize as infringing and so subject to the tariff dealings that, if undertaken with non-digital copies, would plainly not infringe copyright. This approach is wrong in both law and policy, discouraging the adoption of efficient technological educational applications that are emerging in the marketplace.
13. Access Copyright’s Grant of Rights in s. 3 of the Proposed Tariff is overly broad, capturing dealings that plainly fall within fair dealing for the purposes of private study, criticism, education, review, and other fair purposes. A substantial volume of dealings within educational institutions falls squarely within the ambit of this and other exceptions within the *Copyright Act*. It is difficult to square the amounts of the dealings permitted by the tariff with the amounts sanctioned as tending to be fair by key and binding Supreme Court of Canada cases, *CCH Canadian Limited v. The Law Society of Upper Canada*, [2004] 1 S.C.R. 339, and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37. Access Copyright seeks to license volumes of copying that are covered by fair dealing rights, and fails to license greater volumes not covered by fair dealing.

2. Grounds for objecting to any royalty or levy rates in the proposed tariff

14. Access Copyright’s “repertoire” is opaque. The tariff only applies to the repertoire. Accordingly, it is difficult for institutions to assess the benefit of the tariff. Transparency in the contents of the repertoire is a necessary pre-condition for the adoption of the Proposed Tariff.
15. Access Copyright bases payments by institutions on reporting of FTE student numbers. Section 6(2) of the proposed tariff requires reporting of FTE student numbers by “no later than 15 days prior to the start of each academic year”. CAUT and CFS observe that this date does not accord with those used by educational institutions for assessing student fees. Institutions ought to

report numbers after the “course drop deadline”. Access Copyright’s proposed date would result in over-payment by institutions.

16. Calculating the tariff on a wall-to-wall count of FTE students is problematic because Access Copyright’s repertoire does not address the diverse needs of different faculties within most educational institutions. For example, STEM programs, notably, do not find much use for Access’ repertoire.
17. The differential rate between universities and “other educational institution” similarly fails to reflect the differing reliance on works that may or may not be in Access Copyright’s repertoire. A college course on creative writing will pay less than a university mathematics course despite, potentially, the former relying exclusively on repertoire works and the latter not using any at all.
18. These points speak to the lack of fitness of the “one-size-fits all” nature of the Proposed Tariff.

3. Grounds for objecting to any terms or conditions in the proposed tariff.

19. The Proposed Tariff’s provision on Reporting creates problems for academics who will be tasked with implementation. The reporting provisions of the Proposed Tariff go beyond what the tariff requires to achieve an equitable distribution of royalties to authors, unfairly burdens institutions, offends values of intellectual privacy and academic freedom, and undertakes surveillance on activities and content outside of the scope of the Proposed Tariff.
20. The following excerpt from CAUT’s Policy Statement on Academic Freedom, (approved by the CAUT Council, November 2018) offers a useful description of academic freedom:

(1) The institution serves the common good of society, through searching for, and disseminating knowledge, and understanding and through fostering independent thinking and expression in academic staff and students. These ends cannot be achieved without academic freedom. All academic staff members have the right to academic freedom.

(2) Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service; freedom to express one’s opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

21. The Proposed Tariff’s surveillance and reporting obligations inherently chill academic freedom. The reporting obligations extend to matters and works not covered by the Proposed Tariff and

beyond Access Copyright's repertoire. Reporting obligations should be stripped down to the bare minimum of information required to assist Access Copyright in achieving a just distribution of royalties. This will involve, at a minimum, not collecting information on works directly licensed from the publisher, fair dealings, and works not within the repertoire.

22. At the least, Access Copyright ought to be provided with aggregated data only, not segregated by instructor and course. Such granular information reduces the imposition on academic freedom while still providing Access copyright with precisely the information it requires to undertake equitable distribution.
23. The Proposed Tariff's Records and Audit provisions in s. 8(1) and (2) place an unreasonable burden on institutions, who will have to provide the physical and digital storage space and labour to comply with an audit. The one-way penalty is unreasonable: mistaken underreporting is penalized, whereas triggering expensive auditing that finds accurate reporting bears no risk for Access Copyright. The notice period is similarly inappropriate, as institutions will generally require more than ten days to prepare for and facilitate an audit.
24. CAUT and CFS submit that it is almost certain that an institution that agrees to the Proposed Tariff will download the cost onto teachers and students. This will result in higher student fees, and a greater administrative workload for teachers.