

Access Copyright Post-Secondary Education Institution Tariff, 2011-2013

Frequently Asked Questions

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A copyright tariff is a document that sets out the royalties and related terms and conditions for doing something, e.g. copying a published work, for which the permission of the copyright owner, or the owner's representative, is required. A proposed tariff is filed by a collective society with the Copyright Board of Canada (the "Board"), and once it is finalized ("certified") by the Board, the collective society is entitled to collect from users the royalties specified in the certified tariff. If a user does not pay those royalties, the collective society is entitled to collect them in court proceedings.

Access Copyright, a collective society, has proposed the Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013 (the "Access Proposed Tariff"), a copy of which is attached as Schedule A. The Access Proposed Tariff would permit post-secondary educational institutions to make copies, in paper and electronic form, of published works in Access Copyright's repertoire, subject to the limitations and other terms and conditions of the tariff.

The Access Proposed Tariff will take effect as of January 1, 2011 for a term expiring December 31, 2013, but only after it is certified by the Board. It is likely that the Board will make substantial changes to the proposed tariff. As a result, despite the fact that the Access Proposed Tariff will take effect as of January 1, 2011, the final terms and conditions of the tariff will not be known until the Board issues a decision to certify it.

1Q. What copying will be permitted under the Access Proposed Tariff?

- A. The Access Proposed Tariff will permit copying of published literary, dramatic and artistic works in Access Copyright's repertoire within the copying limits specified in section 3 of the tariff. For example, a copy may be made of up to 10 per cent of a published work in Access Copyright's repertoire.

2Q. Who is permitted to make the copies?

- A. Copies may be made by a Student engaged in a course of study in a university and by a Staff Member of the university. The term "Staff Member" is defined in section 2 of the tariff as including a professor, teaching assistant, academic administrator and administrative support staff.

In addition, the Access Proposed Tariff will permit a university to authorize a subcontractor to make copies of published works in Access Copyright's repertoire subject to meeting the requirements of section 10. The requirements include that the university authorize the subcontractor by way of a written agreement and that the university provide Access Copyright a copy of the written agreement within 30 days from the date the agreement is entered into.

The tariff would therefore permit a university to arrange for copies of course packs to be made for it by a commercial copy shop.

3Q. What kinds of copying will be permitted under the Access Tariff?

- A. The Access Proposed Tariff will permit the making of copies in any material form including onto paper and in digital form. The tariff defines “Copying” as making a copy. The term “Copy” is defined in section 2 of the tariff as follows:

“*Copy*” means any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

- (a) reproducing by a reprographic process, including reproduction by photocopying and xerography;
- (b) scanning a paper copy to make a Digital Copy;
- (c) printing a Digital Copy;
- (d) transmission by electronic mail;
- (e) transmission by facsimile;
- (f) storage of a Digital Copy on a local storage device or medium;
- (g) posting or uploading a Digital Copy to a Secure Network or storing a Digital Copy on a Secure Network;
- (h) transmitting a Digital Copy from a Secure Network and storing it on a local storage device or medium;
- (i) projecting an image using a computer or other device;
- (j) displaying a Digital Copy on a computer or other device; and
- (k) posting a link or hyperlink to a Digital Copy.

4Q. What records must be made of copies made under the Access Tariff?

- A. The obligation to maintain records under the Access Proposed Tariff is broader than under the existing blanket license agreement. Section 6 of the tariff requires records to be made for each Course Collection. The term “Course Collection” is defined in section 2 to be (a) assembled paper copies, such as course packs, and (b) digital copies that are emailed, linked or hyperlinked, or are posted on a secure network. Records will therefore be required to be made for copies posted on a course website or on an electronic reserve.

5Q. Must records be made of all works included in a Course Collection?

- A. The Access Proposed Tariff is unclear on this point. The prudent course would be to start to make records of all published literary, dramatic and artistic works reproduced except for reproductions for which the university has otherwise obtained permission, e.g. through a CRKN license agreement, or reproductions for which no permission is required, e.g. a copy that is made under the fair dealing exception. The scope of the record keeping obligation will likely be clarified in the tariff certified by the Board.

6Q. When will Access Copyright be entitled to conduct a survey of a university's copying practices?

- A. Section 13 of the Access Proposed Tariff would entitle Access Copyright to conduct a bibliographic and volume study once every academic year. Access Copyright would not however be entitled to conduct the survey until after the tariff is certified. It is possible that Access Copyright will seek to conduct a survey for purposes of the Board proceedings. AUCC will advise its members in regard to such a survey. Until further advised, AUCC recommends that its members refrain from permitting Access Copyright to conduct any survey until after the Access Proposed Tariff is certified.

When a university is no longer operating under the Access Proposed Tariff the university will need to ensure that it does not copy works in Access Copyright's repertoire unless it has the permission of the copyright owner or permission is not required, e.g. the making of the copy is within fair dealing.

7Q. The right under section 13 of the Access Proposed Tariff to conduct surveys and gain access to secure networks including email communications may contravene a university's obligations under privacy laws. What happens if there is a conflict between the tariff and obligations otherwise imposed by law?

- A. This is a legal issue that the university may face and will depend on the terms of the Access Proposed Tariff as certified. The university may need to seek legal advice on the matter. AUCC will raise concern over conflicts between the tariff and other legal obligations with the Board as part of its objection to the tariff.

8Q. If a university prints a course pack in December, 2010 can it sell the course pack after December 31, 2010 without attracting liability under the Access Proposed Tariff?

- A. Yes. However, the university will be liable under the tariff for any copies made after December 31, 2010 unless permissions have otherwise been obtained from the copyright owner.

9Q. Can a university still forward to Access Copyright the template letter offering to pay the royalties in the certified Access Proposed Tariff (the "Template Letter") drafted by AUCC's legal counsel?

- A. Yes. The Template Letter should be forwarded by December 31, 2010.

10Q. Can a university that has forwarded the Template Letter to Access Copyright give notice at any time that it no longer intends to operate under the Access Proposed Tariff?

- A. Yes. As the Access Proposed Tariff is currently drafted the university would however be obliged to pay the tariff royalties for the full academic year in which the notice was sent. Consideration might therefore be given to forward the notice of the

intent to no longer operate under the tariff effective as of September 1. Although the Access Proposed Tariff will take effect January 1, 2011, the tariff is drafted to apply to the academic year September 1 to August 31. It is likely that, if the tariff is certified, the royalties for the period January 1, 2011 to August 31, 2011 will be prorated to the full academic year.

11Q. If a university decides to operate outside the Access Proposed Tariff on January 1, 2011, can the university elect to opt into the tariff as of a subsequent date?

A. Yes. As the Access Proposed Tariff is currently worded the university would have to pay the tariff royalties for the full academic year in which the opt in date falls. Consideration might therefore be given to opting into the tariff as of September 1.

12Q. Is a university required to make royalty payments to Access Copyright during the period of January 1, 2011 and the date the Access Proposed Tariff is certified.

A. No, unless the Board issues an interim tariff requiring payment. Access Copyright has applied for an interim tariff and AUCC is in the course of vigorously opposing the application. The royalties for that period will be payable once the Access Proposed Tariff is certified.

13Q. What is to be done if the Access Proposed Tariff conflicts with the terms of a university's collective agreement?

A. This is also a legal issue on which the university may need to seek legal advice.

14Q. Does Access Copyright have to produce a list of its repertoire?

A. Under section 70.11 of the *Copyright Act* Access Copyright is required to answer, within a reasonable time, all reasonable requests for information about its repertoire. This does not require that Access Copyright provide a list of its repertoire. It is only required to indicate whether or not specific works mentioned in a request are in its repertoire.

15Q. If a university makes a copy of a work that is not in Access Copyright's repertoire and for which permission of the copyright owner was required, what are the consequences?

A. The university would be liable to the copyright owner for copyright infringement. The Access Proposed Tariff does not include an indemnity for the infringement. Under section 38.2(1) of the *Copyright Act*, the maximum amount the university would be liable for would be the amount payable to Access Copyright if the copy had been authorized under the Access Tariff. If the tariff as certified only includes an FTE royalty rate, it is possible that the maximum would be the per page rate that the Board used in converting copying volume into the FTE rate.

16Q. If Bill C-32 passes and there are new exceptions for copies made by universities, e.g. fair dealing for educational purposes, will there be any impact on the Access Tariff?

A. If Bill C-32 is passed before the Access Proposed Tariff is certified, the Board will consider the new exceptions in determining the royalty rate. If Bill C-32 is not passed until after the tariff is certified, and if the exceptions would have resulted in a significant reduction of the tariff had they been in force at the date of certification, AUCC may consider applying to the Board for a variation of the certified tariff.

17Q. If a university obtains a transactional permission from Access Copyright for the copying of a published work will it thereby be liable to pay the royalties under the Access Proposed Tariff for the academic year in which the copying was conducted?

A. No.