

Access Copyright Postsecondary Education Institution Interim Tariff

Frequently Asked Questions

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On December 23, 2010 the Copyright Board of Canada granted Access Copyright's application for an interim decision and approved an Interim Tariff that will apply from January 1, 2011 until the earlier of December 31, 2013 and the date on which a final tariff is certified. The Interim Tariff tracks the wording of the former AUCC model reprography licence to the extent possible.

1. Why did the Copyright Board certify an Interim Tariff?

A: Access Copyright applied to the Copyright Board in order to certify a proposed tariff - a royalty payment scheme for copying. The process of certifying a final tariff can take several years. Access Copyright therefore applied for an Interim Tariff and the Copyright Board considered how post-secondary institutions should be authorized to copy works within the repertoire of Access Copyright during this interim period.

The Copyright Board considered the options and decided that an Interim Tariff was the best way to maintain the "status quo," by essentially extending the licence agreements with Access Copyright that were already in place since 2003 for most post-secondary institutions.

Access Copyright, AUCC and ACCC have each applied to the Copyright Board to amend various provisions of the Interim Tariff. It is likely that the Board will rule on those applications in the next few weeks. A separate FAQ will be circulated once the Board issues its ruling.

2. How does the Interim Tariff differ from the licence my institution previously had with Access Copyright?

A: The terms of the Interim Tariff are very similar to the post-secondary licence agreements that were previously in place. Notable exceptions include:

- The Interim Tariff no longer allows you to copy musical works.

- Digital copying is now permitted (within certain limits), if an institution elects to be covered under this portion of the tariff (Schedule G), and notice of that election is sent to Access Copyright.
- The royalty rates likely will be adjusted retroactively at such time as the Copyright Board eventually certifies a final tariff. If the rate is higher, institutions which operated under the Interim Tariff may owe an additional amount; if the rate is lower, institutions will be due a corresponding refund.
- Access Copyright no longer issues transactional licences.

3. Is my institution required to operate under the Interim Tariff?

A: No. The Interim Tariff sets the interim royalties payable by any post-secondary educational institution that requires a licence to use the repertoire of Access Copyright. An institution that does not require a licence from Access Copyright is not required to operate under the Interim Tariff. An institution does not require such a licence if the institution does not use the repertoire, if the institution has licensed the use of a work through other means, or if the *Copyright Act* already authorizes the use being made of the relevant work.

Institutions choosing not to operate under the Interim Tariff must take great care to ensure that all copying activity in the institution is authorized by the copyright owner or is otherwise permissible.

4. If my institution chooses not to operate under the Interim Tariff, what happens if a work in Access copyright's repertoire is copied by a faculty member or other employee?

A: The institution may be liable for copyright infringement, if rights to the copied work were not otherwise acquired from the copyright owner directly, or if the copying did not fall under an exception in the *Copyright Act* such as “fair dealing”. This liability may include the full amount that would be payable under the Interim Tariff, plus any additional amount that might be payable once the Copyright Board certifies a final tariff. The Interim Tariff may be triggered automatically and your institution would be required to pay a rate of \$3.38 per FTE and 10 cents per page for course collections for the academic year in which the copy is made.

5. Does my institution have to do anything to operate under the Interim Tariff?

A: No special action is required to “opt in” to the Interim Tariff. Your institution would have to abide by the terms of the Interim Tariff, including making the required payments to Access Copyright and keeping the required records.

6. What if we sent an offer letter to Access Copyright before December 31, 2010?

A: That offer letter no longer has any effect. The Interim Tariff has replaced the offer letter. If your institution wishes to make copies of a work in Access Copyright's repertoire, it must abide by the terms of the Interim Tariff.

7. The Interim Tariff has something called an "Exclusions List." What is an "Exclusions List" and where can I find a copy of it?

A: The Exclusions List is a list of copyrighted works whose rights holders have explicitly informed Access Copyright that they do not wish to be represented by the collective. These works are not in Access Copyright's repertoire and the Interim Tariff specifically does **not** authorize institutions to copy them.

The Exclusions List is available to the public on Access Copyright's website here: www.accesscopyright.ca/docs/Access_Copyright_Exclusions_List.pdf.

8. Section 9 of the Interim Tariff requires my institution to use reasonable efforts to inform students, staff and employees of the general terms of the Interim Tariff. What is required to meet this obligation?

A: This section of the tariff is identical to the ACCC and AUCC licence agreements. Institutions likely already have in place the means to inform students, staff, and employees of allowable copying practices. The major differences in allowable copying which should be communicated are:

- The Interim Tariff no longer allows you to copy musical works.

- Digital copying is now permitted (within certain limits) if an "election" is sent to Access Copyright.

9. How long will the Interim Tariff last?

A: The Interim Tariff will be in place until the Copyright Board certifies an official tariff. The terms of the Interim Tariff may be varied during this period by an order of the Copyright Board (if, for instance, Parliament were to pass new copyright legislation during the Interim Tariff period.)

10. Who is permitted to make copies under the Interim Tariff?

A: The Interim Tariff authorizes students, professors and administrative staff to make copies. As well, the Interim Tariff authorizes third-parties to make copies “for sale to and use by” students, professors and administrative staff, or for distribution to distance education students.

11. What kinds of material can be copied under the Interim Tariff?

A: The Interim Tariff authorizes the copying of books, textbooks, newspapers, magazines, journals, and other periodicals within Access Copyright’s “repertoire” – the “works” for which Access Copyright has an agreement with the copyright owner to collectively represent.

According to Access Copyright's website, there are approximately 20 million works in its print repertoire and 220,000 works in its digital repertoire.

12. Can music be copied under the Interim Tariff?

A: No. The Interim Tariff specifically does not authorize the copying of music.

13. What does making a "copy" mean under the Interim Tariff?

A: According to the terms of the Interim Tariff, "Copy" means a visually perceivable reproduction made by any of the following processes:

- (i) any copying by reprographic process which includes facsimile reproduction by photocopying and xerography;
- (ii) duplicating from a stencil;
- (iii) copying onto microform (including microfilm and microfiche);
- (iv) for the sole purpose of making presentations by overhead, slide or LCD projection, digital copying, copying by transcription by hand or drawing (including tracing) onto acetate or other media;
- (v) for the sole purpose of making paper copies,
 - a. typing or word-processing without adaptation, and
 - b. reproduction by a machine or device that makes Electronic Files, subject to sections 2.1 to 2.3 of this Tariff;
- (vi) facsimile transmission and transmission by VideoTelecom; and
- (vii) without limitation to the technology used, digital transmission for the purposes of interlibrary loan.

14. Can my institution make digital copies under the Interim Tariff?

A: Yes. There is a digital "option" of the Interim Tariff that, unlike the rest of the Interim Tariff, does not apply automatically.

Institutions have the choice of opting in and out of the digital portion of the Interim Tariff every January 1 and July 1. Any institution that wants to opt in must send a letter to Access Copyright at least 30 days before each January 1 or July 1 deadline. When an institution wants to opt out, it must send a letter to Access Copyright at least 30 days before the January 1 or July 1 deadline.

15. What types of digital copying are permitted under the Interim Tariff?

A: The Interim Tariff allows institutions who have opted in to the digital portions to make digital copies through the following processes:

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

16. What types of digital copying are prohibited under the Interim Tariff?

A: The Interim Tariff does not permit digital copies to be made by circumventing technological protection measures.

Digital copies cannot be made available to the public. Digital copies posted online must be digitally protected so that they are only available to users approved by the educational institution using a process of authentication which, at the time of login, identifies the user as an approved user by name, password or some other equally secure method.

17. What are the potential disadvantages to making digital copies under the Interim Tariff?

A: First, the Interim Tariff provides an indemnity that protects educational institutions from adverse effects of lawsuits for copyright infringement by authors who are not represented by Access Copyright. This indemnity applies only to the making of paper copies. There is no indemnity applicable to digital copying.

Second, the rate that the Copyright Board will eventually certify as payable for digital copies has not yet been determined. By opting into the digital portion of the Interim Tariff, institutions agree to pay whatever rate the Board eventually certifies.

Third, the digital repertoire in comparison to the paper repertoire is quite small. According to Access Copyright's website the paper repertoire contains approximately 20 million works and the digital repertoire only 220,000.

18. Does projecting an image, displaying a digital copy or posting a link or hyperlink require a royalty payment to Access Copyright?

A: These are undecided legal issues that will be argued at the hearing on the post-secondary tariff at the Copyright Board. When the Copyright Board eventually certifies the tariff several years from now, it will set the royalty amount to take into account whether these activities require a royalty payment to Access Copyright. For example, if linking or hyperlinking is considered by the Board to be permitted without permission or payment under the *Copyright Act*, the royalty rate set by the Board will not include any royalties for this activity. However, if the Board decides that linking and hyperlinking is not permitted under the *Copyright Act*, the Board will set the rate to include a royalty for this activity.

19. Do records need to be kept of copies made under the Interim Tariff?

A: Institutions must keep electronic records in the same manner as they did under the old licensing regime. Records must be kept of:

- paper copies that are sold to students;
- microforms (microfiches and microfilms); and
- Alternate Format Copies (audio, Braille, large print or machine-readable reproductions produced for disabled persons.)

20. What records need to be kept?

A: For every copy sold to students and every microform and Alternate Format Copy, records need to be kept and submitted to Access Copyright, along with the institution's payment, of:

- the title;
- publisher;
- author or authors (where known);
- the ISBN/ISSN number (where known);
- material onto which the copies were made;
- the total number and page numbers of the pages reproduced;
- where reasonably available, the total number of pages in the publication from which the copies are directly made; and
- the total number of copies they (and their professors, students and librarians) make.

21. Is there any difference between a “Course Collection” under the Interim Tariff and a “course pack” under the expired reprography licence?

A: “Course Collection” is the term used in the Interim Tariff to describe what are, essentially, digital course packs. The Interim Tariff defines them as:

“Course Collection” means, for use by a Licensee as part of a Course of Study, and whether for required or recommended reading for the Course of Study or otherwise, Digital Copies of Published Works that are:

- (i) emailed, linked or hyperlinked to; or
- (ii) posted, uploaded to, or stored, on a Secure Network.

For copies made that are already authorized by a licence directly with the copyright owner, it is not necessary to keep records, but the prudent course of action would be to keep records of all licences authorizing those copies to be made.

22. When should we start sending Access Copyright records of copying and payments for Course Packs?

A: Institutions should start sending Access Copyright records of copying and payments for Course Packs along with their royalty payments. The Interim Tariff requires records and payments in respect of a preceding year for Course Packs to be remitted to Access Copyright within 60 days of August 31 of each year.

23. If my institution is operating outside of the Interim Tariff after January 1, 2011, can it elect to opt into the Tariff as of a subsequent date?

A: Yes. Your institution may choose to opt in at any point by complying with the requirements of the tariff.

It is important to note, however, that the Interim Tariff applies for yearly periods that start on September 1. This means that if your institution chooses to opt into the Tariff near the end of the year, it will be responsible for complying with the Interim Tariff for the entire year. This means that, among other obligations, the payment due will be the amount for the entire year.

24. If my institution started operating under the Interim Tariff on January 1, 2011, can it opt out at any time? What would an institution need to do to opt out?

A: Institutions are free to opt out at any time; however, payments under the Interim Tariff are calculated yearly, so an institution choosing to opt out would be advised to wait until the end of the tariff year on August 31.

The Interim Tariff does not impose specific requirements on institutions that wish to opt out. However, it would be prudent for an institution choosing to opt out of the Interim Tariff to notify Access Copyright of its decision prior to the beginning of the relevant tariff year.

25. If my institution decides to opt out of the Interim tariff on August 31st are there payment obligations to Access Copyright for copies made after August 31st, 2011?

A: No, provided the institution has otherwise obtained authorization to make the copies or an exception in the *Copyright Act* permits the copying without permission or payment. Royalties in this situation are payable for the period January 1st to August 31st, 2011 only.

26. Will royalty rates in the final tariff set by the Copyright Board several years from now be retroactive?

A: Yes. If the Copyright Board eventually sets a higher rate than the rate under the Interim Tariff, institutions will have to pay Access Copyright the difference for the period of January 1, 2011 to the date of certification of the Final Tariff. If the Copyright Board sets a lower rate than the rate under the Interim Tariff, Access Copyright will be required to pay institutions the difference.

27. Does Access Copyright have to produce a list of the works in its repertoire?

A: No. Copyright law requires Access Copyright to answer reasonable questions about its repertoire within a reasonable time. This requires Access Copyright to answer questions about whether specific works are in its repertoire, but does not require it to make a list.

Institutions should check Access Copyright's Exclusions List to determine whether the Interim Tariff does not authorize them to copy a particular work. The Exclusions List is available to the public on Access Copyright's website at:

www.accesscopyright.ca/docs/Access_Copyright_Exclusions_List.pdf.

28. If Access Copyright does not have to produce a list of works in its repertoire, how do we know what we can copy under the Interim Tariff? Do we need to confirm that a work is in the repertoire before we can copy it?

A: Yes. For paper copies, you must check the Exclusions list to ensure that the work you wish to copy is not excluded from the Interim Tariff.

For digital copies made under the digital portion of the Interim Tariff, Access Copyright is developing a Look Up Tool. A beta version of the tool is located at <https://rms.accesscopyright.ca/acrmse/Repertoire/RepertoireLookup.aspx>. Access Copyright has advised that the beta version is not yet reliable.

29. If an institution 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 institution would be liable to the copyright owner for copyright infringement. Under section 38.2(1) of the *Copyright Act*, the maximum amount an institution would be liable for would be the amount payable to Access Copyright if the copy had been authorized under the Interim Tariff.

30. Should my institution adopt a fair dealing policy?

A: Yes, legal counsel has recommended that every institution adopt a fair dealing policy to help guide professors, librarians and other staff who are determining whether permission is needed to copy a work. A recommended fair dealing policy has been distributed to each institution.

All member institutions, whether they are opting in or out of the Interim Tariff, should have a fair dealing policy.

31. If Bill C-32 passes and there are new users' rights for educational institutions, will there be any impact on the Interim Tariff?

A: That is possible. The Copyright Board may choose to modify the Interim Tariff if circumstances change and a stakeholder makes an application. The Copyright Board will be required to take any legal changes into account when setting the final royalty rate.

32. If my institution obtains a transactional permission from a copyright owner or publisher for copying a published work, will it thereby be liable to pay royalties under the Interim Tariff for the year in which the copying was conducted?

A: No, as long as every copy that was made was made with permission or was made pursuant to an exception in the *Copyright Act*.

But if even one extract of a work is copied for which a license from Access Copyright was required, that institution will be liable to pay full royalties under the Interim Tariff for the entire academic year in which the copy is made.

33. If my institution is not operating under the Interim Tariff but still receives an invoice from Access Copyright for use of the Interim Tariff, do we need to respond?

A: No. At that point, it would be Access Copyright's responsibility to initiate a legal action against your institution for payment, and to prove that your institution or one of its faculty or other employees made copies of works in Access Copyright's repertoire.