

Post-Secondary Education Tariffs: An Update and FAQ

On February 6, 2019, the Copyright Board issued a notice requesting comment on tariff wording in draft [Post-Secondary Educational Institution Tariffs for the period of 2011-2014 and for 2015-2017](#). This notice likely indicates that the Copyright Board will certify approved tariffs for the post-secondary educational sector in the near future.

The Canadian Association of Research Libraries (CARL), Universities Canada, the Canadian Association of University Teachers (CAUT) and a number of individual universities replied to the request for comment. These statements are available on the Copyright Board website: <https://cb-cda.gc.ca/avis-notice/2019/NOT-2019-04-01-CB-CDA-2019-016.pdf>

This document provides contextual information relating to the certification of these tariffs and what these tariffs might mean for the University sector. It is based upon the draft post-secondary tariffs released on February 6th and is up-to-date as of April 11th, 2019.

This document will be updated when the Copyright board releases final tariffs or provides more information about draft tariffs.

What is the Post-Secondary Educational Institution tariff?

A tariff issued or certified by the Copyright Board is a legal document that sets out the terms and conditions for the reproduction and communication of copyrighted works by a particular class of users, such as educational institutions, government departments, or businesses. Tariffs include royalty rates to be paid by those who use copyrighted works under the terms of the tariff. Collective societies such as Access Copyright submit tariff proposals to the Copyright Board of Canada; the Board is responsible for certifying the tariff and setting appropriate royalty rates. Tariffs are set for specific time periods, usually multiple years, after which the tariff will expire, and a new tariff will need to be certified, if applicable.

Post-Secondary Educational Institution Tariffs are tariffs filed with the Copyright Board by Access Copyright, to set out the terms and conditions under which post-secondary institutions may copy the works of Access Copyright's members, during the specified tariff term.

Who is involved in the Post-Secondary Educational Institution tariff certification process?

- **The Copyright Board of Canada** “is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to supervise agreements between users and licensing bodies and issues licences when the copyright owner cannot be located.”¹
- **Access Copyright** is a non-profit collective-administration society (collective society) that represents creators of literary works in Canada. Collectives are organizations that act on behalf of rights owners to monitor the use of their works, and collect compensation when those works are used. Collectives can enter into license arrangements with users of copyrighted works, or can file tariffs with the Copyright Board, in order to collect and distribute compensation to their members. The body of copyrighted works for which Access Copyright is authorized to collect royalties under a tariff or license, is referred to as Access Copyright’s “repertoire”. Access Copyright maintains agreements with collectives in other countries which allows it to include works by non-Canadian authors in its repertoire and disburse dues to those authors via these other collectives.
- **Post-Secondary Educational Institutions** are a class of users of copyrighted works that includes universities and colleges (in the case of this tariff only those outside of Quebec) to whom the Post-Secondary Tariffs may apply once they have been certified. Institutions operating under a tariff pay the required royalties in compensation for copies made from Access Copyright’s repertoire by the institution’s users. Other classes of users for which tariffs have been certified by the Copyright Board include the K-12 education sector, and provincial and territorial governments.
- **Users of copyright protected works** are described in the proposed tariffs as students, staff members (broadly defined to include instructors, professors, librarians, administrators, etc.), and all individuals entitled to in-person or remote privileges at post-secondary educational institutions in Canada.

¹ Copyright Board. Raison d’être, mandate and role: who we are and what we do. <https://cb-cda.gc.ca/about-apropos/role-role/raisons-etre-e.html>

How does the tariff certification process work?

The Copyright Act outlines how collective societies can operate in sections 66-79. Section 70.12 of the Act states that a collective has two choices for negotiating with user groups like universities. They can:

- A. enter into an agreement with a specific class of users (higher education, K-12 schools etc.).
and/or
- B. file a proposed tariff with the Copyright Board of Canada that covers a specific class of users. The Board will then examine the proposed tariff and collect evidence to help determine a suitable market rate for copying for this class of users. This process frequently takes a number of years and tariffs are paid retroactively in many cases.

Access Copyright have filed three proposed tariffs with the Copyright Board that may apply to the Post-Secondary Educational sector. They cover the years [2011-2013](#), [2014-2017](#), and [2018-2020](#). All of these proposed tariffs are currently outstanding as they have not been certified by the Copyright Board. The release of the draft versions of the 2011-2013 and 2014-2017 tariffs signals that these two tariffs will be certified soon.

Where is the text of the draft Post-Secondary tariffs posted?

The full text of each draft tariff has been posted by Howard Knopf on his blog ([2011-2014](#) and [2015-17](#)).

What will change once the tariffs are certified?

Once the Copyright Board has certified a tariff, it is enforceable under Canadian law, and the collective society is entitled to initiate court proceedings in order to collect any unpaid amounts from parties that are subject to the tariff. For the Post-Secondary tariffs, this means that Access Copyright could seek payment from any post-secondary institutions that it determines made copies from its repertoire that were not otherwise authorized or licensed.

Is it mandatory for universities to operate under the tariffs?

What remains unclear is whether tariffs proposed by collective management organizations, such as Access Copyright, and issued by the Copyright Board, are mandatory and imposed on users, regardless of whether they wish to obtain a licence under the tariff or not. This is due in part to the foundational provisions outlined in the Copyright Act (68.2(1), 70.11 to 70.6) being ambiguous in nature.

Were a tariff to be **mandatory**, the approved licence would be mandated and users of works (in this case, all post-secondary institutions) would be required to pay fees and comply with any licence terms. The user would not be sued for copyright infringement in this case, rather, they could be sued to recover payment of approved fees.² Most recently, the Federal Court of Canada ruled in favour of this theory in the *Access Copyright v. York University* case, holding that the *Interim Tariff* issued by the Copyright Board was mandatory and enforceable against York. It is important to note that the *Access Copyright v. York University* case is currently under appeal, with a decision expected in the summer or fall of 2019.

Were a tariff **voluntary**, the “approved tariffs [would] only bind users who choose to obtain a licence from the CMO under the terms the Board has approved.”³ The user could potentially choose to deal with works in ways that would not require a blanket license, such as direct licensing of content from publishers, and engaging in new business models, like pay-per-use licensing. In this case, users may be liable for copyright infringement depending on how they used the work.⁴

It is important to note that our understanding of collective administration in this area has evolved with the Supreme Court of Canada’s decision in *CBC v. SODRAC*, where Justice Rothstein stated: “*I find that licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline.*”⁵

What are the royalty amounts payable under the tariffs?

The draft versions of the tariffs released by the Copyright Board do not include the applicable royalties/fees. Royalty amounts will be included in the final published versions of the approved tariffs. The amount payable by an institution operating

² Katz, Ariel. “Canadian Copyright and the Mandatory Tariff - Part I” <https://search.proquest.com/docview/1674665046?pg-origsite=summon> at page 155.

³ Katz, Ariel. “Canadian Copyright and the Mandatory Tariff - Part I” <https://search.proquest.com/docview/1674665046?pg-origsite=summon> at page 155.

⁴ Katz, Ariel. “Canadian Copyright and the Mandatory Tariff - Part I” <https://search.proquest.com/docview/1674665046?pg-origsite=summon> at page 155.

⁵ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <<http://canlii.ca/t/gm8b0>> at 113.

under the tariff will be calculated by multiplying the royalty rate by the number of Full-Time-Equivalent (FTE) students at the institution, on an annual basis.

Will universities have to pay tariffs retroactively for past years?

Each approved tariff will apply retroactively, meaning that there is the possibility of significant lump sum payments for the annual tariff amounts if the tariff is determined to be mandatory and it is determined that the university made copies of works in Access Copyright's repertoire during the term of the tariff. Copies of works that are made under the fair dealing exception, or for which permissions have been obtained from the copyright owner or under a separate license agreement with Access Copyright, will not be subject to the tariff.

For the 2011-14 draft tariff, educational institutions that are subject to the tariff will be required to pay the royalties and any applicable federal and provincial taxes no later than three months after the tariff is certified. For the 2015-17 draft tariff, royalties shall be due on November 15 in respect of the prior academic year. While this may not matter for the retroactive years covered by the tariff, the 2015-2017 tariff will continue to apply until a new tariff is certified for subsequent years. In their comments to the board, Access Copyright have asked that this be changed to January 31 of the year to which the tariff applies.

Will interest be charged on overdue tariff payments?

For both tariffs, interest on unpaid tariff royalties will be calculated daily at a rate equal to one per cent (1%) above the Bank Rate effective on the last day of the previous month (as published by the Bank of Canada). Interest shall not compound. It is not clear at this point whether or not interest will apply to retroactive tariff amounts.

My institution already has a license agreement with Access Copyright. What effect will the certified tariffs have on that license?

Institutions that already have license agreements with Access Copyright will not be subject to the tariff for the years covered by the licenses. Institutions may also opt to continue renewing their license agreements with Access Copyright rather than operating under future Post-Secondary tariffs. However, it is unclear whether Access Copyright will still enter into license agreements with individual institutions after all of the Post-Secondary tariffs have been certified.

What types of copying do the Post-Secondary tariffs authorize?

The tariffs allow a student or a staff member at a post-secondary institution to make copies of portions of works in Access Copyright's repertoire. For example, both tariffs allow copying of up to 20 percent of a work in Access Copyright's repertoire for use in as part of a course of study. See the draft tariff documents ([2011-2014](#) and [2015-2017](#)) for detailed information about the kinds of copying authorized by the tariffs.

Are there any reporting requirements under the Post-Secondary tariffs?

Both draft tariffs allow for the creation of paper course collections (course-packs). When these collections are created, the university must maintain records for each copy made.

Can universities be audited under the terms of the tariffs?

Both draft tariffs include audit procedures. According to the terms of the tariff, Access Copyright is required to provide only five days' notice to audit the reported FTE numbers of a university. If the audit reveals that royalties have been understated by more than 10%, the institution will be required to pay the cost of the audit. An audit may also lead to adjustments to the institution's required royalty payments.

Why are many universities not paying tariffs or blanket licenses to Access Copyright?

Since 2011, the licensing and use of copyrighted works at Canadian post-secondary institutions has been a contentious issue between Access Copyright and universities. The following summary provides a timeline of events that illustrates how universities' copyright policies and practices evolved in light of legislative changes, judicial decisions, and Copyright Board rulings, as well as in response to shifts in the nature and use of copyrighted materials at universities. Together, these factors resulted in a shift away from blanket licensing and tariffs in favour of reliance on copyright exceptions, direct licensing with rights holders, and increased use of open content.

- Prior to 2011 most institutions had blanket licenses with Access Copyright that allowed them to make limited print copies of works in the Access Copyright repertoire. The license was renegotiated every 4 years by AUCC, on behalf of
- its member institutions. The 2007-2010 blanket license cost \$3.38 per FTE student, and did not cover digital copying.
- When universities' blanket licenses expired in 2010, Access Copyright declined to renew them, instead submitting a proposed tariff to the Copyright Board

that included digital copying and which upped the FTE fee to \$45, an increase of more than 1300% over the previous charge. This proposed tariff also included onerous auditing procedures and covered uses such as linking and displaying works that generally are not considered compensable.

- With blanket licenses expiring, and a potentially long wait for the certification of Access Copyright's proposed tariff, the Copyright Board unexpectedly certified an interim tariff in December 2010. Institutions were forced to quickly decide whether to sign on to the Interim Tariff or instead rely on transactional licenses, library-licensed materials, and fair dealing to cover the copyright clearance of course materials. Notably, content being used at universities were increasingly in digital rather than paper form, and linked to within learning management systems.
- Also creating uncertainty for universities at this time, was the ongoing process of Copyright Act reform. Several bills had been tabled proposing significant changes to the Act, most notably the addition of "education" to the list of fair dealing purposes. However, none of the earlier attempts at reform were successful, until the Copyright Modernization Act was passed in June 2012.
- During this period of uncertainty, some universities, as well as AUCC, negotiated separate licensing agreements with Access Copyright. Other institutions continued to operate without license agreements. Access Copyright's proposed tariffs still had not been approved by the Copyright Board.
- In July 2012, the Supreme Court of Canada released the decisions that formed its "copyright pentalogy." These decisions clarified the scope of fair dealing and affirmed that its application is possible in instructional contexts.
- The educational sector began to develop a shared approach to fair dealing, and the AUCC released its Fair Dealing Policy for Universities in October 2012.
- In response to these developments, over the next few years most universities and colleges that had entered into blanket license agreements with Access Copyright exited those agreements. Currently only [approximately 12 universities](#) have license agreements with Access Copyright.

How does the York v. Access Copyright case relate to these tariffs?

The York case (*Canadian Copyright Licensing Agency v. York University*) addressed the question of whether the Interim Tariff was mandatory. In his July 2017 judgment, Justice Phelan determined that the Interim tariff was mandatory and enforceable, based on his interpretation of the language of the *Copyright Act*. Justice Phelan's ruling is binding only between the two parties in this case (York and Access Copyright), but may have wider implications with respect to the enforceability of other tariffs.

Explicitly Justice Phelan’s judgment states:

“In the final analysis, I find that the Interim Tariff is mandatory, not voluntary. Many factors point to the mandatory nature of the Interim Tariff including the scheme of the Act, the Act’s legislative history, and the ordinary meaning of the term “tariff.”⁶

Justice Phelan also found that York’s reliance on the Supreme Court’s decision in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 [SODRAC], was misplaced because the provision for tariff setting in the York Case was distinct from the provisions for licence-term arbitration relevant to the SODRAC decision.⁷(This is contrary to the interpretation of Katz⁸ and Knopf⁹).

This case was recently heard in the Federal Court of Appeal, however the Decision will take several months to be released. After this judgement there is a chance that either losing party may appeal to the Supreme Court of Canada, and that the court would have to agree to hear the case.

⁶[11] Canadian Copyright Licensing Agency v. York University, 2017 FC 669 (CanLII), <<http://canlii.ca/t/h4s07>>, retrieved on 2019-03-11

⁷[12] Canadian Copyright Licensing Agency v. York University, 2017 FC 669 (CanLII), <<http://canlii.ca/t/h4s07>>, retrieved on 2019-03-11

⁸ Katz, Ariel. “Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss”. <https://arielkatz.org/access-copyright-v-york-university-anatomy-predictable-avoidable-loss/>

⁹ Knopf, Howard. “The Mandatory Tariff Issue – The Follow Up and the Future – Implications for the Access Copyright v. York University Case. etc.” <http://excesscopyright.blogspot.com/2016/03/the-mandatory-tariff-issue-follow-up.html>