



Copyright Board
Canada

Commission du droit
d'auteur du Canada

Filed by / Déposé par: Universities Cnd

Date: 2023-01-17

COPYRIGHT BOARD OF CANADA

Access Copyright Post-Secondary Educational Institution Tariff, 2024-2026

For the reproduction, communication to the public by telecommunication or making available to the public by telecommunication, or the authorization of any such act, in Canada, of works in Access Copyright's repertoire

NOTICE OF GROUNDS FOR OBJECTION

filed by

UNIVERSITIES CANADA

OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, Ontario M5X 1B8

John C. Cotter

Tel: 416.862.5662
Fax: 416.862.6666
jcotter@osler.com

Barry Fong

Tel: 613.787.1097
Fax: 613.235.2867
bfong@osler.com

Counsel for the Objector, Universities Canada

This document has not been made nor issued by the Copyright Board. It has not been translated and is only available in the language in which it was filed with the Board.

Introduction

1. Universities Canada (formerly the Association of Universities and Colleges of Canada) was created in 1965 through special act of Parliament. It is a not-for-profit membership organization that represents the interests of 97 Canadian public and private universities and university-degree level colleges (78 of which are located in Canada outside of Québec).

2. On December 19, 2022, Universities Canada filed an objection to the proposed *Access Copyright Post-Secondary Educational Institution Tariff, 2024-2026* (the "Proposed Tariff") filed by The Canadian Copyright Licensing Agency ("Access Copyright").

3. Without limiting its right to raise other issues or grounds of objection or to rely on objections made by any other party in this proceeding, Universities Canada hereby files this Notice of Grounds for Objection to the Proposed Tariff with the Copyright Board (the "Board") pursuant to Practice Notice [PN 2022-007].

Royalties (Section 5)

4. Under subsection 5(1) of the Proposed Tariff, Access Copyright has proposed an annual royalty rate of \$15.65 per full-time-equivalent student ("FTE") for universities (and \$6.01 per FTE for all other educational institutions).

5. Universities Canada objects to the proposed royalty rates on the basis that they are neither fair nor equitable and are not in the public interest. Further, the proposed royalty rates bear no

relationship whatsoever to the value derived by an educational institution that wishes to operate under the tariff. It is important to note that Access Copyright is *not* the only source of the rights it seeks to license under the Proposed Tariff. Access Copyright is not an assignee or an exclusive licensee of the copyright held by its members, which means that Access Copyright's members are free to licence their rights to users directly or through intermediaries other than Access Copyright. Access Copyright chooses to operate on the terms of a non-exclusive licence from its members.

6. In addition, the proposed tariff royalties per FTE are excessive having regard to all of the circumstances, including the scope of Access Copyright's repertoire and the practices of Canadian universities and university-degree level colleges with respect to the copying of literary and other works, and does not adequately reflect such things as:

- (a) copying permitted under other licence agreements with, or permissions obtained from, copyright owners, their agents or other content providers including, by way of example, licences negotiated with publishers or content providers by educational institutions or consortia [such as the Canadian Research Knowledge Network (CRKN) and the Ontario Council of University Libraries (OCUL)] that provide access and broad usage rights to vast catalogs of published works;
- (b) copying permitted under open access licences for content, which is commonly and increasingly used in higher education and research; and
- (c) copying pursuant to exceptions (*i.e.*, users' rights) in the *Copyright Act*, including the fair dealing exception and other explicit exceptions for educational institutions.

Structure of the Proposed Tariff

7. The Proposed Tariff has absolutely no flexibility. It is limited to a blanket licence *only*, at an annual per-FTE royalty rate, which is a tariff structure that is completely unbalanced in favour of Access Copyright and does not reflect, adequately or at all, that Access Copyright is not the only source of the rights it seeks to license. The structure of any approved tariff should complement the other options available to educational institutions for managing their copyright obligations and should not be structured so as to create disincentives for educational institutions to pursue alternatives. Rather, it should be structured in a way that provides educational institutions with choices and facilitates alternatives such as other licensing arrangements. Notably, the Proposed Tariff does not include options in addition to a blanket licence, such as the option for transactional (*i.e.*, pay-per-use) licences as tools that educational institutions can opt to use to comply with their copyright obligations.

8. The licensing model proposed by Access Copyright hinders the ability of each educational institution to select the licensing arrangement(s) best suited to its practices for copyright compliance and the fulfillment of its educational and research mandates. Tariff provisions should encourage and facilitate choice by educational institutions in how they manage copyright, not restrict it.

Subcontractors and Other Third-Parties (Section 4)

9. While subcontracting provisions should exist in any approved tariff, Universities Canada objects to the requirements proposed by Access Copyright in subsections 4(1) and 4(2) of the

Proposed Tariff, namely the requirements for written agreements, reporting and compliance by subcontractors. These requirements are not always practical and feasible for educational institutions and would hinder and limit their ability to use subcontractors and fall within the scope of section 4. Further, an educational institution that wishes to operate under the tariff should not be required to provide its private agreements with subcontractors to Access Copyright.

10. Universities Canada also objects to the proposed removal by Access Copyright of the entitlement of an educational institution that operates under the tariff to a credit for the amount of royalties paid by subcontractors for copies that are otherwise authorized by the tariff.¹ Access Copyright has provided no explanation or justification for this proposed change in its Notice of Grounds for Proposed Tariff filed November 11, 2022. The entitlement to a credit for royalties paid by subcontractors to Access Copyright must be maintained in any approved tariff and be implemented through terms and conditions that are practical and feasible for educational institutions, since such provisions help to avoid the double payment (or more) of royalties for copies made under the tariff.

Payment (Section 6)

11. Universities Canada objects to the requirement in subsection 6(4) of the Proposed Tariff that royalties for the entire year must be paid in a single instalment that is due shortly after the start of the academic year. Consideration should be given to a flexible payment schedule that allows for

¹ See *Access Copyright Post-Secondary Educational Institution Tariff, 2015-2017*, at s. 4(5).

royalties to be paid in more than one instalment over the course of an academic year, which may be more practical and feasible for an educational institution that wishes to operate under the tariff.

Reporting Requirements (Section 7) and Definitions (Section 2)

12. Universities Canada objects to the reporting requirements listed in section 7 of the Proposed Tariff, which would impose overly onerous record keeping and reporting obligations on an educational institution that wishes to operate under the tariff.

13. The onerous nature of the reporting obligations is compounded by the overly broad definitions of “copy” (which includes activities that are not within the exclusive rights of copyright owners or do not otherwise engage the exclusive rights of copyright owners by reason of exceptions or limitations on copyright in the *Copyright Act*) and “course collection” as set out in section 2 of the Proposed Tariff.

14. Further, the reporting requirements in the Proposed Tariff go well beyond the amount of information reasonably required by Access Copyright to properly distribute royalties collected under the tariff to the copyright owners that it represents.

15. In addition, the onerous nature of the reporting obligations is completely inconsistent with the blanket licence sought by Access Copyright in the Proposed Tariff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2023.



OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, Ontario M5X 1B8

John C. Cotter

Tel: 416.862.5662
Fax: 416.862.6666
jcotter@osler.com

Barry Fong

Tel: 613.787.1097
Fax: 613.235.2867
bfong@osler.com

Counsel for the Objector, Universities Canada