

# **Joint Objection of the Canadian Federation of Students and the Canadian Association of University Teachers to the Access Copyright Post-Secondary Educational Institution Tariff, 2014-2016**

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-for-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. The members of CAUT and CFS together constitute the population who will be affected by Access Copyright’s proposed Post-Secondary Institution Educational Institution Tariff 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. They will be the population that bears the burden of paying the levies the Proposed Tariff will impose. However, teachers and students are also authors. Their work – authored in academic settings, publishing 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 in the course of academic study.
4. As both creators and users of academic works, CAUT and CFS members may offer unique contributions to the Copyright Board’s understanding of the merits and demerits of Access Copyright’s Proposed Tariff.
5. CAUT and CFS offer the following joint submissions in respect of Access Copyright’s Proposed Tariff.

## **A Procedural Concerns**

6. CAUT and CFS raise a number of preliminary concerns of a procedural nature.
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## **1. Appropriate Hearing to Permit Intervenor**

7. The Board, as master of its own proceedings, also enjoys broad discretion to grant intervenor status to entities with expertise that are able to assist the Board in its appreciation of the practical and legal implications of the Proposed Tariff.
8. Full participation in Copyright Board proceedings is an onerous undertaking. CAUT and CFS anticipate that – as occurred in the Board’s hearing of *Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013* – the Board will lose the benefit of many unique perspectives in the present hearing once the rigours of the interrogatory process commence. Similarly, many organisations that could offer value to the Board’s assessment of the Proposed Tariff will not object at all. CAUT and CFS urge the Board to adopt a generous view towards intervenor applications in this hearing.
9. Specifically, CAUT and CFS request that, if granted intervener or objector status in the proceeding, CAUT and CFS be granted the right to participate in the hearing but not subjected to the interrogatory process.

## **B Substantive Concerns with Proposed Tariff**

10. The Proposed Tariff raises a number of substantive concerns. These range from novel legal interpretations of the scope and reach of copyright itself to over-reaching mechanisms for administration of the Proposed Tariff. We will address concerns in the order they arise in the Proposed Tariff.

### **1. Definitions – s. 2**

11. CAUT and CFS support the role collective licensing may play in facilitating access to knowledge in post-secondary educational institutions. However, that role occupies a confined space: a tariff can only authorize activities that fall within the ambit of exclusive rights held by the copyright owner. The Proposed Tariff both over-reaches the scope of copyright itself and inappropriately invades the domain of users’ rights.
12. The Proposed Tariff adopts inappropriate definitions of “Copy” and “Digital Copy”. Essentially, the Proposed Tariff (in part) defines a “Copy” as a “reproduction”, but does not say what it is a reproduction of. This appears to be a drafting oversight. The author of the Proposed Tariff addresses the question of “what” in s. 3, “Application”, authorizing persons to “make a copy of a Repertoire Work”. Of course, neither Access Copyright nor the copyright owners whom it represents may prohibit all copying of Repertoire Works. The definitions of “Copy”, “Digital Copy”, “Copying”, and the dealings authorized by the Proposed Tariff should be scaled back to the lawful purview of the copyright owner: the exclusive right to copy a substantial part of the author’s work.
13. The Proposed Tariff also ignores the effect of copyright’s fair dealing defense and other exceptions on the scope of authors’ rights against educational dealings. An

enormous volume of dealings with copyright works in academic settings is for purposes of private study, research and criticism, and so falls squarely within the ambit of the fair dealing defense and outside of the ambit of the Proposed Tariff.

*CCH Canadian Limited v. The Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (*CCH*); *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345 (*Alberta v. Access Copyright*).

14. Educational fair dealing rights have recently been further emphasized by amendments to the copyright Act explicitly enumerating educational purposes among those qualifying for fair dealing.

*Copyright Act*, R.S.C., 1985, c. C-42, s. 29 (as amended).

15. Previously, Access Copyright's licenses with post-secondary educational institutions have acknowledged that fair dealings with content are outside the scope of the license. The Proposed Tariff makes no similar acknowledgement.
16. The definitions of "Copy", "Digital Copy", "Copying", and the dealings authorized by the Proposed Tariff should be further scaled back to respect the lawful rights of copyright users, downstream creators and innovators so as to only authorize dealings that, but for the Proposed Tariff, would infringe copyright.
17. In addition to these sins of omission, the definition of "Copy" also carries out sins of commission, purporting to authorize acts not among the exclusive rights of copyright owners but rather explicitly granted to educational institutions and their stakeholders.
18. The Proposed Tariff includes among its list of compensable activities the act of "projecting an image using a computer or other device" (paragraph (i)) and "displaying a Digital Copy on a computer or other device" (subsection (j)). The *Copyright Act* provides an exception for educational institutions to reproduce works for instructional purposes that embraces these acts. Section 29.4(1)(b) provides that:

[i]t is not an infringement of copyright for an educational institution or a person acting under its authority... to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution.
19. The Proposed Tariff similarly ignores other exceptions and limitations on copyright in the Act. For example, the Proposed Tariff fails to take into account the s. 30.2 exception libraries enjoy for facilitating interlibrary loans.
20. The paragraph (k) of the definition of "Copy" defines "posting a link or hyperlink to the Digital Copy" as an activity within the scope of authors' rights. Section 3 of

the *Copyright Act* does not afford copyright holders any rights with respect to controlling linking. Nor, as a matter of public policy, ought it. Linking is the essence of the internet. To suggest that authors enjoy the exclusive right to link to works made available to the world over the internet is to claim to impose staggering liabilities on the billions who participate in commerce and communications through this medium.

21. The definition of “Copy” also exceeds Access Copyright’s mandate. The definition includes within its ambit the act of “making (a work) available to the public by telecommunication”. This act forms no part of the rights authors provide Access Copyright dominion over, but belongs under other economic rights laid out in the Act.
22. The definition of a “Course Collection” is also overbroad. This definition sweeps into it works that are “emailed, linked, or hyperlinked to” as part of a course of study. Apart from sweeping up a range of actions that are covered by fair dealing, the definition identifies content that goes beyond any reasonable interpretation of a course’s readings list.
23. The treatment the Proposed Tariff envisions for “Course Collections” involves extensive monitoring and survey rights and reporting obligations – treatment that will have materially detrimental effects of academic freedom and privacy (see discussion of sections 6, 13 and 14, below). These concerns heighten the need for the Board to tighten this definition.
24. Finally, the Proposed Tariff defines a “Repertoire Work” – the actual content that is the subject of tariff – as “a Published Work for which Access Copyright collectively administers the rights as authorized by the copyright owner or by another collective management organization, by assignment, licence, agency or otherwise.” The phrase “or otherwise” creates needless ambiguity in the identification of Access Copyright’s repertoire, and must be struck.

## **2. Application – s. 3**

25. But for collective licensing, dealings with works in educational institutions would fall into three classes:
  - a. Authorized dealings accommodated by market mechanisms (such as the purchase of a book or direct licensing with a publisher);
  - b. Unauthorized but lawful dealings (such as those falling under fair dealing); and
  - c. Unauthorized and infringing dealings (such as the unfair reproduction of a substantial part of a work protected by copyright).

26. Collective licensing should aim to accommodate as many dealings that fall into the third category of unauthorized and otherwise infringing dealings as possible. . Authorizing such dealings through collective licensing promotes the dual aims of copyright: compensating authors for their efforts while promoting access to educational works.
27. One would expect that the Proposed Tariff fulfils this objective. It does not. Instead of filling the gap between authorized dealings and lawful dealings, it seeks to charge for lawful and non-infringing dealings while leaving an enormous gap of unauthorized dealings unlicensed.
28. The Proposed Tariff proceeds as if on the mistaken premise that user rights do not exist: the upper range of the application of the Proposed Tariff encroaches on activities already enjoyed by users under fair dealing. For example, sub-paragraph 3(a)(v) of the Proposed Tariff entitles an Authorized Person to “make a Copy of ... one chapter” of a work. However, in *CCH* the Supreme Court of Canada considered that fair dealing permits the copying of a chapter of a book for the purposes of undertaking for-profit legal research for a client. CAUT and CFS reasonably view it as incontestable that the benefits of *CCH* extend to academics undertaking research. The Proposed Tariff’s authorization, in this respect, is worthless.
29. This criticism is true for other sections of the Proposed Tariff’s application. For example, it is difficult to deal fairly with artistic works and photographs (see sub-paragraph 3(c)(iv)) other than by copying the whole of the work. Again, the Supreme Court of Canada in *CCH* clarified that fair dealing can apply to the whole of a work.
30. To offer value to its intended beneficiaries, the Proposed Tariff the Board endorses must offer downstream creators, innovators and the user community something more than what they already enjoy under the *Copyright Act*.
31. Access Copyright must take the law as it is, not as it wishes it were.

### **3. Conditions on Dealings with Copies – ss. 4 and 5**

32. The Proposed Tariff imposes a number of troubling conditions and prohibitions on authorized dealings.
33. First, sub-section 4(1) prohibits educational institutions from offering the benefits of the Proposed Tariff to the wider public it serves. Are members of the public to be excluded from the libraries of our post-secondary institutions? Are visiting scholars to be barred from the knowledge services of their host institutions? The Proposed Tariff must be amended to reflect the reality of the important role our post-secondary institutions play today in Canadian society.

34. Second, sub-section 4(2) inappropriately prohibits “repeated, systematic or cumulative” copying of the same work beyond the limits set out in section 3 for one Course of Study in one Academic Year”. This would have the bizarre effect of meaning that a professor could not use the same work in a course offered in successive semesters. CAUT and CFS suggest that the provision should be rewritten to target systematic copying of sequential sections of a work for the purposes of avoiding purchasing the work in text form.
35. Third, sub-section 4(3) inappropriately prohibits the indexing or storage of copied works “with the intention of creating a library of published works”. This is, however, precisely how scholars employ tools such as desktop search engines to search through a personal library of, for example, scholarly articles to find relevant passages. The Proposed Tariff could have the unanticipated effect of barring use of technological productivity tools in academic settings.
36. Fourth, sub-section 5(4) of the Proposed Tariff requires that educational institutions and all Authorized Persons, which includes academic staff and students, “cease to use all Digital Copies of Repertoire Works” and delete such copies from hard drives, servers and networks. This requirement is deeply troubling. First, there is no right to “use” a work under the *Copyright Act*. Once authorized to make a copy, no infringement can occur for merely possessing that copy. Access Copyright lacks the ability or right to transform the reproduction right into a “lease” or access right. Second, the injunction to delete content off of hard drives – the personal property of academic staff and students – is technologically infeasible and offensive to privacy rights, freedom of expression and academic freedom. This provision ought to be struck in its entirety.
37. Finally, sub-section 5(5) includes an inappropriate prohibition of circumvention of a technological protection measure, an activity legal in Canada under certain circumstances. The newly enacted technical measures protections in the *Copyright Act* contemplate the lawful circumvention of technological protection measures in many circumstances applicable to post-secondary educational institutions. Regardless, technological protection measures form no part of authors’ economic rights under copyright law in Canada and have no place in the collective administration of the rights of authors. Simply, Access Copyright lacks the authority to impose this prohibition on educational institutions.

#### **4. Reporting – s. 6**

38. The reporting provisions of the Proposed Tariff go beyond what the Proposed Tariff requires to achieve an equitable distribution of royalties to authors, unfairly burden licensees, offend values of intellectual privacy and academic freedom, and undertake surveillance on activities and content outside of the scope of the Proposed Tariff.
39. First, the Proposed Tariff wisely proceeds on a per-student basis. It does not rely upon individual actions – such as copying specific articles – to trigger payment

- obligations. Accordingly, the only legitimate use of reporting under the Proposed Tariff is to inform Access Copyright's own distribution undertakings – Access Copyright's system for paying the copyright holders it represents.
40. Royalty distribution is a matter between Access Copyright and its members – as a matter of principle, Access Copyright should not download to beneficiaries of its Proposed Tariff the burden of undertaking a just and equitable distribution among members.
41. Second, the degree of reporting required to inform distribution is much less than that required by the Proposed Tariff. A much smaller sampling size would achieve a substantially similar result at a small fraction of the cost and burden to educational institutions and individual staff members. The principle that should guide the Board is of proportionality: the burden should be the smallest and least intrusive required to achieve a just outcome, and its cost should be proportional to its end. The Orwellian and universal reporting Access Copyright demands does not come close to meeting that test.
42. Third, the reporting mechanism the Proposed Tariff envisions is virtually pre-industrial. Access Copyright will “set out” “a form”. Nowhere does Access Copyright indicate that it will provide technological tools to facilitate reporting and – to its own benefit – distribution of royalties. CAUT and CFS propose that the Proposed Tariff be amended to include a mandatory set-aside of funds collected pursuant to this Proposed Tariff for investment in and deployment of a web-based reporting database of Access Copyright's repertoire and other works that would streamline licensees' reporting obligations under the Proposed Tariff.
43. Fourth, the Proposed Tariff's reporting obligations go beyond reporting course reading lists to capturing works included or hyperlinked to in the email and other correspondence of academic staff. Surveillance of this nature is deeply offensive to academic freedom and to privacy values, and offends PIPEDA, Canada's federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act*.
- Personal Information Protection and Electronic Documents Act, S.C.*  
2000, c. 5.
44. The following excerpt from CAUT's *Policy Statement on Academic Freedom* offers a useful description of academic freedom:
- (1) Post-secondary educational institutions serve the common good of society through searching for, and disseminating, knowledge, truth, and understanding and through fostering independent thinking and expression in academic staff and students. Robust democracies require no less. These ends cannot be achieved without academic freedom.

(2) Academic freedom includes the right, without restriction by prescribed doctrine, to freedom of teaching and discussion; freedom in carrying out research and disseminating and publishing the results thereof; freedom in producing and performing creative works; freedom to engage in service to the institution and the community; freedom to express freely one's opinion about the institution, its administration, or the system in which one works; freedom from institutional censorship; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies.

Canadian Association of University Teachers, Policy Statement on Academic Freedom, (approved by the CAUT Council, November 2005), online: CAUT, <<http://www.caut.ca/pages.asp?page=247&lang=1>>.

45. Academic freedom cannot take place in a culture of surveillance. The overbroad definition of "Course Collection" combined with universal reporting of even private correspondence captured by that definition creates that culture of surveillance.
46. These reporting obligations will also capture personal information – information about the intellectual interests and political leanings of identifiable individuals. This information will be collected and used for a commercial purpose: the distribution of Access Copyright royalties. However, as argued above, Access Copyright proposes to collect far, far too much information than is required to achieve this outcome. Similarly, non-invasive and privacy-neutral sources of information are available for reporting. At the very least, CAUT and CFS agree that the Proposed Tariff should comply with PIPEDA's requirements.
47. Finally, the Proposed Tariff seeks reporting over activities not within scope of the Proposed Tariff, including matters covered by direct licenses with copyright owners and dealings covered by exceptions such as fair dealing. Reporting obligations should be stripped down to the bare minimum of information able to assist Access Copyright in achieving a just distribution of royalties.

## **5. Royalties – s. 7**

48. The Proposed Tariff calls for a royalty of \$35.00 per full-time equivalent student for Universities, and \$25.00 per full-time equivalent student for other Educational Institutions. Access Copyright offers no justification for this royalty.
49. CAUT and CFS conclude the quantum has been arrived at in an arbitrary fashion.
50. The quantum of the royalty is not market-based. It represents a radical increase of per-student license fees Access Copyright charges educational institutions under its previous licenses. For example, Access Copyright's former agreement with McMaster University called for a per-student fee of only \$3.38 per student, which fee itself inflated by over 10% over the course of the license.

Access Copyright Licence with McMaster University, (16 January, 2004), online: <<http://library.lib.mcmaster.ca/about/copyright.pdf>>.

51. The quantum of the royalty also fails to reflect the reality of the educational market place today. Post-secondary educational institutions are employing direct licensing arrangements with publishers – particularly with digital database providers – that are having the dual effects of reducing educational institutions’ need to rely on reprography for students to access content. This reality is reducing publishers’ need to rely on collective licensing for compensation for educational dealings with their content. This reality should be reflected in a corresponding *reduction* in the global amount paid under any Board approved tariff.
52. Access Copyright’s previous license agreements with post-secondary institutions included an indemnification clause. This clause offered educational institutions tremendous value: protection against copyright infringement litigation originating with works outside of Access Copyright’s repertoire. The indemnification clause had the effect of granting educational institutions a global license to virtually all of the works of the world – in practice, an enormous repertoire. Much of the value educational institutions attributed to the Access Copyright licenses may be attributed to the indemnification clause.

See, e.g., Access Copyright Licence with McMaster University, (16 January, 2004), sections 23-26, online: <<http://library.lib.mcmaster.ca/about/copyright.pdf>>.

53. The Proposed Tariff lacks any mechanism for indemnification. The Proposed Tariff grants rights over a comparatively miniscule repertoire: Access Copyright’s repertoire. This factor, alone, should compel a significant *reduction* – not an astronomical increase – in the total money paid to Access Copyright under any arrangement. The Proposed Tariff exposes educational institutions to a much higher risk of liability for infringement than under the former license agreements, since there is a much larger universe of works outside of the confines of the licensing arrangement. Similarly, the repertoire is, in practice, smaller under the Proposed Tariff than under the former licenses. Post-secondary institutions may copy less with comfort. This is just not as valuable. This again speaks to a reduction in the value of the Proposed Tariff, not an increase.
54. Access Copyright’s repertoire problems are particularly acute with respect to Digital Copies. Simply, Access Copyright holds a tiny volume of digital rights. This again speaks against any increase in funds educational institutions will pay Access Copyright under the Proposed Tariff.
55. Finally, it is worth pointing out here how unfairly Access Copyright treats its academic members. Where the author retains copyright, Access Copyright nonetheless pays 50% of royalties derived from copying “education and technical books and scholarly publications, including journals and books” to the publisher –

despite the fact that the publisher enjoys no copyright interest in the work, and that publishers are well placed to bargain for such an interest. Access Copyright effectively uses its position as a collective to override privately ordered entitlements to royalty income *against the interests of authors*. No similar royalty sharing with the author occurs where the publisher owns 100% of the copyright. This can only be described as a breach of trust with Access Copyright's academic members and a case of unjust enrichment on a staggering scale. CAUT and CFS call upon the Board to include in the approved tariff a condition that 100% of the royalties to be distributed pursuant to this tariff be distributed to the copyright owner – whether author or publisher – regardless of Access Copyright's internal machinations.

Access Copyright, "How We Split Royalties Between Publishers and Creators", online: Access Copyright, <<http://www.accesscopyright.ca/publishers/how-we-split-royalties-between-publishers-and-creators/>>.

## **6. Attribution – s. 11**

56. The Proposed Tariff imposes an attribution requirement with respect to copies made pursuant to it. This attribution requirement is impracticable for any "Digital Copy" and for many reproductions that otherwise fall within the meaning of "Copy" under the Proposed Tariff.
57. The attribution requirement creates an absurd burden for educational institutions. To comply with this provision, educational institutions would need to find ways to digitally stamp every digital copy printed, e-mailed, uploaded, stored, posted, transmitted, projected, displayed, or linked under the tariff. Educational institutions simply lack the technological capacity to meet this requirement.
58. Moreover, the attribution requirement amounts to forced speech, inappropriate in an academic setting and even more so in the context of private study and research, that is not necessary for the tariff to fulfil its intended purpose of compensating authors for dealings with works while simultaneously promoting the public interest in the encouragement and dissemination of works of the arts and intellect.

## **7. Notification – s. 12**

59. The Proposed Tariff obliges educational institutions to affix a notice of the terms of the tariff [and of "the tools available to the Educational Institution to confirm a Published Work's status as a Repertoire Work"] "within the immediate vicinity of each machine or device used for making, viewing or transmitting copies". Such "machines or devices" today would include individual professors' and students laptops and smartphones.
60. Access Copyright lacks the authority to require such a notice for digital devices. CAUT and CFS suggest that the Proposed Tariff limit the obligation to post such notices to the vicinity of photocopiers.

## **8. Surveys, Royalty and Compliance Audits – ss. 13-14**

61. The Proposed Tariff's provisions with respect to surveys overstate any reasonable authority that educational institutions have over students. Subsection 13(1) requires educational institutions to ensure that all "Authorized Persons" – which includes students – will participate in surveys. Educational institutions have no such authority to compel students to participate in such surveys. Similarly, no such authority exists for ensuring that students cooperate with compliance audits as set out in subsection 14(3).
62. The Proposed Tariff's provisions on Royalty and Compliance Audits pose severe consequences for misreporting that are disproportionate to the costs of misreporting to Access Copyright. Subsection 14(7) provides that misreporting will result in the cessation of licences until further notice. This approach leaves no room for unintentional misreporting and would substantially interrupt the educational function of any educational institution. The provision should be redrawn to permit such drastic consequences only in cases of deliberate or grossly negligent misreporting that has a material and substantial impact on Access Copyright's revenues.
63. The Proposed Tariff fails to include any prohibition on the use of information gathered through surveying and reporting functions. CAUT and CFS assume that this is simply a drafting oversight on the part of the author of the Proposed Tariff. For example, Access Copyright's former Licensing Agreement with the University of Waterloo included the standard clause that:

Access Copyright acknowledges that the amount of payment made by the Institution pursuant to clause 2(a) of this Agreement is based upon agreement between the parties and that such payment has no relationship to either the volume of material copied pursuant to such clause or the nature of the material copied. Access Copyright shall refrain from using any information obtained as a result of the conduct of the Sampling Survey for any purpose other than to assist it in making distribution of the Institution's payments to copyright owners including to its affiliates. In particular, Access Copyright shall not use any of such information in an attempt to justify the increase in future of the amount payable for such a licence and shall not disclose any of such information to the Copyright Board, a court, an arbitrator or a mediator for any purpose whatsoever.

Access Copyright licence with University of Waterloo, (6 January, 2004).

64. Any tariff finally approved by the Board will have to contain a similar prohibition with respect to all reporting and survey obligations.

## **9. Compliance – s. 15**

65. The Proposed Tariff includes an onerous enforcement burden that mandates educational institutions to "take steps" to ensure that "Authorized Persons" and "Subcontractors" comply with the conditions attached to the tariff. Educational

institutions should not bear the burden of monitoring and enforcing the rights of third parties against staff and students. More appropriate compliance requirements could include requiring educational institutions to publish licence conditions.