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Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper

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Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper

by Samuel E. Trosow, Scott Armstrong and Brent Harasym*

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1.0 Introduction

On March 31, 2010, Access Copyright applied to the Copyright Board to certify a tariff that would govern the relationship between the organization and the members of the Association of Universities and Colleges of Canada (AUCC) and the Association of Community Colleges of Canada (ACCC).¹ Previously, the relationship had been governed by a series of license agreements between the organizations which had been periodically renewed. But Access Copyright chose not to seek renewal of the licenses, and applied to the Board to certify a general tariff that would cover all post-secondary institutions for the period of 2011 through 2013.

Access Copyright was not merely trying to carry forward the terms of previous licensing agreements in the form of a Board certified tariff. Rather, they were seeking a tariff with a much higher rate, wider scope and broader application; one which would place new burdens on the institutions, their staff and students, and which would also jeopardize many of the rights of academic staff and students. This working paper reviews the terms of the Proposed Tariff and its progeny licenses² and discusses several of the arguments that have been raised against them. The first general grouping is that many of the provisions are ambiguous, counterintuitive and are based on problematic definitions which attempt to extend the reach of the compensable activities beyond what is authorized by Canadian law. The second broad issue is the lack of value in the Proposed Tariff itself. The third general grouping deals with the audit, reporting, monitoring and survey (ARMS) provisions in the Proposed Tariff and the progeny licenses. With respect to the Proposed Tariff, we argue that several of its terms³ are also *ultra vires* the *Copyright Act*³ and would not have survived scrutiny had they been fully litigated.

While recent developments have cast a new light on these issues, many of the concerns raised in this report about the Proposed Tariff remain unresolved. Despite strong arguments to the contrary,⁴ and their previous opposition to the Proposed Tariff at the Board;⁵ AUCC, ACCC and

¹ *Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire.* (Canada Gazette Vol. 144, No. 24, June 12, 2010) <http://canadagazette.gc.ca/rp-pr/p1/2010/2010-06-12/html/sup1-eng.html> [Proposed Tariff].

² A full exposition of the objections raised at the Copyright Board to the proposed tariff is beyond the scope of this report, see the joint objection filed by the Canadian Federation of Students and the Canadian Association of University Teachers http://caut.ca/uploads/CAUT_CFS_Objection_to_ACT.pdf [CFS-CAUT Objection].

³ R.S.C., 1985, c, C-42. All statutory references are to the *Copyright Act* unless otherwise stated

⁴ See CFS-CAUT Objection, *supra* note 2, Canadian Association of University Teachers, “Backgrounder: University of Western Ontario and University of Toronto Agreements with Access Copyright”, http://caut.ca/uploads/Backgrounder_UTUWO_Agreements.pdf [“CAUT Backgrounder”] Samuel E. Trosow, “Another Look at Bill C-32 and the Access Copyright Tariff: Still Double Trouble for Higher Education” (October 27, 2010 presentation) <http://www.youtube.com/watch?v=62m6E0mxiCw>, Howard Knopf, “UofT and Western Capitulate to Access Copyright” <http://excesscopyright.blogspot.ca/2012/01/u-of-t-and-western-capitulate-to-access.html>.

⁵ Glen Bloom, Letter to Copyright Board (July 15, 2010), <http://www.scribd.com/doc/38477597/AUCC-Letter-to-Copyright-Board-July-15-2010> [“AUCC Objection”].

several institutions still felt that a license with Access Copyright was needed.⁶ In January 2012, Access Copyright announced they had reached licensing agreements with the University of Toronto and the University of Western Ontario,⁷ the terms of which were substantially similar to the proposed tariff.⁸ Following the “lead” of UWO and the University of Toronto, AUCC and ACCC have since announced a similar agreement with Access Copyright, resulting in a “Model License,”⁹ and they have since dropped their opposition to the Proposed Tariff at the Copyright Board.¹⁰ In this report, we refer to the UWO and University of Toronto agreements and the AUCC/ACCC model licenses as the “progeny” of the Proposed Tariff because despite some differences, they are substantially similar in many respects. To date, some institutions have accepted the Model License, others have rejected it, and many others had not yet announced their intentions as of the end of July 2012.¹¹

⁶ Several institutions signing the Model License were less than enthusiastic about it. For example the University of Victoria said “The costs of the license... are not considered sustainable in the long term and the philosophical underpinnings of the ... license are problematic in a range of areas such as the right to store digital materials and the payment for rights already granted under copyright legislation, such as copying or pasting hyperlinks.” The UVic statement also indicated their decision “was taken reluctantly as a strategy to mitigate the risk of litigation by Access Copyright in the immediate future while giving the university time to work towards setting up internal structures and processes to protect the rights of faculty and students to use materials in their teaching, research and learning. The concerns that arise out of the ... license also highlight the need to move towards Open Access in order to ensure the widest possible distribution of UVic research and support free access to information created by faculty and researchers.” This fear of risk of litigation remains a persistent issue. See BrockTV Special Report: Access Copyright (July 7, 2012) <https://www.brocktv.ca/watch/1198>.

⁷ Posted at <http://www.scribd.com/doc/80007524> (it does not appear that either university has visibly posted a copy of the agreement on their website).

⁸ See Howard Knopf, “UofT and Western Capitulate to Access Copyright” <http://excesscopyright.blogspot.com/2012/01/u-of-t-and-western-capitulate-to-access.html>, Samuel Trosow, “Toronto and Western sign licensing agreement with Access Copyright” <http://samtrosow.ca/content/view/112/2/> and Ariel Katz “Governance Issues: The UofT Copyright Agreement” <http://arielkatz.org/archives/1386>

⁹ Posted at http://www.caut.ca/uploads/Model_License_Agreement_AC.pdf (neither Access Copyright nor AUCC have visibly posted a copy of the agreement on their website). However, in a letter dated April 16, 2012 to member university presidents, AUCC President Paul Davidson announced the agreement for the model license. He stated that it was the best possible outcome for universities, their students and faculty in the current context; that the model license provides long-term certainty on price, and access to a new range of digital materials, and that it respects the principles of academic freedom and privacy and ensures that the administrative burden on institutions is minimized.” <http://www.scribd.com/doc/90215480/Davidson-Email-to-Presidents-April-16-2012-With-Addresses-Blacked-Out> [Davidson Letter] (like the model license itself, the Davidson Letter was not posted on the AUCC website) But see Ariel Katz, “Best Possible Outcome for Universities, Really?” <http://arielkatz.org/archives/1673>.

¹⁰ Glen Bloom, Letter to Copyright Board (April 24, 2012) <http://www.scribd.com/doc/91075676/AUCC-Withdrawal-Letter-April-24-2012>. See Howard Knopf, “AUCC Abruptly Exits from Post-Secondary Copyright Board Case – What’s next for Canadian Universities and Colleges?” <http://excesscopyright.blogspot.ca/2012/04/aucc-abruptly-exits-from-post-secondary.html>.

¹¹ For compilations of these results with links to announcements, see Ariel Katz, “Fair Dealing’s Hall of F/Sh/ame” <http://arielkatz.org/archives/1803> and Samuel Trosow “Compilation of Announcements for Institutions Opting-out of Model License” <http://samtrosow.wordpress.com/2012/06/29/compilation-of-announcements-for-institutions-opting-out-of-model-license/>; “Some Background Docs on the Model License” <http://samtrosow.wordpress.com/2012/06/19/some-background-docs-on-the-model-license/> and “CARL Members Split on AUCC-AC License” <http://samtrosow.wordpress.com/2012/07/16/carl-members-split-on-aucc-ac-model-license/>.

This paper is divided into five sections. Following this introduction, section 2 will address some of the definitional problems in the Proposed Tariff and progeny licenses in more detail. First and foremost are the definitions of “copy” and “course collection” which increase the scope of the statutory reproduction right and create other burdens. These overbroad definitions are foundational problems with the tariff/licenses which not only exceed the scope of owners' statutory rights, but will have the potential to substantially impede the delivery of course materials, adversely impact faculty and student privacy rights, and ultimately threaten academic freedom. The other problematic definition involves the “Secure Network,” along with various limitations that flow from this definition.

The third part of this report will ask the question: What value would institutions obtain under the Proposed Tariff and its progeny licences? A review of section 3 of the Proposed Tariff and its progeny indicates that the scope of the permissions does not add very much to what is already permitted under fair dealing and other limitations and exceptions in the *Copyright Act*. In addition, the scope of Access Copyright's repertoire is ambiguous, and the value of the indemnification clause in the progeny licenses is very limited.

The fourth section will turn to the audit, reporting, monitoring, and survey (ARMS) provisions in the Proposed Tariff. We argue that these measures are overbroad and *ultra vires* the *Copyright Act*. They should be substantially scaled back if not entirely eliminated from any eventual tariff order. And while these ARMS provisions have been cast in modified terms in the progeny licenses, these corresponding provisions remain highly problematic.

The last section will look at the implications of more recent developments (including the UWO and UofT licenses of January 30th, the AUCC and ACCC Model License, and the withdraw of AUCC from objector status at the Board) for the tariff proceedings which are still pending at the Board.¹² It will close with a summary of the recommendations made throughout this report. And while a full treatment of the implications of the passage of Bill C-11 in June and the Supreme Court's historic July pentalogy¹³ is beyond the scope of this report, they will also be considered throughout this report.

Therefore, the overall purpose of this report is to identify and address some of the key issues that have been raised from the outset about the Proposed Tariff dispute, as they remain largely unresolved. In addition to highlighting flaws with the Proposed Tariff and its progeny licenses, we will offer some suggestions for how an effective and fair tariff or license could be crafted. We are calling this report a Working Paper as it is very much still a work in progress given the fast pace of current developments and the still unsettled state of the issues. Many institutions

¹² While AUCC and ACCC have withdrawn their formal objections at the Board, they did not insist as part of any settlement that Access Copyright similarly withdraw their Proposed Tariff.

¹³ A collection of links to the initial reporting and commentary on the pentalogy is compiled at <http://samtrosow.wordpress.com/2012/07/12/decisions-in-sccs-copyright-pentalogy-on-canlii/>

have yet to announce whether they will accept or reject the model license agreement, and the status of the tariff proceedings before the Copyright Board still needs to be addressed.

2.0 Problematic Definitions of “Copy”, “Course Collection” and “Secure Network”

By using unintuitive or inconsistent definitions for the words “copy,” “course collection” and “secure network,” the drafters have obscured the scope of the Proposed Tariff and these problems have been replicated in the progeny licenses. Intuitive definitions are therefore key as unintuitive definitions create a rift between what the text appears to mean, and what it literally means.¹⁴

The inconsistent manner in which “network” and “secure network” are used is especially troubling as institutions must be able to delete any digital copies of repertoire works on its secure networks, and they must take steps to prevent digital copies on the secure network from passing into any network other than a secure network. If “secure network” is construed as broadly as the Proposed Tariff appears to allow, then Access Copyright would have broad access throughout an institution's premises. A principal objection to the definitions then is that they reflect poor drafting; and poor drafting can stifle intelligent policy decisions. By using the flawed definitions in the Proposed Tariff and licenses, the ability of educational institutions to independently manage their content and technology platforms is being compromised. Despite the acceptance of these terms in the progeny agreements, Access Copyright will still have to overcome a heavy burden to justify these provisions in the context of the contested tariff proceedings.

2.1 Increased breadth of “Copy” and “Course Collection”

Section 2 of the Proposed Tariff and its progeny licenses provide that “‘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:” [after which 11 activities are separately enumerated in subparagraphs (a) through (k)].¹⁵ In keeping with our call for intuitive definitions,

¹⁴ For example, it is difficult to tell on an initial reading that taken literally, institutions must affix a prescribed notice to every computer monitor on its premises. A computer monitor is a device used for “viewing copies” of a Repertoire works, because para. (j) of the “Copy” definition provides that displaying a work creates a distinct copy. Section 12 of the Tariff requires that a notice be affixed to all such devices.

¹⁵ “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;

we argue that an activity should be a “copy” only if it meets two criteria. First, the act in question must constitute a reproduction within the meaning of the *Copyright Act*, and second, the act in question must be made by or as a consequence of one of the listed activities.

Turning to the language of the definition, “Reproduction, in any material form whatever,” is reminiscent of the language of sections 3(1) of the *Copyright Act*, which in part, defines “copyright” in relation to a work as meaning “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever....” It is fair to assume that for purposes of the Copyright Board's power to set tariffs, they must limit themselves to “copyright-relevant activities” within the meaning of the *Act*. That is to say, a “copy” under the tariff and a “copy” under the *Act* should be co-extensive and any attempt to expand the scope of “copy” in the tariff beyond its meaning in the *Act* would be *ultra vires* the authority of the Copyright Board.

If a reproduction under the Tariff means a reproduction in the sense of the *Act*, the listed activities in subparagraphs 2(i)-(k) complicate the matter considerably as on their face they include acts that would not be recognized as copying under the section 3(1).

The first kind of questionable conduct caught is copying by displaying. Subparagraph (i) specifies that “Copying” includes reproductions made by “projecting an image using a computer or other device” and (j) specifies reproductions by “displaying a Digital Copy on a computer or other device.” These sorts of transitory display of images are thus treated as a reproduction in a material form under the Tariff. Putting aside the objection that such displays are generally otherwise permitted under section 29.4 of the *Act*, (especially as it has been broadened in Bill C-11); and even if they are not are still within the scope of fair dealing, the threshold triggering of an exclusive owners right within the meaning of section 3(1) has simply not occurred.

The second and even more problematic instance of conduct caught under definition of “copy” that goes beyond the *Act* is linking or hyperlinking. Subparagraph (k) specifies “posting a link or hyperlink” to a Digital Copy.¹⁶ Leaving a more formal definition aside, a hyperlink is an interactive element of an electronic file that sends the user another electronic file or location. A “hyperlink” at least includes ordinary web page links wherein the user clicks on the link, and is sent either to another page or to a file. In a web page, the destination of a link is always a Uniform Resource Identifier (“URI”).

The next problematic definition is “course collection” which is the same in section 2 of the Proposed Tariff and progeny licenses:

(j) displaying a Digital Copy on a computer or other device; and
(k) posting a link or hyperlink to a Digital Copy.

¹⁶ Digital Copy is in turn defined as “a reproduction in any digital form including optical or electronic format.”

‘*Course Collection*’ means for use by an Authorized Person as part of a Course of Study, and whether for required or recommended reading for the Course of Study or otherwise:

- (a) assembled paper Copies of Published Works; or
- (b) Digital Copies of Published Works that are
 - (i) emailed, linked or hyperlinked to, or
 - (ii) posted, uploaded to, or stored, on a Secure Network.

With respect to digital works, this definition adds works that are emailed as well as linked or hyperlinked to. The significance of the definition of “course collection” is that coming within its scope will trigger the reporting requirements of section 6, the survey requirements of section 13 and audit requirements of section 14 of the Proposed Tariff, the implications of which will be discussed below in Part 4.

2.2 Ambiguity about status of linking and emailing

Subparagraph (k) of the definition of "Copy" includes reproductions of a Digital Copy made by or as a consequence of "posting a link or hyperlink to a Digital Copy." What exactly distinguishes a "link" from a "hyperlink" is unclear. Some possible interpretations of subparagraph (k) are:

1. a "hyperlink" means a web page link, and the word "link" was included to encompass any similar kind of interactive electronic link;
2. a "hyperlink" means an electronic link to a Uniform Resource Indicator (URI) (e.g. "www.uwo.ca/arts/"), and a "link" is any non-electronic URI, such as a URI citation; or
3. a "hyperlink" means an *interactive* link to a URI in an electronic document, and a "link" is a *non-interactive* URI in an electronic document (i.e. a motivated user can cut-and-past the non-interactive URI into a web browser in order to access the resource).

There is little in the Tariff to indicate which interpretation is more suitable, but it would be more accurate to say that *none* of them are suitable. Incorporating linking into the definition of "Copy" compounds the burdens associated with Access Copyright's repertoire - for example, the stringent reporting requirements for course collections in s. 6, and the requirement in s. 11(b) to attach a specified notice to *every* copy made. Under any of the above three interpretations, subparagraph (k) is defective, superfluous (given the numerous restrictions on *actual* copying elsewhere in the Proposed Tariff) and should be expunged. If there is a fourth interpretation that is neither defective nor superfluous, the drafters ought to point it out.

Of the three interpretations set out above, the narrowest one (interactive links in electronic documents only) arbitrarily privileges non-electronic methods of pointing to resources (such as a

bibliography) over electronic methods. This is unacceptable in Canadian law and especially in copyright, as the Supreme Court of Canada has recently affirmed.¹⁷

The two broader interpretations, on the other hand, undermine academic citation. Several academic style guides require URIs for certain types of resource, and others, including the widely used MLA style, provide an option to use URIs. Under the expanded definition of copy, any citations to Repertoire Works are caught under the many restrictions in the Proposed Tariff, including the obligation in section 4(1) not to make the copy (i.e. the URI)¹⁸ available to a person who is not an authorized person (such as any person who is not a student or staff member of the institution).

On a cursory reading of the definition, it would appear that any link to a repertoire work is a copy. However, as indicated above, a subparagraph (k) “copy” should have to meet two criteria (the act in question must result from linking and the must actually be a reproduction within the meaning of section 3(1) of the *Copyright Act*).

For linking to amount to copying, there must be a reproduction made “by or as a consequence” of the linking. A reproduction cannot be made by linking because a link only contains a URI or other kind of address or pointer. Therefore, a typical link is not capable of being a work or any substantial part thereof within the meaning of Section 3(1). A typical URI address or pointer is only a few dozen characters in length and cannot possibly arise to the requisite level of a substantial amount of a repertoire work so as to attract copyright relevance.¹⁹

Since a reproduction cannot be made by linking, any copy by linking must be a reproduction “made as a consequence of” the linking. Taking the phrase in its broadest sense, reproductions “made as a consequence of” posting a link are all reproductions that would not exist if the link had not been posted. The user follows the link and creates a reproduction as he or she downloads a copy of the file representing the work. But the definition goes well beyond any actual subsequent download.²⁰

The number of copies made from linking does not depend on the number of times a link is posted but rather the number of times the link is followed. Moreover, the person who posts a

¹⁷ In *Entertainment Software Association v. SOCAN*, 2012 SCC 34, the Supreme Court rejects any approach that would undermine the “principle of technological neutrality.” Abella and Moldaver JJ. stated (at para. 9): “To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.”

¹⁸ Although, technically, there is no copy until a reproduction is made as a consequence of writing the URI - which means yet another layer of uncertainty. See the next paragraph.

¹⁹ An *atypical* URI could in theory amount to a reproduction of a substantial part of a literary work. Different web browsers have maximum URI lengths (online: www.boutell.com/newfaq/misc/urllength.html). A sufficiently long URI could contain entire paragraphs of text. Likewise, simple encoding strategies like hexadecimal could contain bitstreams describing any type of digital file, including images, music or even video. However none of these techniques are very practical. For all intents and purposes, the data within any real-world link is too insubstantial to engage amount to a reproduction in copyright.

²⁰ This leaves aside the question of whether additional copies are created, such as when the work is displayed to the user on a monitor or projector.

link will usually have little control over the number of times the link is followed because the poster will not be able to predict the number of users who will see the link and the proportion thereof that will follow the link.

Since copies ultimately can be made as a consequence of linking, the link creator is effectively cut out from the copying process. The user posts a link, wherefrom copies may or may not subsequently arise. Is it unclear who is actually responsible in that situation for making the copy. Is it the link-creator deemed to have made the copy each time the link is followed or is it the end-user who follows the link? If it is the end user who makes the copy from linking, then subparagraph (k) becomes redundant. Surely the situation of a user following a link to a work and then either saving the work or viewing it is adequately covered by paragraphs (f) (storing a work on a storage device or medium), (i) and (j) (displaying a work).

2.3 Definitions of “Copy” and “Course Collection” need to be scaled back

The expanded definition of “copy” in subparagraph (k) (posting a link or a hyperlink to a copy) is cumbersome at best, serving to arbitrarily restrict the manner in which authorized persons can refer to other works in an electronic document without implicating the tariff. At worst, the definition will vastly increase the number of copies that would become relevant for purposes of the reporting, monitoring and survey requirements. At one level, one might argue that there is no need to quibble over these definitions insofar as the payment mechanism is not based solely the enrollment at the institution, not on the number of copies made. While this might be true as for the initial term, the scope of the monitoring and reporting provisions (under the Proposed Tariff and its progeny) anticipates the setting of future rates.

Objecting to an expansive definition of “copy” is not simply a theoretical matter then because of its interaction with the mechanisms of the Proposed Tariff and licenses which impose onerous requirements on copies made. Any copies made as part of a “course collection” are subject to the extensive reporting requirements in section 6 of the Tariff (and its corresponding provisions in the progeny licenses).

While being included in a “Course Collection” does not result in an immediate cost increase in this FTE-only revenue model, the triggering of the massive ARMS provisions is what makes this definition significant. This expanded definition of “copy” also has consequences for the survey and audit powers in sections 13(2) and 14(4) of the Proposed Tariff and the corresponding (albeit yet to be agreed upon) corresponding provisions in the progeny licenses. The purpose of a survey, according to section 13(1), is to “conduct a bibliographic and volume survey of the uses permitted” under the tariff. The purpose of an audit according to section 14(1) is to ensure that institutions are keeping and reporting the “records from which the royalties and reports due to Access Copyright under this Tariff can be readily ascertained.” If links, hyperlinks and emails are pertinent to the “uses permitted” and the “reports due to Access Copyright,” as they appear to be, then it must follow that a right to conduct surveys and audits entails a right to inspect or scan

any document which contains a link or hyperlink to a repertoire work including those that have been emailed. Moreover, because it is impossible to determine whether a document contains links or hyperlinks to repertoire works without some sort of scan or inspection, there must be a right to inspect or scan any document which *might* contain a link or hyperlink to a repertoire work.

The definitions of “copy” and “course collection” are crucial threshold issues. Since these two definitions in the Proposed Tariff as been carried forward in the progeny license agreements, these same deficiencies apply across the board. The Proposed Tariff needs to be redrafted in a manner that removes displaying, projecting, linking, hyper linking and emailing from the definitions.” Put another way, the proposed definitions must be pared back to be consistent with the owners' exclusive rights in section 3(1) of the *Act*. With this expanded definition as proposed, Access Copyright is casting its net much farther than is permitted under Canadian copyright law.

Subparagraphs (i)-(k) of the definition of “copy” are an attempt to bring displayed images, projected images, links and hyperlinks not only under the ambit of a “copy” but also then within the scope of a “course collection” which then triggers the ARMS provisions discussed in the next section. It was a clumsy attempt because “copy” and “digital copy” are fundamental concepts and any expansion of those definitions would have sweeping implications. This is especially true given that the Supreme Court has recently determined that a hyperlink is not a copy.²¹ And even if a link were a copy, the expansion of Fair Dealing to include “education” would cover the activity in any event. With respect to classroom displaying and projecting, these activities are protected by an expanded section 29.4, but would likewise be subsumed under fair dealing even if section 29.4 were not applicable.

Despite such significant issues, these very definitions are now in effect at UWO, the University of Toronto, and the other institutions that have accepted the AUCC/ACCC model license. True enough that an attempt has been made to note objections and reserve further arguments, but the text of the licenses speak for themselves. The preamble of the UWO and University of Toronto licenses declare that the agreement does not restrict the ability of the licensee to use a repertoire work in any manner permitted under the *Act* including by way of linking or hyper linking. It also purports to disclaim that such acts engage exclusive owner’s rights under the *Act*. But why then not simply remove the problematic references in the operative definition? Why would UWO and UofT agree to these definitions if they are admittedly so problematic that a recital in

²¹ *Crookes v. Newton*, 2011 SCC 47 (CanLII), [2011] 3 SCR 269 <<http://canlii.ca/t/fngpv>>. See also *Warman v. Fournier*, 2012 FC 803 (CanLII) <<http://canlii.ca/t/fs2s2>>; Michael Geist, “Canadian Federal Court says no copyright infringement for linking, posting several paragraphs from article” <http://www.michaelgeist.ca/content/view/6558/125/> and Samuel Trosow, “Once again, linking is not unauthorized copying” <http://samtrosow.wordpress.com/2012/06/25/once-again-linking-is-not-unauthorized-copying/>.

the preamble is needed to offset them? And why is the word “emailed” still in the agreed definition of “course collection”?

The AUCC/ACCC Model License takes this ambiguity a step further by taking the disclaimer out of the preamble and inserting it into a new section 21, entitled Disputed Terms:

- (a) The parties have agreed to certain definitions for the purposes this agreement; in particular the terms “Copy”, “Course Collection” and “Published Work”.
- (b) Notwithstanding subsection 21(a), the definitions in subsection 21(a) have been agreed to on a without prejudice basis to the ability of the parties to argue *in any proceeding unrelated to this agreement* that a different definition should apply. In particular, the parties note that they disagree on whether every act in the definition of “Copy”, “Course Collection” and “Published Work” constitute a compensable reproduction under the Copyright Act. (Emphasis added)

But what about proceedings that *are* related to this agreement? It is not clear what AUCC was thinking when it drafted this section. As emphasized, the licensees retain the right to argue that different definitions should apply but only in proceedings *unrelated to this agreement*. Or to put it another way, while the UWO and University of Toronto language in the preamble leaves the issue very muddy, it appears that licensees under the Model License are bound by the definitions for purpose of any disputes that arise under the license. It is not at all clear what value the licensees derive from paragraph 21 of the Model License.

2.4 The definition of “Secure Network” is overbroad

At the core of the treatment of digital copies in the tariff and licenses is the amorphous concept of the “secure network”. According to section 2, there are four criteria for a “secure network”:

- (i) it is a network;
- (ii) it is operated by an educational institution or for an educational institution with Access Copyright’s consent;
- (iii) it is only accessible to authorized persons; and
- (iv) it is only accessible through a process of authentication at least as secure as a username or password.

While the second, third and fourth criteria seem simple enough,²² the first needs further explanation. Under the Proposed Tariff and progeny licenses, it is clear that all “secure networks” are also networks, but all “networks” are not specified “secure networks” so for any particular meaning of network to fit the tariff, the resulting definition of secure network must also be a good fit.

The definition seems to treats a network as a *place* in which works can reside. For example, section 5(1) provides that digital copies of repertoire works cannot be “transmitted to, made available from, posted or uploaded to, or stored on any computer network other than a secure

²² The second criterion has potential problems insofar as Access Copyright is under no apparent obligation to be reasonable in deciding to give or withhold consent. Nevertheless, its meaning seems clear enough.

network.” The survey and audit provisions in sections 13(2) and 14(4) provide that a “right of access throughout the educational institution’s premises should include ‘full access to the secure network’.” Thus, the interpretation of what is within any institution’s “secure network” is a baseline issue that will determine other rights and obligations.

What the drafters seem to have in mind for “secure network” is actually an educational institution’s course management system website. Section 5(2) has a requirement that digital copies of repertoire works on a secure network “be segregated by individual course of study” which is not at all feasible on a network but is more sensible on the more limited notion of a course website.

If the words “course website” were substituted for “secure network” throughout the tariff/licenses, we would have a somewhat clearer document. The process of authentication described in the section 2 definition of secure network for example resembles the sign-in page already present on most internet accessible learning management systems as well as other entry points within an institution’s IT infrastructure.

The basic prohibition in section 5(1) against posting repertoire works to any computer network other than a secure network could be more coherent if read as “any internet site other than one of the educational institution’s web-accessible learning management systems.” The problem with that limitation would be the further and more explicit restrictions on where and how works could be stored, which raises a whole host of other issues and concerns.

Insofar as being within an institution’s “secure network” triggers reporting and monitoring obligations, concerns about the scope of this definition are hardly theoretical. Indeed it is Access Copyright’s broad rights to access campus IT facilities that are the source of so much concern.

The problem is compounded when the ambiguities of “secure” and “network” are considered in more depth. A “network” means a set of interconnected machines.²³ By using the word “network,” the drafters have needlessly muddled what could have been a much simpler idea.

If network in the tariff and licenses matched the dictionary definition of a network, then which machines are inside the network and which are not? Under what circumstances does a machine join or leave the network? Even if we were to settle on a narrower concept of a network such as a “campus network,” the boundaries are still unclear. What about individual laptops connecting to the network over wireless Internet? What about student machines in their residence hall or faculty machines in their office? What about remote machines connecting to campus servers through a virtual private network? One of the more serious problems with this ambiguity is the possibility that an end user’s machine might be part of a network. Given that section 13(2) and 14(4) provide for “full access” to the secure network without any apparent limitations, Access

²³ In a computing context, the Oxford definition of a “network” is “a number of interconnected computers, machines or operations.”

Copyright might then insist on the right to inspect individual faculty or even student machines during a survey or audit whether under the Proposed Tariff or its progeny licenses

The definition of “secure network” in the tariff is a network with two additional restrictions: (1) that the network be operated by the educational institution; and (2) that the network only be accessible by authorized persons who identify themselves by a “process of authentication” with equivalent security to a username and password.

While a log in mechanism does indeed improve the security of a network, there are many other factors that contribute to a network’s security: administrative policies, vulnerabilities in network software, file and protocol encryption and so forth.

The result is etymological chaos. All modern Canadian educational institutions have networks (meaning actual networks not “secure networks” as defined in the tariff/licenses), and we would at least hope that all those networks have suitable levels of security for all of the purposes of the networks are directed at. Something can simultaneously be a network and it can be a secure, and yet bear no resemblance to the tariff’s conception of a “secure network.”²⁴

While the drafters of the Proposed Tariff may have intended that “secure network” mean those networks hosting a course website, some provisions in the tariff suggest that the broader term “secure servers” may indeed have been meant instead. As has already been mentioned, sections 13(2) and 14(4) of the Proposed Tariff suggest that the secure network is a physical system rather than an address on the web. Moreover, section 6(2) contemplates that the educational institution is under a duty to compile records for “course collections” made available by staff members through email. In order to fully assess during an audit whether all records have been properly kept, Access Copyright would need access to staff member email accounts, something that many institutions have attempted to disclaim an intention to do despite the inclusion of the “email” in the definition of “course collection,” which definition then gets carried forward and operationalized in subsequent provisions. Does usage in the definition of “course collection” suggest that the “secure network” (to which section 14(4) grants full access) includes email servers, and if so, how does this language then interact in the subsequent language in the licenses apparently disclaiming the intention to enter individual email accounts.²⁵

²⁴ It has already been discussed how a tariff/license network differs from an actual network. One simple way that the definition of “secure network” can differ from the institution’s is that the network may have an anonymity function- for example, a website that allows for students and staff members to raise complaints without fear of reprisal. In that situation, appropriate secure behavior for the network is to intentionally discard any data that could be used to identify a site visitor. This would be inconsistent with the login mechanism required under the tariff/license definition of “secure network.”

²⁵ A recital in the preamble and the text in Section 11(d) of the Model License recognize this problem, but the word “emailed” remains in the operative definition of “course collection” in section 2. And the importance of this definition is emphasized by its inclusion in Schedule B to the license which expressly includes “transmit by email” in the listing of acts within the scope of the tariff.

If email servers are considered part of the “secure network”, or if they are a location where “course collections” can be maintained, stored or transmitted, what about other systems within an institution's IT infrastructure? Would Access Copyright have the authority to examine personnel or student databases in order to confirm a users status as and “authorized” person? What about file servers whose primary role is storing research data or servers dedicated to other forms of electronic communication like web forums or instant messaging? What about a department wiki? Any system that can be accessed only through a “process of authentication” described in the definition of “secure network” is potentially part of the network to which Access Copyright must be given access under the ARMS provisions of the Proposed Tariff.

Even if these access questions can be settled, the end result will be a definition of “secure network” which differs substantially from its etymology. Understanding the scope of the “secure network” is crucial to understanding the scope of any privacy or academic freedom concerns arising from the Proposed Tariff and its progeny licenses. It is the threshold baseline from which other rights and obligations follow. It will only take one educational institution’s administrator to misunderstand that scope during an audit or survey in order to compromise the integrity of students’ and staff privacy throughout the system.

2.5 The Definition of “Secure Network” needs to be more precise and limited

The definition of “secure network” as set forth in the Proposed Tariff and its progeny licenses is indefensible. It stretches both words more than they can bear and creates needless ambiguity. At minimum, several changes are needed, the first is definitional and the others go to the operative provisions which refer back to the definition.

At the outset the definition of the term “secure network” needs to be more carefully refined and limited. More precision is needed in this definition because it has implications that carry on through several substantive provisions. As indicated, the proposed definition of “secure network” is neither secure nor a network. “Restricted” could be a better way to describe a system that requires a process of authentication at the access point, and the word “network” could be replaced with “internet site” or “server” or “course website.”

Likewise, the references to the “secure network” (or its eventual successor term) in section 5 needs to be removed, and again, this is an unequivocal requirement. Section 5(a) provides that “digital copies of repertoire works shall not be transmitted to, posted or uploaded to, or stored on any computer network other than a secure network.” This provision is hardly enforceable unless one wants to assume that Access Copyright be given access to the personal machines of staff and students including their storage devices and external accounts. Like in the case of email accounts, the institutions do not have effective custody or control over this broad range of equipment, devices and networks that they are even in a position to negotiate away access to them in the first instance. Attempting to control how and where staff and students transmit, post,

upload or store their work is simply not a viable concept given the realities of contemporary academic practices. Fixing the definition of “secure network” is not going to alleviate this concern.

Similarly, section 5(d), (which deals with the obligation of an institution on termination of the agreement to immediately undertake reasonable efforts to “prevent access to digital copies of repertoire works made under this agreement and stored on a secure network under its control”) would on its face require the destruction of massive amounts of materials, perhaps in situations where they have already been incorporated into lessons, course notes, presentations, assignments, research papers, and the list goes on. It is simply an unreasonable requirement which could not possibly be complied with other than through the most draconian and destructive of methods. This provision also needs to be removed, and it is not a remote problem either insofar as some institutions have already indicated they will not be renewing the license on its termination. Section 5(d) should be of particular concern to institutions that think they only want to use the Model License as a temporary solution while other long-term policies are being developed.

Finally, the references to the “secure network” in the ARMS provisions need to be more carefully constrained. As will be further discussed in Part 4, delimiting the audit and survey powers should be of particular urgency given its direct relationship to privacy and academic freedom. As they are drafted they are too open-ended and pose the real potential of compromising the integrity of secure data. Sections 13(2) and 14(4) of the Proposed Tariff apply very broadly throughout the entirety of an institution's premises and this language needs to be more carefully crafted. In addition, the limitations on the right of access should be much more clearly spelled out. The term “reasonable arrangements for supervision” in these sections is especially vague. Similarly, and though perhaps well meaning, the vague references in the preamble and section 11 of the progeny licenses²⁶ disclaiming any intention to invade privacy or impede academic freedom are largely precatory and in potentially in conflict with more precise obligations elsewhere in the license. Insofar as universities do not even have custody and control over emails, they are hardly in a position to negotiate away access to them. As a matter of principal then, the definitional references to email need to be removed.

3.0 What Benefits are obtained under the Proposed Tariff and Progeny Licenses?

Section 3 of the Proposed Tariff and its progeny licenses set forth the permitted uses. We conclude that very little, if any value is being provided to institutions under this section. This conclusion is only bolstered by the passage of Bill C-11 with educational fair dealing intact and

²⁶ Section 11(c) in the case of the UWO and UT licenses and section 11(d) in the case of the AUCC/ACCC Model License.

bolstered even further by the strong user rights direction in the Supreme Court's July pentalogy. At this point, we need not further debate the issue of whether the activities included in section 3 would have already constituted fair dealing based on an application of the fair dealing criteria set forth by the Supreme Court in *CCH v. LSUC*²⁷ in 2004. But we argue that much of the earlier uncertainty and hesitation about fully embracing fair dealing has been settled now by the new amendments and the pentalogy.

3.1 The scope of permissions is too narrow

Paragraph 3 of the Proposed Tariff sets forth the extent of allowable copying that can be made under its terms:

Subject to compliance with each of the conditions in Sections 4 and 5, this tariff entitles an Authorized Person for Authorized Purposes only, to

- (a) make a Copy of up to ten per cent (10%) of a Repertoire Work;
- (b) make a Copy of up to twenty per cent (20%) of a Repertoire Work only as part of a Course Collection; or
- (c) make a Copy of a Repertoire Work that is
 - (i) an entire newspaper or periodical article or page,
 - (ii) a single short story, play, poem, essay or article,
 - (iii) an entire entry from an encyclopaedia, annotated bibliography, dictionary or similar reference work,
 - (iv) an entire reproduction of an artistic work (including a drawing, painting, print, photograph and reproduction of a work of sculpture, an architectural work of art and a work of artistic craftsmanship), and
 - (v) one chapter, provided it is no more than twenty per cent (20%) of a book.

The AUCC/ACCC Model license extends the right to “any library patron” as well as for certain interlibrary loans to:

- (a) make a Copy of up to ten per cent (10%) of a Repertoire Work;
- (b) make a Copy of up to twenty per cent (20%) of a Repertoire Work only as part of a Course Collection; or
- (c) make a Copy of a Repertoire Work that is
 - (i) an entire newspaper or periodical article or page,
 - (ii) a single short story, play, poem, essay or article,
 - (iii) an entire entry from an encyclopaedia, annotated bibliography, dictionary or

²⁷ [2004] 1 S.C.R. 339. In that case the court adopted criteria to determine whether or not an act is fair dealing. The court decided that the purpose of the dealing, the nature of the dealing, the nature of the work, available alternatives of the work and the effect of the dealing on the work must be taken into effect when determining whether a particular dealing is fair.

- similar reference work,
- (iv) an entire reproduction of an artistic work (including a drawing, painting, print, photograph and reproduction of a work of sculpture, an architectural work of art and a work of artistic craftsmanship), and
 - (v) one chapter, provided it is no more than twenty per cent (20%) of a book.²⁸

The Model License also a licensee’s library or archive to copy up to 20% of a repertoire work in order to replace damaged or missing pages,²⁹ and also to

make an Alternate Format Copy of a Repertoire Work, for use by an Authorized Person who is blind, visually impaired or otherwise unable to view normal print because of a disability and by those involved in assisting that person – where no such Alternate Format Copy is, to the knowledge of the Licensee, commercially available on the Canadian market at a reasonable price and within a reasonable period of time...³⁰

This latter allowance is subject to two conditions. First, the licensee must include, on the Alternate Format Copy the international copyright symbol (©), a credit to the publisher and the author(s) of the Repertoire Work (where known), and a notice stating “This material has been in alternate format under permission from Access Copyright. Further reproduction, distribution or transmission is prohibited, except as otherwise permitted by law.”³¹ The second condition is that Access Copyright be given with a copy of the Alternate Format Copy on request if available.³²

But both the replacement page and alternative format allowances are uses that are already covered by specific exemptions under the *Copyright Act*. Section 30.1(a)(i) of the Copyright Act allows a library, archive or museum to make copies for the purpose of maintenance or management of its permanent collection in situations where the original is rare or unpublished, unless there is a commercially available replacement

On account of these “commercially available” counter-limitations in section 30.1, it is arguable that section 3(c)(i) of the Model License potentially provides some additional value to libraries and archives of licensees libraries because the same counter- limitations is not mentioned in the license. As a practical matter, this situation typically arises with respect to older works and loose leaf periodicals. Each of these presents a solution which allows for the necessary pages to be replaced without the need for a license. Many of the older books are already in the public domain

²⁸ AUCC and ACCC Model License, section 3(b). The interlibrary loan may be made “to another institution or corporation licensed by Access Copyright, or to another non-profit educational institution, library, archive or museum, provided in each case that the Copy is made in accordance with the conditions in sections 4, 5 and 6.” The UWO and UT licenses contain similar language.

²⁹ *Id.*, section 3(c)(i)

³⁰ *Id.*, section 3(c)(ii)

³¹ *Id.*, section 3(c)(ii)(A)

³² *Id.*, section 3(c)(ii)(B)

and as a result, no license is necessary to copy pages from these books. Publishers of loose leaf periodicals will often replace small numbers of pages free of charge even in the absence of a license. Even in the absence of another license-free means of replacing the page, many of these materials are used for research purposes which would be permitted under fair dealing.

With respect to the exception for copying materials for a person with a perceptual difficulty under section 32 of the *Copyright Act*,³³ the terms of this exception cover what is being allowed in section 3(c)(ii) of the Proposed Tariff/Licenses with the exception of the counter-limitation for large print books under section 32(2).

The agreement imposes an additional requirement of providing a copy to Access where requested, and this is not required in the *Act*. The only additional benefit is that unlike in the legislation, the license would allow for a large print copy to be made.

The Proposed Tariff and progeny licenses also deal with digital rights, which will allow an institution to place digital copies onto a secure network. There are two main issues with this provision. The first is that institutions already expend considerable resources in their collections budgets for electronic materials. So many of these potential digital works are already licensed, and others are already available openly on the Internet.

The second problem here is that Access Copyright is only able to license the rights to copy works that are within its repertoire, and it is not clear how extensive this repertoire is. Without knowing its extent of Access's repertoire, it is impossible to determine what if any value can be derived from the inclusion of digital rights.

3.2 The scope of the repertoire is ambiguous

The Proposed Tariff and its progeny licenses define "repertoire work" to mean:

³³ Section 32 provides that:

- (1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to
 - (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
 - (b) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
 - (c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
- (2) Subsection (1) does not authorize the making of a large print book.
- (3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (a) of the definition "commercially available".

a Published Work in which Access Copyright collectively administers the rights, as authorized by the copyright owner or by another collective management organization, whether by assignment, licence, agency *or otherwise*, and includes any Copy of a Repertoire Work. For clarity, Repertoire Works consist of Published Works that have a print equivalent and are not on the Exclusions List and Published Works in born-digital format that are identified on the Inclusions List. (Emphasis added)³⁴

It would appear that there are two prongs to this definition depending on whether the published work has a print equivalent or is “born digital.” In the case of a print work as in the past, it is considered in the repertoire unless it is on the “exclusions list.” But in the case of works that are born digital, they only fall within the scope of the repertoire if included on an “inclusions list.”

“Exclusions List” is further defined as meaning “a list in PDF format or a searchable database provided by Access Copyright, identifying Published Works that are not Repertoire Works.”

“Inclusions List” is also further defined. It means “a list in PDF format or a searchable database provided by Access Copyright, identifying Published Works in born-digital format that are Repertoire Works.”

Ascertaining whether or not a particular work is in the repertoire is an important threshold issue because section 3 of the Proposed Tariff and its progeny only applies to “repertoire works.” And every provision in sections 4 and 5 specifically refers to repertoire works.

Access Copyright has provided a repertoire look-up tool on their webpage,³⁵ although it contains the disclaimer that “You may encounter errors, bugs, defects, glitches or lack of functionality.”³⁶ Given the centrality of the concept of repertoire to the operation a tariff or license, it is surprising that the term has not been defined with more clarity. In their joint objection to the Proposed Tariff, CFS and CAUT state:

Access Copyright’s repertoire problems are particularly acute with respect to Digital Copies. In short, 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 tariff.³⁷

In its announcement rejecting the Model License, the University of British Columbia stated:

The AUCC model license only permits copying of up to 10% of a work (20% in case of course packs) and only with respect to a narrow repertoire that is almost exclusively print-based. Therefore, the license would not be cost-effective for UBC and does not

³⁴ The CFS-CAUT Objection, *supra* note 2 at paragraph 23, p. 6 notes that the emphasized phrase, “or otherwise” creates needless ambiguity in the identification of the repertoire, and must be struck.

³⁵ <https://rms.accesscopyright.ca/rplookup/repertoire/RepertoireLookup.aspx>

³⁶ *Id.*

³⁷ CFS-CAUT Objection, *supra* note 2 at paragraph 60, p. 11.

absolve faculty members and students from the need to respect the legal rights of copyright owners.³⁸

3.3 The coverage of the indemnification clause is limited

The Proposed Tariff does not include an indemnification clause, but one has been added to the progeny licenses.³⁹ However, these clauses are not unlimited; they will only apply to copying that is “consistent with the terms and conditions applicable to Repertoire Works under section 3, 4 and 5 of this agreement.”⁴⁰ While much attention has been focused on the value of having an indemnity clause as a benefit of the Model License, insufficient attention has been given to the significance of this specific limitation. Under this provision, Access Copyright could reject a claim for indemnification if the copying was above the strict limits in section 3, or for that matter if any of the provisions contained in sections 4 and 5 were not complied with. Given the limited scope of permissions in section 3 combined with the broad range of prohibitions in sections 4 and 5; a licensee institution will be operating at its peril if it assumes it is receiving broad protection under this particular indemnification clause. Like any insurance policy, it is important for a prospective policy holder to read the terms of coverage very carefully.

3.4 Conclusion: There are insignificant benefits to warrant the costs of the license

Given the limited nature of the permissions granted to licensees in section 3 over and above their already existing rights, combined with the ambiguous nature of what is actually in the Access Copyright repertoire, also combined with the limited nature of the indemnification protections, there seems to be little value for institutions in signing on to the Model License. This conclusion is certainly strengthened with the passage of Bill C-11 and the rulings in the pentalogy. Even before the Supreme Court’s decisions of July 12th, Memorial University succinctly highlighted this point in their announcement that they would not be signing the license:

A dominant theme running through all discussions, consultations and feedback on this issue was the absence of a compelling value proposition for Memorial under the proposed licensing terms.⁴¹

³⁸ “UBC is not signing a license agreement with Access Copyright” (May 15, 2012) <http://www.broadcastemail.ubc.ca/2012/05/15/ubc-is-not-signing-a-license-agreement-with-access-copyright/>. See also University of Saskatchewan announcement of July 3, 2012, stating: “The agreement with Access Copyright is not cost effective for us given the material that is covered by the license.” <http://www.usask.ca/copyright/news/model-license-decision.php>.

³⁹ See Section 13 in the UWO, UT and AUCC/ACCC Model Licenses.

⁴⁰ AUCC/ACCC Model License section 13(a)(ii). (A similar limitation is contained in section 13 of the UWO and UT versions).

⁴¹ “Memorial will not sign copyright agreement between AUCC and Access Copyright” (June 28, 2012) http://today.mun.ca/news.php?news_id=7462. See also CFS-CAUT Objection, *supra* note 2 at paragraph 34, p. 7,

4.0 The Audit, Reporting, Monitoring and Survey Provisions are *Ultra Vires* the Act

The Proposed Tariff would give Access Copyright far reaching powers to audit records, to obtain reports, to engage in monitoring, and to conduct surveys of educational institutions that is in excess of what is authorized by the *Copyright Act*. These additional powers exceed what would be necessary for the effective operation of a Tariff and thereby go beyond what could be properly ordered by the Board. This section will outline what provisions are authorized by the *Act* and analyze what terms can then be included in a tariff.

Our conclusion, that the ARMS provisions in the Proposed Tariff are *ultra vires* the *Copyright Act* is based on the text of the *Act* itself as well as cases interpreting the scope of the Board's authority with respect to ancillary provisions. While our conclusion does not help UWO, the University of Toronto and the other institutions that have signed the Model License as they have agreed to the terms in their respective licenses, these points should be taken into account by any institution still thinking about signing on to (or renewing) the Model License.

This section will first review the applicable standards for determining the proper scope of ancillary provisions within a tariff, and then assess the terms of the Proposed Tariff under these standards. Section 4.4 will then turn to the provisions in the progeny licenses that have altered these ARMS provisions by replacing them with what is essentially a loose “agreement to agree” on the terms of a future survey.⁴²

4.1 What is the scope the Board's authority to order verification provisions?

Most generally, the *Copyright Act* grants the Board the power to authorize tariffs for the collective administration of copyright⁴³. The purpose of these tariffs is to set out “by license the royalties and terms and conditions relating to classes of uses.”⁴⁴ This provision appears to grant the Board broad powers with respect to the royalty rates as well as the related terms and conditions included in a tariff. In practice, it seems that the Board has been allowed to adopt such terms and conditions that are necessary for the effective operation of the tariff. Typically, the terms and conditions set out who is allowed to copy a work, the amount to be paid and how the royalties will be verified and determined.

stating: “To offer value, the tariff the Board endorses must offer downstream creators, innovators and the user community something more than what they already enjoy under the *Copyright Act*.”

⁴² See section 11 in the UWO, UofT and AUCC/ACCC Model License.

⁴³ *id* at s. 70.12

⁴⁴ *id*

More formally, in determining the proper breadth of audit and related provisions, the starting point will be the terms in the *Act* itself. In the case of the subject tariff application, the provisions of section 70.1, *et seq* of the *Act* apply.

With respect to the Board's powers to order ancillary terms beyond the royalty rate, two particular sections seem relevant. Generally, section 70.15(1) provides that: "The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions ***related thereto*** as the Board considers necessary, having regard to any objections to the tariffs." (Emphasis added).

The important limiting language here are the emphasized words ***related thereto***. The Board is not given a general plenary authority to add such terms as it considers necessary. Any terms added must relate to the royalties.

In addition, with respect to tariffs to be paid by educational institutions, section 73(1) (a) gives the Board the authority to establish the manner of determining royalties including "(ii) such terms and conditions ***related to*** those royalties as the Board considers appropriate." (Emphasis added).

Both of these provisions, on their face, expressly ***relate to*** the royalty rate.

Turning to case law, there have been instances where the courts have implied a power to include certain audit-related terms. In *Maple Leaf Broadcasting v. C.A.P.A.C.*⁴⁵, the collective brought an action for unpaid royalties against the broadcaster and relied on a provision in the tariff giving them the right "to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee."⁴⁶ In a split decision, a majority of the Supreme Court of Canada allowed an audit provision to stand:

Once it has been held that the Board was acting within its powers in fixing fees at a stated percentage of the gross revenue of a licensee it appears to me to follow that it must be within its powers to approve or prescribe the manner in which the amount of such gross revenue is to be ascertained or verified.⁴⁷

Even though the *Act* (as then in effect)⁴⁸ did not expressly grant an audit power, the court ruled that once the Board acts within its power in fixing a royalty then it is within the powers of the board to prescribe the manner in which the *amounts due are to be ascertained or verified*. This case applies to the present tariff application insofar as the verification of amounts due are involved.

⁴⁵ [1954] S.C.R. 624 <http://canlii.ca/en/ca/scc/doc/1954/1954canlii62/1954canlii62.html> [*Maple Leaf*]

⁴⁶ *id* at p. 628, quoting paragraph 1(b) of Tariff No. 2 (Radio Broadcasting).

⁴⁷ *id* at p 631. In separate dissents, J. Rand and J. Locke would have disallowed the inspection provision.

⁴⁸ This ruling was in 1954 and the *Copyright Act* has been amended since. However, there is still no express provision granting audit power and this line of reasoning was used in *Cano Tech* and is a binding precedent.

In *Canadian Private Copying Collective v. Cano Tech Inc.*⁴⁹ the CPCC was seeking unpaid levies, and the audit in question was directly related to the amount of money that was due and owing. The Federal Court upheld the audit provision with respect to the private copying levy:

The imposition of a right on the part of a collecting body to verify the information provided by manufacturers or importers of blank audio recording media, by means of audit, is a term or condition related to the levies imposed by the Board in accordance with the provisions of subparagraph 83(8)(a)(ii) of the *Copyright Act*. As a consequence, the audit provision is not *ultra vires* the Act...⁵⁰

The court noted that in the case of the private copying levy, *the Act* expressly authorizes the Board, in certifying a tariff to establish such terms and conditions related to those levies as the Board considers appropriate, including, without limiting the generality of the foregoing, the form, content and frequency of the statements of account mentioned in subsection 82(1), measures for the protection of confidential information contained in those statements, and the times at which the levies are payable.⁵¹

In an earlier decision relating to a request for an enforcement order from the CPCC, the Board considered the scope of its enforcement jurisdiction under section 66.7 of the *Act*.⁵² CPCC was seeking a broad enforcement order to require certain importers:

to pay outstanding levies and interest, as well as amounts ascertained as owing in the future; to comply with the tariff's reporting requirements; to allow auditors to have access to the importers' books and premises, cooperate with auditors, answer all reasonable questions, and not remove from their premises documents that auditors might need to conduct an audit; and to generally comply in the future with their obligations as set out in the tariff.⁵³

The Board framed the issue as whether it had “the power to order someone to comply with the terms of a certified tariff and if so, can it sanction non compliance with the order through contempt proceedings?”⁵⁴ In finding that it did not, the Board noted that “CPCC's argument runs against strongly held administrative law values and principles, such as restricting a tribunal's

⁴⁹ [2006] 3 F.C.R. 581 <http://www.canlii.org/en/ca/fct/doc/2006/2006fc28/2006fc28.html> [*Cano Tech*].
⁵⁰ *id* at para 96.

⁵¹ *Copyright Act*, section 83(8)(a)(2).

⁵² Section 66.7(1) provides: “The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.” But the Act is clear that these powers are not self-executing as section 66.7(2) continues: “Any decision of the Board may, for the purposes of its enforcement, be made an order of the Federal Court or of any superior court and is enforceable in the same manner as an order thereof.”

⁵³ *Private Copying Tariff Enforcement* (January 19, 2004) <http://www.cb-cda.gc.ca/decisions/2004/20040119-c-b.pdf>, at p. 1.

⁵⁴ *id* at p. 3.

powers to those that are expressly granted to it by statute or impliedly necessary to the proper exercise of its core competence.”⁵⁵ In determining that CPCC would need to obtain the order from a court, the Board was unsympathetic to the argument that filing separate actions was impractical, stating: “[a]s for having to decide whether filing legal actions makes practical sense, that is nothing more than what confronts all rights-holders who suspect that a user’s obligations towards them are not being satisfied.”⁵⁶

Taken together, the applicable statutory language and these rulings suggest that while the Board will be given some latitude to include ancillary verification provisions, this power is not unlimited. The question in any individual case should focus on the extent of the relationship between the provision in question and the royalty rate.⁵⁷

4.2 The Proposed Tariff is *Ultra Vires* the *Copyright Act*

In the Proposed Tariff the amount due is calculated based solely on the institution's FTE enrollment multiplied by the prescribed rate, \$45 per FTE for Universities or \$35 per FTE for other institutions.⁵⁸

⁵⁵ *id.*, at p. 4.

⁵⁶ *id.*, at p. 8.

⁵⁷ It is helpful to compare the Proposed Tariff to the SOCAN tariff that was passed on July 10, 2010. *Statement of Royalties to be Collected by SOCAN, Re: Sound, CSI, AVLA/SOPROQ and Artist I in Respect of Commercial Radio Stations* Canada Gazette July 10, 2010 s. 5-6. <http://www.gazette.gc.ca/rp-pr/p1/2010/2010-07-10/html/sup1-eng.html>. Under this SOCAN tariff, the royalty fee is calculated based on the total income of the station, not the number of songs that are played. This measure is similar as it is not directly usage-based. Under the audit provisions, the station was only required to produce the documents that are necessary to verify their income and there was no additional access granted to the station’s network. Under a separate provision, section 10(1), and on request, the stations must report the songs that are played, along with certain identifying data. The equivalent of this provision in an Access Copyright tariff would be along the lines of the author of the work, the title, the sections used, and the publisher. This level of reporting would not be as objectionable as the provisions in the Proposed Tariff insofar as it is reasonably related to ensuring that the appropriate rights holders have been paid an appropriate amount and it also a minimal burden. But this SOCAN tariff does not provide SOCAN with access to the station’s internal IT infrastructure subject only to a vaguely described appropriate supervision. It is instructive that SOCAN is able to effectively operate a similar tariff without the invasive and overreaching provisions that Access Copyright wants to include in the post-secondary education sector SOCAN seems able to ascertain and verify the amount that is owed as well as how the payments need to be divided amongst members without having access to any of the station’s internal networks.

⁵⁸ Section 7 provides: “(1) The Educational Institution shall pay an annual royalty to Access Copyright calculated by multiplying the number of its Full-time-equivalent Students by the royalty rate of (a) \$45.00 CAD for Universities; or (b) \$35.00 CAD for all other Educational Institutions.” Unlike under the previous license which was based on a combination of fees based on FTE (for unascertained copies) and per-page assessments (based on ascertained copies in course-packs) This straight FTE-based method of assessing royalties has as an advantage its simplicity and ease of calculation. On the other hand, there were two benefits of the per-page fee that are being lost in FTE-only method in the Proposed Tariff. First, there is a certain equity in terms of allocating the costs amongst the students. Those who make use of course packs pay for them at the bookstore, those who do not buy course packs do not share in this assessment. More attention needs to be paid to the disparities as between different courses and programs as well as different course levels in terms of course pack frequency. For example, a cursory examination

Section 8 goes on to provide for the method and timing of payment, while section 9 deals with interest and section 14 establishes an audit procedure.

While the section 14 audit could include the seeking of evidence with respect to the amount of royalties due, it is not so limited as it is drafted. For example, Section 14(1) mandates that an institution keep records for a period of six years “from which the royalties and reports due to Access Copyright under this tariff can be readily ascertained.” Putting aside the reasonableness of a six-year retention question, the words “and reports” must be stricken, otherwise the section can go beyond the issue of the royalties due. Or it could be altered to say “royalties due to Access Copyright and reports *pertaining thereto*...” in which case the scope of the reports would be understood to be limited to those pertaining to royalties.

Section 14(3) is also overboard as it requires that “If selected for an audit, the Educational Institution shall ensure that it and all Authorized Persons cooperate fully with Access Copyright.” Yet, very few among those defined as Authorized Persons in section 2 on any campus have access to FTE-related information. So the persons to whom this cooperation is mandated does not need to include everyone last student and staff member on campus.

Section 14(4) needs to be scaled back considerably so that it pertains only to royalties. As drafted, it provides, “The Educational Institution shall give Access Copyright, on reasonable notice, right of access throughout the Educational Institution’s premises in order to organize and carry out an audit, including full access to the Secure Network and all Course Collections.”

With respect to reporting, none of the extensive requirements contained in section 6 have anything even remotely to do with aggregate FTE and therefore go beyond what is needed to verify that the correct amount of royalties have been paid. It needs to be emphasized again that under the previous license some portion of the amount due was based on the copying of ascertainable works at a per page price. In that situation, some level of reporting *was* directly tied to the amount of the royalty due. But in the new Proposed Tariff, it was the decision of Access Copyright and Access Copyright alone to forego royalties based on ascertainable copies of particular works.

Section 13 of the Proposed Tariff also includes survey requirements that are not reasonably related to ascertaining the amount of royalties due.⁵⁹ In addition to repeating some of the

of data obtained from the UWO Bookstore indicates very little course pack activity at the graduate level. The second benefit from the per page fees was the (relatively) straightforward reporting involved which was in the nature of identifying data (ISBN, title, author publisher) combined with usage (number of pages, number of copies sold).

⁵⁹ Section 13 provides of the Proposed Tariff provides:

(1) Once every Academic Year, Access Copyright may advise the Educational Institution of Access Copyright’s intention to conduct a bibliographic and volume survey of the uses permitted hereunder. Upon request by Access Copyright, the Educational Institution will participate in the survey and will ensure that all Authorized

deficiencies from the audit section, the last subsection (allowing sanctions for an unreasonable refusal to participate in the survey) is a punitive provision. Access Copyright has no reason to doubt the good faith of its licensees in seeking to comply with its obligations. And in any event, how is reasonableness to be determined? And who is to make the determination? What they are seeking here is an unprecedented power to engage in what would amount to self-help in case such a dispute might arise.

Section 13 does not have a reasonable nexus to determining whether the appropriate royalties have been paid or are due and owing. As such it needs to be deleted in its entirety.

While the Proposed Tariff does not contain a section labeled “Monitoring” as such, the need for extensive monitoring in order to comply with its terms becomes evident in order to give meaning to several of its sections. Section 15 provides that:

The Educational Institution shall take steps to ensure that the conditions in sections 4 and 5 are complied with and that no Copying by Authorized Persons or Subcontractors takes place in contravention of the conditions set out in sections 4 or 5.

How could an institution take steps to ensure that the various provisions in sections 4 and 5 are all complied with? Among other things, section 4 requires that:

- repertoire works not be made available, distributed, or transmitted to anyone other than an authorized person;⁶⁰
- there be no repeated, systematic or cumulative copying of the same work beyond the limits set out in section 3 for one course of study in a year;⁶¹
- repertoire works not be stored or indexed with the intention or result of creating a library of published works;⁶² and that

Persons cooperate fully with the requirements of Access Copyright.

(2) The Educational Institution shall give Access Copyright, on reasonable notice, right of access throughout the Educational Institution’s premises, including full access to the Secure Network and all Course Collections, at any reasonable times, to administer the survey. Such access may be subject to reasonable arrangements for supervision as required by the Educational Institution to ensure the security of its premises, including its computer systems and networks, and to maintain the confidentiality of personal or other confidential data.

(3) If an Educational Institution unreasonably refuses to participate in the survey or otherwise does not comply with this section, the licences in sections 3 and 10 will cease to be in effect on written notice from Access Copyright until Access Copyright provides further notice that the deficiency has been remedied.

⁶⁰ Proposed Tariff, Section 4.1

⁶¹ *Id.*, Section 4.2. The CFS-CAUT Objection, *supra* note 2 at paragraph 38, p. 8 states this section “...would have the bizarre effect of meaning that a professor could not use the same work in a course offered in successive semesters.”

- there be no moral rights violations.⁶³

In addition, section 5 requires that digital copies of repertoire works:

- not be transmitted to, made available from, posted or uploaded to, or stored on, any computer network other than a Secure Network;⁶⁴
- be further segregated by individual course of study and made available and accessible only to authorized persons.⁶⁵
- not be transmitted to, made available from, posted or uploaded to, or stored, on any device or medium, computer or computer network in such a manner that makes them publicly available or accessible including available or accessible over the Internet or other public network.⁶⁶

In addition, with respect to a situation where the tariff coverage ends, there is the further requirement that:

Where the Educational Institution is no longer covered by this tariff, the Educational Institution and all Authorized Persons shall immediately cease to use all Digital Copies of Repertoire Works, delete from their hard drives, servers and networks, and make reasonable efforts to delete from any other device or medium capable of storing Digital Copies, those Digital Copies and upon written request from Access Copyright shall certify that it has done so.⁶⁷

Taken together and cumulatively, the requirements of section 4 and 5 impose a broad range of obligations on an institution. How would these requirements be met without establishing a broad system of monitoring and surveillance of the everyday activities students and staff? And how would an institution meet its section 15 obligations with respect to sections 4 and 5 without such extensive monitoring?

⁶² *Id.*, Section 4.3. The CFS-CAUT Objection, *supra* note 2 at paragraph 39, p. 8 argues this section “inappropriately prohibits the indexing or storage of copied works ‘with the intention of creating a library of published works’ [and that] this is precisely how scholars employ tools such as desktop search engines: for example, to search through a personal library of scholarly articles to find relevant passages.”

⁶³ Proposed Tariff, Section 4.6

⁶⁴ *id.*, Section 5.1

⁶⁵ *id.*, Section 5.2

⁶⁶ *id.*, Section 5.3

⁶⁷ *id.*, Section 5.4. With respect to this section, the CFS-CAUT Objection, *supra* note 2, paragraph 40, page 8 argues “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. Additionally, 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.”

As a result, the ARMS requirements of the Proposed Tariff, individually and cumulatively, go well beyond what is necessary to ascertain or verify the royalty amount due. If the tariff is based on the number of full time equivalent students, all AC needs to ascertain or verify the amount due is the number of FTE students. The terms as they stand essentially amount to an unprecedented level of extrinsic monitoring and surveillance wholly unrelated to computing the amount due under the tariff.

Although courts have found an implied power to include audit provisions, it seems unlikely that the courts would uphold implied power to authorize surveillance of this magnitude where there is no reasonable nexus to the computation of the amount of royalties due.

Essentially, the provisions amount to compliance monitoring, not royalty payment verification, and ordering such a provision in a tariff would be beyond the jurisdiction of the Copyright Board. The Board's jurisdiction is to set royalties, not to adjudicate potential infringement allegations.

Access Copyright is trying to use the tariff proceedings to preempt the judicial discovery rules that would bind a plaintiff in an infringement action. They are seeking what would amount to a built-in and self-executing set of pre-filing discovery tools. The Copyright Board simply does not have the jurisdiction to authorize such an imposition on the jurisdiction of the courts⁶⁸ not to mention on the rights of the institutions and its constituents.⁶⁹

4.3 Reasonable Arrangements for Supervision and Privacy/Security Concerns

The limitations on the right of Access Copyright's to access the premises of a licensee during a survey or audit in the Proposed Tariff are vague. Subsections 13(2) and 14(4) provide that the right "may be subject to reasonable arrangements for supervision as required by the educational institution to ensure the security of its premises including its computer systems and networks and to maintain the confidentiality of personal or other confidential data."

⁶⁸ Section 37 of the Copyright Act vests the Federal Court and provincial courts with concurrent jurisdiction to hear and determine civil copyright infringement proceedings. With respect to the rules of practice applicable in infringement actions, s. 34(5) provides that the rules of practice and procedure, in civil matters, of the court in which proceedings are commenced by way of application apply to those proceedings. Access Copyright is seeking through the tariff what would be the equivalent to an advance discovery order.

⁶⁹ The Courts have also rejected these types of activities in the context its own proceedings. *BMG Canada Inc. v. Doe*, 2005 FCA 193 (CanLII), [2005], <<http://canlii.ca/t/1kx1k>> the Court denied the request made by record companies to obtain private personal information from subscribers who were allegedly infringing copyright. A major reason for this refusal was the record companies' inability to establish a *prima facie* case of copyright infringement. Without resolving the issue of what level of proof would be required in order to obtain such an order, it is clear that an individual application would need to be made. In *Merck & Co. v. Apotex Inc.* (1998), 145 F.T.R. 303 1998 CanLII 7466 (FC), <<http://canlii.ca/t/4cfc>> the Court refused to issue a subpoena when it felt that the seeking party was fishing for relevant information (para 13). Generally, the resolution of discovery disputes will be fact-dependent and addressed to the discretion of a supervising court. In essence, Access Copyright is seeking a level of *carte-blanche* discovery that would not be permitted in a pending or anticipated infringement action.

To begin with, the tone of these subsections is very uneven. The obligation of the licensees is stated in broad and mandatory terms, they “shall” give access. Shall is the standard word to impose a mandatory obligation in a legal instrument. The educational institution is required not merely to give “access” but “full access throughout” the educational institution’s entire premises.

Such a sweeping right of access is balanced against much weaker offsetting language. The right of access may be subject to supervision, except that the tariff inexplicably states that the right of access may be subject to “arrangements for supervision” instead. These arrangements must be *reasonable*. The overall effect is that the tariff confers sweeping powers on Access Copyright to inspect an institution’s records, subject only to these vague limitations.

Supervision is not a term of art in Canadian law but even if it were, it would be problematic in the context of this particular provision. The tariff provides that network security and personal information protection as reasons for the supervision two areas which are sensitive to minutia. We can at least assume that the educational institution has the right to monitor a survey and audit while it is being conducted. Beyond that however, the nature of the limitation is unclear.

First, on what scale can the limitation be imposed? Can the institution block access to folders? Logical pieces of infrastructure like databases and message repositories? What about entire avenues of inquiry?⁷⁰

Second, at what time can limitations be imposed? Can an institution bar access to certain locations or types of information ahead of time? Can the institutions use a permissions only system whereby all information access must be carried out through an institution appointed intermediary?

Third, what does it mean to limit access? Does this include a right to confiscate or otherwise suppress information already accessed?

Fourth, if there is a disagreement over whether a particular limitation is reasonable, how is the dispute resolved? It would appear from the Proposed Tariff and the progeny licenses that Access Copyright retains a range of disciplinary tools which can be imposed on institutions it deems not to be in compliance and with no apparent need to first obtain a judicial or administrative order.

The failure of the tariff to even approach an answer to these concerns means that as a practical there is no actual mechanism to manage a survey or audit while maintaining an even playing field. Throughout these procedures, Access Copyright will be wielding several powerful clubs with their right to give a notice of suspension under section 13(3)⁷¹ the requirement of

⁷⁰ Assuming that doing so would be a reasonable step to ensure that security and confidentiality are preserved.

⁷¹ With respect to surveys, section 13(3) provides: If an Educational Institution unreasonably refuses to participate in the survey or otherwise does not comply with this section, the licences in sections 3 and 10 will

mandatory cooperation in the case of an audit.⁷² And in the case of the AUCC Model License, Access Copyright holds the power of issuing and an ultimate notice of termination under section 17(a). Any of the supposed protections or offset are, as a practical matter, both illusory and precatory.

These limitations therefore need to be set out in much more precise detail. While it is not explicitly stated as such, the Proposed Tariff and its progeny licenses appear to grant broad powers of self-help to Access Copyright. Compare how the supervision issue is treated in the Proposed Tariff with other tariff applications that have come before the Copyright Board.

The ambiguity of the word “supervision” is compounded with the “reasonable” standard. Based on the tariff wording, “supervision” is reasonable to the extent that it balances Access Copyright’s interests during a survey or audit with the institution’s and individuals’ interest in security and confidentiality.

Finding a reasonable balance between the interests of Access Copyright and those of the institutions and its constituents should be more straightforward and clearly delineated. But it is manifestly unreasonable that a survey or audit be conducted in a way that compromises security secrets, encryption keys, password tables or otherwise creates new security holes in the secure network. Copyright administration and security may not be complementary goals, but they should at least be made more compatible. And during these processes, institutions will be under pressure not to object, less they be deemed to be in violation of their obligations.

As the Proposed Tariff was drafted, Access Copyright’s interests during a survey or audit are adverse to the institution’s and its constituents interest in confidentiality.

There is a strong possibility however that the Proposed Tariff and progeny licenses do not confine themselves merely to the course pages where repertoire works might be present. At the very least, they appear to assume that email servers are part of the secure network and other sensitive content might also be included. Left unchecked, a right of full access would lead to a major loss of privacy for authorized persons notwithstanding the attempts in the progeny licenses to ameliorate this concern. And again, the vague assurances in the preamble and in section 11 of the progeny licenses do not really adequately address this concern given the broad meaning of “secure network” and the explicit inclusion of the word “emailed” in the definition of “course collection in both the Proposed Tariff and the progeny licenses.

It is in this possible construction, where the secure network encompasses confidential communications and sensitive personal information where the real privacy concerns arise. The

cease to be in effect on written notice from Access Copyright until Access Copyright provides further notice that the deficiency has been remedied.

⁷² Section 14(3) of the Proposed Tariff mandates that “If selected for an audit, an Educational Institution shall ensure that it and all Authorized Persons cooperate fully with Access Copyright.”

drafters had defined “copy” in such a way that new copies can emerge in many new and unconventional ways, including as part of personal communications such as email and could encompass many other systems containing sensitive personal information.⁷³ Under such a system, how is a reasonable standard of confidentiality to be determined?

Perhaps the most obvious source for the standard is the *Personal Information and Privacy and Electronics Document Act*.⁷⁴ While PIPEDA is applicable to Access Copyright’s actions⁷⁵, it operates chiefly through a set of principles set out in its Schedule 1. On the assumption that PIPEDA might be a persuasive basis for a standard of reasonableness, let us consider those principles.

First, there must be informed consent for the collection of personal information (Principle 4.3). However, the tariff would effectively require people to give their consent to the extent that the collection is reasonable for the purpose of conducting a survey or audit, so this is not helpful as an independent basis of reasonableness

Second, information must be collected for an identified purpose (Principle 4.2) and no information should be collected that is not in furtherance of that purpose (Principle 4.4). This could establish a baseline for reasonableness: the institution can block Access Copyright from taking any information that is clearly irrelevant to a survey or audit. Furthermore, one of the sub-principles is that collection of personal information must not be indiscriminate (Principle 4.5.2).

Third, personal information must be used only for the purpose for which it was collected (Principle 4.5). While this principle may limit the use of information after it is collected, it is not engaged at the collection stage.

PIPEDA thus at least establishes some obvious limits on reasonableness: it is unreasonable to collect information that is clearly irrelevant to the survey or audit, and it is unreasonable to collect information *en masse* without cause. Even these constraints can be thrown into doubt however in the context of an audit or survey where, as indicated above, Access Copyright retains broad authority to insist on compliance as it sees it.

Even if PIPEDA is a baseline for reasonableness, it is nevertheless only a baseline. It provides no guidance on how to handle situations where a surveyor or auditor wishes to examine a piece of highly relevant but highly sensitive personal or confidential information. How would such a dispute be handled under the Proposed Tariff?

While it is probably infeasible to set out clear and exhaustive rules to handle supervision, this does not excuse the almost total absence of any guidelines within the tariff. In the face of a right

⁷³ See “Copy” *Objections* above at page 7

⁷⁴ S.C. 2000, c. 5 (*PIPEDA*)

⁷⁵ Section 4 of PIPEDA provides that the act applies to “organizations,” which are defined in s. 2 as including “an association, a partnership, a person and a trade union.”

of “full access” to an educational institution’s premises and an intermediate number of its computer systems, this absence is unacceptable.

The reality is that digital copies will be extremely difficult if not impossible to track, at least not without imposing draconian monitoring measures. We think it is sensible to avoid a usage-based payment mechanism with respect to digital copies, and an FTE-only rate is a reasonable way to circumvent the challenge. The only information that Access Copyright would need to verify the royalty rate would be the number of FTE students enrolled at the institution. But this potential benefit is lost when the ARMS provisions require the same level of tracking that would be needed if the tariff were usage-based.

Nor do the progeny licenses adequately address these concerns. There are no clear guidelines for how the audits and surveys should be handled and this is left to the institutions and Access Copyright to negotiate. While conducting these negotiations, the institutions should keep these criticisms in mind and ensure that they do not negotiate audit and sampling provisions that Access Copyright would not be able to obtain under Canadian law at the Copyright Board. Finally, in the case of the AUCC/ACCC model licenses, there is the related concern of an undue delegation of matters concerning institutional autonomy due to the national scope of the joint committee.

4.4 The Survey Provisions in the Progeny Licenses are uncertain

The progeny licenses with UWO, the University of Toronto, and AUCC/ACCC have deleted the substance of most of the ARMS provisions contained in the Proposed Tariff. In these newer licenses, section 6 (Reporting), section 13 (Surveys) and section 14 (Royalty and Compliance Audits) have been removed and are replaced with a new section 11, entitled “Survey of Bibliographic and Volume Data.” These provisions anticipate the appointment of a joint task force between Access Copyright and representatives of the licensees UWO, University of Toronto, and of AUCC and ACCC in the case of the respective Model Licenses.

In the case of the UWO and University of Toronto licenses, section 11(a) provides that the joint taskforce will

develop a mutually agreeable survey methodology *and/or reporting structure* for the provision of valid and reliable bibliographic and volume data to Access Copyright for distribution purposes and to be used as a measure of volume to assess the appropriateness of the Royalties for any extension term. (Emphasis added).

Section 11(c) further provides that “Any survey shall respect all applicable privacy laws, including the Licensee's privacy policies in effect from time to time, and principles of academic freedom.”

There is similar, although more detailed language in the AUCC and ACCC Model Licenses. Sections 11(c) of the Model Licenses provide:

“Within six months of signing this agreement, or as otherwise agreed between the parties, the Licensee shall participate if requested in the survey (“Survey”) **and/or further reporting** to be designed by a group of experts comprising of no more than five representatives appointed by [AUCC or ACCC in the applicable license] and no more than five representatives appointed by Access Copyright. The purposes of the Survey **and/or further reporting** shall be to provide:

- (i) valid and reliable bibliographic data to Access Copyright for the purposes of allowing Access Copyright to make a fair distribution of the Royalties to its affiliates;
- (ii) valid and reliable volume data to the Licensee and Access Copyright for the purposes of trending the appropriateness of the Royalties and other terms and conditions of this agreement; and
- (iii) valid and reliable bibliographic and volume data to [AUCC/ACCC] for the purposes of trending the appropriateness of the Royalties **and other terms and conditions of this agreement**. (Emphasis added)

In addition to proper royalty payment verification, these terms have two additional purposes: (1) to assist Access Copyright in making appropriate royalty distributions; and (2) to provide evidence for the next round of rate setting for any extension term.

Whatever arguments were made above about the *ultra vires* nature of the ARMS provisions in the Proposed Tariff do not apply to these sections, as they are voluntary contracts not limited by the scope of the authority of the Copyright Board under the *Act*. Carefully parsing these provisions indicates that they are not limited to the determination of the proper assessment of royalties due under the FTE-based fee structure, but that they are more open-ended. The potentially broad scope of these provisions is highlighted by the emphasized text above. The scope of the agreements are not limited to the anticipated survey, and the purpose of the survey as well as the further reporting is not limited to ascertaining the proper amount of royalties due.

A fair reading of these changes is that Access Copyright probably came to the realization that the broad ARMS provisions in the Proposed Tariff were indeed likely *ultra vires* the *Act* and would likely be pared back considerably if not by the Board, then ultimately by a reviewing court. So long as the licensee has agreed to the reporting provisions as they are ultimately to be determined by the respective joint taskforces there is no limitation, at least not as matter of the *Copyright Act*. Of course there will be other limitations to the scope of these activities including the ones mentioned, privacy laws, internal privacy policies, collective agreements and the requirements of academic freedom. But how the results of the taskforce deliberations will fare is difficult to assess because it is speculative at this time.

The delegation of the ARMS provisions to these joint task forces can be viewed in a positive light insofar as the exceptionally problematic and invasive provisions from the Proposed Tariff have been removed. But there are three negative aspects of this substitution.

First, there is the problem of transparency. We do not know who is on these bodies, how they are appointed, when they will meet, what is on their agenda, etc. Unlike the Copyright Board, which is a public body, there is no apparent requirement of open meetings for these task forces nor any requirement that they publicly post agendas and minutes, much less allow interested stakeholders the ability to make submissions.

Second, and related to this lack of transparency are serious due process concerns. There is no right to judicial review of the decisions of the joint task forces as attach to a Copyright Board order. Basically the licensees have waived these rights by voluntarily agreeing to the license with these terms.

Third, in the case of the AUCC and ACCC Model License, the individual institutions are surrendering any semblance of institutional autonomy by delegating the decisions about their representation to five members selected by AUCC or ACCC as the case may be. At least UWO and University of Toronto have maintained the ability to select their own delegates, although the time limit for the establishment of these two task forces has come and gone with no apparent announcement about their status.

In addition to the problems of lack of transparency, loss of accountability and loss of the right of review, these voluntary agreements are also not subject to the same constraints as would be present in a Board proceeding. The worst-case scenario is that the joint task force develops provisions which are similar to the ARMS sections in the Proposed Tariff, but only now without the opportunity for judicial review. That is, these task forces are free to extend the inquiry well past the issue of determining the amount of the royalties to be paid and they seem poised to do so without any public scrutiny.

4.5 Conclusions on ARMS and related compliance provisions

Information gathering about the activities of copyright users can take different forms, and it can be based on different functions and purposes occur. The Proposed Tariff conflates these various functions and situates them into a series of self-executing provisions. To conclude this discussion about the ARMS provisions in the Proposed Tariff, we identify three different types of information gathering functions. First, in the context of setting a royalty rate for a prospective tariff, the Copyright Board needs to gather evidence upon which to base its decision. Towards this end, the Board has adopted a Model Directive on Procedure which “outlines the procedure the Board usually follows in considering a proposed tariff and objections thereto [and which] aims to ensure that the proceedings are conducted as efficiently and simply as possible,

while providing the appropriate procedural safeguards.”⁷⁶ These rules provide for the issuance of subpoenas,⁷⁷ outline a process for the use of interrogatories,⁷⁸ and provide for the filing of evidence⁷⁹ and reply evidence.⁸⁰ In the context of recent tariff proceedings, the parties have engaged in surveys based on a mutually agreed upon set of procedures.⁸¹ The engagement of consultants to conduct this stipulation-based volume study and its use as evidence *intrinsic* to the tariff proceeding was well within the Board's control. But this should not be conflated with transporting similar procedures into a tariff, where its terms will be executed *extrinsic* to the Board's supervision.

It is evident that the Board has very broad powers to gather evidence upon which to base its determination. But an important distinction needs to be made between the Board's broad powers to collect evidence within the context of its own proceeding, and the additional power to include ongoing provisions for ongoing evidence gathering throughout the term of the tariff on behalf of the collective. This important difference between evidence gathering *intrinsic* to a proceeding which remains under the supervision of the Board (and ultimately by reviewing courts), and evidence gathering that is *extrinsic* to the proceeding has been conflated by Access Copyright in the Proposed Tariff. We argue that it is precisely the broad scope of this extrinsic evidence gathering which is *ultra vires* the scope of a tariff.

Another important distinction which is conflated in the ARMS provisions in the Proposed Tariff is the difference between the functions of the Copyright Board and that of the courts. As we noted at the end of section 4.2, concurrent jurisdiction to hear and determine copyright infringement actions is vested in the courts. And the courts have established rules of practice and procedure including their own discovery rules. Section 34(5) of the Copyright Act is explicit that in civil actions, the rules of practice and procedure of the court in which proceedings are commenced are applicable to those proceedings. Access Copyright is seeking to use a Board certified to obtain what would be equivalent to a broad and sweeping advance discovery order.⁸²

⁷⁶ Copyright Board, Model Directive on Procedure, <http://www.cb-cda.gc.ca/about-aposop/directive-e.html>.

⁷⁷ *Id.*, Part A, paragraph 6, which provides: “The Board may, upon request or of its own motion, issue a subpoena to require a person to appear at the hearing, to testify and to produce any document the Board may consider helpful. A subpoena is issued by the Secretary General.”

⁷⁸ *Id.*, Part B, which provides for the form and service of interrogatories as well as guidelines for responses and objections thereto

⁷⁹ *Id.*, Part B, paragraph 5.

⁸⁰ *Id.*, Part B, paragraph 6.

⁸¹ See Decision of the Board, Statement of Royalties to be Collected by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire- Educational Institutions, 2005-2009. (June 26, 2009), <http://cb-cda.gc.ca/decisions/2009/20090626-b.pdf> (describing a “volume study” in paragraphs 29-37).

⁸² An analogy can be drawn between the compliance-based discovery provisions sought in the Proposed Tariff and information the record companies were attempting to obtain about consumers from Internet Service Providers in *BMG Canada Inc. v. John Doe* 2005 FCA 193 (CanLII) <http://canlii.org/en/ca/fca/doc/2005/2005fca193/2005fca193.html>. In a judicial proceeding, Access Copyright would not be permitted to gather this type of evidence without first satisfying a court that there was a *prima facie* case of copyright infringement by or within the targeted institution. Leaving aside the actual level of proof that would be

This is not only *ultra vires* the Act as a matter of administrative law, but it raises serious due process and privacy issues as well.

The issue of how these considerations apply to the corresponding provisions in the progeny license is more problematic. Unfortunately, many institutions have taken the position that the joint taskforce based provisions in the licenses are better than the what would have resulted from an ultimate Copyright Board order.

5.0 Conclusion

This report began with the objective of analyzing and critiquing the Proposed Tariff pending at the Copyright Board. As indicated in the introduction, new developments since January 2012 have complicated this effort. In addition to looking at a singular tariff application, our scope has been expanded to consider the progeny licenses as well. And with the announcement in April that AUCC (and subsequently ACCC) withdrew their opposition to the Proposed Tariff, the state of the proceedings at the Board is in a state of flux. However, unless Access Copyright withdraws its application, these proceedings will continue.

We argue that it is essential to continue to mount an effective opposition to the Proposed Tariff at the Board, even without AUCC at the table. This effort will pose several challenges, including the need to recalibrate the status of the parties, dealing with some of the outstanding discovery issues and resetting tentative schedules that had been set. Clearly the abandonment of the opposition by AUCC has left a leadership vacuum that needs to be filled.

While these developments are pending at the Copyright Board, there is also the issue as to the status of those institutions who have not signed the Model License. A pressing concern had been raised about the legal consequences of opting-out of the interim tariff, and the same considerations have been raised with respect to an institution's decision on the Model License. The concern is that if an institution were to make a copy that should have been licensed under the tariff/license that said institution would be considered to be operating under the tariff and would be liable for all of the payments that would otherwise be due. This “just one copy” theory was circulated by AUCC to its membership in April 2012.⁸³ These concerns are addressed and rebutted by Ariel Katz who concludes that these worries are overstated and largely illusory.⁸⁴ We will not repeat the points that Prof. Katz has made in this important posting, but we agree with his conclusion that “[u]sers who decline to take advantage of the statutory license may still be

required to satisfy the BMG requirements as they were established by the FCA there is no precedent in Canadian law that would support the judicially unsupervised and unbounded access to the entire premises of an institution as anticipated in the Proposed Tariff.

⁸³ See Davidson Letter; *supra* note 9, which made the claim that “Use of even one work within Access Copyright’s repertoire without permission would be enough to trigger payment of the full tariff fee.”

⁸⁴ Ariel Katz, “Keep Calm, Opt Out and Carry On” <http://arielkatz.org/archives/1769> (rebuttal of the One Copy theory).

liable for copyright infringement, but they cannot be compelled to comply with the terms of a licensing scheme that they have not chosen to accept.”⁸⁵ Yet, the fear of litigation is very real and has continued even after the passage of Bill C-11.⁸⁶ It is too early to assess whether the clear messages in the pentalogy will allay these fears, but in any event, those institutions that have signed the Model License are in a contract with Access Copyright at least through the end of 2015.

The University of Western Ontario and the University of Toronto are in a slightly better position, as their license only runs through the end of 2013.⁸⁷ In order to avoid an automatic one-year extension through 2014, they must give Access Copyright notice of their intention not to renew by June 30, 2013. It is an unequivocal recommendation that these two universities notify Access Copyright of their intention not to renew the license past its initial expiration date, and this be done so as soon as possible.

As needs to be done at every educational institution on an ongoing basis, UWO and UofT have a particularly pressing and immediate need to engage in a thorough evaluation of their campus copyright policies. This process needs to begin immediately as the termination notice to Access Copyright needs to be sent by the end of the current academic year (2012-13). This review must be transparent and inclusive, and it should focus on a number of issues. First, an historical analysis of bookstore course pack data needs to be undertaken. This data can help with an understanding of patterns of usage under the old license which could help inform library acquisition policies. It could also identify specific publishers from whom individual permissions may need to be sought in cases where usage exceeds allowable fair dealing standards. Second, a more aggressive strategy for developing open access course materials needs to be considered. As in the case of library acquisitions practices, this would be a fruitful area for cross-campus collaboration and sharing. Third, campus fair dealing policies need to be revisited and appropriately adjusted in light of the amendments to the Copyright Act and the decisions in the pentalogy. The schools that are bound by the license until 2015 can build on this work, and indeed these efforts have already been identified in some of the announcements.

As of the end of July 2012, there appear to be many educational institutions who have yet to announce their intentions with respect to the Model License. First, schools should be forthcoming and transparent about that they are doing (or already have done). Nothing is to be gained by quietly making changes to copyright webpages without openly announcing that the

⁸⁵ *Id.*

⁸⁶ See BrockTV Special Report: Access Copyright (July 7, 2012) <https://www.brocktv.ca/watch/1198>.

⁸⁷ *Supra*, note 7 at paragraph 2. Ironically, AUCC had characterized the longer term in the Model License as an advantage over the earlier expiration date in the UWO and UofT agreements on the grounds that it “provided greater certainty of price for a longer period.” See Davidson Letter, *supra* note 9 at p. 2.

license has been signed (except perhaps to avoid a public induction into Ariel Katz's Hall of Shame.)⁸⁸

Perhaps most important, those schools who have reserved their decision now have the benefit of hindsight and can read the decisions in the pentalogy. The recommendation that institutions who have not yet signed should continue to abstain from doing so may seem self-evident at this point. It is recommended that institutions refrain from accepting the model license, and those who have done so should be planning their “exit strategy” from it when the initial term expires (in this case in 2015). Regardless of what position a school takes on this particular license, there should be an ongoing evaluation of institutional copyright practices in any event. We have seen some dynamic shifts in the copyright policy environment in the past few months and things should be settling down now.

In closing, we cannot over-emphasize our assessment that the AUCC/ACCC-Access Copyright Model License agreements, as well as the separate UWO and University of Toronto agreements are substantially similar to the Proposed Tariff that these same institutions spent months fighting at the Copyright Board. That is why we call them the “progeny licenses” throughout this report. These agreements have placed the signatory institutions in largely the same position that they would have been in had they continued with their opposition Copyright Board but lost on most issues. Notwithstanding the rate difference and the substitution of the ARMS provisions for an agreement-to-agree to parallel provisions in the future, the bulk of the problematic issues and drafting errors contained in the Proposed Tariff remain. They have been largely carried through in the progeny licenses only now with the consent of the affected institutions. The ability to pose objections to the Proposed Tariff at the Board and to ultimately subject the Board's decision to the scrutiny of judicial review were important rights. One only needs to refer to the pentalogy to appreciate how potent the right of judicial review of Board decisions has become. AUCC and ACCC did not hold these rights on their own behalf for their own purposes. They held these rights in their capacity as principal institutional objectors and on behalf of a broader public interest. These important rights should not have been waived; and certainly not for the little that was gained in the Model License.

In order to have salvaged any semblance of normalcy between Access Copyright and the educational community, both sides should have engaged in more fulsome negotiations at the outset. And once Access Copyright abandoned the possibility of meaningful negotiations by filing their tariff application, the educational institutions needed to stay the course in pursuing their rights at the Copyright Board. By abandoning their opposition at the Board, AUCC and ACCC have left their members in a tenuous position. But in light of the outcomes in the Supreme Court's pentalogy, together with the rejection of the Model License by a significant

⁸⁸ See, for example the materials posted by the University of Regina at <http://www.uregina.ca/copyright/assets/docs/pdf/access-copyright-licence-instructor.pdf>

number of schools, we have not seen the end to the matter and there may still be an actively litigated proceeding at the Copyright Board. And in any event, all educational institutions now need to revisit their fair dealing policies, although even a strong implementation of fair dealing will not change the royalty payments that will be borne mostly by students at UWO, UT and the others who have signed on to the Model License.

And beyond the question of the ultimate shape of a tariff, it is time to ask the broader question of whether Access Copyright is still relevant as a collective or if the interests of all of the stakeholders involved would be better served in its absence.