

Access Copyright and the Proposed Model Copyright Licence Agreement: A Shakespearean Tragedy

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“So foul and fair a day I have not seen.” — William Shakespeare

The year 2012 proved to be a turning point for copyright law in Canada, with new amending legislation finally passed by Parliament and important decisions delivered by the Supreme Court of Canada expounding on users’ rights to deal fairly with works for the purposes of research and private study. As the public battle on whether teachers could make photocopies for distribution to students was being fought by a coalition of primary and secondary institutions all the way up to the Supreme Court, a quiet war had been waged against post-secondary institutions in the field and was being settled privately. Canadian universities faced mounting pressure in early spring to sign a Proposed Model Licence with Access Copyright and many yielded on the basis of certain considerations that now demand further scrutiny: the pressure of timing, assumptions regarding the best means of mitigating risk and a narrow calculation of what risk of litigation and liability might entail. The resulting contracts with Access Copyright may not serve educational institutions well as they create new obligations and undermine any progress made towards a balanced regime for the educational context; they may also have served to destabilize Access Copyright’s market position as the best means of ensuring fair access to works for educational institutions.

L’année 2012 a été marquante en matière de droit d’auteur au Canada en raison des modifications législatives finalement sanctionnées par le Parlement et des décisions importantes rendues par la Cour suprême du Canada qui ont précisé davantage les droits des utilisateurs de faire un usage équitable des œuvres à des fins d’étude privée ou de recherche. Tandis qu’un regroupement d’établissements d’enseignement primaire et secondaire a débattu sur la place publique la question à savoir si les professeurs peuvent faire des photocopies et les distribuer à leurs élèves, se rendant jusqu’en Cour suprême, une autre bataille, silencieuse cette fois, a touché les établissements d’éducation postsecondaire et a été réglée en privé. Les universités canadiennes ont subi des pressions grandissantes au début du printemps pour signer un modèle de licence proposé avec Access Copyright et

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plusieurs ont capitulé sur le fondement de certaines considérations qui méritent un examen plus poussé : les contraintes de temps, les suppositions sur les meilleurs moyens de réduire les risques et un calcul des conséquences des risques de litige et de responsabilité. Les contrats signés avec Access Copyright qui en ont résulté ne répondent pas nécessairement aux besoins de ces établissements, car ils créent de nouvelles obligations et vont à l'encontre de tout progrès en vue d'obtenir plus d'équilibre dans le contexte éducatif. Ils peuvent aussi avoir déstabilisé la position d'Access Copyright au sein du marché comme étant l'organisme le plus en mesure d'accorder des droits d'utilisation équitable aux établissements d'enseignement.

1. INTRODUCTION

What I learned about Shakespeare I first learned in school. I came to love school so much that I decided to make it a permanent fixture in my life. School was more than the institutional bricks and mortar in which I was housed for a good portion of my day; school was learning. I had some great teachers; their greatness was often not simply in the novel contributions to thinking they made but in their nudging forward each student towards the realization of how limited our time is to experience all things ourselves; learning would be a life-long commitment. It was this passion for inquiry and the process of discovery that was inspiring. Classroom learning was punctuated with the pause of individual contemplation needed to foster the critical reflection and questioning of our own normative assumptions, a push to seek truth, however conceived, or the pull towards “unreality”.¹ Such efforts required the examination and scrutiny of the works of others. In this way, teachers serve as intellectual guides that use select texts to illustrate certain points, build a critical lens, and help navigate the human spirit across unfamiliar terrain and foreign landscapes of thought. Most teachers will agree that the best way to learn something is to teach it; indeed, “[i]nstruction and research/private study are, in the school context, tautological.”² Learning gave me the opportunity to explore the crevices of my own mind too, by gazing into the “window panes” of others’ for their vision and light: “if a writer can induce his reader to feel that the reader would have come to the same conclusion that the author reached had the reader done his or her own investigation of the subject matter, the writer has achieved a kind of ‘window pane’ effect on the reader.”³

Texts are, however, protected works in copyright and, as noted recently by the Supreme Court of Canada, “many authors create textbooks and other literary works to sell to primary and secondary level educational institutions across Canada.” Justice Abella, for the court majority in the recent *K-12* decision writes that: “[p]hotocopying short excerpts of these works is a common practice in Canadian schools, and is often used as an important administrative and teaching tool by

¹ In tribute to L. Ferlinghetti’s “A Pennycandy store beyond the El” in *A Coney Island of the Mind* (New York: New Directions Books: 1958).

² *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 at para. 23 [*K-12*].

³ Pamela Samuelson, quotes George Orwell in saying “[g]ood prose is like a window pane”, in “Good Legal Writing: Of Orwell and Window Panes” (1984) 46 U. Pitt. L. Rev. 149.

teachers.”⁴ When is payment or permission not required?

The law provides that copyright shall subsist in Canada, “in every original literary, dramatic, musical and artistic work” if the conditions precedent set out in the *Copyright Act*⁵ are met. The materials from which we learn, whether musical scores, works of art, documentaries, poems, photographs, medical drawings, textbooks, plays, and any adaptations, translations or performances therefrom, are protected by copyright: any unauthorized reproduction may constitute copyright infringement. While the courts have been active in recent years in addressing the interests of users and giving further legal content to fair dealing, attempts over the past decade to renegotiate existing copyright boundaries through legislative reform have been less successful.

The year 2012 proved to be a turning point for copyright law in Canada, with new amending legislation finally passed by Parliament at the end of June and five judgments released by the Supreme Court of Canada two weeks later on July 12. As the public battle on whether teachers could make photocopies to distribute to their students was being fought by a coalition of primary and secondary institutions all the way up to the Supreme Court, a quiet war was waged against post-secondary institutions in the field and was being settled privately. Fair and foul were the days, and so the stage was set.

As a member of the Copyright Working Committee at Queen’s University’s Faculty of Law, as a faculty member whose research and teaching is almost exclusively in the subject area of intellectual property law, and as an author, copyright owner, and user, I was concerned enough over the institutional prospect of Queen’s signing a proposed Access Copyright Licence to put my views in a letter to the University Provost. Canadian universities were facing mounting pressure in early spring to sign the model licence. Many had yielded. Queen’s University debated the merits of doing so internally, setting up forums for community consultation in tandem with public education efforts through a specialized copyright advisory office. Queen’s ultimately joined the ranks of the 15 universities comprising 35 per cent of the total that have declined to sign the Licence.⁶

The decision not to sign was a principled one and its wisdom was later reaffirmed. Some institutions may yet sign an Access Copyright licence and can do so by September 1, 2012 or January 1, 2013,⁷ although some of the legal uncertainties and financial incentives to do so that existed before July 12, 2012, have substantially waned.⁸ This comment will reflect on legal events that have transpired since my letter to the Provost and the issues outlined there that remain.

Access Copyright (formerly CANCOPY) is an organization that, on behalf of its membership of authors and publishers of literary and artistic works in printed material, oversees copyright licensing and royalty collection and distribution in re-

⁴ *K-12* at para 1.

⁵ R.S.C. 1985, c. C-42, s. 5(1).

⁶ P. Berkowitz, “Majority of Universities Sign Licence with Access Copyright”, *University Affairs*, July 9, 2012, <<http://www.universityaffairs.ca/majority-of-canadian-universities-sign-licence-with-access-copyright.aspx>>.

⁷ *Ibid.*

⁸ *Ibid.*

spect of that material in Canada. Justice Abella in the *K-12* decision explains that “[w]hen Access Copyright does not reach a licensing or royalty agreement with users who photocopy published works in its repertoire, it can apply to the Copyright Board to certify a royalty in the form of a tariff.”⁹ When a tariff is imposed, the *property* rights model of copyright, which allows for exclusion of users from protected works by owners, effectively shifts to a *compensatory* model based on collective licensing. Collective licensing is premised on the view that the collection and redistribution of the tariff royalty administered through the organization will ensure fair compensation for any reproduction of photocopies made in the absence of individual permissions; it removes the practical barriers and transaction costs of individual enforcement. For a tariff to apply, reproduction would have to legally infringe copyright. If the copying is insubstantial or permissible in law, the tariff is inapplicable; users need not pay for doing what the law entitles them to do.

Access Copyright (“AC”) had a licence in place with elementary and secondary schools across Canada for 1991–1997. The licence was renewed in 1999 for all the provinces (the “Coalition”) for a five-year term based on a per student calculation. When the licence ended in 2004, however, many of the primary and secondary institutions opted not to renew at the new higher tariff that AC proposed. It sought new terms and higher rates to reflect both the volume (number of pages) and content of the copies¹⁰ and soon filed a proposed tariff with the Copyright Board under s. 70.13(2) of the *Copyright Act* to secure these. While this tariff dispute (*K-12*) made its way through the Board, judicial review by the Federal Court of Appeal, and a further appeal to the Supreme Court, AC filed another tariff with the Copyright Board on March 31, 2010 to govern the relationship with post-secondary institutions. The proposed tariff proceedings are still pending before the Board¹¹ and, once there is final determination, the tariff will apply to post-secondary institutions for the period of 2011–2013.¹² The Association of Universities and Colleges of Canada (AUCC) and the Association of Community Colleges of Canada (ACCC) opposed this tariff certification. The request for certification was, according to Paul Davidson, President of the AUCC,

imposing a new copying regime on postsecondary institutions that would include far higher fees and a costly administrative burden on institutions choosing to use the tariff. Access Copyright chose the same approach in its dealings with other sectors when it terminated existing licensing arrangements and filed tariffs to cover copying in K-12 schools and copying by

⁹ *K-12* at para. 2.

¹⁰ *K-12* at paras 3–5.

¹¹ S. Trosow *et al.*, “Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses” Working Paper, August 14, 2012 [Trosow *et al.*] online <<http://ir.lib.uwo.ca/fimspub/24/?>> at 5. The hearings for this proceeding are scheduled to commence February 11, 2014, see the September 27, 2012 ruling of the Board, <<http://www.cb-cda.gc.ca/avis-notice/index-e.hotmail#access2-27092012>>.

¹² A new proposed tariff for the period 2013–2015 has also been applied for. See <http://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2013/Supplement_16_juin_2012.pdf>.

provincial and territorial governments.¹³

In his op-ed, “Opting Out: why some universities are opting out of Access Copyright”, Davidson contends that “[t]he fact is that it was Access Copyright that chose to upset the licensing apple cart in all of these sectors, not educational institutions and governments.”¹⁴ With the post-secondary institutions, AC pursued a second strategy that sought to leverage the legal uncertainties of the *K-12* case and the pending approval of its filed tariff. Because of its timing, the tactic gained considerable traction, as part of the institutional calculation of risk was not only the proposed tariff rate but the real possibility that the Copyright Board would apply it retroactively. So while legal uncertainties remained around the final judicial determination of photocopying as fair dealing in the *K-12* case, the certification of the post-secondary tariff, and whether and when new proposed copyright legislation would take effect, AC was able to successfully negotiate licences with post-secondary institutional stakeholders that had formerly registered their resistance:

Despite strong arguments to the contrary, and their previous opposition to the Proposed Tariff at the Board; AUCC, ACCC and several institutions still felt that a license with Access Copyright was needed. In January 2012, Access Copyright announced they had reached licensing agreements with the University of Toronto and the University of Western Ontario, the terms of which were substantially similar to the proposed tariff. 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,” and they have since dropped their opposition to the Proposed Tariff at the Copyright Board.¹⁵

Universities and colleges had for many years under various licences paid a per-student rate for a FTE (full time equivalent) student, plus a per-page fee for course packs. As their contracts had expired, these institutions rebuffed AC’s attempts to revise its terms and substantially increase tariffs, in part because, as the Canadian Association of University Teachers (CAUT) noted,

[o]ver time the academic community began to object to the administrative burden, surveillance and perceived aggressive behaviour that accompanied Access Copyright’s presence on campus. Access Copyright’s lobbying for copyright legislation harmful to the post-secondary sector compounded this concern. When the current license expired, Access Copyright proposed costly and invasive changes, a number of universities began to opt out of arrangements with Access Copyright. The academic community also began to develop alternative ways of creating, accessing and sharing works through means such as fair dealing, open access publishing and site licensing directly with publishers.¹⁶

Peter Ricketts, Carleton University’s Vice President Academic and Provost,

¹³ <<http://www.aucc.ca/media-room/news-and-commentary/opting-out-why-some-universities-are-opting-out-of-access-copyright>>.

¹⁴ *Ibid.*

¹⁵ Trosow *et al.*, *supra* note 11.

¹⁶ CAUT, “A Bad Deal: AUCC/Access Copyright Model Licence Agreement” <<http://www.caut.ca/pages.asp?page=1079>> [CAUT].

for example, estimated that the cost of an AC licence would be close to \$700,000 per year. Since 80 per cent of requests to use copyright material already came under various other licences that Carleton held, the AC proposal did not make financial sense; Carleton opted out of the new licence as early as September 2011.¹⁷ But with the announcement that the University of Toronto and University of Western Ontario had reached agreements on January 30, 2012, AC was valorized into negotiating a proposed model licence (PAC) with the AUCC, the organization representing the presidents of 95 per cent of Canadian post-secondary private and public institutions¹⁸ and ACCC. Suddenly, the compelling reasons for opting out¹⁹ no longer were compelling. The PAC rate was an annual fee of \$26 per FTE student and would include what used to be the .10 cent per page copy for course packs.²⁰ This was perhaps a better prospect for the risk averse than the proposed tariff for post-secondary institutions still pending before the Copyright Board, which would have set the rate, if certified, at \$45 per FTE for universities and \$35 per FTE for other institutions.²¹ The PAC would remain in effect until Dec. 31, 2015, and would automatically renew for one-year terms during which either party could seek termination with notice. The model licence was intended for uptake by all of the member institutions outside Quebec. It was a time-sensitive proposition: delay in agreement beyond June 30, 2012, would be subject to financial disincentives associated with the risks of the unknown.²² Each university would have to sign the licence with AC independently, as parties to a contract. The proposed tariff has extensive surveillance, compliance and audit provisions, provides for mandatory disclosure and co-operation for enforcement. A persuasive case has been made by Trosow *et al.*, that the proposed tariff is *ultra vires* the Copyright Board's powers by seeking to give effect through certification to what is tantamount to an "advance discovery order":

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

¹⁷ Berkowitz, *supra* note 6.

¹⁸ <<http://www.aucc.ca/about-us/>>.

¹⁹ CAUT, *supra* note 16.

²⁰ <<http://www.aucc.ca/media-room/news-and-commentary/association-of-universities-and-colleges-of-canada-reaches-agreement-with-access-copyright>>. This is better than the \$27.50 per FTE that the University of Toronto and University of Western secured. See Access Copyright Joint Media Release, January 30, 2012, <http://www.accesscopyright.ca/media/21943/u_of_t_and_western_sign_agreement_with_access_copyright.pdf>.

²¹ Trosow *et al.*, *supra* note 11 at 23 fn 58, discussing specific provisions of the tariff proposal. For the full document of the proposed post-secondary tariff, see <<http://www.accesscopyright.ca/media/1822/Proposed-post-secondary-tariff-2010.pdf>>.

²² A second deadline (July 31, 2012) for signing the PAC with reduced retroactive royalty payments for 16 months has also passed. See W. Noel, letter to the Copyright Board of Canada, August 10, 2012 <<http://www.cb-cda.gc.ca/avis-notice/active/2012/access2-10082012-2.pdf>>.

jurisdiction to authorize such an imposition on the jurisdiction of the courts not to mention on the rights of the institutions and its constituents.²³

Nevertheless, misgivings over the risk of not signing and being subject to the indeterminacies of a proposed tariff which was still pending were enough to prompt a good number of institutions to reach agreement with AC, however unpopular the decision might be when made public.²⁴ A reported 65 per cent of universities outside Quebec that are eligible to sign the PAC licence are now under some kind of AC agreement (either pre-existing contracts that have yet to expire, licences under interim tariffs, or new PAC licences).²⁵ These institutions may be now relieved to find that the position they have adopted exempts them from AC's current application to the Copyright Board demanding that unlicensed institutions answer questions ("interrogatories") providing details regarding institutional copying for the purposes of determining the appropriate tariff rate in the pending proceedings.²⁶

The PAC licence has met with frustration and the disapproval of a number of academics across diverse fields of study, all of whom are committed to the public interest mandate of universities and a view of knowledge as a public good. Many aspects of the model licence were considered undesirable: the expanded definition

²³ Trosow *et al.*, *supra* note 11 at 27, footnotes omitted. The case of *BMG Canada Inc. v. Doe*, 2005 FCA 193 is referred to, however, in which the Court denies the request for third party disclosure made by record companies for personal (private) information of subscribers in an effort to determine copyright infringement and enforce copyright law. The evidential case for *prima facie* infringement could not be made out. The authors write, "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." (fn 69) The authors later add:

[i]t 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. (at p 36).

²⁴ Professor Katz established a blog that would track individual institutional decisions regarding PAC and classify these decisions into the "hall of f/sh/ame" and purgatory for the undecided. By his account, there are currently 16 universities in the hall of fame, 21 in the hall of shame and two in purgatory. See <<http://arielkatz.org/archives/1803>>.

²⁵ Berkowitz, *supra* note 6.

²⁶ See Access Copyright's Press Release, September 17, 2012, regarding the interrogatories. <http://accesscopyright.ca/media/30244/notice_of_copyright_board_interrogatories_09_17_2012_final.pdf>.

of copying to include posting a link or hyperlink, extensive surveillance and scrutiny of student, faculty, and staff activities to monitor activities that now would constitute “copying” (e.g., transmission by email, posting, and storing), and the prevention of storage of materials on any computers other than the universities.²⁷ Since PAC was modelled on the proposed tariff, it imports similarly worrisome surveillance, monitoring, disclosure and compliance requirements into the contract. Consequently, educators, reputable scholars, and experts in intellectual property law, policy and governance advanced persuasive arguments against the adoption of such a licence. One may refer to the opinions expressed by law professors Ariel Katz of the University of Toronto,²⁸ Michael Geist of the University of Ottawa,²⁹ and the Association of Professors of the University of Ottawa;³⁰ the detailed examination set out in the working paper of Professors Trosow, Armstrong and Harasym;³¹ the opinions of expert counsel such as Howard Knopf;³² views on record by organizations intervening before the Supreme Court of Canada on the scope of fair dealing in the educational context for research and private study, such as the Centre for Innovation Law and Policy³³ and the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC);³⁴ and, of course, student and faculty associations.³⁵

I wish to focus on three issues that merit further consideration: timing, means and risk.

(a) Timing

Many commentators noted the curious timing of the deadline (June 30, 2012) for universities to agree to the PAC licence. The timing coincided with the end of term and summer holidays and so removed the chance for a real dialogue with interested stakeholders within the university community. One might also infer AC’s desire to supplant the widely anticipated outcome of recent Supreme Court of Canada hearings that would elaborate on the fair dealing defence, permissible uses in

²⁷ For a complete version of the PAC, see <http://www.caut.ca/uploads/Model_License_Agreement_AC.pdf>.

²⁸ See generally, <<http://arielkatz.org>> and specifically his blog post “Keep Calm, Opt Out and Carry On,” <<http://arielkatz.org/archives/1769>>.

²⁹ <<http://www.michaelgeist.ca>>.

³⁰ <<http://www.michaelgeist.ca/content/view/6517/125/>>.

³¹ Trosow *et al.*, *supra* note 11.

³² <<http://excesscopyright.blogspot.ca/2012/05/aucc-settlement-with-access-copyright.html>>.

³³ <<http://www.scribd.com/doc/91212181/CILP-Intervenr-Factum-Nov-21st-2011-SCC-33-888>>.

³⁴ <http://www.cippic.ca/sites/default/files/33888_CIPPIC_Factum.pdf>.

³⁵ *E.g.*, open letter of the Society of Graduate and Professional Students: <<http://senatefacultycaucus.wordpress.com/2012/05/22/sgps-open-letter-on-access-copyright-22-may-2012/>>; for the Canadian Association of University Teachers’ view, <<http://www.caut.ca/pages.asp?page=1079>>; and Queen’s University Faculty Association, <<http://senatefacultycaucus.wordpress.com/2012/05/22/sgps-open-letter-on-access-copyright-22-may-2012/>>.

the educational context, users' rights, the scope of copyright collectives and propriety of double compensation.³⁶ The timing ignored the anticipated enactment of the copyright amendments in Bill C-11, which received Royal Assent on June 29, 2012.³⁷

Bill C-11 has been criticized by some for its digital locks protections but it has also been lauded for its expansion of permissible uses for education and fair dealing. While the current *Copyright Act* has no preamble, the Bill introduces one: "whereas Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies *for research and education*." Preambles play an important role in statutory interpretation in Canada.³⁸ Bill C-11 also introduces some significant reforms to fair dealing. Section 29 of the *Copyright Act* currently reads: "[f]air dealing for the purpose of research or private study does not infringe copyright," but the amendments add "education" as a further permissible purpose. In fact, the new version increases the allowable fair dealing purposes in s. 29 from two to five: research, private study, education, parody or satire.³⁹ A new provision exempting non-commercial user-generated content from infringement may also be used in education for presentations using a variety of content sources (with proper attribution, of course).⁴⁰ Fair dealing for the other enumerated purposes (criticism and review (s. 29.1) and news reporting (s. 29.2)) remains in its current form. The net effect is that research and education are now given greater prominence by the express acknowledgement of their importance in the preamble and the explicit inclusion of education as a purpose for fair dealing. A new provision allowing reproduction for private purposes is also added, and the separate educational institutions exception (s. 29.4(1)), which allows more limited reproduction (specific to certain uses of (old) technology, such as a flip chart, dry-erase boards, and overhead projectors) for the purpose of "instruction," is now simplified and made technologically neutral:

It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to

³⁶ CIPPIC has summarized the five cases for ease of reference: <<http://gamepolitics.com/2011/12/05/cippic-tackles-039copyright-pentology039-canada039s-supreme-court-week>>. The two decisions relevant in this context are discussed in greater detail in text below.

³⁷ The provisions of the Act come into force on a day or days to be fixed by order of the Governor in Council (s. 63). For full text of Bill C-11, see <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5686009&file=4>>.

³⁸ K. Roach, "The Uses and Audiences of Preambles in Statutory Interpretation" (2001) 47 McGill L.J. 129: "while preambles have frequently oversold legislation and have been excluded from working versions of the law, they should still be included in important laws to better outline the purposes and processes which led to the enactment of the legislation and better communicate with the multiple audiences of modern legislation."

³⁹ Bill C-11, s. 21.

⁴⁰ The user must have a reasonable basis for believing the existing work is not infringement. See Bill C-11, s. 22 adding a new s. 29.21 to the *Copyright Act*.

display it.⁴¹

Physical locality (“on its premises”) is still a criterion for the educational institutional exemption to apply. This is also the case for reproductions for examination or tests under s. 29.4(2). Section 29.4 is subject to an amended s. 29.4(3) that reflects the new language of s. 29.4(1) and excludes the application of the educational institutions exemption where the work or subject matter is “commercially available” in a suitable medium for the use of the exemption. Commercial availability is defined in paragraph 2(a) such that the availability of a licence “from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort” would preclude the application of the s. 29.4 exemption. The Federal Court of Appeal on judicial review of the Board’s *K-12* decision held that the s. 29.4 “exception will be available to institutions not only for the use of works that are not part of Access Copyright’s repertoire, but also for dealings for which Access offers no licence authorizing use of the work in the appropriate format, such as examinations that must be taken electronically.”⁴² But the court also found that the Board did not address the “appropriate medium” part of the educational use exemption test and remitted the matter. The s. 29.4 educational institutional exemption was not pursued before the Supreme Court of Canada.⁴³ Other changes will also benefit education. The Government of Canada website highlights that Bill C-11 introduces “more options for educators” and “introduces new measures aimed at improving the educational experience.”⁴⁴

Given all this, what was the impetus for forging ahead so aggressively to es-

⁴¹ Bill C-11, s. 23(1).

⁴² 2010 FCA 198.

⁴³ *K-12* at paras. 10-11. The Federal Court decision, subject to Bill C-11, is for now the last word.

⁴⁴ *Copyright Modernization Act: Backgrounder*, September 28, 2011. Some of the gains in uses the government site identifies are as follows:

teachers and students will be allowed to use copyrighted material in lessons conducted over the internet. The amendments would apply to teachers and students who are in the physical classroom as well as those who are participating in the lessons, or viewing recordings of the lessons afterwards using internet technology. For example, this allows music students — both those in the classroom and those who are participating from a remote location — perform a copyright-protected song together as part of a lesson. Teachers will be allowed to digitally deliver course materials to students, subject to fair compensation to copyright owners. Students will be allowed to print a single copy of these course materials. For educational purposes, teachers and students will be allowed to use material that they find on the Internet as long as it is [sic] has been legitimately posted there by copyright owners without expectation of compensation. For example, teachers and students could make multiple copies of articles found on the Internet and distribute them to classmates . . . The existing provisions that allow certain copyright materials, such as a play, to be performed in the classroom will now be extended to allow teachers and students to watch legitimately acquired films and other audiovisual works . . . Librarians

establish private contractual obligations in a shifting legal landscape?

Intellectual property (“IP”) rights are inherently anti-competitive. They confer a limited grant of exclusivity for a fixed period of time. In copyright, this period is generally life of the author plus 50 years from the calendar year end of death. Owners can exclude others from doing what the law has prescribed as being within their exclusive rights to do. Although owners have an exclusive right to reproduce a work (*Copyright Act*, s. 3), “[r]eproduction implies copying”⁴⁵ and the right is not an exclusive right to use. A purchaser of a book may still resell it, lend it, rip pages out of it or burn it at Fahrenheit 451.⁴⁶ There is a fundamental legal distinction between property rights in the material object and intellectual property rights in the intangible copyright-protected expression. IP rights do not give a right to commercialize the underlying goods or to exploit them at a certain price. Rather, the true economic value of a good will depend, as with traditional goods, on market demand and supply. The only difference is that IP legislation has created artificial scarcity. Normatively, the grant of exclusive proprietary rights in copyright is justified on the view that the regime will generate the necessary incentives for further expansion of an “expressive universe” and in this way serves the public policy purpose of a regulatory regime. This theoretical position has yet to be evidenced empirically: it deceptively conflates the interests of authors with those of owners. Implicit in this assumption is the oversimplification of the disparity of power in the contractual relationships⁴⁷ between authors and copyright owners, which serves to alienate the author from the full or fair benefit of market exploitation. Moreover, some works would be generated whether or not there are any external incentives in place. People are driven to express themselves for a number of reasons other than the promise of an exclusive proprietary right that may be used for economic exploitation.⁴⁸ Where the incentive rationale is unsupported, copyright protection proves inefficient. Access to copyright works is limited by the discretion of their owners or the collective societies that represent them, unless the law has provided a user right such as the provisions exempting libraries, archives, museums, and educational institutions (LAMEs) from infringement, or the defence of fair dealing.

Yet, on further scrutiny, is the timing that curious?

will be allowed to digitize print materials and then send a copy electronically to a library client through an interlibrary loan.

See <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html>.

⁴⁵ D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed. (Toronto: Irwin Law, 2011) at 159.

⁴⁶ The temperature at which paper burns, according to Ray Bradbury, *Fahrenheit 451* (U.S.A.: Random House Publishing, 1953). The destruction or alteration of some property may however raise moral rights claims: see, e.g., *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 [*Théberge*].

⁴⁷ G. D’Agostino, *Copyright, Contract, Creators- New Media, New Rules* (Cheltenham: Edward Elgar, 2010).

⁴⁸ Take, e.g., fan fiction or any other user generated content, now a flourishing by-product of digital culture: see B. Amani, “Copyright and Freedom of Expression: Fair Dealing Between Work and Play” in R. Coombe *et al.*, eds, *Dynamic Fair Dealing* (Toronto: University of Press) [*forthcoming*].

There has been growing recognition, in the academic and policy literature as well as in court decisions, of the predatory and anti-competitive effects of peremptory market *practices* in IP. Owners push for incremental expansion of the scope of rights through means such as overlapping forms of IP protection⁴⁹ or contractual arrangements that impose new interests (such as the view that linking constitutes copying in the AC Model Licence).⁵⁰ There is surplus value in stockpiling rights for the purposes of extortion-like rent seeking and collection, and for securing settlements through opportunistic and anti-competitive litigation.⁵¹ The growing trend is for owners to shift to accumulating IP rights as capital assets to be managed in IP portfolios that are used to exact royalties under threat of litigation. For the risk averse, fear of liability is reinforced by the costs of litigation and has generated a permission-seeking culture even when permissions are not needed.⁵² The effect of capitulation to aggressive licensing demands is to create a presumption of rights even where they do not exist, to sanction enforcement of payments to be made by third party users, and to use private ordering to derogate from the legal rights of users and downstream creators in favour of upstream owners. Will the presence of such an agreement effectively co-opt the way established legal legislative and judi-

⁴⁹ The Supreme Court of Canada noted the need to restrict owners from using multiple forms of intellectual property rights to effectively generate perpetual (“evergreen”) rights: “Granting such a claim in these circumstances would amount to recreating a monopoly contrary to basic policies of the laws and legal principles which inform the various forms of intellectual property in our legal system. The appellant is no longer entitled to protection against competition in respect of its product. It must now face the rigours of a free market and its process of creative destruction”: *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65 at para. 69.

⁵⁰ See the discussion by CAUT, *supra* note 16.

⁵¹ Michael Meurer reports:

[s]ome IP owners value their property rights chiefly as “tickets” into court that give them a credible threat to sue vulnerable IP users. Socially harmful IP litigation is common because the rights are easy to get and potentially apply quite broadly, and the problem is growing worse because of the expansion of the scope and strength of IP law.

M.J. Meurer, “Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation” (2002) 44 B.C.L. Rev. 509.

⁵² L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004). Lessig writes

A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain *as free as possible* from the control of the past. A free culture is not a culture without property, just as a free market is not a market in which everything is free. The opposite of a free culture is a “permission culture” — a culture in which creators get to create only with the permission of the powerful, or of creators from the past.

<<http://www.authorama.com/free-culture-1.html>>.

cial mechanisms function, and recalibrate the necessary *balance* of rights⁵³ and obligations in an age of growing predatory practices and increased abuse of IPRs? Will the AC agreements spur litigation to validate different interpretations given effect by the parties once the new legislation takes effect?⁵⁴

On the whole, the legislative reforms in Bill C-11 support the existing special set of exceptions for LAMEs, which are a necessary part of a balanced regime insofar as they “enable them to carry out their vital role of making knowledge and data easily accessible to Canadians.”⁵⁵ Protection of these institutional stakeholder interests is consistent with the public interest and was reinforced with the Supreme Court’s application of fair dealing to a commercial context in the 2004 *CCH* case,⁵⁶ where libraries were found not liable in copyright for digital or hard copy excerpts made from their holdings to satisfy the research needs of their patrons (there, lawyers). The decision’s implication was that “[t]he patron’s right to deal fairly extended at least to LAMEs which charged only their recovery costs (including reasonable overheads) and took some steps to ensure that users were fair in their requests or copying practices.”⁵⁷ Bill C-11 reforms of fair dealing and education do not disturb *CCH*. Rather, they give legal support to individual and institutional users who operate in an atmosphere of fear, by providing a statutory push-back against coercive market practices. The reforms should not be so readily forfeited by pressures related to timing. Bill C-11 is the result of lengthy consultation, several

⁵³ See *e.g.*, *Théberge*, *supra* note 45 at: “The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”

⁵⁴ Already it has affected the parties’ views on the design of the survey and volume studies in the proposed tariff:

ACCC believes that a thorough assessment of the impact of the *Copyright Modernization Act* and the July 12, 2012 Supreme Court decisions on copyright issues, particularly in the case of *Alberta et al. v. Access Copyright* are relevant to these survey discussions. These recent changes to existing copyright law in Canada will likely have an impact on the conception and design of any survey, or surveys, intended to measure the volume of copying and fair dealing in post-secondary educational institutions. Legal counsel for ACCC, much like staff at the Copyright Board, is in the process of interpreting and applying various changes made to the *Copyright Act* by the *Copyright Modernization Act* and the recent Supreme Court decisions, to the Access Copyright post-secondary tariff proposals. This work takes time, as well as consultation with our client and its members. At this point in our work, we believe that the survey design will have to be reassessed in light of these recent legislative and judicial developments . . . We therefore request that the Copyright Board give both ACCC and Access Copyright until Thursday, January 31, 2013, to provide the Board with a further status report on survey discussions.

See the letter of Wanda Noel to the Board, *supra* note 22.

⁵⁵ Vaver, *supra* note 46 at 244.

⁵⁶ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

⁵⁷ Vaver, *supra* note 45 at 244.

past failed law reform attempts, and a democratic process that now demands to be honoured by universities rather than bargained away privately under spurious or at least doubtful assertions of risk and liability. The Bill reflects Parliament's view of necessary trade-offs for a balanced copyright regime, a single package deal that reflects current cultural practices in its expansion of users' rights. The Supreme Court of Canada had the foresight to reserve its decision-making in the December 2011 pentology of cases until the Bill had received Royal Assent. Would it not have been wise for universities to have done the same?

(b) Desired Objectives and Rationally Connected Means

The objectives of opting for the PAC licence were presumably to expand the university community's access to copyrighted works while reducing the risk of exposure to litigation and potential findings of liability. However, the AC licence is not a rationally connected means for achieving these objectives, for a number of reasons. First, it is not clear that the rights that AC purports to be licensing are in fact under their authority. This issue arises from two separate potential areas of uncertainty: Does AC actually have the legal authority to license the rights sought? What is the full repertoire of works legally made available, and in what formats and for what permissible uses?

These questions are critical because the answers, or lack thereof, will create gaps that increase the exposure to risk without any return on payments. The answers will reveal whether agreeing to the AC licence will be economically wasteful for an institution. If there is no authority to license (a title issue), or if the work is not part of the collection (and so is not covered by the licence), or if the uses at issue are different from those licensed or interpreted as being licensed, or exceed the licence in scope, or if the uses are consistent with the licence but already permissible at law, then the university will have paid unnecessary rents and failed to mitigate the real or perceived risks it sought to license around.

The full extent of the AC repertoire is unclear. Some works may not be in its collection, while other works that are may already be paid for through existing digital content licensing agreements.⁵⁸ At best case, additional rents are superfluous and duplicate costs for students, faculty and the university community. At worst, these questions lack clear answers and will be litigated anyway, making payments of rents inefficient. Certain risks by their nature cannot be insured against; others depend on AC's being the rightful licensor.⁵⁹

The layering of multiple copyright collectives compounds these issues; the problem cannot be fixed through a single licence with AC. In an expert report to Industry Canada (March 2006) by legal counsel from Blake Cassels & Graydon, it was noted that:

There are upwards of 30 collective societies in Canada, dealing with differ-

⁵⁸ <<http://qufa.wordpress.com/2012/05/07/qufa-on-access-copyright-a-letter-to-the-provost-and-university-librarian-3-may-2012/>>.

⁵⁹ Rights to digital works are important but need to be distinguished from rights to the digitization of analogue works, which was the issue before the Supreme Court of Canada in *Robertson v. Thomson Corp.*, 2006 SCC 43. The determination of this issue may also affect the ability to invoke the s. 29.4 educational institutional exemption as well.

ent media, different copyrights, and different copyright holders. In addition, there are other organizations and companies that do not style themselves as copyright collectives but may fall within the definition of “collective societies” in the *Copyright Act* (for example, book publishers, record companies, motion picture studios). Users may often have to deal with multiple collectives and other organizations in order to fulfill their requirements and obtain the requisite licenses. This is particularly the case in the increasingly digital context — playing a song over the internet may arguably involve both the communication right of each of the composer and sound recording owner (for transmission over the internet) and reproduction rights (for downloading). Industry Canada has recognized such new technology issues as a part of the medium-term reform agenda of the *Copyright Act*. While dealing with collectives vastly reduces the complications of dealing with multiple owners or licensees of copyrights, dealing with multiple collective societies also increases complexity and transaction costs, running contrary to some of the key benefits of collectives.⁶⁰

As publishers respond to consumer preferences and shifting business models in the digital age and provide content subscriptions and pay per use/user agreements, the more legally certain approach would be to deal with copyright owners directly. Complex administrative matters persist, moreover, pertaining to the redistribution of collected funds, as noted by Professor Vaver:

Board decisions can be contentious . . . Issuing a licence where none was needed would be outside the Board’s power. The Board’s practice on granting a licence is to fix an appropriate royalty for the user to pay to a collecting society. The Board then authorizes the society to apply the sum to its general revenue if the copyright owner does not collect the royalty within five years. This practice seems questionable. The Board cannot require applicants to make charitable donations as a condition of obtaining licences. A power to authorize copyright collectives to confiscate money is even less plausible. The royalty might better be deposited with the Board, which could then return it to the user if the owner does not claim it within five years of the expiry of the licence.⁶¹

Since the Supreme Court released its decisions on July 12, 2012, it has become apparent that the pressure and politics of fear used to get some universities to agree to the PAC agreement were unfounded. The decisions of the Court in *K-12* and *SOCAN v. Bell Canada*⁶² are effectively wide endorsements for educational uses. Both decisions were rendered before the new educational purpose addition to fair dealing in Bill C-11 takes effect.

Bell addressed the issue of whether listening to a 30- to 90-second song preview should be subject to a separate royalty for compensation from Internet service

⁶⁰ R.F.D. Corley, N. Joneja & P. Narayanan, “The Competition-Intellectual Property Interface: Present Concerns and Future Challenges” March 2006: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02285.html#2B1>>, footnotes omitted.

⁶¹ Vaver, *supra* note 45 at 262-63. See also more detailed discussion in Trosow *et al.*, *supra* note 11.

⁶² 2012 SCC 36 [*Bell*].

providers beyond the tariff SOCAN collects for the download of music.⁶³ SOCAN, the Society of Composers, Authors and Music Publishers of Canada, is the collective society in Canada representing the administration and collection of royalties for its members' right to publicly perform a work or communicate it to the public by telecommunication.⁶⁴ The Copyright Board, Federal Court of Appeal and Supreme Court of Canada (unanimously) agreed that previewing short musical clips was not subject to a royalty: it constituted research and a fair dealing under s. 29 of the *Copyright Act*.⁶⁵ The Supreme Court in *Bell* adopted a definition for "research" that was far more expansive than that advanced by SOCAN, which preferred to characterize a preview as search, not research. The Supreme Court of Canada disagreed, holding that research or private study may be engaged in simply for personal interest, finding no compelling reason to give any more restrictive meaning to research than to private study:

Limiting research to creative purposes would also run counter to the ordinary meaning of "research", which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.⁶⁶

Future cases may seek to narrow the application of this decision by the facts: the previews sampled were streamed and not "copied", and any downloaded music purchased was subject to a royalty. The analysis of the definition of "research" for the qualifying purpose of "research and private study" in s. 29, however, will be of more lasting significance for copyright users. *Bell* also reaffirms the proper approach to be taken to the fair dealing analysis:

The test for fair dealing articulated in *CCH* involves two steps. The first is to determine whether the dealing is for the purpose of either "research" or "private study", the two allowable purposes listed under s. 29. The second step assesses whether the dealing is "fair". The onus is on the person invoking "fair dealing" to satisfy both aspects of the test under *CCH*.

To assist in determining whether the dealing is "fair", this Court set out the following six fairness factors for guidance: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.⁶⁷

The *CCH* test and its explanation in *Bell* were referred to in the companion case of *K-12*,⁶⁸ where one issue was the proper meaning to be given to "private study," the second of the allowable purposes in s. 29, and "whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair deal-

⁶³ *Bell* at para. 3.

⁶⁴ <<http://www.socan.ca/>>.

⁶⁵ *Bell*, affirming the 2010 FCA 123 (Federal Court of Appeal); affirming the (2007), 61 C.P.R. (4th) 353 (Copyright Board).

⁶⁶ *Bell* at para. 22.

⁶⁷ *K-12* at paras. 13-14.

⁶⁸ *K-12* at para. 14.

ing under the *Copyright Act*.⁶⁹ The Copyright Board concluded that, although the copies made at the teacher's initiative with instructions to students to read the materials were made for "research or private study," they were not fair dealings and would be subject to the Board certified royalty. The Federal Court of Appeal agreed.⁷⁰ A 5:4 majority of the Supreme Court allowed the appeal and remitted the matter to the Board for reconsideration, finding that:

photocopies made by a teacher and provided to primary and secondary school students are an essential element in research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.⁷¹

Despite some original challenges, AC and the Coalition had agreed on the terms of a volume study, carried out in 2005-2006, which observed and recorded detailed information regarding photocopying. The data were categorized into four classifications, of which three dealt with copies made by teachers for themselves or at student request. These were not in issue, as the parties agreed that these 1.7 million pages constituted fair dealing.⁷² Category 4 (16.9 million pages) comprised copies made on the teachers' own initiative, with instructions to students to read the material: "teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used."⁷³ The Supreme Court majority found that the problem with the Board's decision on the "purpose of the dealing" factor was the conclusion that, since the Category 4 copies were not made at student request, they were no longer made for the purpose of research or private study. In *K-12*, the Board had "concluded that the *predominant* purpose was that of the teacher, namely, "instruction" or "non-private study" [and] found therefore that this factor tended to make the Category 4 copies unfair."⁷⁴ The Federal Court of Appeal and the Supreme Court dissenters agreed with this view. The Supreme Court majority, however, found the supporting references made to foreign court decisions to be generally unhelpful and at odds with statements and findings in *CCH*.⁷⁵ The decisions did support the principle that copiers cannot hide behind the purpose of the user to camouflage their own distinct purpose where it is a commercial one, by "purporting to conflate it with the research or study purposes of the ultimate user," but they did not endorse the view that teachers' instructional purposes are inconsistent with those of "research" and "private study."⁷⁶ The copier's purpose is relevant at the stage of testing for fairness if there is a *separate*

⁶⁹ *K-12* at para. 1.

⁷⁰ *K-12* at para. 10.

⁷¹ *K-12* at para. 25. The hearing for Access Copyright — Provincial and Territorial Governments Tariffs (2005–2009) and (2010–2014) has been scheduled to commence October 23, 2012, <<http://cb-cda.gc.ca/home-accueil-e.html>>.

⁷² *K-12* at paras. 5–7.

⁷³ *K-12* at paras. 7. These constitute part of the "navigational maps" outlined in the opening of this comment.

⁷⁴ *K-12* at para. 15.

⁷⁵ *K-12* at para. 19.

⁷⁶ *K-12* at para. 21.

purpose that is being masked behind the user's allowable purpose; this may constitute dealing that is unfair. But the majority found there was no such separate purpose on the part of teachers. The following statement by the majority coheres with how most teachers are likely to view their role:

Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study.⁷⁷

As to what constitutes "private" study, the majority held that:

the word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of the classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers' instruction from the students' studying.⁷⁸

The Board had erred in its approach to the "amount of dealing" factor: it should have assessed whether the proportion of each of the short excerpts in relation to the whole of the work was fair, instead of focusing on whether repeated copies were made from the same sources to find the dealing unfair. Citing *Bell*, Justice Abella explained how this conflated two different factors, the character of the dealing with the amount of dealing. The quantification of the total number of pages copied

⁷⁷ *K-12* at para. 23.

⁷⁸ *K-12* at para. 26. The sensitivity of the majority to this important distinction between the concept of learning and the loci for it shows an appreciation for the cultural construction of institutional space that is too often taken for granted in discussions on education. See *e.g.*, M. Chon, "Intellectual Property 'From Below': Copyright and Capability for Education" (2006) 40 U.C. Davis L. Rev. 803, who notes

the conditions of education in many developing countries may not fall within the local exceptions for fair use or educational use. For example, under local South African copyright law, educational exceptions are limited to classroom use, and materials have to be used in the classroom. Yet, in many rural schools, the teaching literarily takes place outside and thus falls outside the exception. A relatively recent phenomenon is the expansion of the reprographic collection society model to parts of the developing world that have questionable capacity to participate in the exchange of royalty fees between reproduction rights organizations and user groups (mostly educational institutions. [at 831, fn omitted].

K-12 at para. 27.

(based on aggregated use) fits under the former, while the “amount” requires “an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated.” Conflating the two factors was said to erase any sense of proportionality from the fairness analysis.⁷⁹ The dissent agreed on this distinction “as a matter of analytical coherence” but found that the error did not warrant branding the Board’s finding as unreasonable.⁸⁰ The dissent also agreed with the majority view that buying books for each student instead of making the limited excerpts needed to supplement student textbooks was not a realistic alternative; but whereas the majority found the alternative to be unreasonable,⁸¹ the dissent disagreed and found the Board’s decision reasonable as the evidence established that the same class set of books would be subject to multiple copies. For the majority, however, such copying is “reasonably necessary to achieve the ultimate purpose of the students’ research and private study.”⁸² Finally, the evidence did not clearly support a causal connection to support the claim that shrinking sales (a 30 per cent decline) over the past 20 years were linked to photocopying done by teachers, as opposed to other plausible explanations such as term teaching, longer life-spans of texts, digital access to works and increased resource-based learning.

In addition to the positive implications of the individual findings for the educational context, both *Bell* and *K-12* can be expected to inform future legal interpretations of companion provisions, such as the s. 30.2 exemption for libraries, archives and museums conducting activities that are allowable under s. 29 and s. 29.1 as fair dealing when done by an individual.

James L. Turk, Executive Director of CAUT, the association of university teachers that intervened in both cases, rightly concludes that “the Court’s decision directly calls into question the model license agreement recently reached between Access Copyright and the Association of Universities and Colleges of Canada . . . Colleges and universities who have opted out of the agreement have been vindicated, while those who signed on should start thinking today about not renewing their licence.”⁸³ Though the objectives of a university seeking to insulate itself and its members from risk are laudable, choosing to do so through the AC licence was short-sighted and perhaps based on some misunderstanding of what the licence would in fact do: contractually insure risk. The AC licence, however, does not necessarily mitigate liability, and can adversely increase the risk of litigation.

(c) Increased Exposure to Risk

How might the AC licence increase exposure to risk? An unintended consequence for any university community that signs the PAC licence is that it could foster a false sense of security and create potential for illegality if the new restraints

⁷⁹ *K-12* at paras. 29-30.

⁸⁰ *K-12* at paras. 50, 54.

⁸¹ *K-12* at para. 32.

⁸² *Ibid.*

⁸³ CAUT NEWS, July 13, 2012, <<http://www.caut.ca/pages.asp?page=1095>>. CAUT, together with the Canadian Federation of Students opposed the AC post-secondary tariff (Aug. 11, 2010). See <http://caut.ca/uploads/CAUT_CFS_Objection_to_ACT.pdf>.

imposed (such as on communication, usage of scholarly material, indexing, linking, *etc.*) are not complied with. These restraints are greater than those imposed by the *Copyright Act*. So, despite positive legal reforms that may favour education and learning, the contractual relationship is likely to control through its terms binding the parties. Moreover, a false sense of security associated with the licence in the university context may lead to a failure to ensure copyright clearances are obtained for the right uses from other relevant parties as required by law. Duplication of effort, administrative confusion, and errors about the steps needed to comply with the law may result. Gaps in the licence may not be known or noticed until litigation is initiated and the necessary due diligence steps are found to be lacking. Compliance with the licence may attract scrutiny elsewhere, such as privacy law for the tort of intrusion on seclusion,⁸⁴ and by the Privacy Commissioner under PIPEDA.⁸⁵

A better alternative to the licence is to use copyright advisory bureaus such as the well-established and active Copyright Advisory Office at Queen's University to educate the community about the law after Bill C-11 and the Supreme Court of Canada pentalogy, and trust that determinations of fair dealing will consequently be made fairly. Though clearing houses could be used, a specialized university Office could assume a central coordinating and educational role. Members of the university community could be encouraged to contact this Office to be consulted on more complex scenarios to determine if permission is needed. Many universities already have such a set-up. Any decision made by administrative staff on whether permission or payment is needed, however, should be defensible on the merits and not based on risk aversion or the potential for a lawsuit. If permission is needed, copyright clearances should be obtained from the relevant owners of the relevant rights in question (reproduction right, telecommunication right, public performance right, *etc.*).

AC is limited by the scope of its repertoire and its decreasing value to educational institutions,⁸⁶ as well as the nature of rights associated with the repertoire. Rather than the institutions pursuing a blanket licence with a single entity and having to perform the necessary due diligence in any event, the savings to be had in not adopting the PAC licence can be used for greater acquisitions and online access, to secure relevant copyright clearances as needed, and help fund the purchase of IP insurance coverage for IP exposures,⁸⁷ if the university does not already have this.

⁸⁴ *Jones v. Tsige*, 2012 ONCA 32.

⁸⁵ Trosow *et al.*, *supra* note 11, starting at p. 32.

⁸⁶ M. Geist, "Access Copyright's Diminishing Repertoire: Why a Growing Repertoire Offers Decreasing Value", <<http://www.michaelgeist.ca/content/view/6514/125/>>. But see Access Copyright, "Post-Secondary Licence- University of Toronto, Western University, AUCC, ACC — FAQs" <<http://www.cb-cda.gc.ca/avis-notice/active/2012/access2-10082012-2.pdf>>, noting that a licence would give access to a repertoire of over 22 million works.

⁸⁷ Such products exist. See *e.g.*, <http://www.insurecast.com/html/intellectualproperty_insurance.asp>.

Insurance is more effective than an indemnity clause in PAC⁸⁸ as it is not affected by the conflicted interests of disputing parties to the licence contract. Insurance might better help to ensure that risk is not the decisive reason for entering or renewing a licence with AC, or that faculty always obtain permissions in its absence. This would allow staff to make reasoned determinations of permissible uses on the merits. Universities might also consider creating a defence fund for any claims that might exceed maximum coverage under an insurance policy; establishing such a fund and securing any such coverage should be coordinated with other universities. Beyond potential opportunistic litigation, legal ambiguities may arise from the contract or depend on findings of fact that must go to trial. Disparities between the agreement and interpretations given to it under the new law may also cause litigation. Incongruence between the licence provisions and institutional and educational practices by the university community is likely to occur in the short term, given the shifting legal landscape and lag in changing personal practices. Moreover, the AC licence removes the significant legal distinction between property and intellectual property rights, creating a path-dependent trajectory for a licensee that has been criticized by CAUT: “[s]ection 5(d) provides that if the institution does not renew the license it must prevent access to all copies made while the license was in place.”⁸⁹ In short, the licence imposes new rights and further restrictions, and deviates from more generous reforms, thereby creating an additional layer of contractual obligations that will only complicate individual understanding of what the law permits, and what is needed as due diligence when it does not. The contract locks in licensees and is likely to create a further site for risk of litigation and liability due to non-compliance, because the licence takes as a given the legal rights and obligations the parties agree to without incorporating the benefit of a trial on the merits or with attention to the safeguards for a balanced regime. The licensee voluntarily concedes that authorization and payments are required and, since the costs are borne by third parties (students), a university may find itself in a fiduciary role in relation to them — particularly insofar as the agreement affects fundamental rights to education, freedom of expression, communication and academic freedom. This reality may attract legal risks of liability for the university of yet a different kind from those threatened under copyright, and possibly on a larger scale (class actions), and thus should be part of a more comprehensive and coherent calculation of

⁸⁸ Beyond the presumed protection the licensee may infer from the payment of licence fees, PAC contains an indemnity clause. But, as it has been argued,

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.

Trosow *et al.*, *supra* note 11 at 21.

⁸⁹ CAUT, *supra* note 16.

risk-related costs and benefits. Without the licence, the university might expect that many uses will not be copyright infringements — takings may not be substantial, may fall within the educational uses or may constitute fair dealing, may be from open sources or under an implied, express, or copyright commons licence. The university may also expect that many copyright owners would continue to elect *not to* enforce their rights against universities where the use is educational, fair, or in that grey area where litigation costs exceed benefits. On the other hand, the university can expect AC to insist on its rights under its licence and to construe them widely.

The second area for consideration on the issue of risk stems from how private arrangements and practices between parties may affect legal rights and obligations against others. The Supreme Court in *CCH* found that:

Fair dealing is always available . . . Research must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained . . . Research is not limited to non-commercial or private contexts . . . *The availability of a licence is not relevant to deciding whether a dealing has been fair.*⁹⁰

While the *availability* of a licence does not affect the parameters of the fair dealing defence and ability to invoke it, the *existence* of a licence may. Narrower readings of users' rights by parties to a licence may restrict the robust approach to fair dealing *CCH* endorses and can also shape the content for what is considered to be fair dealing in Canadian law. The licence may be used to enjoin the university and its members from subsequently asserting a user right against an infringement claim by AC or a third party, if the licence is interpreted to establish certain intentions and undertakings that would allow for inferences to be drawn about the rights of owners or their collectives. This may be so even if AC is found not to represent the true copyright owner. If the true owner with good title sues, the question to be answered is why would the university have paid for a licence if it honestly believed the contested use is legal? This is an estoppel-like argument that flows from the very deeds of the licensee and may also be advanced against any library reserve system that claims fair dealing. Representations captured in the licence may, therefore, be taken as legal acquiescence, if not in copyright law, then under contract or in equity, with ancillary consequences. The presence of a licence and how it is given effect, whether under fear or duress, may therefore shape the long-term contextual understanding of what is fair dealing through incremental erosion of users' rights in law. It may reinforce a system of permission-seeking through private arrangement precisely at a time when contrary public pronouncements have been made by the judiciary and Parliament. The collateral effect may be to limit not only the ability to invoke copyright defences but also the scrutiny of other areas of law that are useful in curtailing IP abuse.

The intersection of IP rights and competition policy was explored by expert legal counsel in a report to Industry Canada in 2006. While provision for copyright collectives is made under the *Copyright Act*, there are harms as well as benefits in having collectives when they are viewed through the lens of competition law and policy:

While the administration of copyrights through copyright collectives offers

⁹⁰ *CCH*, *supra* note 56 at para. 51, emphasis mine.

a number of advantages, the main justification for their use is the reduction of transaction costs since collective administration enables potential users to access multiple works through a single source and individual owners of copyrights need not negotiate with numerous potential users. It is therefore generally argued that collective societies increase efficiency by reducing costs for licensing transactions which individually would not have high value, such as photocopying several pages of a book or playing a single song on a radio broadcast. In addition, because copyright collectives have developed in most countries across the world, there exists an international network of collectives that allows users to obtain licenses through the domestic copyright collective even when the copyright owners reside in a foreign jurisdiction and may be members of a foreign copyright collective.

The main objection to copyright collectives from a competition policy perspective is that they entail the joining together of a number of individual copyright owners to control the availability of their copyright protected works. Without some regulatory controls, this may result in a lessening of competition *and the ability of the copyright owners, through their collective societies, to extract monopoly prices from the marketplace or otherwise abuse their market power.* To some extent, the *Copyright Act* provisions discussed above relating to collective societies and the fixing of tariffs by the Copyright Board are intended to ensure that this potential market power of collective societies is eliminated or at least attenuated.⁹¹

The IP/competition interface is one of the least theorized but most significant and relevant areas to consider in relation to IP rights. The same report states:

Agreements entered into by copyright collective societies and users are in limited circumstances granted a somewhat favoured position when it comes to scrutiny by Canadian competition regulators. Where a collective society concludes an agreement to grant a license and files a copy of the agreement with the Copyright Board within 15 days, the *Copyright Act* provides an explicit exemption from the application of Section 45 of the *CA [Competition Act]*, although the Commissioner may inspect the agreement and may request the Board to “examine” it.⁹²

The AC licence may consequently limit the opportunity to go outside copyright law as well.⁹³

The fact that the five cases before the Supreme Court of Canada were all reviews of decisions first made by the Copyright Board of Canada that involved a number of different copyright collectives is revealing. It shows that even when parties act in good faith with full belief in the validity of their legal position, legal

⁹¹ *Supra* note 60. Emphasis mine.

⁹² *Ibid.* Footnotes omitted.

⁹³ Section 45 the *Competition Act* limits the anti-competitive effects of cartels and price fixing by making conspiracy criminally actionable. It “prohibits agreements or arrangements to prevent or lessen competition unduly or enhance prices unreasonably. Unlike the competition legislation of the other major jurisdictions, section 45 incorporates a market-effects test for all agreements that potentially lessen competition, whether they be cartels or complex strategic alliances.” R. Pierce, “Reform of Section 45, the Bureau’s Perspective” available at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01116.html>>.

uncertainty will persist and litigation may ensue, particularly when the success of predatory demands in the market valorizes the view of legal entitlement. It also underscores the importance of opposing the pending post-secondary tariff proposed by AC in order to establish a proper record for judicial review and appeal.

On July 20, 2012, the Copyright Board ordered that the parties in *K-12* provide submissions to address the issues remitted by order of the Federal Court of Appeal on the s. 29.4 educational institutional exemption (July 23, 2010) and order of the Supreme Court of Canada on fair dealing (July 12, 2012); and has since decided that the disputed category 4 photocopies were indeed fair dealing under the law.⁹⁴ Yet, the educational photocopying drama may well be far from over, particularly in the post-secondary context; how many more tax dollars will be spent?

Copyright owners do not have any natural or common law copyrights, but only the rights created by statute, acquired under contract or acquiesced to in practice. And so the proposed model AC licence can be looked back upon as a Shakespearean tragedy⁹⁵ in which concessions were made, compromises achieved and les-

⁹⁴ Specifically, the Copyright Board ordered the parties provide to the Board by no later than Friday, August 17, their opinions on the following questions: “a) What issues must be addressed by the Board to comply with the decisions of the Federal Court of Appeal and of the Supreme Court of Canada? [;] b) Can these issues be determined on the basis of the existing record? Will it be necessary for the parties to file additional argument or additional evidence? [;] c) If the parties require an opportunity to file additional argument or evidence, how can this be achieved most efficiently? A proposed timetable would be welcome. [;] d) Are the instructions of the Federal Court of Appeal sufficiently precise or should the parties ask the Court for further directions? A joint filing would be welcome.” Copyright Board, Access Copyright- Educational Institutions (2005–2009), Order of the Board July 20, 2012, <<http://www.cb-cda.gc.ca/avis-notice/index-e.html#access3-20072012>>. On September 19, 2012, the Board ruled that the contested copies were fair dealing, see <<http://arielkatz.org/archives/2022>>; Access Copyright issued a media response, see <<http://www.accesscopyright.ca/media/30333/the-recent-copyright-board-of-canada-decision-does-not-change-the-fact-that-most-copying-done-in-the-k-12-education-sector-requires-a-licence.pdf>>.

⁹⁵ Shakespearean tragedies, like the Greek dramas which they mirrored, are marked by conflict that leads to some tragic results. Typically, they follow a five act structure. Professor Debra Schwartz summarizes Northrop Frye’s classification (from *The Anatomy of Criticism*, 1957) of the five stages of action in tragedy: “1) *Encroachment*. Protagonist takes on too much, makes a mistake that causes his/her ‘fall.’ This mistake is often unconscious (an act blindly done, through over-confidence in one’s ability to regulate the world or through insensitivity to others) . . . 2) *Complication*. The building up of events aligning opposing forces that will lead inexorably to the tragic conclusion . . . ‘tragedy presents the reverse theme of narrowing a comparatively free life into a process of causation.’ 3) *Reversal*. The point at which it becomes clear that the hero’s expectations are mistaken; that his fate will be the reverse of what he had hoped. At this moment, the vision of the dramatist and the audience are the same. The classic example is Oedipus, who seeks the knowledge that proves him guilty of murdering his father and marrying his mother; when he accomplishes his objective, he realizes he has destroyed himself in the process. 4) *Catastrophe*. The catastrophe exposes the limits of the hero’s power and dramatizes the waste of his life . . . dead bodies remind us that the forces unleashed are not easily contained; there are also elaborate subplots . . . which reinforce the impression of a world inundated with evil. 5) *Recognition*. The audience

sons hard learned based on erroneous beliefs and narrow vision. Pursuit of higher tariffs, new surveillance and compliance terms, and attempts to expand on the number and nature of existing rights for owners established in the regulatory regime have instigated a more fundamental inquiry: “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.”⁹⁶

While the power of collectives to operate under the law is provided for in the *Copyright Act*, the manner in which collective societies have operated, using funds that should be redistributed to authors and owners to subsidize aggressive enforcement and litigation, their attempts through private contract to sidestep administrative governance and the development of a balanced copyright regime, as articulated by lawmakers and the judiciary, have not escaped criticism. That considerable power and authority have been deployed to establish a licence agreement, precisely at a time when both Parliament and the judiciary were defining the scope and limits of copyrights, raises many questions. Universities should closely examine internal practices and institutional needs and seek external counsel. It is clear that copyright needs education as much as education needs copyright. In a particular context, a licence with AC may perhaps be well merited, but whether on the terms of the proposed licence or tariff is a distinct question. The push for these terms at all costs may well prove to be the “tragic flaw.”

The University of Toronto sought counsel and opted for the PAC licence. It was however criticized for a perceived conflict of interest of their expert, and greater care is needed to protect against such an apprehension.⁹⁷ Queen’s University moved out of purgatory and joined “the hall of fame.” What will other institutions do? Both the University of Toronto’s and the University of Western Ontario’s agreements end in 2013.⁹⁸ If notice of intent to terminate is given, it will stop automatic renewal. Though the alternative to a licence with AC may require more work and effort, it seems to be the most prudent course and, most importantly, signals to the universe of post-secondary education communities that successful outcomes are

(sometimes the hero as well) recognizes the larger pattern. If the hero does experience recognition, he assumes the vision of his life held by the dramatist and the audience. From this new perspective he can see the irony of his actions, adding to the poignancy of the tragic events.” See Schwarts, “Shakespeare’s Plays: Tragedy”, online: <<http://cla.calpoly.edu/~dschwartz/engl339/tragedy.html>>.

⁹⁶ Trosow *et al.*, *supra* note 11 at 40.

⁹⁷ L. Beadon, “University of Toronto’s lawyer on Access Copyright deal also advised Access Copyright on related legislation”, Techdirt, <<http://www.techdirt.com/articles/20120509/21321818854/university-torontos-lawyer-access-copyright-deal-also-advised-access-copyright-related-legislation.shtml>>.

⁹⁸ Access Copyright Joint Media Release, January 30, 2012, *supra* note 20.

not to be achieved by the perceived path of least legal resistance but on the basis of principled action. To borrow the words of the Bard: "Things done well and with a care, exempt themselves from fear."⁹⁹

⁹⁹ William Shakespeare & John Feltcher, *King Henry VIII* or *All is True*, Act I Scene II (this scene and hence the words quoted are however usually attributed to Shakespeare alone).

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