

# Filtering the Flow from the Fountains of Knowledge:

## Access and Copyright in Education and Libraries

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### A. INTRODUCTION<sup>1</sup>

Since 1997 the Canadian *Copyright Act*<sup>2</sup> has contained specific exceptions to the rights of copyright holders which are only available to defined, targeted institutions. As recently as March 2005, in their joint *Government Statement on Proposals for Copyright Reform*,<sup>3</sup> the Ministers of Industry and Heritage signalled an intention to continue singling out particular institutions for special treatment under the copyright regime. The recent Bill C-60 further demonstrates this intent.<sup>4</sup> Given the current minority government,<sup>5</sup> it remains uncertain whether the proposed enactments will be

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1 This chapter discusses the Canadian copyright environment as at 1 July 2005.

2 *Copyright Act*, R.S.C. 1985, c. C-42. <<http://laws.justice.gc.ca/en/C-42>>.

3 **Canada, Ministries of Industry and Canadian Heritage**, *Government Statement on Proposals for Copyright Reform* (March 2005). <[http://pch.gc.ca/progs/ac-ca/progs/da-cpb/reform/statement\\_e.cfm](http://pch.gc.ca/progs/ac-ca/progs/da-cpb/reform/statement_e.cfm)> [Statement].

4 **Bill C-60, An Act to amend the Copyright Act**, 1st Sess., 37th Parl., 2005, 1st session, 38th Parliament, First reading 20 June 2005. <[www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60\\_1/C-60-3E.html](http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60-3E.html)>.

5 The final distribution of the 308 seats after the election was: Liberals 135 seats, Conservatives 99, Bloc Quebecois 54 (all from the province of Quebec), and New Democratic Party 19. Also elected was 1 independent member, from British

enacted. Nonetheless, it is important to discuss and comment upon the ongoing approach of government to limit certain copyright exceptions to particular institutional contexts.

Not only are its reforms to be limited to particular institutional contexts, but the Government Statement also declared that “[t]he Government supports the use of leading-edge technologies in education and research” and, therefore, that the proposed federal bill introducing copyright change “will propose *certain* measures that will facilitate the use of the Internet for these purposes” [emphasis added]. On the other hand, the government has deliberately refrained from making other proposals in this connection. One such absence occurs in the area of the Statement headed “Educational use of Publicly Available Internet Material.” In this area, the Statement points to the need for further consideration of “the implications of recent copyright decisions by the courts (notably the recent Supreme Court of Canada decision regarding fair dealing, *CCH v. Law Society of Upper Canada*)” before policy can be proposed. It is the argument of this chapter that the implications of recent decisions of the Supreme Court of Canada are much wider than the Government appears to believe and that analysis of these decisions remains an important factor in considering the proposals which the Government is putting forward, as well as in considering the issues which the Government proposes to defer. The chapter concludes by demonstrating that two of the proposed amendments in these areas are probably unnecessary, given the current state of the law, and the third is probably ill-timed and may also be ill-conceived.

## B. BACKGROUND

In the 1980s there was a large round of consultations on copyright in Ottawa, which culminated in an important series of position papers.<sup>6</sup> Out of

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Columbia (who has since died of cancer, leaving a vacancy). Since 155 seats are needed to dominate the House, this has been a very interesting, if potentially short-lived, Parliament. Already the distribution of seats has changed, through defections, resignations and death. As of July 2005, the distribution is: Liberals 133 (through three defections — to sit as Independents — and one death and then success in one by-election and one defection from the Conservatives); Conservatives 98, Bloc Quebecois unchanged at 54, NDP unchanged at 19, Independents now 3 plus 1 vacancy.

6 The first federal discussion paper was *From Gutenberg to Teledon: A Guide to Canada's Copyright Revision Proposals* (Ottawa: Government of Canada, Consumer and Corporate Affairs, Department of Communications, 1984), which was followed by *A Charter of Rights for Creators* (Ottawa: Government of

this process, however, the first tangible statutory changes occurred only in 1988 and these changes, generally, enhanced the position of rightsholders in the copyright environment.<sup>7</sup> One consequence of the reforms of 1988 has been the rapid creation and growth of collective societies representing the rightsholders of different aspects of the range of copyright interests originally bestowed by the *Copyright Act*. Prior to 1988, the two collectives then active in the music industry were the only major players of this type in the copyright policy environment.<sup>8</sup> Now there are many.<sup>9</sup>

As the decade of the 1980s passed with no sign of the anticipated “Phase 2” legislative reforms, which it was thought would address users’ perspectives, those groups who had participated in the consultations representing the perspectives of information users and intermediaries, rather than copyright owners, were disappointed and disillusioned by the process.<sup>10</sup> However, lobbying efforts continued, aimed at getting the federal govern-

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Canada, Parliament, House of Commons, Sub-Committee on the Revision of Copyright, 1985).

- 7 For example, up until 1988, most copyright holders were discouraged from engaging in collective administration of their rights because of the threat of anti-combines prosecution pursuant to the *Competition Act*, R.S.C.1985, c. C-34. In 1988, however, s. 70.5(3) of the *Copyright Act* was added which provides: “Section 45 of the *Competition Act* does not apply in respect of any royalties or related terms and conditions arising under an agreement filed in accordance with subsection (2).” Immediately two large print collectives became very active in Canada: CANCOPY (which was incorporated as a federal non-profit organization in August, 1988), now AccessCopyright, for English language materials and UNEQ, now COPIBEC, for French language materials.
- 8 The Composers, Authors, and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN). With origins as early as 1925, the two joined together in 1990 to form the Society of Composers, Authors, and Music Publishers of Canada (SOCAN).
- 9 CANCOPY, now AccessCopyright, Christian Copyright Licensing Inc., Neighbouring Rights Collective of Canada, and so on. The Copyright Board of Canada maintains a list at <[www.cb-cda.gc.ca/societies/index-e.html](http://www.cb-cda.gc.ca/societies/index-e.html)>.
- 10 In the controversy following the appearance of the *Charter of Rights for Creators*, groups representing user interests were persuaded that copyright reform was being packaged as a two-phase process. The first phase was to be Bill C-60 which, when enacted in 1988, created the amendments to the *Copyright Act* that largely favoured copyright owners. A second phase was promised, which was to focus on the needs of information users and intermediaries. The promised second phase, however, failed to appear in a timely manner. See Linda Hansen, “The Half-circled “C”: Canadian Copyright Legislation,” (1992) 19 Government Publications Review 137.

ment to enhance the position of users of copyrighted material under the statute.<sup>11</sup>

At about the same time, however, changes were taking place in terms of Canada's international obligations in copyright. The *North American Free Trade Agreement [NAFTA]*,<sup>12</sup> concluded between Canada, the United States, and Mexico in 1994, opened a new chapter in international relationships involving copyright.<sup>13</sup> For the first time, Canada was involved in a more binding international trade agreement that included intellectual property (Chapter 17 of *NAFTA*). Although Canada had long been a voluntary member of the *Berne Convention*<sup>14</sup> on copyright, *NAFTA* has brought copyright into an arena of possible trade sanctions for non-compliance, a level of enforcement of Canada's international copyright obligations that had not

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- 11 For example, the National Information Summit in Ottawa in 1992 was organized by the Canadian Library Association (CLA) and its francophone counterpart, L'Association pour l'Avancement des Sciences et des Techniques de la Documentation (ASTED), involving 171 delegates and 71 observers. As further evidence of these ongoing efforts, on the back cover of her *Demystifying Copyright: A Researcher's Guide to Copyright in Canadian Libraries and Archives* (Ottawa: Canadian Library Association, 2001), Jean Dryden is described as having "played a lead role in successful lobbying for exceptions for libraries, archives, and museums during the discussions leading to the 1997 amendments to the *Copyright Act*." This period of copyright policy development coincided with a period of intense government activity focused on the goal of developing a national information policy. The notion of the "information highway" was prominent in Canada. My former student Daniel Dorner won the American Society for Information Science Doctoral Dissertation Award for his empirical doctoral research which established, amongst other findings, that during this period Industry Canada held a far stronger policy influencing position than did its counterpart Canadian Heritage: see Daniel G. Dorner, "The Essential Services Policy Network: Organizational Influence in Canada's Information Highway Policy Development Process," (2002) 72 *Library Quarterly*: 27.
- 12 *North American Free Trade Agreement, Canada, Mexico and the United States*, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 1 January 1994) <[www.NAFTA-sec-alena.org/DefaultSite/index\\_e.aspx?CategoryId=42](http://www.NAFTA-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42)>.
- 13 Although Canada and the United States had concluded the *Free Trade Agreement* in 1989, it did not affect copyright as it contained no provisions governing intellectual property. *Canada-U.S. Free Trade Agreement*, Canada and United States, 4 October 1987, (entered into force 1 January 1989) <[www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf)>.
- 14 Note that although Canada's first and only *Copyright Act* has been *Berne*-compliant since coming into force in 1924, the latest version of the *Berne Convention* which Canada had signed prior to 1994 was the 1928 Rome version; Canada declined to sign the 1948 Brussels, 1967 Stockholm, or 1971 Paris versions until its obligations under *NAFTA* and *TRIPS* changed its views.

previously been part of Canada's copyright policy environment. In particular, Article 1705(5) of *NAFTA* provides

Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.<sup>15</sup>

Although copyright continues to be a responsibility shared between the Heritage and Industry ministers,<sup>16</sup> it has become now also of greater concern in Foreign Affairs and International Trade portfolios.<sup>17</sup> Immediately after becoming party to *NAFTA*, Canada was a founding member of the World Trade Organization and, as such, a party to the *Trade-Related Aspects of Intellectual Property Rights Agreement [TRIPS]*.<sup>18</sup> Under this 1995 agreement, Article 13 provides:

Members shall confine limitations or exceptions to exclusive rights

- to certain special cases
- which do not conflict with a normal exploitation of the work
- and do not unreasonably prejudice the legitimate interests of the right holder.

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15 *North American Free Trade Agreement, Canada, Mexico and the United States*, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 1 January 1994), Article 1705(5). <[www.NAFTA-sec-alena.org/DefaultSite/index\\_e.aspx?CategoryId=42](http://www.NAFTA-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42)>.

16 **David Emerson is currently Industry Minister, in his first term as an elected Member of Parliament and formerly Chief Executive Officer of Canfor, British Columbia's largest forestry company.** It was speculated in the Canadian press, when Cabinet was named, July 19, 2004, that he has been brought into cabinet, in part, to represent the interests of big business. Liz Frulla is Minister of Canadian Heritage and Minister responsible for the Status of Women. A member of Parliament only since 2002, commentators have viewed her appointment to Heritage variously, as a fast-track advancement or as an indication of de-emphasis on the Heritage portfolio. A former television host, Ms. Frulla has also previously been Minister of Social Development and Quebec's Minister of Culture.

17 **The Minister of Foreign Affairs now is Pierre Pettigrew, formerly federal Minister of Health.** Jim Peterson, who had been Minister of International Trade, has remained in that portfolio. In the recent past, this portfolio has been a combined one, administered through the Department of Foreign Affairs and International Trade.

18 (1994), 33 I.L.M.1197. <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)>.

This is a mandatory provision, and, while other provisions might appear to ameliorate the demands of this section, they are couched only in permissive terms.<sup>19</sup>

*TRIPS* also incorporates by reference the provisions of the *Berne Convention* in its 1971 version, which Canada has now also signed,<sup>20</sup> independent of its WTO membership. Article 9 of the *Berne Convention* provides:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

These new trade obligations in copyright appear to have had a great impact on government attitudes toward enlarging exceptions to the rights of copyright holders since such amendments now need to be assessed in light of their possible impact in the trade context. Given the longevity and strength of the publishing industry focused on the education sector, particularly the involvement of foreign publishers in this market in Canada, it might be difficult to establish that broad exemptions in this sector would “not unreasonably prejudice the legitimate interests of the author.”<sup>21</sup> Thus the environment of consideration of copyright reform that had existed in the 1980s, when the “Phase I” copyright reforms occurred, was vastly different after 1994 and 1995 (and continues to be different); and the “Phase 2” reforms were still in abeyance.

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19 Article 8, in particular, provides

1. Members may ... adopt measures necessary ... to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with this Agreement, may be needed
  - to prevent the abuse of intellectual property rights by right holders or
  - the resort to practices which
    - unreasonably restrain trade or
    - adversely affect the international transfer of technology.

20 Canada signed the 1971 Paris version of the *Berne Convention* in 1998.

21 Referring to the language in Art. 9 of the *Berne Convention*, just quoted.

Eventually, in 1997, special exceptions to the rights of copyright for (1) “educational institutions” and (2) “libraries, archives and museums” were added to the statute.<sup>22</sup> However, these additional exceptions did not represent a universal triumph for the communities of educational institutions or of libraries, archives, and museums. Indeed, they split these communities because the exceptions created can only be enjoyed by those defined within the *Copyright Act* as members of each community.

With respect to educational institutions, only those defined as an “educational institution” in the Act enjoy the privileges of the exemptions in the Act, that is:

- (a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,[or]
- (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,[or]
- (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or
- (d) any other non-profit institution prescribed by regulation.<sup>23</sup>

With respect to the three communities of libraries, archives, and museums, which are actually quite separate communities in their own eyes,<sup>24</sup> the statute has lumped those who will enjoy the statutory exceptions to-

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22 S.C. 1997, c. 24. The amendments with respect to “libraries, archives, and museums” did not come into effect until 1 September 1999. Other than the case of *CCH v. Law Society of Upper Canada*, 2004 SCC 13 <[www.canlii.org/ca/cas/scc/2004/2004scc13.html](http://www.canlii.org/ca/cas/scc/2004/2004scc13.html)>; [2004] S.C.R. 339, S.C.J. No.12, [2004] [CCH et al v. Law Society of Upper Canada cited to S.C.R.], these provisions do not appear to have been tested in court: there are no reported cases.

23 *Copyright Act*, above note 2, s. 2.

24 The libraries have been generally represented at the national level by the Canadian Library Association as well as through the National Library, the archivists by the Bureau of Canadian Archivists and through the National Archivist. Recently, the two national institutions of the National Library and the National Archives have been merged into one institution headed by the Librarian and Archivist of Canada. See *Library and Archives of Canada Act*, S.C. 2004, c.11, <<http://laws.justice.gc.ca/en/L-77/>>.

gether into one definition (now popularly referred to as “LAMs,” a term that will be used in the remainder of this chapter):<sup>25</sup>

“library, archive or museum” means

- (a) an institution, whether or not incorporated, that is not established or conducted for profit or does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or
- (b) any other non-profit institution prescribed by regulation.<sup>26</sup>

During the period of the last Parliament there were indications of legislative initiative in copyright, which culminated in the May 2004 *Interim Report on Copyright Reform* [2004 *Interim Report*].<sup>27</sup> The 2004 *Interim Report* specifically discussed technology-enhanced learning<sup>28</sup> and pointed out the copyright challenges “when information and communications tech-

25 In its recent decision involving the Law Society of Upper Canada, the Supreme Court of Canada went out of its way to point out that the Great Library of the Law Society of Upper Canada is a library which would fall under the purview of these exceptions, despite the fact that the facts of the case arose before the passage of these exceptions and so they did not apply in the case at bar before the Court. The Court found: “The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practice law for profit when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit.” (*CCH et al. v. Law Society of Upper Canada*, above note 22, at para. 84.) As the Court phrases it (*CCH et al. v. Law Society of Upper Canada* at para. 83), to enjoy these exceptions, a library

- must not be established or conducted for profit;
- must not be administered or controlled by a body that is established or conducted for profit; and
- must hold and maintain a collection of documents and other materials that is open to the public or to researchers.

26 *Copyright Act*, above note 2, s. 2.

27 The process of copyright reform underway before the election is fully described in the recent House of Commons Standing Committee on Canadian Heritage *Interim Report on Copyright Reform*, released May 2004. Sarmite D. Bulte, M.P. (Liberal), Chair. <[www.parl.gc.ca/committee/CommitteePublication.aspx?com=8792&Lang=1&SourceId=80836](http://www.parl.gc.ca/committee/CommitteePublication.aspx?com=8792&Lang=1&SourceId=80836)> [2004 *Interim Report*]. There had been some speculation that Ms. Bulte, who was re-elected, might be made Heritage Minister, but this did not happen. The then Minister of Canadian Heritage, Helene Scherrer, lost her seat in the election.

28 2004 *Interim Report*, above note 27, at Section F.

nologies are used to extend the reach of the classroom beyond its physical boundaries, such as in distance education, or to provide access to modern instructional media either on campus or away from the classroom.”

Meanwhile, during the period in which the 1997 legislative reforms were put in place and the consultations leading to the 2004 *Interim Report* were underway, the important lawsuit involving the legal publishers and the Great Library of the Law Society of Upper Canada was making its way through the Canadian courts, beginning in 1993 and culminating in the release of the Supreme Court of Canada’s decision on March 4, 2004.

As will be further discussed below, the Supreme Court of Canada in this decision appears to have rendered moot a number of the statutory provisions legislated in 1997 and may have introduced important limitations on Parliament’s ability to interfere in future with the current balance of interests in the *Copyright Act*. The Court has championed users’ rights as exceptions to the rights of copyright holders under the copyright regime. That users’ rights aspect of the public interest inherent in copyright, however, went utterly without recognition in the Heritage Committee 2004 *Interim Report*. In important areas of its policy recommendations, the Committee consistently endorsed the collective administration of copyright and recommended licensing as the solution to the tensions between copyright owners and users: for educational purposes<sup>29</sup> and with respect to interlibrary loans.<sup>30</sup>

There is also an important case now pending before the Supreme Court of Canada in copyright: *Robertson v. Thomson Corporation, et al.*<sup>31</sup> The majority judgment in the Ontario Court of Appeal found that the *Globe & Mail* newspaper *prima facie* infringed the copyright of freelance contributor Heather Robertson by including her work, not only in the newspaper, the *Globe & Mail* (and archives of it), but in other electronic databases.<sup>32</sup>

It is against this background, then, that Industry Canada and Heritage Canada published their joint Statement and that the recent Bill C-60 has been put forward.

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29 2004 *Interim Report*, above note 27, at Recommendations 4, 5, & 6.

30 *Ibid.*, at Recommendation 7.

31 Leave to appeal granted 21 April 2004.

32 *Robertson v. Thomson Corporation*, [2004] 72 O.R. (3d) 481 (C.A.) on appeal from *Robertson v. Thomson Corporation*, [1999], 171 D.L.R. (4th) 171 (Ont. Ct. Gen. Div.). Justice Weiler wrote the majority judgment, in which Justice Gillese concurred. Justice Blair dissented.

### C. THE DIRECTIONS OF NEW REFORM

It is apparent at the outset, in examining the Statement and the subsequent Bill C-60, that the 2004 *Interim Report* has given way to a new political environment in Ottawa. In terms of proposals to be put forward in this context, the Statement first declared:

Amendments would permit educational institutions to use network technologies such as the Internet to deliver classroom instruction and material to students remotely, without incurring copyright liability.

And, in particular,

Current educational exceptions permit the performance or display, within the classroom, of certain copyright material as part of a lecture. The requirement that the performance or display be confined to the classroom would be removed to enable remote students to view the lecture using network technology, either live or at a more convenient time. Educational institutions would be required to adopt reasonable safeguards to prevent misuse of the copyright material.<sup>33</sup>

And

Material that may be photocopied and provided to students pursuant to an educational institution's blanket licence with a collective society would also be permitted to be delivered to the students electronically without additional copyright liability, unless the licence in question provides for such delivery. Educational institutions would be required to adopt effective safeguards to prevent misuse of the copyright material.

Second, in terms of proposals, the Statement identified that

The Act currently permits, as part of an inter-library loan, the reproduction of certain copyright material (notably academic articles), provided, among other things, that the requesting patron receives only a paper copy.

The Ministers went on to propose an amendment, namely that:

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33 This appears to parallel Option 2 on Technology-Enhanced Learning (Status Report Option 42(a)), identified but not adopted by the Committee in the 2004 *Interim Report* (above note 27).

The electronic desktop delivery of certain copyright material directly to the patron would be permitted, provided that effective safeguards were in place to prevent the misuse of the material or of the inter-library loan service.<sup>34</sup>

On the other hand, it is interesting that the Statement also contained a section labeled “Educational use of Publicly Available Internet Material,” (as opposed to the section labeled “Educational and Research Access Issues” which we have just been discussing). With respect to the “Educational use of Publicly Available Internet material,” the Statement declared that the Canadian Government “recognizes that the Internet has become an important resource for students and teachers to conduct education-related activities.” Indeed, the Statement went on to say that “Internet material is often downloaded, reproduced or transmitted to students and teachers for the purposes of assignments, lessons and research.” The Statement prevaricated, however, about whether this is a permitted use: “Use of Internet material in the classroom setting *may* trigger copyright liability ...”[emphasis added]. In the end, however, the Statement declared that “this issue” will not be the subject of statutory reform at this time.

The Statement thus raises a number of questions with respect to education and interlibrary loans. Are “educational and research access issues” so materially different from issues involving the “educational use of publicly available Internet issues” that the first is susceptible to an immediate statutory solution while the second requires much longer study? Is it appropriate to continue to provide exceptions to the rights of copyright holders for particular educational institutions, libraries, archives, and museums, leaving other such institutions without similar exceptions? Are the proposed exceptions to the rights of copyright holders actually necessary given the current state of the law? Is the downloading, reproducing, and transmitting of Internet material by students and teachers for the purposes of assignments, lessons, and research a permitted use? If particular statutory exceptions for educational institutions and libraries such

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34 This appears to be the first Option identified (and rejected in favour of the second) by the Committee in the 2004 *Interim Report* (above note 27): see Option 1 (Status Report Option 44(a)) on Interlibrary Loans. The Committee’s approach to interlibrary loans also involved expansion of the collective licensing regime, by introducing an extended compulsory licensing regime “where appropriate” (Recommendation 7) and otherwise encouraging “the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study.” (Recommendation 7).

as those set out by the Statement are to be enacted, should educational institutions and libraries be required to put in place or adopt “reasonable” or “effective” safeguards?

## D. THE CURRENT STATE OF THE LAW

### 1) Collective Administration of Copyright

In the copyright area, Canada has been increasingly relying upon an administrative regime to supplement and complement traditional copyright protection. It is an approach that is quite different from recent initiatives to broaden the reach of copyright laws in the United States. Canada’s approach is distinctive, relying upon recognition of, and legal protection for, the collective administration of rights. Canada has probably gone farthest in the world in this direction of enlisting administrative law to supplement the policy objectives of copyright.<sup>35</sup> The English language Canadian print collective, since its inception in 1988, has made steady inroads into the education sector, beginning with its flagship agreement, on August 1, 1991, with the Ontario Ministry of Education, and followed shortly thereafter by a similar agreement with the Manitoba Ministry of Education (December, 1991). That first, one-year license for reprographic uses of literary works in publicly-funded schools in Ontario netted the fledgling CANCOPY collective (now Access Copyright) \$2 million.<sup>36</sup>

A central institution in these developments is the Copyright Board of Canada. It describes its own mandate as follows:

The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to supervise agreements between users

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35 Evidence for this is the fact that, on Saturday, October 11, 2003, in Ottawa, the International Association of Copyright Administrative Institutions (IACAI) was founded during a meeting at a conference hosted by the Copyright Board of Canada — and it was evident during that conference that Canada was a world leader in this area.

36 See Margaret Ann Wilkinson, “Conflicting values in coping with copyright” (1992) 49 *Canadian Library Journal* 251.

and licensing bodies and issues licences when the copyright owner cannot be located.<sup>37</sup>

The Supreme Court of Canada, particularly in the recent decision in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*,<sup>38</sup> has signaled its acceptance and approval of the role being played in Canada by the Copyright Board — and the Board itself is taking a leading role in organizing other similar administrative bodies worldwide.

The fact that Parliament, in the establishment and empowerment of the Board, and the Canadian courts, in endorsing it, appear to be providing support and encouragement to rightsholders through the establishment of an effective and efficient administrative apparatus is, however, only one aspect of these developments. The Board is a quasi-judicial tribunal with a clear vision of its responsibility to the public interest — a public interest that includes the rights of users as well as copyright holders:

The Board must consider the underlying technologies (such as the Internet, digital radio, satellite communications), the economic issues and the interests of owners and users in order to contribute, with fair and equitable decisions, to the continued growth of this component of Canada's knowledge industries.... The key objective of the Board is to set royalties which are fair and equitable to both copyright owners and users of copyright-protected works.<sup>39</sup>

The Supreme Court of Canada may have been prepared to accept and recognize that this administrative Board has an ongoing role with respect to protecting user interests under the copyright regime, in the context of the administration of the collective rights of rightsholders. But the Court has also signaled, in the *CCH v. Law Society of Upper Canada* decision, that there lies inherent within the notion of copyright itself another sphere of user rights which are *exceptions* to the rights of rightsholders — where licenses are not required and where uses are free to all at any time. This is

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37 <[www.cb-cda.gc.ca/aboutus/mandate-e.html](http://www.cb-cda.gc.ca/aboutus/mandate-e.html)>.

38 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] S.C.J. No. 44, [2004] 2 S.C.R. 45 [Tariff 22 cited to S.C.J.].

39 Copyright Board Canada, *Performance Report for the period ending 31 March 2003*, <[www.tbs-sct.gc.ca/rma/dpr/02-03/CB-CDA/CB-CDA03D-PR\\_e.asp?printable=True](http://www.tbs-sct.gc.ca/rma/dpr/02-03/CB-CDA/CB-CDA03D-PR_e.asp?printable=True)> at Section II: Departmental Context — Organization, Mandate and Strategic Outcomes.

an arena of user rights that the Court will delineate and which lies beyond the sphere of influence of the Copyright Board:

The availability of a licence is not relevant to deciding whether a dealing has been fair ... fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.<sup>40</sup>

## 2) The Position of Educational Institutions, Libraries, Archives, and Museums with Respect to Exceptions of General Application

### a) *CCH v. Law Society of Upper Canada*

This landmark 2004 decision directly involved the exceptions to the copyright holders' rights legislated in the *Copyright Act*. The decision marked the resolution of a long-standing dispute between a group of Canadian legal publishers (CCH Canadian Ltd., Thomson Canada, including Carswells, and Canada Law Book),<sup>41</sup> and the governing body for lawyers in the province of Ontario, the Law Society of Upper Canada. The case concerned the operation of the Great Library at Osgoode Hall in Toronto,<sup>42</sup> home of the Law Society and traditional seat of the province's courts. The Great Hall library has photocopy machines available for the use of patrons and also operates a custom photocopy service through which library staff copy and deliver (in person, by mail, or by fax) various materials from the collection

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40 *CCH v. Law Society of Upper Canada*, above note 22, at para.70.

41 In 1993, when this action was commenced, the Canadian legal publishers had not joined the English-language print collective in Canada. All the legal publishers involved in the action had become members of AccessCopyright by the time the case came before the Supreme Court. AccessCopyright was an intervener before the Court, as was the French language print collective, COPIBEC. The other interveners in the same interest were the Canadian Publishers' Council and the Association of Canadian Publishers. The other intervener was the Federation of Law Societies of Canada.

42 Under the direction of Janine Miller, Director of Libraries for the Law Society of Upper Canada.

which are requested by Law Society members (lawyers), the judiciary, and other researchers.

The case began in 1993. The legal publishers sought a declaration of their copyright in a sample of their publications, representative of the various types of publications they produced, and an injunction prohibiting the Law Society of Upper Canada from continuing the Library's activities. The Law Society not only filed a defence to the action, but also launched a counterclaim seeking a declaration that the Library's activities fell within the purview of the research element of "fair dealing" under the *Copyright Act*.<sup>43</sup>

The judgment of first instance, at the Federal Court Trial Division, found for the publishers, in part, and dismissed the Law Society's counterclaim.<sup>44</sup> That judgment held for the publishers only in respect of a selection of the various materials in which infringement had been alleged — and therefore virtually guaranteed appeals from both sides. And, indeed, both the publishers and the Law Society appealed.

The Federal Court of Appeal then found entirely for the publishers and dismissed the Law Society's cross-appeal.<sup>45</sup> Again, both sides appealed: the Law Society appealing the finding that the Society had infringed the legal publishers' copyrights and the legal publishers cross-appealing the finding that the infringement lay only in reproducing their copyrighted works. The legal publishers, on the cross-appeal, primarily sought additional relief for infringements of their copyrights by the Law Society through the Law Society's faxing of the legal publishers' copyrighted works to patrons and, as the legal publishers viewed the terms of the custom photocopy service, through the Law Society selling the copies.

The judgment of the nine-person, full panel Supreme Court of Canada was unanimous and was written by the Chief Justice. Despite the fact that the Court accepted the legal publishers' contention that they held copyright interests in all the works involved in the case, the Law Society prevailed entirely in the result.

As mentioned, this litigation was based upon facts presented in 1993, before the exceptions for "libraries, archives and museums" or "educational institutions" had been legislated and the Supreme Court held the later exceptions were not available to the Law Society of Upper Canada in

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43 *Copyright Act*, above note 2, s. 29.

44 *CCH et al. v. Law Society of Upper Canada*, [2002] 2 F.C. 451, 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.P.R. (2d) 139, 199 F.C.J. No. 1647.

45 *CCH v. Law Society of Upper Canada*, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, [2002] F.C.J. No. 690, 2002 FCA 187.

defending its Library's activities. However, the Supreme Court held that those exceptions were not necessary to give the Law Society a full defence for its activities: the traditional exception of fair dealing gave the Great Library protection from copyright claims in respect of its activities.

The key feature of the Chief Justice's reasons, for our purposes, is the unequivocal assertion of users' rights in copyright as balancing the copyright holder's rights:<sup>46</sup> "Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users."<sup>47</sup> And again, the Chief Justice referred to the "exceptions to copyright infringement, perhaps more properly understood as users' rights, ... set out in ss. 29 and 30 of the Act."<sup>48</sup> Specifically, the Chief Justice wrote:

Procedurally, a defendant is required to prove [to come within the fair dealing exception under the *Copyright Act*] that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.<sup>49</sup>

Another important aspect of the judgment which increases the extent of the user exceptions in copyright is the first clear statement that agency is permitted within the scope of the fair dealing exceptions. The Court

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46 Indeed, the Supreme Court of Canada began to champion user rights in the copyright environment even before the decision in *CCH v. Law Society of Upper Canada* when Justice Binnie wrote his judgment in *Théberge v. Galerie d'Art du Petit Champlain Inc.* 2002 SCC 34, <[www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, [2002] 2 S.C.R. 336, at paras. 31 & 32 respectively: [*Théberge* cited to LexUM].

The proper balance ... lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists ... as it would be self-defeating to under-compensate them ....

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.

47 *CCH v. Law Society of Upper Canada*, above note 22, at para. 11.

48 *Ibid.*, at para. 12.

49 *Ibid.*, at para. 48.

held that the Law Society was entitled to rely upon its general practice to establish fair dealing, rather than having to adduce evidence that every patron used the material provided for in a fair dealing manner.<sup>50</sup>

The language [of section 29] is general. “Dealing” connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only provide that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.<sup>51</sup>

When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process.<sup>52</sup>

The set of “fair dealing” exceptions in the *Copyright Act* provides:

Fair dealing for the purpose of research or private study does not infringe copyright.<sup>53</sup>

Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer’s performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.<sup>54</sup>

Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned

- (a) the source; and

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50 *Ibid.*, at para. 63.

51 *Ibid.*, at para. 63.

52 *Ibid.*, at para. 64.

53 *Copyright Act*, above note 2, s. 29.

54 *Ibid.*, s. 29.1.

- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.<sup>55</sup>

The Supreme Court stated, in this context, that “[i]t may be possible to deal fairly with the whole work ... for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision.”<sup>56</sup>

Further, the Court found that when staff of the Great Library, as part of their custom photocopy service, faxed works to patrons, “the fax transmissions were not communications to the public.”<sup>57</sup> The Supreme Court approved the reasoning of the trial judge that fax transmissions were not telecommunications within the rights of the copyright holder under section 3(1)(f) because they “emanated from a single point and were each intended to be received at a single point.”<sup>58</sup> On the other hand, the Supreme Court appeared to agree with the Court of Appeal that, if a series of faxes were sent between the same two points, that “might constitute an infringement of an owner’s right to communicate to the public.”<sup>59</sup> The Supreme Court also observed, in considering the criteria for the fair dealing exception, that “the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty percent of the requestors live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific source.”<sup>60</sup>

It would appear, then, that, at the very least, the Supreme Court of Canada’s view of the scope of the traditional exemptions from the rights of copyright holders under the *Copyright Act* has brought educational institutions, libraries, archives, and museums that are not included within the statutory schemes for special exemptions (basically, those operating in a for-profit context), some measure of parity with their sister institutions who have been legislated into those special exemptions. For example, the

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55 *Ibid.*, s. 29.2.

56 *CCH v. Law Society of Upper Canada*, above note 22, at para. 56.

57 *Ibid.*, at para. 7.

58 *Ibid.*, at para. 77, quoting the trial judgment (above note 44) at para. 167.

59 *CCH v. Law Society of Upper Canada*, above note 22, at para. 77.

60 *Ibid.*, at para. 69.

Supreme Court clearly stated that within the exception for fair dealing, “research is not limited to non-commercial or private contexts.”<sup>61</sup>

### b) “Tariff 22” Decision

Since the Supreme Court’s decision in *CCH v. Law Society of Upper Canada*, Justice Binnie, on behalf of the Supreme Court, Justice LeBel concurring, has continued the focus on defences to infringement in the subsequent “Tariff 22” case involving retransmission rights:

[the exception claimed] is not a loophole but an important element of the balance struck by the statutory copyright scheme. It finds its roots, perhaps, in the defence of innocent dissemination sometimes available to bookstores, libraries, news vendors, and the like who, generally speaking, have no actual knowledge of an alleged libel, are aware of no circumstances to put them on notice to suspect a libel, and committed no negligence in failing to find out about the libel.<sup>62</sup>

The Court expressly found that the exception to the rights of the copyright holder at bar<sup>63</sup> was not “an exemption from liability [which] should be read narrowly .... Under the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give “the fair and balanced reading that befits remedial legislation.”<sup>64</sup>

Specifically, the “Tariff 22 decision” arose from ongoing proceedings before the Copyright Board of Canada. SOCAN had applied to the Board for approval of a tariff (“Tariff 22”) to be applied to Internet Service Providers [ISPs] located in Canada. SOCAN took the position that, in the absence of such a royalty arrangement with SOCAN, which administers both Canadian and foreign-owned copyrights in music,<sup>65</sup> the ISPs were violating the music copyright holders’ rights “to communicate the work to the public by telecommunication”<sup>66</sup> and, either simultaneously or alternatively, were violating the music copyright holders’ rights to “authorize any such acts.”<sup>67</sup> The

61 *Ibid.*, at para. 51. The Court, in the same context and paragraph, stated that “‘Research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”

62 *Tariff 22*, above note 38, at para. 89, authorities omitted.

63 *Copyright Act*, above note 3, s. 2.4(1)(b).

64 *Tariff 22*, above note 38 at para. 88, quoting the unanimous decision of the Court itself in *CCH*, per McLachlin, C.J., above note 22, at para. 48.

65 The foreign copyright holders are represented by SOCAN through reciprocal arrangements with counterpart collecting societies in other countries.

66 A partial quotation from the *Copyright Act*, above note 2, s. 3(1)(f).

67 The concluding words of the *Copyright Act*, *ibid.*, s. 3(1).

ISPs, on the other hand, took the position that they could not be subject to any such tariff because their activities were excepted from the rights of copyright holders, in works in music as in any other work, by the wording of section 2.4(1)(b) of the *Copyright Act*.<sup>68</sup>

In response to this challenge, the Board took the unusual step, which has been subsequently endorsed by the appellate courts, of splitting its proceedings into two parts, “Phase I” being a hearing to determine the question of liability, after which the Board issued the reasons which form the subject matter of this case.<sup>69</sup> The Board issued its decision on Phase I at the end of October 1999. SOCAN applied to the Federal Court of Appeal for judicial review.<sup>70</sup> The respondents were various associations involved in the transmission of music, as well as individual broadcasters and telephone companies.<sup>71</sup> Eventually, the Federal Court of Appeal decided that the ISPs did indeed fall within the exemption for common carriers and were not able to be subject to the tariff, except, in the majority’s opinion,<sup>72</sup> in the instance where an ISP cached material on its own site. A number

68 *Ibid.*, s. 2.4(1):

For the purposes of communication to the public by telecommunication,  
 (b) a person whose only act in respect of the communication of a work or other subject matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

69 As Justice Evans of the Federal Court of Appeal, writing for himself and Justice Linden, explained, “Only those whose activities were found at the end of Phase I to infringe copyright would need to participate at Phase II, when the Board would determine which of them should be required to pay a royalty, on what basis the royalty should be calculated, and at what rate it should be set.” *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, et al.*, 2002 FCA 166, [2002] 4 F.C. 3, 215 D.L.R. (4th) 118, 290 N.R. 131, 19 C.P.R. (4th) 289, [2002] F.C.J. No. 691 at para. 23.

70 SOCAN’s position was supported by the intervener Canadian Recording Industry Association and Neighbouring Rights Collective of Canada.

71 The respondents were: the *Canadian Association of Internet Providers*, *Canadian Cable Television Association*, *AT&T Canada Long Distance Services Company*, *MCI Communications Corporation*, *Bell/ExpressVu*, *Canadian Association of Broadcasters*, *Telus Communications Inc.*, *Bell Canada*, the *Canadian Broadcasting Corporation*, the *Canadian Motion Picture Distributors Association*, the *Canadian Recording Industry Association*, *TimeWarner Inc.*, *Aliant Inc.*, *MTS Communications Inc.*, and *Saskatchewan Telecommunications* [emphasis indicates those who were also appellants to the Supreme Court of Canada].

72 Justice Sharlow dissented from the majority just on this one point, agreeing with the Board that those who cache also fall within the exception. See *Tariff 22*,

of the respondents before the Federal Court of Appeal appealed to the Supreme Court,<sup>73</sup> and were joined by interested interveners.<sup>74</sup> SOCAN responded.<sup>75</sup>

The Supreme Court found that the exemption in section 2.4(1)(b) for common carriers, from the copyright holders rights to control telecommunication in section 3(1)(f), was meant to distinguish between those who use telecommunications to supply or obtain content (who would not be eligible for the exemption from the rights of the copyright holder)<sup>76</sup> and those who facilitate electronic communications as intermediaries, who only provide “the means of communication necessary,”<sup>77</sup> who do benefit from the exemption.<sup>78</sup> The Court also found that the copyright holders’ right to control authorization of acts connected to the rights of the rightsholders listed in section 3 of the Act<sup>79</sup> was not infringed by the activities of ISPs. The Court held that knowledge of the possibility that the means of communication they controlled could be used for infringing purposes was not, in the absence of actual knowledge of infringing activity, enough to construe the intermediary ISPs as having authorized the infringing activity:

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above note 38, at para. 39 and also Justice Sharlow himself in the Federal Court of Appeal decision, above note 70, at para. 195–97.

73 Although not all — only those listed in bold in note 71, above.

74 **The Internet Commerce Coalition, the European Telecommunications Network Operators’ Association, the European Internet Service Provider’s Association, the Australian Internet Industry Association, the Telecom Services Association, and the US Internet Industry Association.**

75 **Joined by the Canadian Recording Industry Association (appearing here as an intervener rather than, as before the Federal Court of Appeal, as a respondent) and the International Federation of Phonogram Industry.**

76 *Tariff 22*, above note 38, at para. 102.

77 *Copyright Act*, above note 2, s. 2.4(1)(b) uses the phrase “the means of telecommunication necessary.”

78 **The Court agreed both with the Board and with Justice Sharlow, in the minority in the Federal Court of Appeal, and included those ISPs who cache as among those benefiting from the exemption because “necessary” includes those measures “reasonably useful and proper to achieve the benefits of enhanced economy and efficiency.” (quoting from *Tariff 22*, per Binnie, J., at para. 92). The full discussion of the Court’s reasoning specifically with respect to caching is at paras. 113–19. See above note 38.**

79 **The exemption from the rights of copyright holders stated in the *Copyright Act*, above note 2, s. 2.4(1)(b) does not include exemption from the right to control authorization set out in s. 3(1). Thus the ISPs could have been found to be violating the authorization rights even though s. 2.4(1)(b) was found to give the ISPs a defence against the claim that they were infringing the telecommunication rights of the rightsholders.**

... when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material.<sup>80</sup>

In coming to this conclusion, the Court was cognizant of the impossibility of monitoring the vast content involved in Internet transmission but did concede “that ‘authorization’ could be inferred in a proper case but all would depend upon the facts.”<sup>81</sup>

### 3) Current Statutory Provisions for Educational Exceptions

The recent Statement claims that the exceptions set out in the *Copyright Act* currently “permit the performance or display, within the classroom, of certain copyright material as part of a lecture.”

It is certainly the case that section 29.4(1) of the Act provides

- (1) It is not an infringement of copyright for an educational institution or a person acting under its authority
  - (a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or
  - (b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training *on the premises of an educational institution* [emphasis added].

However, in addition to the requirement on which the Government Statement focuses, that these activities take place “on the premises of an educational institution,” there are three important caveats to this exception. First, it will be recalled that “educational institution” is a defined term in the Act and therefore there are institutions involved in education in Canada which cannot qualify for these exemptions because they fall

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80 *Tariff 22*, above note 39, at para.123.

81 *Ibid.*, at para. 128. As a result of the appeal, the Supreme Court of Canada remitted the matter back to the Board, ordering it to proceed to Phase II of its hearing in accordance with the reasons of the Court. Because of the decision of the Supreme Court, however, a very narrow scope for Phase II remained before the Copyright Board.

outside the Act's definition. Second, the statute states that "the exemption from copyright infringement provided by paragraph (1) (b) ... does not apply [except in the case of manual reproduction] if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose referred to in that paragraph ...."<sup>82</sup>

Third, the exemption is not available if the "action referred to" is "carried out with motive of gain."<sup>83</sup>

In any event, the Statement also says the current exemptions "permit the *performance* ..., within the classroom, of certain copyright material as part of a lecture." [emphasis added].

Certainly section 29.5 of the Act currently provides

It is not an infringement of copyright for an educational institution [again, as defined in the Act] or a person acting under its authority to do the following acts ...

- a. the live performance in public, primarily by students of the educational institution, of a work; [and]
- b. the performance in public of a sound recording or of a work or performers' performance that is embodied in a sound recording; and
- c. the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication

However, the same section also contains limitations on the exercise of this exception:<sup>84</sup> the activities are only exempted if

- they are done *on the premises* [[emphasis added] of an educational institution for educational or training purposes and
- [they are done] not for profit, [and]
- [they are done] before an audience consisting primarily of
  - students of the educational institution, [or]

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82 *Copyright Act*, above note 2, s. 29.4(3).

83 *Copyright Act*, above note 2, s. 29.3(1). Note that s. 29.3(2) provides that "[a]n educational institution ... does not have motive of gain where it or the person acting under its authority, does anything referred to in s. 29.4 ... and recovers no more than the costs, including overhead costs, associated with doing that act."

84 As well as two of the limitations mentioned above in connection with the exception in s. 29.4: again, this exception in s. 29.5 is limited to statutorily defined "educational institutions" and the exception does not apply where the institution is engaged in the activities for "motive of gain," although, again, the exception would apply if the institution is simply engaged in cost recovery (s.29.3).

- instructors acting under the authority of the educational institution or
- any person who is directly responsible for setting a curriculum for the educational institution<sup>85</sup>

Moreover, if the communication to the public by telecommunication is being received by the educational institution by unlawful means, then its performance in public by the educational institution is not excepted from copyright infringement.<sup>86</sup>

While section 29.5(c) permits performance of contemporaneous or synchronous telecommunicated works and subject matter, certain further asynchronous performances in educational institutions are also permitted — but only of news and news commentary:

Subject to subsection (2)<sup>87</sup> and section 29.9,<sup>88</sup> it is not an infringement of copyright for an educational institution or a person acting under its authority to

- (a) make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries, for the purposes of performing the copy for the students of the educational institution for educational and training purposes; and
- (b) perform the copy in public, at any time or times within one year after the making of a copy under paragraph (a), before an audience consisting primarily of students of the educational institu-

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85 These provisions of s. 29.5 have been laid out for ease of reference here and do not have the same format in the statute, although the wording is identical.

86 *Copyright Act*, above note 2, s. 29.8. This limitation on the exception also applies to the exceptions for news and news summary programs and other broadcasts which are about to be discussed.

87 This is a limited term exception. Section 29.6(2) of the *Copyright Act*, above note 2, goes on to provide:

The educational institution must

- on the expiration of one year after making a copy under paragraph (1)(a), [either] pay the royalties and comply with any terms and conditions fixed under this Act for the making of the copy or destroy the copy; and
- where it has paid the royalties referred to in paragraph (a), pay the royalties and comply with any terms and conditions fixed under this Act for any performance in public of the copy after the expiration of that year.

88 Section 29.9 of the *Copyright Act*, above note 2, details record-keeping requirements with which the educational institution must comply if it makes a copy of a news program or news commentary program and performs it.

tion on its premises for educational or training purposes [emphasis added].<sup>89</sup>

Another exception provides that broadcasts of other subject matter may also be performed, but this area of exception is available only once appropriate royalties have been paid:

It is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy [of a broadcast other than news or news commentary<sup>90</sup>] in public for educational training purposes *on the premises of the educational institution* before an audience consisting primarily of students of the educational institution *if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public* [emphasis added].<sup>91</sup>

#### 4) Current Provisions for “Libraries, Archives, and Museums”

The Statement alludes to a provision of the *Copyright Act* that “currently permits, as part of an inter-library loan, the reproduction of certain copyright material (notably academic articles), provided, among other things, that the requesting patron receives only a paper copy.” This is a reference to section 30.2(5) of the Act which provides:

A [LAM] or a person acting under the authority of a [LAM] may do, on behalf of a person who is a patron of another [LAM], anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons,

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89 *Copyright Act*, above note 2, s. 29.6.

90 Section 29.7 (1) of the *Copyright Act*, above note 2, provides

... it is not an infringement of copyright for an educational institution or a person acting under its authority to make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and keep the copy for up to thirty days to decide whether to perform the copy for educational and training purposes.

Section 29.7(2) provides that unless either the copy is destroyed after thirty days, or royalties are paid, the institution is infringing — and, again, s. 29.8 applies, making the exception invalid if the communication was originally received by unlawful means.

91 *Copyright Act*, above note 2, s. 29.7(3).

*but the copy given to the patron must not be in digital form* [emphasis added].<sup>92</sup>

And the exceptions referred to are as follows:

30.2(1) It is not an infringement of copyright for a [LAM] or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 [fair dealing for the purposes of research or private study] or 29.1 [fair dealing for criticism].

(2) It is not an infringement of copyright for a [LAM] or a person acting under the authority of a [LAM] to make, by reprographic reproduction, for any person requesting to use the copy for research or private study, a copy of the work that is, or that is contained in, an article published in

(a) a scholarly, scientific or technical periodical; or

(b) a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made.

Section 30.2 goes on to provide further restrictions on the exceptions from the rights of the copyright holders provided in subsection (2). One applies to the whole of subsection (2):

A [LAM] may make a copy under subsection (2) only on the condition that

(a) the person for whom the copy will be made has satisfied the [LAM] that the person will not use the copy for a purpose other than research and private study; and

(b) the person is provided with a single copy of the work.

Another applies only to the copying of newspapers and periodicals:

Paragraph (2)(b) does not apply in respect of a work of fiction or poetry or a dramatic or musical work.<sup>93</sup>

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92 The statute goes further and instructs the LAMs that “Where an intermediate copy is made in order to copy a work referred to in subsection (5), once the copy is given to the patron, the intermediate copy must be destroyed. (*Copyright Act*, above note 2, s. 30.2 (5.1)).

93 *Copyright Act*, above note 2, s. 30.2(3).

And finally, the 1997 amendments added the further caveat on these exceptions for LAMs that

The Governor in Council may, for the purposes of this section, make regulations

- (a) defining “newspaper” and “periodical”;
- (b) defining scholarly, scientific and technical periodicals;
- (c) prescribing the information to be recorded about any action taken under subsection (1) or (5) and the manner and form in which the information is to be kept; and
- (d) prescribing the manner and form in which the conditions set out in subsection (4) are to be met.

And, indeed, the Government did produce regulations, which, *inter alia*, defined “newspaper or periodical” as “a newspaper or periodical, other than a scholarly, scientific or technical periodical, that was published more than one year before the copy is made.”<sup>94</sup>

All of this foregoing legislating for LAMs, however, would appear to have been rendered redundant because of the Supreme Court’s clarification of the “fair dealing” exception to the rights of the copyright holders of general application. The Court stated clearly that “a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the *Copyright Act* to prove that it qualified for the library exemption.”<sup>95</sup> Moreover, the Court said that “research, private study, criticism, review or news reporting ... these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”<sup>96</sup>

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94 *Exception for Educational Institutions, Libraries, Archives and Museums Regulations*, SOR/99-325, <<http://laws.justice.gc.ca/en/C-42/SOR-99-325/>>, s. 2.

95 *CCH v. Law Society of Upper Canada*, above note 22, at para. 49.

96 *Ibid.*, at para. 54.

## E. ARE THE PROPOSED AMENDMENTS FOR EDUCATION AND INTERLIBRARY LOANS NECESSARY AND APPROPRIATE?

### 1) The Question of Reasonable and Effective Safeguards

One question raised by the proposals in the Statement, now expressed in Bill C-60, is whether educational institutions and libraries should be required to put in place or adopt “reasonable” or “effective” safeguards as a condition of benefiting from statutory exceptions.

One of the elements provided for in the regulations made under the existing LAMs exceptions to the *Copyright Act*<sup>97</sup> is the following precisely worded and laid out notice to be placed at photocopiers:

WARNING!

Works protected by copyright may be copied on this photocopier only if authorized by

- (a) the *Copyright Act* for the purpose of fair dealing or under specific exemptions set out in that Act;
- (b) the copyright owner; or
- (c) a license agreement between this institution and a collective society or a tariff, if any.

For details of authorized copying, please consult the license agreement of applicable tariff, if any, and other relevant information available from a staff member.

The *Copyright Act* provides for civil and criminal remedies for infringement of copyright.

The Great Library of the Law Society of Upper Canada had traditionally posted its own notice:

The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines.<sup>98</sup>

97 This notice is specifically worded and laid out in s. 8 of the *Exception for Educational Institutions, Libraries, Archives and Museums Regulations*, SOR/99-325.

98 *CCH v. Law Society of Upper Canada*, above note 22, at para. 39.

Despite argument over the effect of the notice, the Supreme Court found that this notice was sufficient to overcome any argument that the Great Library implicitly sanctioned, approved or countenanced copyright infringement.<sup>99</sup>

One wonders, then, why there would ever be any need to post the more elaborate signs provided for in the regulations made under the LAMs exceptions to the *Copyright Act*.<sup>100</sup>

Certainly, the Supreme Court of Canada has specifically approved the simpler policy notices in use by the Great Library of the Law Society of Upper Canada since 1996.<sup>101</sup>

Moreover, in finding ISPs not liable for infringing the copyright interest of authorizing activities of their end users in the “Tariff 22” case, the Supreme Court has signalled that having knowledge of the possibility that end users may infringe copyright will not, absent specific knowledge of end users’ infringing activity, place the intermediary in the position of authorizing any infringing activity of end users. The Court was concerned with the impossibility of monitoring the activities of end users — a situation at least as difficult in the library or educational institution environment, given the relative paucity of resources for monitoring the behaviour of students and patrons that these organizations have (in contrast to the technology at the disposal of commercial ISPs, for example).

These factors lead to the conclusion that Government attempts to require LAMs to put in place “effective safeguards ... to prevent the misuse of the material or of the inter-library loan service,” beyond the type of notice used by the Great Library and approved by the Supreme Court of Canada, are unnecessary, impractical, and probably unenforceable.

The Statement also anticipated obligations being placed on educational institutions to “adopt reasonable safeguards to prevent misuse of the copyright material” and, indeed, in telecommunicating a lesson, Bill C-60 provides that the institution must take any measure prescribed by regulation<sup>102</sup> and “must take measures that can reasonably be expected to limit the communication by telecommunication of the lesson to [students and instructors] and prevent any use of it by them after the course of which the

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99 *CCH v. Law Society of Upper Canada*, above note 22, at para. 44.

100 Set out above and specifically worded and laid out in s. 8 of the *Exception for Educational Institutions, Libraries, Archives and Museums Regulations*, SOR/99-325.

101 The contents of these longer and larger notices are set out at *CCH v. Law Society of Upper Canada*, above note 22, at para. 61.

102 Bill C-60, s. 18, proposing s. 30.01(4)(c).

lesson forms a part has ended as well as any reproduction or communication of it by them.”<sup>103</sup> While it may be a reasonable further safeguard proposed in Bill C-60 that an educational institution “must not communicate the lesson by telecommunication ... after the course of which the lesson forms a part has ended,”<sup>104</sup> it appears to show a complete lack of understanding of the process of course development from year to year to insist that the institution, professor, or teacher “must destroy any fixation of the lesson within 30 days after the course of which it form a part has ended.”<sup>105</sup> And, again, given the approach taken by the Supreme Court, these provisions are at best impractical and unnecessary, and at worst unenforceable.

## 2) The Question of Interlibrary Loans

Bill C-60 confirms the 1997 provisions creating exemption for certain LAM activities in the nature of fair dealing<sup>106</sup> but adds<sup>107</sup> that they

... do not apply with respect to the making of a copy in digital form of printed matter... [for ILL between LAMs] unless the [LAM] providing the copy takes measures that can reasonably be expected to prevent the making of any reproduction of the copy other than a single printing, its communication, or its use for a period of more than seven days.<sup>108</sup>

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103 Bill C-60, s. 18, proposing s. 30.01(4)(d). The Bill also imposes an apparently arduous archiving responsibility upon institutions: that records of any lessons taped, recorded, or otherwise “fixed” must be kept for three years (Bill C-60, s. 18, proposing s. 30.01(4)(e)). Given the rapid turnover of technological systems in educational institutions, the decentralization of responsibilities for lesson preparation, and scarce resources for technological support of teaching, one wonders whether such an onerous record-keeping obligation is reasonable.

104 Bill C-60, s. 18, proposing s. 30.01(4)(a).

105 Bill C-60, s. 18, proposing s. 30.01(4)(b).

106 See the discussion above in the section on Current Provisions for “Libraries, Archives and Museums.”

107 The 2004 Committee’s approach to interlibrary loans involved expansion of the collective licensing regime (typical of the Committee’s whole approach), by introducing an extended compulsory licensing regime “where appropriate” (2004 *Interim Report*, above note 27, at Recommendation 7) and otherwise encouraging “the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study.” (Recommendation 7.)

108 Bill C-60, above note 4, s. 19, proposing to replace the current s. 30.2(5) of the *Copyright Act*, above note 2, with a new subsection.

As drafted, Bill C-60's section 30.2(5) appears to have "thrown the baby out with the bathwater" in that the exception for interlibrary loan copies provided to the patron in other than in electronic form (for example, by fax) seems to have been lost. Moreover, it is difficult to discern which LAM would be considered the LAM "providing the copy" and therefore having the obligations about reasonable measures: does the Bill intend the institution supplying the information to the requesting institution to bear that responsibility for reasonable measures? Or is it the receiving institution whose patron made the request that is to bear that responsibility? The current drafting of the Bill is not clear.<sup>109</sup> Moreover, the notion that a LAM can prevent a patron from making use of a document "for a period of more than seven days" seems particularly ill-conceived and should be removed from the Bill. Copyright holders have not traditionally had the right to prevent particular uses of works, only to control certain actions taken with respect to works; such as copying, publishing, and so on. As the Supreme Court of Canada has so recently pointed out (discussed above), it is users who are guaranteed certain uses of works under the *Copyright Act*. Limiting patrons to seven days use seems contrary to the spirit of the *Copyright Act*. In addition, of course, it would seem virtually impossible to police. Finally, the proposed provision does not permit interlibrary loan of materials held by the originating library in electronic form.

Whatever the merits of its drafting, the proposed exception seems redundant in light of the reasoning of the Supreme Court of Canada in the *CCH v. Law Society of Upper Canada* case. That case specifically addresses the question of the delivery of materials to patrons using the telecommunication process of the fax. The issue of delivery of materials to patrons using the digital network process of the Internet would seem to call forth exactly the same reasoning. As in the case of fax delivery, Internet delivery of interlibrary loan materials would be "emanating from a single point and each intended to be received at a single point."<sup>110</sup> The librarian engaged in the delivery of the electronic version to the patron would be relying upon the patron's right to private study and research, just as in the case at bar in *CCH v. Law Society of Upper Canada*, whatever the special provisions added since 1997 for certain libraries might provide. Thus it would seem

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109 Whichever institution is to bear the responsibility for reasonable measures, the Bill will need amendment to clarify what is meant by being expected to prevent "its communication."

110 *CCH v. Law Society of Upper Canada*, above note 22 at para. 77, quoted earlier as well.

that the amendments proposed in Bill C-60 dealing with interlibrary loans are very probably unnecessary.

### 3) The Question of Performance or Display of Lectures to Remote Sites

Following the direction indicated by the Statement, Bill C-60 creates a regime under which educational institutions are to be exempted from copyright liability when engaged in distance learning activities using telecommunication.<sup>111</sup> This is particularly important given that Bill C-60 proposes to make it absolutely clear that

a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication.<sup>112</sup>

The proposed scheme for educational institutions centres around the concept of the “lesson,” a new term in the *Copyright Act*, which is not defined in the Bill, other than in tautological terms.<sup>113</sup> Inherent in the defini-

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111 Bill C-60, above note 4, s. 18 (adding a new s. 30.01 after the existing s. 30 in the *Copyright Act*, above note 2).

112 Bill C-60, above note 4, s. 2, proposing to replace the existing s. 2.4(1)(a) of the *Copyright Act* (above note 2) with the s. 2.4(1)(a) quoted here. It had appeared that the exception to “enable remote students to view the lecture using network technology, either live or at a more convenient time,” posited by the Statement (above note 3) might have been intended to be an addition to s. 29.5, through which Parliament has created an exception to the copyright holder’s right of reproduction (*Copyright Act*, above note 2, s. 3(1)(a)). That exception, by virtue of this amendment, would necessarily be an exception to the rightsholder’s right to communicate the work to the public by telecommunication (*Copyright Act*, above note 2, s. 3(1)(f)).

113 Bill C-60, above note 4, s. 18 would create a new s. 30.01(1) in the *Copyright Act* (above note 2) providing, in part, “In this section, ‘lesson’ means any lesson, test or examination...” Although the definition refers to lessons “on the premises,” the section in which the definition is to be operative, s. 30.01, revolves around “communication to the public by telecommunication.” It seems odd that this concept of “lesson” is not carried forward into the offline teaching environment through amendment to the older s. 29 amendments discussed above. It is interesting that Bill C-60 carries forward the signal in the Statement (above note 3) that these new amendments, which permit an educational institution to enlarge the classroom by creating a virtual classroom through employing network technology and to create asynchronous delivery of a lecture, apply only so long as network technology is used. The Statement spoke of the proposed

tion of “lesson” is the concept that in it “a work or other subject-matter is copied, reproduced, translated, performed in public or otherwise used on the premises of an educational institution or communicated by telecommunication to the public situated on those premises.”<sup>114</sup> Thus a distance class is to emanate from the educational institution, not from the home office of a teacher or professor, apparently. But, even more confusingly, despite this definition of “lesson,” it will be an infringement of copyright to communicate a lesson by telecommunication (or fix such a lesson or otherwise perform any act in connection with such a lesson)<sup>115</sup> if the “lesson” includes “a work or other subject-matter whose use in the lesson constitute an infringement of copyright or for whose use in the lesson the consent of the copyright owner is required.”<sup>116</sup> So, is Bill C-60 creating any exception for educational institutions in this regard at all by introducing the proposed section 30.01?

Moreover, rather than generously extending protection from liability to *students*, Bill C-60 seems to actually target students, in that a student would appear to be a “person” particularly having the potential to be liable for secondary infringement with respect to lessons as now specifically set out by the Bill:<sup>117</sup>

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amendment being designed “to enable remote students to view the lecture using network technology, either live [that is, synchronous with the delivery of the lecture on the premises of the institution] or at a more convenient time [i.e., asynchronously].” Asynchronous delivery of a lecture does not seem to be permitted if the lecture is fixed but not delivered via telecommunication but rather via other technology. As quoted above, the location in Bill C-60 of the notion of accessing a work “at a time individually chosen,” that is asynchronously, occurs only in the definition of communication to the public by telecommunication in the proposed s. 2.4(1)(a).

114 Bill C-60, above note 4, s. 18 proposing s. 30.01(1).

115 The heart of the proposed s. 30.01 would otherwise appear to be the exception from infringement provided by s. 30.01(2) which provides :

Subject to subsections (3) and (4), it is not an infringement of copyright for an educational institution or a person acting under its authority

(a) to communicate a lesson to the public by telecommunication, if that public consists only of its students enrolled in a course of which the lesson forms a part and instructors acting under the authority of the educational institution;

(b) to make a fixation of the lesson...

(c) to perform any other act that is necessary [for (a) or (b)].

116 Bill C-60, above note 4, s. 18 proposing s. 30.01(3).

117 *Ibid.*, s. 15, proposing an amendment to s. 27 of the *Copyright Act* (above note 2) by adding subsection (2.2), quoted here.

It is an infringement of copyright for any person to do any of the following acts with respect to anything that the person knows or ought to know is a lesson ... or a fixation of one:

- (a) to sell it or to rent it out;
- (b) to distribute it to such an extent as to prejudicially affect the owner of copyright in the work or other subject-matter that is included in the lesson;
- (c) by way of trade, to distribute it, expose or offer it for sale or rental or exhibit it in public;
- (d) to possess it for the purpose of doing anything referred to in any of paragraphs (a) to (c);
- (e) to circumvent any measure taken in conformity with paragraph 30.01(4)(d)<sup>118</sup>; or
- (f) to communicate it by telecommunications to any person other than a person referred to in paragraph 30.01(2)(a).<sup>119</sup>

The approach dictated by the educational exceptions for the electronic environment in Bill C-60 seems redolent of an old-style pedagogy — one in which the instructor packages knowledge and delivers it, top-down, to waiting students. A progressive, participative educational process, in which students bring resources which they have located into the class, sharing them with other students and with the instructor, does not seem to have a place in the vision of education shaping Bill C-60.<sup>120</sup> And, indeed, the notion of the “lesson” does not seem to add a usefully discriminating concept in the context of copyright.

Moreover, again, as in the case of interlibrary loans, given the approach of the Supreme Court of Canada to the ambit of fair dealing in Canada, the role of intermediaries, and the concept of authorization under the statute, the amendments contemplated by the Statement and proposed in Bill C-

118 The “reasonable measures” discussed above, which educational institutions will be required to take to limit communication of lessons to students and instructors and prevent use of lessons after the course has ended.

119 That is, as discussed above, students in the course and instructors in the institution.

120 Unless a student can be interpreted under this new regime as a person acting under the authority of an educational institution, the students have none of the exceptions to infringement provided under the new s. 30.01. If it is intended that students are to be interpreted as persons acting under the authority of the educational institution within this section, it would be better to be explicit since, with respect to other aspects of the law, students are not considered to be part of their educational institutions.

60 dealing with performance or display of lectures to students at remote sites would seem to be very probably unnecessary.<sup>121</sup> It does not seem an unreasonable extension of the principles and reasoning announced by the Supreme Court in the interpretation of the existing fair dealing provisions to paraphrase from the judgment in *CCH v. Law Society of Upper Canada*, replacing research with private study, and focusing on the transmission rather than the reproduction, as follows:

When the [educational institution] makes [performances or transmissions of lectures containing the copyrighted material for students], they do so for the purposes of [private study]. Although the [performances or transmissions of the lectures] are not [private study] in and of themselves, they are necessary conditions of [private study] and thus part of the [private study] process.<sup>122</sup>

Again, paralleling the observations of the Supreme Court about patrons of the custom photocopy delivery service at the Great Library of the Law Society of Upper Canada, it surely can be observed equally that

patrons of [interlibrary loan services and students] cannot reasonably be expected to always [collect their interlibrary loan materials or attend classes, respectively] on-site [at their library or educational institution] ... it would be burdensome to expect them to travel to the city [or library, campus, or institution] each time they wanted to [retrieve a particular interlibrary loan document ordered or to attend a given class]....<sup>123</sup>

Moreover, the Supreme Court took its position about what was unreasonable with respect to the facts involved in the transmission of information

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- 121 Again, as discussed above, fair dealing has been found to encompass situations where transmissions “emanated from a single point and were each intended to be received at a single point ...”— which is the case with distance learning.
- 122 It will be recalled from above that the actual text of para. 64 of *CCH v. Law Society of Upper Canada* (above note 22) reads: “When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process.”
- 123 It will be recalled from above that the actual text of para. 69 of *CCH v. Law Society of Upper Canada* (*ibid.*) reads: “patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site ... it would be burdensome to expect them to travel to the city each time they wanted to track down a specific source.”

from the Great Library to its patrons despite the fact that only 20 percent of the patrons of the service were in fact located outside the city,<sup>124</sup> whereas, in the case of interlibrary loan and remote learning in Canada, the proportion of inter-city transfers of information is arguably much higher.

#### 4) The Question of Electronic Provision of Material to Students

Students are provided with one protection in the Bill, in the area of telecommunication of works, but only in respect of situations in which the educational institution involved has an agreement with a collective society (the proposed section 30.02) and, curiously, not in connection with telecommunication of lessons under the proposed section 30.01 (where, as quoted above, reproduction of the lesson must be prevented). The protection provided for students is that

The owner of copyright in a work may not recover any damages against a student for a single printing of a reproduction in digital form of the work that was communicated to the student by telecommunication if, at the time of the printing, it was reasonable for the student to believe that the reproduction had been communicated to him or her [legally by an educational institution that has an agreement with a collective society].<sup>125</sup>

The provision in the Statement relating to the liability of educational institutions for the electronic delivery to students of materials appeared ambiguous. It seemed that the intention was, in effect, that the statute would automatically extend electronic rights to an institution when it has a reprography agreement in place. It was difficult to understand what institutions would purchase an additional license for electronic rights under these conditions, which seemed disadvantageous to copyright holders. The instantiation of these provisions in Bill C-60, on the other hand, appears, in fact, to swing the pendulum quite the other way.<sup>126</sup> Under the approach taken by the Bill, if a collective society makes a license for electronic rights in works available, an educational institution cannot avail itself of any

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124 *CCH v. Law Society of Upper Canada*, above note 22, at para. 69.

125 Bill C-60, above note 4, s. 18, creating a new s. 30.02(4). The proposed protection for students does not extend to protection from injunctive relief sought by copyright holders.

126 *Ibid.*, s. 18, proposing s. 30.02.

of the exceptions provided under statute in the proposed section 30.02, whether or not the institution enters into the proffered license.<sup>127</sup>

To situate the approaches in the Statement and Bill C-60 in context, it must be realized that the “heart and soul” of the existing reprography licenses is the indemnity clause. A typical example of such a clause is contained in the Agreement between AccessCopyright and the University of Western Ontario:

CANCOPY shall indemnify and save the Licensee harmless from any costs, expenses and damages (including punitive damages) relating to any Claim against the Licensee whatsoever and howsoever arising from the exercise of rights under this Agreement....

The rights given are related to “Published Works” which are defined in the contract to be all publications not listed on the “Exclusions List” (and thus a more extensive inclusion than just the works in the “Repertoire” which is defined in the agreement as being those works to which CANCOPY has the Canadian rights).

There is great value in this indemnity clause in the reprographics context for the participating “Licensee” institutions because, while the Canadian collectives represent a high proportion of domestic rightsholders, they cannot represent so high a proportion of foreign rightsholders because most rightsholders in other jurisdictions are far less collectivized than are Canadian rightsholders. Since the copyright in material used in Canada is frequently foreign-owned, arguably users buy licenses from the Canadian collectives mostly to benefit from the indemnification from suits brought against them by those not party to the collective which the license makes available.

AccessCopyright, Canada’s largest print collective (representing English language works, and, through a reciprocal agreement with COPIBEC, also representing Canada’s French repertoire), has been working diligently to acquire the rights to administer digital rights for the rightsholders now represented by it in the arena of reprography. However, as is evidenced by the message on its website, AccessCopyright has not yet been prepared to

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<sup>127</sup> *Ibid.*, s. 18, proposing s. 30.02(7): “Subsections (1) to (6) do not apply in respect of a work if the educational institution can obtain from a collective society a license authorizing the acts permitted under paragraphs (1)(a) and (b) with respect to the repertoire of works of the society that includes the work in question ....”

issue blanket licenses with respect to digital rights.<sup>128</sup> Although the ability to offer such licenses remains a goal, such licenses have not progressed beyond drafts and are not available to users.<sup>129</sup> Those wishing to acquire digital rights from AccessCopyright must do so on a transactional basis and only for those works for which AccessCopyright has succeeded in acquiring control of the digital rights.

One may speculate that the business decision for AccessCopyright and other Canadian collectives contemplating offering blanket licenses in the electronic environment is the potential cost of including the indemnity clause which the purchasers of the reprography licenses have come to expect. If the collectives do not represent, with respect to electronic rights, what they consider to be an acceptable number of copyright holders, presumably on a worldwide basis, the indemnity clause expected by potential purchasing institutions is going to represent too much risk for the prices those Canadian user institutions are going to be willing to pay.

As well, in considering the proposed amendments respecting electronic delivery of materials to students, it would seem that the Supreme Court's vision of fair dealing already would not encompass the wholesale distribution of copyrighted works to users, electronically or otherwise: the Court specifically placed the caveat on the faxing of works that if a series of faxes were to be sent between the same two points, that "might constitute an infringement of an owner's right to communicate to the public." Similarly, it would seem to follow that a whole course pack, which would have required licenses (or the protection of a blanket license with AccessCopyright) if reproduced in paper form, would not be able to be posted to an intranet or Internet site without either license or other permissions, under the guise of fair dealing.

With the *Robertson v. Thomson* case, discussed above, still before the Supreme Court of Canada, it seems too early to bring legislative change to this area. Moreover — assuming that the Supreme Court of Canada main-

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128 "AccessCopyright does, however, offer digital licences on a transactional basis, to cover some digital uses of works in its repertoire. This may include scanning (taking a print work and digitizing it), importing a work from a digital form to a print form and taking a digital work and using it in a different digital format. To determine whether the work you wish to license is available for these various digital uses, go to the Rights Management System (RMS), (AccessCopyright <[www.accesscopyright.ca/licenses.asp?a=10](http://www.accesscopyright.ca/licenses.asp?a=10)>.)

129 The goal has been articulated by Cancopy representatives for several years. That such blanket licenses have not yet been made available was confirmed by telephone communication with AccessCopyright as recently as June, 2005.

tains the position taken by the courts below, that the electronic reproduction rights are separate from other rights — if through the proposed amendments, the Canadian government effectively merges the value of the electronic rights in works with the value of the reproduction rights, it would certainly seem to affect the rights of foreign rightsholders in a way that would create the likelihood of a challenge under *NAFTA* or *TRIPS*. Even considering only the position of domestic rights holders, it seems premature to provide for rights such as those contained in the proposed section 30.02 in the electronic environment when there is no parallel provision proposed for the offline reprographic world. Again, such an inconsistency would seem difficult to defend.

### 5) Are “Educational and Research Access Issues” the Same as Issues about the “Educational Use of Publicly Available Internet Material”?

In indicating that the Government is declining to initiate specific legislative reform in the area of the educational use of Internet material, the Statement says that “[e]ducators seek an exemption from copyright liability for use for educational purposes of Internet material which is “publicly available.” The Statement defines “publicly available” material as being “generally understood to be material in respect of which the rights holder does not seek compensation for use.”<sup>130</sup> The Statement goes on:

However, there is disagreement as to what material on the Internet is to be considered “publicly available” and which uses are to be permitted. Rights holders also want to encourage use of the Internet in an educational context, but to do so through licensing approaches.

“The challenge” declares the Statement, in this context of the Internet as a resource for students and teachers, “is how to ensure a copyright framework that will facilitate Internet use in the classroom in a manner that will not unreasonably impair the rights of copyright owners.” This challenge is

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130 This is a less elaborate definition than that proposed in the 2004 *Interim Report*, above note 27, Recommendation 5:

material that is available on public Internet sites (sites that do not require subscriptions or passwords and for which there is no associated fee or technological protection measures which restrict access or use) and is accompanied by notice from the copyright owner explicitly consenting that the material can be used without prior payment or permission.

so great and the issue so “complex and contentious” that the Government “believes it requires further public input and consideration”<sup>131</sup> whereas issues surrounding the use of “network technologies such as the Internet to deliver classroom instruction and material to students remotely” and electronic inter-library loan are presumably less challenging, and statutory solutions have been intimated in the Statement.<sup>132</sup>

First, given the definition of “publicly available” which is put forward by the Government in the Statement, it is puzzling why the Government would worry about contemplating legislative reform with respect to such material. If the definition of “publicly available” is that permission has been given by the rightsholder for the proposed use, there is no need for law reform: the rightsholder has exercised her right in favour of giving public access.

Second, the Government is prepared to allow works in copyright to be copied from any source, which could apparently include works accessed from the Internet, used in a lecture by means of a hand drawing or an overhead projector or similar device (which it can be argued would include a data projector displaying works retrieved online) and then disseminated to remote students via technology — which the Statement endorses as a direction in which it hopes to move. But from the perspective of the functional use of information in educational institutions, it is difficult to distinguish this conceptually from downloading, reproducing, and transmitting material “to students and teachers for the purposes of assignments, lessons and research,” which the Government reports is too complex and contentious to address.

While the Government had expressed uncertainty in the Statement about whether the downloading, reproducing, and transmitting of Internet material by students and teachers for the purposes of assignments, lessons, and research was a permitted use, whatever the eventual decision of the Supreme Court in *Robertson v. Thomson*, it would seem that, rather than being so uncertain as the Government articulates, teachers and students have rights in this area. Teachers already have the right to download and reproduce material for their own needs in undertaking pedagogical and background research, as an element of fair dealing. Similarly, stu-

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131 The 2004 *Interim Report*, above note 27, called for extended collective licensing in this context: Recommendation 4. The Committee did, however, state that “Such a licensing regime must recognize that the collective should not apply a fee to publicly available material.” Recommendation 4.

132 Statement, above note 3, at para. 15.

dents would appear to have the ability to download and reproduce material for their own private study (again, fair dealing). Following upon the reasoning of the Supreme Court in *CCH v. Law Society of Upper Canada*, it would appear eminently reasonable that teachers could act as agents for students in facilitating their access to materials they need for private study, just as the Court found librarians act as agents for patrons in the exercise of the patrons' research uses. In any event, if, as it has in Bill C-60, the Government ventures into the arena of the electronic delivery of material to students which would otherwise be delivered in paper form under reprography licenses, it is difficult to see the issues raised thereby as different from those which are raised in considering the transmission of electronic material to students for the purposes of assignments, lessons, and research, from which the Government has said it is shying away.

There is another concern with the Government's indications that it intends to push ahead with amendments permitting remote students using network technology to view lectures either live or at a more convenient time, while reserving other technology issues involving digital communication for further consideration. It may be that the proposed amendment involving distance learning will create unanticipated challenges. The brief commentary in the Statement, for example, does not indicate an awareness that the exception contemplated to allow remote students to view the lecture later may involve a performer's performance right in the lecturer's performance of the lecture.<sup>133</sup>

It is asserted at the beginning of the Statement that it is a public policy principle underlying the *Copyright Act* that "the Act be drafted, to the extent possible, in technologically neutral terms." However, an exception stating that students may view lectures which include copyrighted materials at a more convenient time — namely, a time other than contemporaneous with the live delivery of the lecture — only if network technology is used is not consistent with the principle of technological neutrality. Why should the exception not also include an exception for videotapes of lectures made available for students who were unwell and not in attendance at the lecture?

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133 *Copyright Act*, above note 2, s. 15(1), including in s. 15(1)(a), for a live performance, the right to communicate the performer's performance to the public by telecommunication and s. 15(1)(b) if the lecture is fixed in order to be shown asynchronously later. See also the definition of "performer's performance" in s. 2.

The suggestion of the Council of Ministers of Education<sup>134</sup> to deal with the application of copyright exemptions to the environment of distance learning would have been to amend the definition of “educational institution” rather than to create new categories of exceptions. Such an amendment would appear to have the advantage of technological neutrality that the Government has said that it seeks but which it seems to have difficulty achieving if the approach in the Statement and Bill C-60 is adopted.

### 6) Should All Educational Institutions, Libraries, Archives, and Museums Enjoy the Same Exceptions?

The Supreme Court of Canada has spoken repeatedly of users’ *rights*, not merely of exceptions to the rights of rightsholders. From this perspective, it seems difficult to justify giving users greater or lesser access based upon the ownership of the entity from whom the access is sought. This is the more obvious in an era of increasing public-private sector partnership. Surely user resources should not be dependent upon whether they choose to access them through the public sector or non-profit partner or the for-profit partner; the more so as the public and private sectors are increasingly integrated in the delivery of services to Canadians.

It is true that the Supreme Court which decided the *CCH v. Law Society of Upper Canada* and “*Tariff 22*” cases is a composition of the Court which no longer exists; however, a majority of the court remains.<sup>135</sup> Despite the loss of two judges from that Court,<sup>136</sup> Canada is fortunate that its Supreme Court has been, and continues to be, relatively experienced in intellectual

134 Council of Ministers of Education, Canada, “Statement on Copyright from the Following Provinces and Territories: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, Yukon” (February 1995). <[www.cmec.ca/copyright/stat-eng.htm](http://www.cmec.ca/copyright/stat-eng.htm)>, s. 1, Definition of Educational Institution.

135 Justice Louise Arbour left the court in late June of 2004, having accepted the nomination from Secretary General Kofi Annan to become United Nations High Commissioner for Human Rights. Justice Frank Iacobucci also left the Court in June 2004, ostensibly looking forward to retirement, but actually to step into the responsibilities of the Presidency of the University of Toronto on an interim basis. Justices Rosalie Abella and Louise Charron have replaced them. Justice John Major has signaled his intention to retire from the Court.

136 Of whom Justice Frank Iacobucci, in particular, had considerable past experience in intellectual property matters, having worked in the late 1980s on cases in the patent area, in particular. Justice Iacobucci was also later on the Federal Court, where he heard at least thirteen intellectual property cases and was Chief Justice for two years.

property law decision-making and practice.<sup>137</sup> It appears unlikely that the Court will back away from the strong stand it has taken on a “users’ rights” perspective which it insists must be considered on balance with the rights of copyright holders.

## F. CONCLUSION

Rather than continuing to distinguish between the rights to be made available to users based on the ownership of the institution from which the users have sought information, the Government should consider all educational institutions and libraries and archives and museums based on their functions. To do otherwise appears inconsistent with the conversation about users’ rights now firmly entrenched in the Supreme Court of Canada.

The proposed amendments for enabling remote students to view a lecture using network technology and permitting the electronic desktop delivery of material directly to an interlibrary loan patron seem unnecessary given the parameters of the existing fair dealing exception described by the Supreme Court of Canada — and the requirements for reasonable and effective safeguards seem an impractical and unreasonable burden on these institutions, one which the Supreme Court has indicated that ISPs do not have to shoulder.

The proposal for permitting the electronic delivery of material covered by an educational institution’s blanket reprography licence with a collective society, “unless the licence in question provides for such delivery,” is, at best, ill-timed. The issues it is apparently meant to address are indistinguishable from those the Government has chosen not to address at this time. As operationalized by Bill C-60, the idea appears to be trying to force the collective administration of rights in this area beyond the scope of certainty currently available in terms of the business model being developed by the collectives and the known limits of the rights involved.<sup>138</sup>

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137 Chief Justice McLachlin, for example, handled several important intellectual property cases during her sojourn on the Supreme Court of British Columbia, as well as acting as counsel on at least one reported case from the 1970s. Justice Binnie practiced intellectual property litigation extensively, particularly in the patent area, while with the law firm of McCarthy Tétrault. Many of the other Justices have heard intellectual property cases while on their respective provincial court benches. Amongst more recent appointments to the Court, Justice Deschamps has experience in practice as counsel in the trademark area.

138 In the 2004 *Interim Report* (above note 27, at Recommendation 6), the Committee advocated a collective administration solution to all the problems of technology-enhanced learning:

The users' rights language of the Supreme Court of Canada is strong, rights-based language and offers a powerful alternative to the potential tyranny of rightsholders' interests signaled by the mandatory language in the *Berne Convention*, *NAFTA*, and *TRIPS* agreements. The Government may wish to bear in mind that a strong connection may be drawn between the rights-based language of the Supreme Court of Canada in this area and the right to freedom of expression, including rights to access information, under section 2(b) of the *Charter of Rights and Freedoms*.<sup>139</sup>

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The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed.

Although, again, the Committee applied the caveat: "Such a licensing regime must recognize that the collective should not apply a fee to publicly available material." (Recommendation 6). While the Committee's solution may not be appropriate, its attitude toward all technology-enhanced learning as requiring one consistent approach seems wiser than the piecemeal approach the Government is attempting in the Statement (above note 3) and Bill C-60 (above note 4).

139 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982*, being Schedule B to *The Canada Act 1982* (U.K.), 1982, c.11, <<http://laws.justice.gc.ca/en/charter/>>. It is not possible to definitively predict the outcome of a *Charter* challenge to legislation which upsets the balance between the rights of copyright holders and users now delineated by the Supreme Court of Canada; and a full analysis is the subject of another article. However, the language of the Court in recent copyright decisions flags the possibility of a constitutional check on Parliament's ability to diminish user rights in the name of compliance with trade obligations that favour rightsholders' rights over access.