

## Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing

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This chapter will focus on some of the copyright issues facing Canadian students, teachers, librarians and researchers, and how they will be affected by the educational provisions of Bill C-32<sup>1</sup> which would amend Canada's *Copyright Act*.<sup>2</sup> The bill proposes to add the word "education" as an enumerated purpose to the act's fair dealing provision,<sup>3</sup> it updates some of the special exemptions for educational institutions that were added in 1997,<sup>4</sup> and it proposes some new special exceptions for educational institutions.<sup>5</sup>

While the overall effect of these amendments would be positive, and the government should be given credit for including some reasonable and balanced provisions in the bill, it is important to place these developments within the overall context of the broader copyright policy environment in Canada's educational sector. In particular, the recurring uncertainty and risk aversion that has inhibited Canadian educational institutions from

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1 Bill C-32, *An Act to amend the Copyright Act*, 3d Sess., 40th Parl., 2010, [www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7026&Session=23&List=toC](http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7026&Session=23&List=toC), [Bill C-32].

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

3 See section B(1) below.

4 See section B(2), below.

5 See sections B(3), (4), & (5), below.

implementing the broad fair dealing policies set forth in the Supreme Court of Canada's (SCC) historical ruling in *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>6</sup> needs to be addressed, and the proposed amendments need to be assessed in light of these considerations.

In the increasingly complex web of Canadian educational copyright policy, there remain serious impediments, or counter-factors, to the realization of fair dealing as a substantive users' right, at least insofar as it is formally recognized and incorporated into the reality of everyday practice. These impediments include the risk aversion of educational administrators, the aggressive overreaching of content owners and their representatives; and the general lack of understanding about basic copyright rights and obligations. These three factors reinforce each other, and taken together, they have frustrated the implementation of a unanimous SCC decision for over six years.

In addition to reviewing the provisions of Bill C-32 that have the most direct bearing on the educational sector, this paper seeks to scrutinize and confront these counter-factors. Insofar as copyright laws should be designed to promote teaching, learning and research, they need to be carefully crafted, implemented and assessed so that they do not impede the very purposes they were intended to promote. But the careful scrutiny of Bill C-32 cannot stay within the four corners of the document itself; rather, it must also account for the political, economic and social environment in which the outputs of the legislative process operate.

Before proceeding with a section-by-section analysis of the educational provisions of Bill C-32 in section II then, the first section will assess the current copyright policy environment in Canadian educational institutions.

## A. THE STATE OF FAIR DEALING SIX YEARS AFTER CCH

In framing the 2009 copyright consultation process, the government asked how copyright law could be changed to withstand the test of time based on Canadian values and interests, and what changes would best foster innovation, creativity, competition and investment.<sup>7</sup> These goals are best served by recognizing Canada as a haven for fair copyright practices, reflecting the balanced approach envisioned by the CCH decision. Practising fair copyright, which may take on different forms in different contexts,

6 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html](http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html), [2004] 1 S.C.R. 339 [CCH].

7 Government of Canada, "Copyright Consultations," [www.ic.gc.ca/eic/site/oo8.nsf/eng/home](http://www.ic.gc.ca/eic/site/oo8.nsf/eng/home).

should become the hallmark of a Canadian copyright culture reflecting Canadian values and encouraging, rather than impeding, the creative and transformative uses of new information technologies. A necessary, though not sufficient requisite of realizing this practice is that the law be clear, consistent and understandable by those who must follow and apply it.

### 1) Reconnecting the *Copyright Act* with Reality

A recurring theme raised throughout the consultation process included the need to bring the text of the *Copyright Act* into closer harmony with the practices of modern technology, while at the same time striving for consistency and simplicity. A troubling disconnect had emerged between the static text of the act, which continued to reflect the rigidities of the strict categorical approach of the limited fair dealing defence, and the more recent recognition of fair dealing as a substantive users' right — a right that was identified by the SCC as an integral part of the *Copyright Act* that should not be interpreted restrictively.<sup>8</sup> But there are other social and cultural factors at play here, such as an enlarging fissure between the limited categories of fair dealing and the growing range of commonly accepted uses of information technology and new media. As stated in my consultation submission:

... we have an unfortunate disconnect between the actual state of copyright law as it is construed in the courts, and the actual text of the Act itself. This discrepancy should be harmonized so the Act reflects the case-law as set down by the Supreme Court. Not only is there a discrepancy between the text of the Act and the Supreme Court case-law, but there is a whole set of discrepancies between common ordinary everyday practices of Canadians and the text of the Act. For example, while it is common practice to utilize VCR and other types of recorders in the home, it is not at all clear how such use fits neatly within any of the enumerated categories of research, private study, criticism, review or news reporting. Yet these devices are lawfully sold by Canadian retailers and purchased and used routinely by Canadian consumers. There are many other examples of how typical information usage practices do not neatly fit within the narrow confines of the fair dealing provisions of the Act as it was drafted.<sup>9</sup>

8 CCH, above note 6 at para. 48.

9 Samuel Trosow. "Copyright Submission" (2009) 2 Osgoode Hall Rev of L and Pol'y 169, 180., <http://ohrlp.ca/index.php/Previous-Journal/Samuel-Trosow-Copyright-Consultations-Submission-2009-Osgoode-Hall-Rev.L.Pol-y-169.html>.

Social and cultural factors, such as the popularity of new digital media and the consequent breakdown of the old dichotomies between content producers and end users only magnify the growing fissure between copyright law “on the books” and new social realities in the networked environment. This problem could be rectified by adding the words “such as” to the enumerated fair dealing categories, an approach incorporated into resolution M-506, which was introduced in Parliament by M.P. Charlie Angus in March 2010:

That, in the opinion of the House, the government should amend section 29 of the *Copyright Act* in such a way as to expand the Fair Dealing provisions of the act, specifically by deleting section 29 and inserting the following: “29. Fair dealing of a copyrighted work for purposes such as research, private study, criticism, news reporting or review, is not an infringement of copyright. 29.1 In determining whether the dealing made of a work in any particular case is fair dealing, the factors to be considered shall include: (a) the purpose of the dealing; (b) the character of the dealing; (c) the amount of the dealing; (d) alternatives to the dealing; (e) the nature of the work; and (f) the effect of the dealing on the work.”<sup>10</sup>

But there are other more damaging counter-factors underlying this disconnect between practice in the educational sector and the promise of CCH. One such impediment standing in the way of end-users’ ability to engage in creative uses is the imposition of technological protection measures (TPMs). Their purpose and effect is to lock digital content, even where users might access and utilize the content in a variety of non-infringing and indeed transformative and beneficial ways. The inclusion in both Bill C-61 and now again in Bill C-32 of a strict version of the United States’ *Digital Millennium Copyright Act’s*<sup>11</sup> anti-circumvention measures threatens to override many aspects of users’ rights, including fair dealing and other educational exemptions. While this significant counter-factor is treated in greater depth elsewhere in this volume, the important and sometime

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10 *House of Commons Notice Paper*, No. 10 (16 March 2010) (Charlie Angus), [www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4345800&File=11](http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4345800&File=11).

11 *Digital Millennium Copyright Act*, Pub. L. 105-304, 112 Stat. 2860 (1998), [www.copyright.gov/title17](http://www.copyright.gov/title17).

overriding role given to TPMs in the newly proposed special exemptions for educational institutions is a recurring problem.<sup>12</sup>

## 2) Risk Aversion, Licensing and Rights Accretion

A subtler and less visible problem has been the reluctance of educational institutions to take full advantage of the fair dealing rights that became available as a result of the *CCH* decision in 2004. The Canadian Federation of Students has observed:

Many in the educational community have argued that, when viewed through the lens of the 2004 ruling, the current definition of fair dealing affords broad rights to those in the educational community. While this view is widely held amongst copyright experts, university and college administrators have not prescribed to it, instead off-loading the fees for using copyrighted materials onto students.<sup>13</sup>

Perhaps the most serious impediment to fair dealing in the educational sector has been the confusion caused by what appears to be the broad and all-encompassing scope of the Access Copyright licence, which aggravates the fears of risk of liability. Some background on the license will help frame the problem.

In January 2004, Access Copyright entered into multi-year licensing agreements with Canadian educational institutions.<sup>14</sup> While the agreements expired in 2007 they were extended for an additional three years through August 2010. During the three-year extension, payments were kept at the 2006–07 rate of \$3.38 per Full Time Equivalent (FTE) student plus 10 cents per page for materials in course packs. The FTE rate is assessed across the board as an educational fee, but the per page course pack charges are incurred by the student when purchasing a course pack. Under the license, Access Copyright grants the licensee institution non-exclusive rights to reproduce works in its repertoire<sup>15</sup> and agrees to indemnify the

12 See particularly the discussions of proposed sections 30.01, 30.02, and 30.04 in sections B(3), (4), & (5), respectively.

13 Canadian Federation of Students. *Member Advisory (May 2010), Copyright Modernization Act: Bill C-32*, [www.cfs-fcee.ca/html/english/campaigns/Mem\\_Advisory-C\\_32-CFS.pdf](http://www.cfs-fcee.ca/html/english/campaigns/Mem_Advisory-C_32-CFS.pdf) at 2.

14 While the model agreement was negotiated by AUCC, it was signed by individual institutions. The agreement between Access Copyright and the University of Western Ontario is available at [www.lib.uwo.ca/copyright/access/access\\_copyright.shtml](http://www.lib.uwo.ca/copyright/access/access_copyright.shtml) [Access Copyright License].

15 *Ibid.* at section 2, [www.lib.uwo.ca/copyright/access/access\\_licences.shtml](http://www.lib.uwo.ca/copyright/access/access_licences.shtml).

licensee for copies made in accordance with the license.<sup>16</sup> In addition to making payments under the contract, the licensees agree to various reporting and record-keeping.<sup>17</sup> Access Copyright is also given the right to inspect and audit university records in order to verify the accuracy of payments<sup>18</sup> and to conduct an annual sampling survey.<sup>19</sup>

Given the potential value of the indemnification clause from a risk management perspective, it was understandable why universities negotiated and entered into these agreements in the years prior to 2004. While there was an exclusion in the license for uses which constituted fair dealing<sup>20</sup> these were not considered to be significant limitations on the scope of the license prior to the CCH decision in March 2004. Even after CCH, the universities may have felt locked into these license terms which were not to expire until 2007. But despite the significant changes in the copyright landscape, the educational institutions continued to extend the contract through 2010 without renegotiating the rate to reflect reasonable offsets for uses which were now fair dealing under CCH. While reliance on the license had created a comfort zone from a liability-avoidance perspective, it came at a cost. Consider this excerpt from the copyright page maintained by the York University library:

Can I copy something not covered by Access Copyright?

[I]f you want to make copies of materials not covered by the Access Copyright license and the material is not in the public domain, then permission must be obtained from the copyright owner before copying can be done.<sup>21</sup>

Other examples of unduly cautious copyright advice which emphasize licenses and permissions at the expense of fair dealing include the continued reliance on the Association of Universities and Colleges of Canada (AUCC) 2002 publication *Copying Right*<sup>22</sup> and the Council of Min-

16 *Ibid.* at section 23, [www.lib.uwo.ca/copyright/access/access\\_indemnification.shtml](http://www.lib.uwo.ca/copyright/access/access_indemnification.shtml).

17 *Ibid.* at section 11, [www.lib.uwo.ca/copyright/access/access\\_recordkeeping.shtml](http://www.lib.uwo.ca/copyright/access/access_recordkeeping.shtml).

18 *Ibid.* at section 20, [www.lib.uwo.ca/copyright/access/access\\_audit.shtml](http://www.lib.uwo.ca/copyright/access/access_audit.shtml).

19 *Ibid.* at section 22.2.

20 See text accompanying notes 26 and 27, below.

21 York University, *Copyright and You*, [www.yorku.ca/univsec/documents/copyright/facultyinfo.htm](http://www.yorku.ca/univsec/documents/copyright/facultyinfo.htm).

22 Association of Universities and Colleges of Canada, *Copying Right: A guide for Canada's universities for copyright, fair dealing and collective licensing* (August 2002), [www.bookstore.uwo.ca/copyrightGuide.pdf](http://www.bookstore.uwo.ca/copyrightGuide.pdf). The publication continues to be utilized despite its 2002 release date.

isters of Education, Canada (CMEC) 2005 publication entitled “Copyright Matters!”<sup>23</sup> both of which offer weak accounts of fair dealing.<sup>24</sup> These works over-emphasize the importance of the Access Copyright licence and create the impression that it somehow supersedes other principles of copyright law such as fair dealing.<sup>25</sup> The perception that it trumps those principles overshadows the fact that it does no such thing.

The Access Copyright licence itself does not override fair dealing. Its preamble includes the following recitals:

AND WHEREAS the Institution desires to continue to secure the right to reproduce copyright works for the purposes of education, research and higher learning which reproductions would be outside the scope of fair dealing under the *Copyright Act* R.S.C. 1985 c.C-42, as amended;

AND WHEREAS the parties do not agree on the scope of the said fair dealing . . .<sup>26</sup>

Section 3 of the license lists the exclusions, which explicitly include fair dealing:

3. This Agreement does not cover: . . . (c) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary . . .<sup>27</sup>

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23 Wanda Noel & Gerald Bureau, “Copyright Matters!: Some Questions and Answers for Teachers” Council of Ministers of Education, Canada, 2d ed., (2005), [www.cmec.ca/Publications/Lists/Publications/Attachments/12/copyrightmatters.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/12/copyrightmatters.pdf) [Copyright Matters].

24 As Howard Knopf points out, the second edition of Copyright Matters is dated 2005 but does not even mention the 2004 CCH decision. See “Excess Caution” (8 February 2006), <http://excesscopyright.blogspot.com/2006/02/excess-caution.html>.

25 Another oft-cited resource is AUCC’s copyright flow chart which, if read literally, would indicate that fair dealing is not available for electronic resources. See: Association of Universities and Colleges of Canada, *Copyright* (August 2002), [www.lib.uwaterloo.ca/copyright/copying.html#flow](http://www.lib.uwaterloo.ca/copyright/copying.html#flow).

26 Western Libraries, *Access Copyright Agreement* (January 2006), [www.lib.uwo.ca/copyright/access/access\\_preamble.shtml](http://www.lib.uwo.ca/copyright/access/access_preamble.shtml) [*Access Copyright Agreement*].

27 *Ibid.* at s. 3, [www.lib.uwo.ca/copyright/access/access\\_licences.shtml](http://www.lib.uwo.ca/copyright/access/access_licences.shtml). In addition, s. 4 reiterated the point in made in the preamble that the parties did not agree on the scope of fair dealing, stating: “By entering into this Agreement neither party is agreeing or representing in any way, either directly or indirectly, that the making of a single copy of all or a portion of a periodical article of a scientific, technical or scholarly nature and a single copy of a portion of any other Published Work, without the permission of the owner of copyright therein, is or is not an infringement of copyright.”

In other words, the copying that is permissible under the Access Copyright license is *in addition to*, not *instead of*, the copying that can be done under fair dealing and other users' rights provisions. Put another way, you do not need to resort to the Access Copyright licence where a particular use or series of uses would constitute fair dealing. Yet the impression is unmistakable, as indicated on the University of Waterloo library's website, that: "In order to determine whether what you want to do is permissible, you therefore need to check that you comply *both* with the *Copyright Act* and with any agreements or licences covering . . . the work in question"<sup>28</sup> (emphasis added). The emphasized word *both* is incorrect. If the use in question constitutes fair dealing, the license is inapplicable by its own terms.<sup>29</sup>

In his insightful analysis of risk aversion and rights accretion in intellectual property, James Gibson notes that "[b]ecause liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed."<sup>30</sup> With respect to copyright, he makes the further point that:

. . . the decision-makers in the real world of copyright practice are typically risk-averse. New works of creativity often require high up-front investment, with the prospect of profit only after the work is completed. With so much at risk, those who work with copyrighted materials try hard to avoid potential pitfalls, and understandably so. They approach legal issues very conservatively, particularly issues like copyright liability, which have the potential to delay or even destroy the entire project.<sup>31</sup>

But Gibson is writing in the American context where the availability of a licence has been recognized as a relevant factor in fair use analysis.<sup>32</sup> In Canada, where the availability of a license is not relevant for fair dealing analysis, the over-reliance on licensing motivated by risk aversion should be much less of a factor.

28 University of Waterloo, *Waterloo Copyright FAQ* (17 November 2009), [www.lib.uwaterloo.ca/copyright/index.html#copyright\\_basics](http://www.lib.uwaterloo.ca/copyright/index.html#copyright_basics).

29 Even though a careful reading of the entire document would lead one to this conclusion, the careless usage of the word "both" indicates the nature of the problem being addressed.

30 James Gibson, "Risk Aversion and Rights Accretion in Intellectual Property Law" (2007) 116 *Yale L.J.* 882. <http://ssrn.com/abstract=918871> at 882.

31 *Ibid.* at 891.

32 See *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), cert. denied., 117 S. Ct. 1336 (1997), [www.bitlaw.com/source/cases/copyright/pup.html](http://www.bitlaw.com/source/cases/copyright/pup.html). In this case, the fourth fair use factor, economic effect on the work, favoured the plaintiff because of the potential loss of licensing revenue.



As the Supreme Court stated in *CCH*:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, 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 then 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>33</sup>

But while the availability of a license is not a relevant factor in Canadian fair dealing analysis, an institution's past practices can be. The *CCH* court also stated that “[i]t may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”<sup>34</sup>

So while a Canadian institution needn't be risk-averse because of the availability of a licence, its adoption of risk-averse practices — instead of relying on fair dealing — could nevertheless lead to serious rights accretion that only becomes more difficult to reverse over time. The resulting failure to incorporate fair dealing into routine practices not only increases the direct financial costs to students, it also discourages the full and proper utilization of existing knowledge resources.

Concerned that the lack of accurate copyright information was contributing to the paralysis of fair dealing in the post-secondary sector, the Canadian Association of University Teachers (CAUT) issued a Fair Dealing Advisory in December 2008 which presents the doctrine in a positive and unequivocal manner:

Fair Dealing is the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners.<sup>35</sup>

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33 *CCH*, above note 6 at para. 70.

34 *Ibid.* at para. 54.

35 Canadian Association of University Teachers, Fair Dealing, Intellectual Property Advisory. No. 3 (December 2008), <http://caut.ca/uploads/IP-Advisory3-en.pdf> at 1 [CAUT Fair Dealing Advisory].

Fair dealing is characterized as a “right” because *CCH* indicated it is more than simply a technical defence to an infringement action, but rather an integral part of the Act itself.<sup>36</sup> Yet this right is “within limits” and the interests of the owners are protected because it is always subject to the six-factor fairness analysis approved by the Supreme Court in *CCH*.<sup>37</sup> The reproduction can be “substantial” since section 3 of the Act limits the copyright owner’s exclusive reproduction right to “the work or any substantial part thereof.”<sup>38</sup> If the reproduction does not meet a threshold level of substantiality, the exclusive reproduction right is not even implicated and there would be no need to resort to fair dealing analysis. The right to fair dealing is also without the requirement of “permission from, or payment to” the owner because under section 27 of the Act infringement requires a lack of consent.<sup>39</sup>

The CAUT Advisory goes on to address the issue of uncertainty in fair dealing, but from a positive perspective:

Theoretically, fair dealing could have been legislated as a precise formula with crisp boundaries, but this is not the way the law has developed. The limits of the practice are imprecise and will always be subject to dispute. Rather than retreating from this grant of discretion, the education community must fully accept it and define for itself, within the parameters set by Parliament and the courts, what is fair.

This means that academic staff must know their fair dealing rights and exercise them to the fullest extent. It is equally important that

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36 *CCH* above note 6 at para. 49. (Holding that “[a]n integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.”)

37 *Ibid.* at para. 53. (Holding that the six factors to be considered are “(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.”)

38 *Copyright Act*, above note 2, at s. 3(1), which provides that “. . . ‘copyright’, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever . . .”

39 *Ibid.* at s. 27, which provides that “[i]s an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” In other words, any consent (which may itself be implied from the circumstances) would vitiate the infringement itself and the fair dealing analysis would not even be necessary.

universities and colleges codify robust fair dealing practices in institutional policy. Such guidelines can inform the actions of academic staff and will signal to the courts and Parliament the “custom and practice” of fair dealing at universities and colleges.<sup>40</sup>

In summary, due to a convergence of factors, fair dealing is not operating on an even playing field in our educational institutions. It is subject to powerful counter-factors which erode its meaning and constrain its application. These impediments are not due to factors intrinsic to the Copyright Act, but are often ironically self-imposed.

In evaluating the education provisions in Bill C-32, the question must be asked whether they would mitigate, reinforce or aggravate these constraints if enacted.

## **B. ANALYSIS OF EDUCATIONAL PROVISIONS IN BILL C-32**

Bill C-32 contains several provisions that directly bear on the uses of copyrighted materials in educational settings. This section will analyse these provisions in three categories: (1) the inclusion of education as an expressly enumerated fair dealing category; (2) the revision of several existing special exemptions available to educational institutions; and (3) the addition of new special exemptions for educational institutions.

### **1) Section 29: Inclusion of Education as Enumerated Fair Dealing Category**

First and foremost, Bill C-32 proposes to amend section 29 of the *Copyright Act* to read: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”<sup>41</sup> While this amendment does not adopt the inclusive “such as” language, or incorporate the fair dealing factors, it is a positive and significant step in the right direction.<sup>42</sup> The importance of this aspect of the amendment is only

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40 CAUT Fair Dealing Advisory, above note 30 at 6. The guidelines are in reference to institutional policies along the lines of the Access to the Law Policy of the Great Library which were endorsed by the Supreme Court in *CCH*, above note 6 at para. 61. The policy described the specific purpose of the library’s custom photocopy service and indicated that “[a]ny doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.”

41 Bill C-32, above note 1 at cl. 21.

42 The addition of parody and satire do not appear to be particularly controversial, and the uncertainty regarding parody that plagued the courts in the *Compagnie Générale*

underscored by the vehement opposition it has attracted from the content industry. Access Copyright, for example has stated:

On behalf of creators and publishers Access Copyright is deeply concerned by the extension of fair dealing to cover education and the introduction of numerous other exceptions in the *Copyright Act* which undermine the ability of creators and publishers to get paid for the use of their works.

“It is discouraging to creators and publishers to see that instead of encouraging the use of collective management the Government has chosen to restrict or remove existing uses from collective management in favour of exceptions that do not provide compensation to creators or copyright owners when their works are used,” says Access Copyright’s Executive Director, Maureen Cavan.<sup>43</sup>

The Writers’ Union of Canada similarly noted:

Canada’s book writers are outraged by the inclusion of a new provision for educational uses in Bill C-32. This new “fair dealing” for the purpose of education is a wholesale expropriation of writers’ rights and opens the door for the education sector to copy freely from books and other copyright material without paying writers.<sup>44</sup>

Indeed, this will be one of the key sections to watch carefully as Bill C-32 progresses through its next stages. The lessons learned from the fate of the former Bill C-32 in 1996 are instructive. The first reading version of that bill contained numerous educational and library exceptions that were strongly supported by the library and educational communities. CanCopy (the predecessor of Access Copyright) had been established through the

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*des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996), [1997] 2 F.C. 306, [www.canlii.org/en/ca/fct/doc/1996/1996canlii3920/1996canlii3920.html](http://www.canlii.org/en/ca/fct/doc/1996/1996canlii3920/1996canlii3920.html) and more recently in the Canwest litigation in British Columbia (See *Canwest v. Horizon*, 2008 BCSC 1609, [www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1609/2008bcsc1609.html](http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1609/2008bcsc1609.html) and *Canwest Mediaworks Publications Inc. v. Murray*, 2009 BCSC 391, [www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc391/2009bcsc391.html](http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc391/2009bcsc391.html)) should be resolved.

43 Access Copyright, News Release, “Access Copyright is Deeply Concerned by the Government’s Lack of Support for the Remuneration of Creators through Collective Licensing” (3 June 2010), [www.marketwire.com/press-release/Access-Copyright-Is-Deeply-Concerned-Governments-Lack-Support-Remuneration-Creators-1270887.htm](http://www.marketwire.com/press-release/Access-Copyright-Is-Deeply-Concerned-Governments-Lack-Support-Remuneration-Creators-1270887.htm).

44 The Writers’ Union of Canada, News Release, “Canada’s Writers Demand Change to *Copyright Act*” (6 June 2010), [www.writersunion.ca/av\\_pro60810.asp](http://www.writersunion.ca/av_pro60810.asp).

Phase I round of amendments to the Act in 1988, and was aggressively asserting that many of the activities conducted by libraries were infringing. The library and educational communities wanted to establish protections that were certain and reliable. As fair dealing was not yet a viable doctrine under the case law, the emphasis on institution-specific special exemptions was understandable in 1996. But the promise of a user-oriented set of amendments did not materialize, and after a series of amendments effectively weakened the measure, the broad coalition of library and education groups who had initially supported the bill in 1996 withdrew their support. The amendment process was reported in the February 1997 CAUT Bulletin:

On Dec. 11, 1996, the Canadian public received a holiday package of some 70 amendments to the proposals of April 1996 from the Heritage Committee. On balance, these modifications can only be described as a “defeat” for public educational institutions. Sheila Copps congratulated the Heritage Committee on its work.

The manner in which the amendments were pushed through the committee in just a few hours, many without prior consent from representatives of the jointly-responsible Industry Canada left onlookers aghast . . .<sup>45</sup>

It is clear that the content industry remembers the magnitude of this shift in favour of publishers and licensing collectives and will attempt a repeat of its efforts 14 years later with the current Bill C-32. But even if the addition of education to the enumerated fair dealing categories survives the legislative process, there will still be barriers to overcome in order for it to be properly implemented into practice in Canadian educational settings. Adding the word “education” to section 29 does not in itself solve the problems of lack of information, risk-aversion and rights accretion. But it certainly holds the promise of mitigating and ultimately reversing these impediments if it is taken seriously and implemented in a purposeful manner on our campuses.

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45 “Ambushed by the Heritage Committee” *CAUT Bulletin*, Vol. 44, No. 2 (February 1997), [www.cautbulletin.ca/default.asp?SectionID=0&SectionName=&VolID=247&VolumeName=No%202&VolumeStartDate=February%201,%201997&EditionID=28&EditionName=Vol%2044&EditionStartDate=January%2001,%201997&ArticleID=0](http://www.cautbulletin.ca/default.asp?SectionID=0&SectionName=&VolID=247&VolumeName=No%202&VolumeStartDate=February%201,%201997&EditionID=28&EditionName=Vol%2044&EditionStartDate=January%2001,%201997&ArticleID=0).

## 2) Section 29.4–29.9: Amending Educational Institutional Exemptions

Less crucial than including education in general fair dealing, but also of positive significance, are a series of proposed amendments to the special educational exemption sections that survived the 1997 Phase II Amendments.<sup>46</sup> While fair dealing is generally available to anyone regardless of their institutional affiliation, the special educational exemptions in sections 29.4 through 30 of the Act are only applicable to certain defined “educational institutions.”<sup>47</sup>

### a) Section 29.4

Section 29.4 currently provides a limited exception for classroom displays in certain circumstances.<sup>48</sup> It would be amended to read:

29.4(1). It is not an infringement of copyright for an educational institution or a person acting under its authority *for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it* [emphasized text is added by amendment].

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46 An Act to amend the Copyright Act, Assented to 25 April 1997, [www.parl.gc.ca/bills/government/C-32/C-32\\_4/C-32TOCE.html](http://www.parl.gc.ca/bills/government/C-32/C-32_4/C-32TOCE.html).

47 Section 2 of the Act defines “educational institution” as

- (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,
- (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,
- (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.

48 Section 29.4(1) currently provides:

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.

While deleting the former reference to dry erase boards and flip charts is a positive step, as is substituting more generally purposeful language, the section is still fundamentally flawed because its benefits are still negated where the work is “commercially available.”<sup>49</sup> The carve-out for materials that are commercially available appears in a number of sections added in 1997<sup>50</sup> and remains problematic because it gives the content owner the ability to unilaterally negate the exception.

In any event, section 29.4, like the other special institution-specific exemptions, should be viewed as a statutory safe-harbour which supplements, but does not supplant fair dealing. As the *CCH* Court said with respect to the library exemptions, resort to fair dealing is always available,<sup>51</sup> and the same reasoning should apply to the exemptions for educational institutions as well should any of the conditions not be met.

### b) Section 29.5

Section 29.5 of the current act allows certain public performances “on the premises of an educational institution for educational or training purpos-

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49 Bill C-32 would amend section 29.4(3) to read:

Except in the case of manual reproduction, the exemption from copyright infringement provided by subsections (1) and (2) does not apply if the work or other subject-matter is commercially available, within the meaning of paragraph (a) of the definition “commercially available” in section 2, in a medium that is appropriate for the purposes referred to in those subsections.

See: Bill C-32, above note 1 at cl. 23(2).

Section 2 of the act defines the term:

“commercially available” means, in relation to a work or other subject-matter,  
 (a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or  
 (b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort . . .

50 The carve-out for materials that are commercially available is also found in s. 30.1(2) (with respect to the management and maintenance of a library, museum or archival collection), and s. 32(3) (with respect to making materials available in alternative formats for persons with perceptual difficulties).

51 *Ibid.* at para. 49. (Holding that “[a]n integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.”)

es and not for profit, before an audience consisting primarily of students of the educational institution, 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>52</sup>

This section is also a statutory safe-harbour separate and apart from fair dealing. Currently, the exception applies to the live performance of a work done primarily by students<sup>53</sup> as well as to the public performance of “a sound recording or of a work or performer’s performance that is embodied in a sound recording”<sup>54</sup> Also exempted is “the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication.”<sup>55</sup>

So long as these conditions with respect to participants, audience and place of performance are met, there will be no infringement liability and there would be no need to resort to fair dealing. If, however, one of these conditions is not met, fair dealing would still be available. For example, if the event is held off of the institution’s premises, or if the broader public is in the audience, the institution could still invoke fair dealing if a claim were made that the performance was infringing.

Currently, this special exemption does not apply to films. But the proposed amendment would add a new subsection which would apply to “the performance in public of a cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy.”<sup>56</sup> Insofar as this section is additive to fair dealing, it can play a useful purpose. The extension of the exception to films is a positive development, as it should assist academic staff in being able to better incorporate film into classroom instruction without having to incur the costs involved with clearing public performance rights.

### c) Sections 29.6 and 29.9

There are also some positive changes proposed for sections 29.6 and 29.9 with respect to the classroom use of news broadcasts. Section 29.6 currently permits making a single copy of a news program or news commentary program (but not a documentary) for subsequent classroom use.<sup>57</sup> The

52 *Copyright Act*, above note 3 at s. 29.5.

53 *Ibid.* at s. 29.5(a).

54 *Ibid.* at s. 29.5(b).

55 *Ibid.* at s. 29.5(c).

56 Bill C-32, above note 1 at cl. 24(2).

57 *Copyright Act*, above note 3 at s. 29.6.



exemption only permits the keeping of the copy for a year, at which time royalties must be paid or the copy must be destroyed.<sup>58</sup> Section 29.9 also authorizes the promulgation of further regulations relating to the record-keeping requirement for the news programs copied under the section.<sup>59</sup> The proposed amendment repeals the “pay or destroy” requirement as well as the authority for record-keeping regulations. While these are positive developments, at least as far as news or news commentary programs are concerned, news documentaries should be treated in a similar manner. Currently, other broadcasts (including documentaries) are covered by section 29.7, which also has a “pay or destroy” requirement.<sup>60</sup>

Rather than differentiate between different genres of programming in the act, it would make more sense to extend the amendment to section 29.7 as well. The choice of what type of broadcast is appropriate for classroom use is best left to the instructor and the act itself should strive for content-neutrality with respect to its special treatment of classroom uses of broadcasts.

#### **d) Overall Assessment of Amendments to Existing Special Exemptions for Educational Institutions**

All in all, these are positive amendments, none of which were included in Bill C-61. Their importance does need to be placed in context, as all of these situations could be subsumed into a general fair dealing analysis, especially with the explicit recognition of education as an enumerated category. But given the assumption that these sections provide an alternative mechanism of protection for institutions, in the nature of statutory safe-harbours where certain conditions are met, they continue to serve a useful function.

But unlike this series of amendments, the proposed new sections 30.01 through 30.04 are not so benign.

### **3) Section 30.01: New Special Exemption for Lessons**

This new proposed section is similar to its counterpart in Bill C-61 and exemplifies undue complexity to the point of obfuscation. Throughout its labyrinthine subsections, it is never clear what is to be gained through the provision. The section starts with a self-referential definition:

58 *Ibid.* at s. 29.6(2)(a)

59 *Ibid.* at s. 29.9.

60 The pay or destroy requirement applies to other broadcasts 30 days after the copy is made. See: *Ibid.* at s. 29.7(2).

For the purposes of this section, “lesson” means a lesson, test or examination, or part of one, in which, or during the course of which, an act is done in respect of a work or other subject-matter by an educational institution or a person acting under its authority that would otherwise be an infringement of copyright but is permitted under a limitation or exception under this Act.<sup>61</sup>

If a lesson means “a lesson, test or examination,” it remains unclear how the term “lesson” is defined when it is used in ways other than a test or examination. It is the classic case of the circular definition. Whatever it means, its usefulness is quickly eroded by the carve-outs and requirements contained in the subsequent sections.

Subject to a series of conditions in section 30.01(6), section 30.01(3) provides it is not an infringement of copyright to do certain things with a lesson:

- (a) to communicate a lesson to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course of which the lesson forms a part or of other persons acting under the authority of the educational institution;
- (b) to make a fixation of the lesson for the purpose of the act referred to in paragraph (a); or
- (c) to do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) and (b).<sup>62</sup>

The proposed section 30.01(6) imposes a number of conditions on the educational institution (or person acting on its behalf other than a student). First, the institution must “destroy any fixation of the lesson within 30 days after the day on which the students who are enrolled in the course to which the lesson relates have received their final course evaluations.”<sup>63</sup> Classroom instructors may wonder why anyone would want to go to the trouble of preparing a “lesson” (however it is defined) only to have to destroy it after the end of the term.

It is not at all clear how this requirement would play out in practice. Is the institution going to advise instructors that they are under an obligation to destroy course materials each term? And if so, how is that mandate going to be enforced?

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61 Bill C-32, above note 1 at cl. 27.

62 *Ibid.*

63 *Ibid.*

Second, the proposal says the institution must take measures to limit the communication by telecommunication of the lesson to the enrolled students and other authorized persons.<sup>64</sup> Third, measures must also be taken to “prevent the students from fixing, reproducing or communicating the lesson other than as they may do under this section.”<sup>65</sup> Both are examples of forcing the implementation of TPMs. What does it mean to “take measures,” as it is so vaguely put in these two subsections, and what level of TPMs is mandated through these requirements?

Unfortunately, Bill C-32 leaves these questions unanswered since subsection 30.01(6)(d) provides that the institution must also “take, in relation to a communication by telecommunication in digital form, any measure prescribed by regulation.”<sup>66</sup> Given the importance of TPMs in the overall scope of the bill, not to mention their highly contentious nature, delegating this question to the regulatory process only acts to further frustrate the goals of transparency and Parliamentary accountability. Such measures should not be deferred to the less visible regulatory process, as they need to be fully aired as part of the legislative process.

In addition to the burdens imposed on the institution and its staff, a student who wants to reproduce the “lesson” in order to listen to or view it at a more convenient time must “destroy the reproduction within 30 days after the day on which the students who are enrolled in the course to which the lesson relates have received their final course evaluations.”<sup>67</sup> This is a particularly onerous provision, and was not even included in Bill C-61. Telling a student they must destroy the materials they worked from during a course of study is simply not an acceptable practice from the point of view of teachers and librarians. And the problem is compounded for students who want to refer back to materials from earlier courses, as noted by the President of Athabasca University:

Students are expected to somehow accumulate knowledge as they proceed through their studies. The content delivered in one course builds on the knowledge acquired in previous courses. The provision that content from Algebra 1 must be destroyed so that students taking Algebra 2 cannot refer back to it when needed is counter to the principles of education and how people learn. It just does not make sense.<sup>68</sup>

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64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 Frits Pannekoek. AU President’s Letter Concerning Proposed Copyright Changes (18 November 2008), [www2.athabascau.ca/aboutau/news/news\\_item.php?id=423](http://www2.athabascau.ca/aboutau/news/news_item.php?id=423).

In any event, such a draconian and counterintuitive provision is hardly enforceable. Even if one strains to find a beneficial purpose in this section, its carve-outs and special requirements are hardly worth the effort, so the provision should simply be scuttled.

#### 4 Sections 30.02 and 30.03: Digital Licences

Sections 30.02 and 30.03 are exceptionally complex provisions and they must be read together with the provisions in the proposed tariff in order to fully appreciate their meaning and intention.

On 30 March 2010, Access Copyright filed a Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire for 2011 through 2013 with the Copyright Board, and it was formally published in the *Canada Gazette* on 12 June 2010.<sup>69</sup> Under the proposed tariff the rate will rise from \$3.38 per Full Time Equivalent (FTE) to \$45 per FTE for universities (\$35 per FTE for community colleges) but the 10 cent per page fee for course packs will be discontinued.<sup>70</sup> The scope of what is considered a “copy” will be expanded to include not only reproduction by a mechanical reprography but also scanning, transmission by fax or e-mail, uploading, displaying or projecting an image, and even posting a link to a digital copy.<sup>71</sup> While per page fees are discontinued, the reporting requirements<sup>72</sup> will apply to materials in “course collections” which will include digital copies that are e-mailed, linked to, or posted on a secure network as well as assembled paper copies.<sup>73</sup>

Bill C-32’s proposed section 30.02(1) would allow an educational institution to make a digital reproduction of a work<sup>74</sup> and to communicate it by

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69 Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire, C. Gaz. 2010.I., Vol. 144, No. 24 (12 June 2010), <http://canadagazette.gc.ca/rp-pr/p1/2010/2010-06-12/html/sup1-eng.html> [Proposed Tariff]. This notice triggered a 60 day comment period in which interested parties can file objections.

70 For a discussion of the terms under the current Access Copyright Licence, see text accompanying notes 14–19, above.

71 Proposed Tariff, above note 68 at s. 2 (definition of “copy”).

72 *Ibid.*, at s. 6. The reporting requirements will include, in addition to the general bibliographic data, the electronic address where a work is being stored or can be accessed, information pertaining to any direct licence from a publisher/aggregator for the work, data about new works added to the course collection for every reporting month, and records for digital copies emailed by a staff member.

73 *Ibid.* at s. 2 (definition of “course collection”).

74 Bill C-32, above note 1 at cl. 27, proposed s. 30.02(1)(a).

telecommunication for an educational or training purpose.<sup>75</sup> In addition, the person to whom the copy is sent may make one copy of the work.<sup>76</sup> However, there are several carve-outs and conditions on this allowance.

First, the exemption is only applicable to an institution that has a reprographic reproduction licence with a collective society that permits the making of reprographic reproductions.<sup>77</sup> Second, the institution is required to pay the royalty for all persons to whom the digital communication was sent that would have been applicable if a print copy was made, and they must also comply with all of the terms of the licence.<sup>78</sup> By writing a requirement that the institution comply with the terms of the license into the act itself, it appears that these terms could supersede users' rights under the act to the extent they are inconstant with the contract. With respect to the reprography license now in effect between the educational institutions and Access Copyright, this provision foreshadows a significant shift in favour of private ordering. As noted in the earlier discussion about the relationship between the license and fair dealing,<sup>79</sup> the current Access Copyright license is additive, not substitutive, for provisions of the act. This new section would appear to reverse that assumption and provide the collectives with a more robust mechanism to utilize terms that derogate from statutory rights.<sup>80</sup>

Third, the institution must also take measures to prevent the recipient from printing more than one copy or otherwise further communicating or reproducing it,<sup>81</sup> and take any additional measure prescribed by regulation.<sup>82</sup> Finally, the owner of the work may opt out of this arrangement by informing the collective that the institution may not make such digital copies.<sup>83</sup>

Section 30.02 was drafted as a provisional measure because the right to make the digital copy under this section is cut off if a subsequently certi-

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75 *Ibid.* at cl. 27 proposed s. 30.02(1)(b).

76 *Ibid.* at cl. 27 proposed s. 30.02(2).

77 *Ibid.* at cl. 27 proposed s. 30.02(1).

78 *Ibid.* at cl. 27 proposed s. 30.02(3)(a).

79 See text accompanying notes 25–27, above.

80 The fact that the proposed tariff does not contain language similar to the preamble and sections 3 and 4 of the current license which expressly preserves fair dealing only seems to reinforce this concern.

81 *Ibid.* at proposed s. 30.02(3)(c).

82 *Ibid.* at proposed s. 30.02(3)(d). Here is another instance of requiring the implementation of some (yet to be determined) level of technological protection measures.

83 *Ibid.* at proposed s. 30.02(5).

fied tariff is applicable to such digital reproduction, communication and printing.<sup>84</sup>

With respect to the royalties that have been paid under section 30.02, if there is subsequently a digital reproduction agreement between the institution and the collective, or if a tariff becomes applicable to such digital reproductions, then the difference in the royalties paid by the institution and the royalties which would be due under the agreement or tariff must be made up.<sup>85</sup> While this obligation is reciprocal — that is, if the new royalties are less than what was paid then the institution will receive a refund — the obligation to make up the difference implicitly imposes a massive record-keeping requirement on the institution.<sup>86</sup>

These two sections will place institutions at a severe disadvantage because at the outset, they will lock the institution into a licence with a collective. And in essence, the section bestows all of its terms with the same force of law as they would have if they were included in the act. While the opposition to the tariff will proceed on a separate track at the Copyright Board from developments on Bill C-32, it will remain important to keep their interrelationships in mind.

#### 4) Section 30.04: Special Exception for Publicly Available Materials on the Internet

The proposed section 30.04 would create an exception for educational institutions (or persons acting under their authority) to reproduce, publicly perform or communicate to the public by telecommunication materials that are available through the Internet for educational or training purposes.<sup>87</sup> The exception does not apply where the work or other subject matter or the Internet site on which it is posted is protected by a TPM,<sup>88</sup> or where there is a clearly visible notice prohibiting the act.<sup>89</sup>

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84 *Ibid.* at proposed s. 30.04(4)(b).

85 *Ibid.* at proposed s. 30.03.

86 In this regard, it is instructive to look at the reporting and record keeping requirements contained in section 6 of the proposed tariff. See note 68, above.

87 *Ibid.* at proposed s. 30.04(1). The performance and communication exceptions are limited to where the public is primarily students or other persons under the institution's authority.

88 *Ibid.* at proposed ss. 30.04(3) (with respect to an access control) and 30.04(4)(a) (with respect to a use control).

89 *Ibid.* at proposed s. 30.04(4)(b). Section 30.04(6) gives the Governor General the authority to make regulations prescribing what constitutes a clearly visible notice.

There are several problems with this provision, both in how it is specifically drafted in Bill C-32 (which is identical to its predecessor in Bill C-61), as well as in its underlying conceptual basis. Whatever benefits the proposed section provides are overridden if TPMs are involved. Permitting the content owner to avoid the operation of a user's right through the imposition of a TPM is a fundamental flaw that runs throughout Bill C-32, but section 30.04(4)(b) extends the problem even further. The owner does not even have to resort to using effective TPMs; they need only give notice that they do not want the section to be operative. This amounts to what is essentially self-help opting out, and the section does not even specify what requirements the notice must satisfy as this detail is left to subsequent regulations. Should this provision be enacted, it will likely encourage owners of content which is now accessible on the Internet to impose additional restrictions either through the use of TPMs or through the giving of notice opting out of the provision. In its submission on Bill C-61, the Canadian Library Association (CLA) objected

... to provisions that allow owners of works to unilaterally opt-out of user's [*sic*] rights either by terms of a contract, posting a notice on a website, installing a technological protection measure, or otherwise ... [and recommended] sections 30.01 through 30.04 be reviewed in light of our concerns and that these issues be addressed as part of a broad reaching public consultation.<sup>90</sup>

The special educational internet exemption has become controversial within the educational community. Despite its basic flaws, it is still supported by some groups in the educational community including the AUCC,<sup>91</sup> CMEC,<sup>92</sup> and the Canadian Association of Research Libraries (CARL).<sup>93</sup> While the proponents' underlying motivation may have had merit, the justification for the amendment became based on an undue

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90 Canadian Library Association, *Unlocking the Public Interest: The views of the Canadian Library Association/Association canadienne des bibliothèques on Bill C-61, An Act to Amend the Copyright Act* (September 2008), [www.cla.ca/copyright/Unlocking%20the%20public%20interest-Final.pdf](http://www.cla.ca/copyright/Unlocking%20the%20public%20interest-Final.pdf) at 8.

91 Association of Universities and Colleges of Canada, News Release, "Proposed copyright law amendments: some very good changes but some cause for concern" (13 June 2008), [www.aucc.ca/publications/media/2008/copyright\\_06\\_13\\_e.html](http://www.aucc.ca/publications/media/2008/copyright_06_13_e.html).

92 In 2008 CMEC issued a series of five Copyright Bulletins supporting the provision. See: *Copyright Bulletins*, [www.cmec.ca/Programs/Copyright/bulletin/Pages/default.aspx](http://www.cmec.ca/Programs/Copyright/bulletin/Pages/default.aspx) and text accompanying notes 100–105, below.

93 Brent Roe, Submission to 2009 Copyright Consultations, [www.carl-abrc.ca/projects/copyright/pdf/carl\\_copyright\\_consultation\\_submission\\_2009.pdf](http://www.carl-abrc.ca/projects/copyright/pdf/carl_copyright_consultation_submission_2009.pdf) at 2.

level of risk aversion and a corresponding unwillingness to rely on fair dealing. For example, a passage from CMEC's 2005 publication "Copyright Matters!"<sup>94</sup> responds to the question "Can Teachers and Students Copy from the Internet?":

Most material available on the Internet is protected by copyright.

This includes text (e.g., postings to newsgroups, e-mail messages), images, photographs, music, video clips, and computer software.

Under the *Copyright Act*, reproduction and unauthorized use of a protected work are currently infringements. Therefore, reproduction of any work or a substantial part of any work on the Internet would infringe copyright unless you have the permission of the owner.<sup>95</sup>

A 2008 statement from the Canadian Federation of Teachers 2008 also makes the similar point:

The proposed educational use of the Internet amendment provides clarity in the copyright law. Parliamentary passage of this amendment will avoid litigation to determine how fair dealing and an implied licence may apply to educational uses of Internet materials.

The amendment is also necessary because during the 2002 consultation facilitated by the Department of Canadian Heritage and Industry Canada, some rights holders and collectives took the position that fair dealing and the implied licence theory do not apply to the educational uses of their works.<sup>96</sup>

In January 2008, CMEC issued the first of five Copyright Bulletins, which attempted to justify the continuing need for the amendment:

... schools, teachers, and students need the permission of rights holders—and can be required to pay royalties—for some educational uses of material on the Internet. These rules apply even to "free stuff" on the Internet. "Free stuff" refers to material posted on the Internet by the copyright owner without password protection or other technological restrictions on access or use. "Free stuff" is posted on the Internet with the intention that it be copied and shared by members of the public using the Internet. It is publicly available

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94 *Copyright Matters*, above note 23.

95 *Ibid.* at 16.

96 Canadian Federation of Teachers. Educational Issues in Bill C-61 (29 October 2008), [www.ctf-fce.ca/publications/Briefs/Education\\_Issues\\_Bill\\_C-61\\_CTF\\_29Oct2008\\_eng.pdf](http://www.ctf-fce.ca/publications/Briefs/Education_Issues_Bill_C-61_CTF_29Oct2008_eng.pdf) at 3.



for anyone who wants to use it, but the current copyright law may not protect schools, teachers, or students even when they are making normal educational uses of this “free stuff.”<sup>97</sup>

This justification was criticized on several grounds, including its failure to account for the implied consent for reasonable uses that accompanies posting such material on the internet without restriction, and its failure to account for fair dealing even if there was no such implied consent.<sup>98</sup> It was also argued that a special exemption for users in educational institutions would

directly and adversely impact on public libraries, corporate users, and millions of ordinary Canadians with their Rogers and Sympatico and other ISP accounts. What the student can do with her campus account will now by implication be illegal with her mother’s Sympatico or her father’s Rogers account.<sup>99</sup>

CMEC responded in a second Copyright Bulletin that the “amendment is necessary to clarify the law so that students and teachers can have the assurance that they will not infringe copyright law when they engage in routine uses of publicly available Internet works for educational purposes,”<sup>100</sup> and in a third why fair dealing was inadequate for the purpose.<sup>101</sup> In the latter, they again took a narrow view of fair dealing:

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97 CMEC, Copyright Bulletin #1 “Changes to the Copyright Law Must Include An Amendment to Address Educational Use of the Internet” (31 January 2008), [www.cmec.ca/Publications/Lists/Publications/Attachments/106/note-01.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/106/note-01.en.pdf) at 1.

98 See Samuel Trosow, “Educational Use of the Internet Amendment: Is it Necessary?” (31 January 2008), <http://samtrosow.ca/content/view/27/43>. See also Howard Knopf, “The ‘A Contrario’ Scenario & CMEC” (31 January 2008), <http://excesscopyright.blogspot.com/2008/01/a-contrario-scenario-cmec.html>, and “The CMEC Red Herring” (13 March 2008), <http://excesscopyright.blogspot.com/2008/03/cmec-red-herring.html>.

99 *Ibid.* Howard Knopf refers to this problem as the “A Contrario Scenario.”

100 CMEC, Copyright Bulletin #2, “Education Organizations Need Clarity in Canada’s New Copyright Law” (7 March 2008), [www.cmec.ca/Publications/Lists/Publications/Attachments/109/bulletin-02.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/109/bulletin-02.en.pdf) at 2. In response see Samuel Trosow “Educational Use of the Internet Amendment: Is it Necessary (Part II)” (9 March 2008), <http://samtrosow.ca/content/view/37/43>.

101 CMEC, Copyright Bulletin #3 “Educational Use of the Internet: “Fair Dealing” Just May Not Be Enough” (14 March 2008), [www.cmec.ca/Publications/Lists/Publications/Attachments/110/bulletin-03.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/110/bulletin-03.en.pdf). In response see Samuel Trosow “Educational Use of the Internet Amendment: Is it Necessary (Part III)” (22 March 2008), <http://samtrosow.ca/content/view/41/43>.

The act does not define what is “fair,” nor does it define what is included in research, private study, criticism, or review. It is left up to the judgment of a user to decide whether a use is “fair.”

This is a difficult exercise for someone who is not knowledgeable about copyright. What one person thinks of as ‘fair,’ another may not. If a copyright owner disagrees with your judgment, he or she can sue you for copyright infringement.<sup>102</sup>

The measure has been opposed by the Canadian Association of University Teachers (CAUT) on conceptual grounds. With respect to the sectoral approach to special exemptions, they said:

This sectoral approach continues to be supported by some educational associations that press for specific educational exemptions.

Such an approach is fundamentally flawed. It cannot be sufficiently flexible to meet changing user needs. For example, artists need more explicit rights of parody; teachers need more explicit classroom display and reproduction rights; and computer scientists need more explicit rights to engage in reverse engineering. As well, reliance on specific institution-based exemptions is divisive as it allows an oppressive copyright regime, but then exempts some users but not others. While seeking a range of specialized exemptions was understandable in the mid-1990s given the limited nature of fair dealing, a broader approach based on fair dealing is a preferable alternative in light of *CCH*. Rather than foster competition between many worthy stakeholders for what might be limited legislative exemptions, a generalized solution is more sensible.<sup>103</sup>

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102 *Ibid.* at 1. In response to the “A Contrario Scenario” argument, CMEC finally acknowledges the *CCH* case and the potential applicability of fair dealing. See CMEC, Copyright Bulletin #4, “Concerning the Educational Use of the Internet: An Education Amendment Does Not Narrow Fair Dealing” (18 March 1 2008), [www.cmec.ca/Publications/Lists/Publications/Attachments/111/bulletin-04.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/111/bulletin-04.en.pdf). In the fifth and final Bulletin, they stress the uncertainty of an implied license and suggest that a court would be more likely to imply a licence for personal use than in an educational setting. Copyright Bulletin #5, “Educational Use of the Internet: Is There an Implied Licence?” (31 March 2008), [www.cmec.ca/Publications/Lists/Publications/Attachments/112/bulletin-05.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/112/bulletin-05.en.pdf). In response see Samuel Trosow “Educational Use of the Internet Amendment: Is it Necessary (Part IV)” (1 April 2008), <http://samtrosow.ca/content/view/44/43/>.

103 Canadian Association of University Teachers. Copyright and Academic Staff, CAUT Education Review, Vol. 1, No. 10 (February 2008), <http://caut.ca/uploads/EducationReviewvol10no1-en.pdf> at 4–5.

The Canadian Federation of Students (CFS) has opposed the exception, stating that [s]eeking further special exemptions that are not available to the general public is a fundamentally flawed strategy. The better option is an expanded and open-ended definition in the Act of fair dealing that reflects the principles laid out in the *CCH* judgement.<sup>104</sup>

The Canadian Alliance of Student Associations (CASA) has also opposed the provision, stating that "[t]he federal government should pursue a clarification of users' rights under fair dealing in future legislation, rather than rely on overly complex special exceptions and conditions for educational institutions."<sup>105</sup>

Given the proposed addition of "education" as an explicit fair dealing category, the need for this amendment is even more tenuous and it is unclear why its proponents continue to press for its inclusion, apparently as a priority. In the case of CMEC, their initial statement in support of Bill C-32 suggests that they consider this provision more important than the addition of the word "education" to section 29. They indicated support because the bill ". . . allows students and educators in elementary and secondary schools, colleges, and universities to have fair and reasonable access to publicly available Internet materials in their educational pursuits."<sup>106</sup> While the CMEC release neither mentioned support for the expansion of fair dealing, nor any concerns with the digital locks provisions AUCC's initial statement on Bill C-32 was broader, including support for the expansion of fair dealing and concern about the digital locks provisions as well as support for the special internet exemption.<sup>107</sup>

An additional problem with expanding special educational exemptions is the Act's limited definition of "educational institution."<sup>108</sup> As the differentiation between what goes on inside and outside of formal educational institutions is becoming increasingly tenuous, the disparate effects of the special exemptions are becoming problematic. Nor are the goals of simplicity and understanding the law promoted by having one set of rules at

104 Canadian Federation of Students, *Statement on Copyright Reform*, [www.cfs-fcee.ca/html/english/research/submissions/copyright2008.pdf](http://www.cfs-fcee.ca/html/english/research/submissions/copyright2008.pdf), at 3.

105 Canadian Alliance of Student Associations (CASA). *Our Path Forward: Strengthening Post-Secondary Access, Research and Learning in Canada*. (2009 Advocacy Week Document), [www.casa-acae.com/wp-content/uploads/2010/01/CASA-Advocacy-Week-Documents-2009.pdf](http://www.casa-acae.com/wp-content/uploads/2010/01/CASA-Advocacy-Week-Documents-2009.pdf).

106 Communiqués — CMEC Copyright Consortium Pleased with New Federal Copyright Legislation (3 June 2010), [www.cmec.ca/Press/2010/Pages/2010-06-03.aspx](http://www.cmec.ca/Press/2010/Pages/2010-06-03.aspx).

107 *Media Release: AUCC welcomes new copyright bill* (3 June 2010), [www.aucc.ca/publications/media/2010/copyright\\_06\\_03\\_e.html](http://www.aucc.ca/publications/media/2010/copyright_06_03_e.html).

108 Above note 47.

school and another at home. Instead of seeking additional special exemptions to promote teaching and learning, educators should be adopting their own sets of best practices for determining what does and does not constitute fair-dealing within their own institutions.<sup>109</sup>

An important principal that should help inform the evaluation of particular provisions is to ask whether it states clear and consistent principles that people can adopt and use in their daily lives. Sections 30.01 through 30.04 of Bill C-32 all fail by this yardstick.

### C. CONCLUSION

On its face, the educational provisions of Bill C-32 are cause for some optimism on the part of students and educators. But when placed into the context of the educational copyright environment, several of the provisions become problematic. While recognizing education as an enumerated fair dealing category in section 29 is a critical reform, and while the proposed changes to sections 29.4, 29.5 and 29.6 are also beneficial, proposed sections 30.01 through 30.04 would be harmful additions to the Act. Taken together these measures would reinforce the tendency of risk aversion, they would require the utilization of burdensome TPMs by educational institutions, and they would add an unnecessary level of complexity to the law. In the case of section 30.04, it would have the further deleterious effect of encouraging owners of what is now openly available internet content to take measures to impede access to their works. While the addition of education to the fair dealing categories will reduce uncertainty and perhaps alleviate some of the risk aversion that continues to plague educational copyright policy making, many of its benefits could be offset if not neutralized by these new provisions.

This chapter has, hopefully, dispelled any unwarranted complacency and premature celebration. At the same time, the government should be given credit for including some reasonable and balanced provisions in this latest iteration of copyright reform. Whether these beneficial provisions will withstand the incredible lobbying pressure to which they will be subject is another question. An even bigger question is whether they can make any significant changes in the actual day-to-day practices in our educational system, assuming they are enacted, in the face of the serious counter-factors that continue to be present.

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109 Above note 40.