

PART FOUR

Education

Copyright, Collectives, and Contracts:

New Math for Educational Institutions and Libraries

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A. INTRODUCTION

It is more than a decade since the last reforms to the *Copyright Act*¹ came into force.² While the statute has remained static,³ the “copyright worlds” of institutions involved in the provision of education and library services in Canada have changed dramatically. These changes have come as a result

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1 R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42>

2 *An Act to Amend the Copyright Act*, S.C. 1997, c. 24.

3 This is not for lack of legislative effort. Several Parliaments have attempted copyright reform in the interval. First a Liberal government introduced Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 37th Parl., 2005, first reading 20 June 2005. Second reading was scheduled for fall 2005, but never occurred due to the dissolution of Parliament on 29 November 2005: www2.parl.gc.ca/Content/LOP/LegislativeSummaries/38/1/c60-e.pdf.

Like Bill C-60 in 2005, Bill C-61, introduced by the Conservatives in 2008, never reached Second Reading: Bill C-61, *An Act to amend the Copyright Act*, 2d Sess., 39th Parl., 2008, First reading 12 June 2008. Parliament was dissolved 7 August 2008, www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/2/c61-e.pdf.

of the ways in which these institutions provide services. They have also come about as a result of the ways in which the actors in the information environment in Canada have changed their behaviours. Whatever the causes of these changes, institutions involved in education, library services, archival activities or museum practice find themselves in increasingly varied positions with respect to changes in the copyright legislation such as those proposed in the current Bill C-32, *An Act to amend the Copyright Act*.⁴ Given these varied positions, it may be difficult to assess just what the impact of the proposed changes will be on this sector. As this chapter will illustrate, the impact that Parliament can have by implementing these changes will be directly affected by the individual managerial decisions of each institutional decision-maker involved in education, library services, archival activity and museum practice in Canada.

The chapter will begin by outlining the current copyright worlds of institutions involved in education and library, archival and museum services in Canada. This outline will include discussion of contracts, collectives, the Copyright Board and the courts. Against this complex tapestry, the chapter will then discuss the provisions of Bill C-32 that particularly would affect this tapestry. Specifically, the chapter will highlight several changes proposed which will affect institutions (and, through them, their users) involved in library, archive and museum services as well as provision of education. These include users' rights in fair dealing and the special provision for certain "educational institutions" and "libraries, archives and museums." It will also point out several matters which Bill C-32 does not address, including expanding those institutions that can avail themselves of the rights given to certain educational institutions and libraries, archives, and museums and clarifying the representative nature of collectives in the Canada. Finally, the chapter will point out that, despite the rhetoric surrounding the importance of copyright reform, whether or not Bill C-32 passes,⁵ the copyright environment of Canada is being changed by players other than Parliament.

4 Bill C-32, *An Act to amend the Copyright Act*, 3d Sess., 40th Parl., First reading 2 June 2010, www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&file=4. At the time of writing, Bill C-32 has not entered the committee stage. All references herein, therefore, are to Bill C-32 as it was introduced. Note: for the remainder of this chapter, quotes will be used to denote those "libraries, archives and museums" enjoying special statutory exemptions. If there are no quotation marks, the reader should assume that the institutions are being referred to in general terms and are meant to include both those covered by the statutory exceptions and those not.

5 The recent governments attempting copyright reform have all been minority ones. The current distribution of the House of Commons as of June 2010 is: Conservatives 144, Liberals 77, Bloc Quebecois 48, NDP 36, Independent 2, and 1 vacancy due to the

This chapter will establish that Canadian institutions involved in education and the provision of library services are going to experience the reforms in Bill C-32 in very different ways because there are many different copyright worlds currently surrounding these institutions.

Schools inhabit at least three different copyright worlds: many schools are both “educational institutions” under the *Copyright Act* and would be entitled to the expanded users’ rights for such institutions that Bill C-32 would bring but are also “educational institutions” under the current *Access Copyright Elementary and Secondary School Tariff, 2005–2009* and proposed *Access Copyright Elementary and Secondary School Tariff 2010–2012* and will therefore only experience expanded rights under Bill C-32 indirectly in respect of rights marketed by Access Copyright; other schools, private non-profits, lie outside the ambit of the two Tariffs promulgated by Access Copyright but still lie within the sphere of “educational institutions” under the *Copyright Act* and would therefore benefit directly from all expansions of users’ rights under Bill C-32; still other schools are purely for profit and private and will neither benefit from the expansion of exceptions for educational institutions under Bill C-32 nor be affected by the tariff proceedings before the Copyright Board which Access Copyright has initiated — these latter schools will, however, have a specific and direct interest in the expansion of the concept of “fair dealing” to encompass “education” as proposed under Bill C-32.

Universities and colleges find themselves the target of tariff proceedings before the Copyright Board launched by Access Copyright, just as public schools have experienced. However, because the governance structures of colleges and universities are different from those of schools, those governing each of Canada’s colleges and universities will have to make a series of decisions about the Copyright Board proceeding: some may decide to operate in such a way that their uses, including their libraries’ operations, fall within the ambit of the users’ rights provided in the *Copyright Act* — these institutions will have a direct interest in the expanded ambit of users’ rights set out in Bill C-32; others may plan on extending their abilities to serve students and library patrons by purchasing rights from

resignation of the NDP MP Judy Wasylycia-Leis in April 2010: www.parl.gc.ca/information/about/process/house/partystandings/standings-e.htm

The 2005 Liberal minority situation was: Liberals 133, Conservatives 98, Bloc Quebecois 54, NDP 19, Independent 3, and 1 vacancy. The Conservative minority situation when Bill C-61 was introduced was almost the exact reverse (at the top) from the 2005 picture: Conservatives 127, Liberals 95, Bloc Quebecois 48, NDP 30, Independent 4, and 4 vacancies.

Access Copyright but will not decide to actively participate in the Tariff proceedings before the Board, and still others will decide to actively oppose the Tariff and participate in the Board's proceedings (in either of these last two cases, the institutions can decide later whether to actually purchase the blanket licences under the Tariff the Copyright Board decides).

The chapter will describe why, where the Copyright Board is deciding the value of the rights to be made available under a tariff, the institutions to whom the tariff is targeted will experience the implications of any relevant changes that Bill C-32 may make to the *Copyright Act* only indirectly, as part of the considerations of the Copyright Board. Thus changes that Bill C-32 would represent would only be experienced indirectly by the educational institutions and libraries in the copyright worlds which involve the jurisdiction of the Copyright Board. The 'copyright worlds' now inhabited by libraries in public schools and private not-for-profit schools are, from this perspective, similar to those which are becoming inhabited by academic libraries and government libraries.

On the other hand, private, non-profit schools which enjoy the educational institution users' rights under the *Copyright Act* and public libraries and any other library which enjoys the library, archive or museum users' rights under the *Copyright Act*, but is not part of an academic institution or provincial or territorial government, will occupy similar, though not identical, copyright worlds — not least because none of them are included in any current tariff proceeding by Access Copyright before the Copyright Board — and will have similar, though not identical, direct experiences of the expansions of users' rights proposed in Bill C-32.

Finally, the copyright worlds inhabited by private, for profit schools; libraries that are operated by for profit organizations; and libraries operated not for profit but which do not maintain collections of documents or other materials open to the public or researchers are all identical in certain respects:

- 1) these institutions do not enjoy the benefits of the current educational institution or library, archive or museum exceptions in the *Copyright Act* and will not benefit by the extensions in Bill C-32 to them,
- 2) these institutions are not affected by tariffs being imposed by the Copyright Board in respect of schools, post-secondary institutions, provincial and territorial governments, and
- 3) these institutions will benefit directly from the addition of "education" to the definition of fair dealing in Bill C-32.

The chapter will also point out that the choices that individual institutions make about what proportion of their resources is subject to directly negotiated licences with the holders of copyright (where copyright collectives are not relevant) will have an impact on the importance of collective processes and, indeed, legislative reform for that institution and will, thus, create further subdivisions between otherwise “like” institutions. Similarly, the uses to which each institution puts works and other subject matter in order to meet the needs of its institution, its students or its patrons will affect the copyright world in which each institution uniquely finds itself.

Bill C-32, even if it passes, will clearly not be solely determinative of future relationships between copyright holders and institutions providing education and library services in Canada.

In particular, copyright holders and institutional players such as those engaged in education, library, archive and museum activities are shaping their own environments. Even if Bill C-32 passes, its effect on these institutions and players will depend on their own actions.

B. THE CURRENT COPYRIGHT WORLDS OF INSTITUTIONS INVOLVED IN EDUCATION AND PROVISION OF LIBRARY SERVICES

1) Worlds of Collectives and Contracts

In 2010, most institutions involved in education in Canada find themselves being virtually fully engaged by a combination of (1) tariff processes before the Copyright Board of Canada with collectives representing some copyright holders and (2) contracts directly with other copyright holders. Similarly, more and more libraries find themselves in the same situation as these schools, colleges and universities.

This is an environment of rapid change, even in five years. In 2005, it was true that

[t]he 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).⁶

6 Margaret Ann Wilkinson, “Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries,” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), 331–74 at

It was also contemplated in 2005, at least in some circles, that copyright collectives would probably come to play an increasing role in Canada's future.⁷ On one model of Canada's future, it was thought

there would be uses paid to the rightsholder (in most cases, on a transactional basis). A subscription to an online publication or the download of a song or pay-per-view movie are good examples. A second universe would encompass free uses, such as those permitted by exceptions or stemming from ownership rights in a copy. . . But that leaves a universe of uses not covered by exceptions and which cannot be realistically [licensed] transactionally. An annual or similar licence then remains the only possible option to compensate rightsholders (within the scheme of the Act). Such licences can only be efficiently offered by copyright collectives.⁸

The situation in 2010, however, is radically different, in a number of respects, to that experienced even in 2005—and dramatically different from the situation which obtained when the *Copyright Act* was last amended in 1997.

The roots of the new environment are primarily recent: since 1988, when the *Copyright Act* was amended to encourage the proliferation of copyright collectives,⁹ collectives have come to represent more rightsholders holding different classes of copyright interests in different kinds of works in Canada.¹⁰ Indeed, in Canada, collectives have come to be able to represent

342, www.irwinlaw.com/pages/content-commons/filtering-the-flow-from-the-fountains-of-knowledge--access-and-copyright-in-education-and-libraries--margaret-anne-wilkinson

7 *Ibid.* See also Daniel Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing," in Michael Geist, ed., *In the Public Interest*, *ibid.*, 517–49 at 549, www.irwinlaw.com/content/assets/content-commons/120/Three_04_Gervais.pdf [Gervais (2005)].

8 Gervais (2005), *ibid.*, at 541.

9 *An Act to amend the Copyright Act and to amend other Acts in consequence thereof*, R.S.C. 1985, c. 10 (4th Supp.), s.14. There were further amendments to the *Copyright Act* in 1997 which provided additional clarification about the collective administration of copyright in Canada. For example, a definition of a "collective society" was added at that time. See *An Act to amend the Copyright Act*, S.C. 1997, c. 24, s. 1(5).

10 Canada is said to have more copyright collectives than any other major developed country. See Howard P. Knopf, "Canadian Copyright Collectives and the Copyright Board: A snapshot in 2008" (2008) 21 I.P.J. 117, at 122. This proliferation has developed from very narrow roots in the performing rights area. Collecting societies in Canada trace their roots back to 1925 when the first Canadian Performing Rights Society (CPRS) was formed. It was related to the British Performing Rights Society.

a great array of rightsholders rights.¹¹ Many, but by no means all, of the uses sought by institutions involved in education, library, archive and museum activities in Canada *prima facie* would come within the purview of the rights represented by various collective societies in Canada.

Figure 1 groups the collectives currently active in Canada¹² according to the various copyright holders' rights set out in section 3 of the *Copyright Act*.¹³ This analysis is not necessarily comprehensive,¹⁴ given the limita-

Eventually, BMI Canada was formed in 1941, related to Broadcast Music, Inc (BMI) which had been formed in the United States in 1939. In 1946, the Composers, Authors and Publishers Association of Canada (CAPAC) formed from CPRS and in 1978, the Performing Rights Organization of Canada (PROCAN) descended from BMI Canada. Ultimately, after the *Copyright Act* reforms of 1988, the two organizations merged in 1990 to form the current Society of Composers, Authors and Music Publishers of Canada (SOCAN).

- 11 Until the statutory reforms of 1988, no collectives were allowed to exist with respect to any rights other than the performing rights — now see the array in Figure 1. And see also the discussion below describing the increasing range of rights which Access Copyright is becoming able to offer with respect to English language print works in Canada.
- 12 As identified by the Copyright Board of Canada on its website — <http://www.cb-cda.gc.ca/societies-societes/index-e.html> (last modified 27 August 2010) — using the descriptions of the collectives provided there.
- 13 This chart does not include collectives exclusively representing rightsholders in “other subject matter” than “works.” Thus collectives representing exclusively rightsholders in sound recordings, performers’ performances, or broadcasts are not included. For example, a number of collectives listed on the Copyright Board website would appear to have their origins in s.15 (performer’s performance rights) and are therefore not shown on Figure 1. The collective now called Re:Sound, (Re:Sound Music Licensing Company) — formerly the NRCC (the Neighbouring Rights Collective of Canada) — is an “umbrella” music licensing company for performance rights. It represents, in this respect, AFM (American Federation of Musicians of the United States and Canada), ACTRA PRS (ACTRA Performers’ Rights Society), Artist I (collective society of the Union des artistes (UDA)), SOPROQ and AVLA from this perspective). The Société de gestion des droits des artistes-musiciens (SOGEDAM) represents Canadian musician performers and performers who are members of foreign societies. Others listed on the Copyright Board site appear to be representing rights which have arisen through s.21 (broadcasters’ rights in communication signals). Border Broadcasters Inc. (BBI) represents broadcasters along the Canada/US border with respect to local programming. The Copyright Collective of Canada (CCC) relates to comedy and drama programming. The Direct Response Television Collective (DRTVC) relates to certain television programs including “infomercials.”
- 14 Previous published taxonomies have focused on the genres of works covered or characteristics of the rightsholders rather than on which rights under the *Copyright Act* are being represented, as is being done here. See, for example, the taxonomy by Daniel Gervais (2008), below note 18, at 202–6. See also the select briefer listing of “Some of the Canadian Collectives” in Knopf, above note 10 at 122.

tions of its documentary source data, but may serve to reinforce certain points being made herein.

As Figure 1 indicates, most of the collectives group around the *reproduction rights* to various types of works, the *right to perform works in public*, and the *right to telecommunicate* various works. All three of these uses of works would seem to be germane to the modern functions of institutions engaged in educating and serving user needs through library activities.¹⁵ Other rights, such as translating works, converting dramatic works, adapting works as cinematographic works, and making records, would seem to be activities undertaken less frequently by these institutions. For these latter uses, particular transactional licences, as contemplated in Daniel Gervais's "second universe," above, would seem to be more natural. Renting computer programs and sound recordings is probably very rare, if it occurs at all, in these institutional settings.

15 Conversely, since "private copying" under Part VIII of the *Copyright Act* (ss. 79–88, added by *An Act to Amend the Copyright Act*, S.C. 1997, c. 24) is not a users' right which is available to the institutions being discussed here (in terms of delivering services to students or library patrons), it is therefore not included in this analysis. The Canadian Private Copying Collective (CPCC) arises from this new rights regime since copyright holders are compensated through levies on the sale (s. 82(1)) of "blank audio recording media" as defined in s. 79) for the new users' right to "private use of the person who makes the copy" (s. 80(1)) and this compensation is orchestrated through the Copyright Board (see, in particular, s. 83). CPCC represents, in this respect, CMRRA, SOGEDAM, SODRAC, SOCAN and Re:Sound, all identified in full above. The Producers Audiovisual Collective of Canada identified itself as specifically engaged in matters related to private copy levies as well and is therefore not represented in Figure 1. The Canadian Screenwriters Collection Society (CSCS) similarly identifies itself as being concerned with private copying levies and educational use levies — but it is shown above in Figure 1 because of its self-identification with rental and lending levies. The Directors Rights Collective of Canada (DRCC) in its description on the Copyright Board website is most clearly identified with those whom it represents, film and television directors, rather than the particular rights involved. However, the membership application for joining the Directors Guild of Canada, from which it springs, identifies the collective most clearly with the private copying regime in Canada: see www.dgcodc.ca/pdf/Applics/DGCDirectorsMemAppMay3008.pdf.

Figure 1: Collectives Grouped by Copyright Holder's Rights

Section 3(1) Right	Associated Collective Society
Produce or Reproduce the Work	Access Copyright (writing) AVLA (music: videos and audio) CARCC (visual arts) CCLI (church uses) CMRAA (audio & music) COPIBEC (writing) SODRAC (music)
Perform the Work in Public	ACF (films) Criterion Pictures (films) CVLI (films and audio-visual) ERCC (tv and radio, education only) SOCAN (music) SoQAD (theatre, education only)
Publish the Work	
(a) Translate the Work	
(b) Convert a dramatic work	
(c) Convert a non-dramatic work by performance	
(c) Convert an artistic work into a dramatic work by performance	PGC (theatre) SOCAN (music) SoQAD (theatre, education only)
(d) Sound/cinematography film to mechanically reproduce a literary, dramatic or music work	
(e) Adapt a work as a cinematographic work	
(f) Communicate the work by Telecommunication	CBRA (tv) CRC (TV and film) CRRRA (TV) FWS (sports) MLB (sports, baseball) SACD (theatre, film, radio, audio) SCAM SOCAN (music) SOPROQ (audio and video)
(g) Present an Artistic work at a Public Exhibition	
(h) Rent out a Computer Program	
(i) Rent out a Sound Recording	CSCS
ACF (Audio Cine Films); AVLA (Audio-Video Licensing Agency); CARCC (Canadian Artists' Representation Copyright Collective); CBRA (Canadian Broadcasters Rights Agency); CCLI (Christian Copyright Licensing Inc.); CMRAA (Canadian Musical Reproduction Rights Agency); Criterion Pictures; COPIBEC (Société québécoise de gestion collective des droits de reproduction); CRC (Canadian Retransmission Collective); CRRRA (Canadian Retransmission Right Association); CSCS (Canadian Screenwriters Collection Society); CVLI (Christian Video Licensing International); ERCC (Education Rights Collective of Canada); FWS (FWS Joint Sports Claimants); MLB (Major League Baseball Collective of Canada); PGC (Playwrights Guild of Canada (formerly the Playwrights Union of Canada)); SOCAN (Society of Composers, Authors and Music Publishers of Canada); SACD (Société des auteurs et compositeurs dramatiques); SCAM (Société civile des auteurs multimédias); SODRAC (Society for Reproduction Rights of Authors, Composers and Publishers in Canada); SOPROQ (Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec); SoQAD (Société québécoise des auteurs dramatiques)	

The creation of copyright collectives lies within the sole power of the rightsholders themselves under the Canadian *Copyright Act*,¹⁶ and, certainly, it is demonstrably evident in Figure 1 that holders of Canadian rights in only certain rights have found it useful to form collectives. Conversely, it seems clear that other rights are not sought by users in ways that commend themselves to the rightsholders as appropriate to collective administration.¹⁷

The reality in 2010, as Bill C-32 is introduced, is very different than it has been in the past: for a very rapidly expanding number of institutions involved in education and library services, there are now coming to be only two types of copyright “universes”: one comprising contracts for uses paid to the rightsholders (mostly on an ongoing contracted subscription basis, rather than the transactional basis contemplated by Gervais in 2005) and the other, being relationships with copyright collectives. The “second universe” of “free uses” imagined in 2005 appears to have been subsumed largely into the negotiations attendant upon the other two. Again, understanding why this is becoming the case and how this affects the ways in which these institutions will experience all future reform of the *Copyright Act*, including Bill C-32, may assist in predicting the actual effects of the changes proposed in Bill C-32. But one reason for the decline in importance of the “second universe” may be the way in which the “third universe” is coming to be experienced now: the experience of dealing with collectives is rapidly shifting from one of negotiation to one of appearances before the Copyright Board.

2) Enter the Copyright Board

While, as pointed out, the continuing expansion of copyright collectives in Canada has been an ongoing part of the institutional life of educational

16 That the creation of a collective occurs at the instigation of rightsholders is evident in the statutory definition of “collective society” as one “that carries on the business of collective administration of copyright . . . for the benefit of those who . . . authorize it to act on their behalf in relation to that administration . . .” (*Copyright Act*, above note 1, s. 2).

17 Sometime before the 1988 statutory reforms that encouraged the proliferation of collectives in Canada, Peter Grant identified “When A Copyright Collective Makes Sense” as being when there are a “multitude of copyright users, multitude of transactions (uses), unplanned character of uses, multitude of copyright owners, [and] no physical/electronic nexus between owners and users.” Figure 2 in “Copyright Collectives in Canada: Current Regulatory Structures and New Ideas,” in *Proceedings of the Colloquium on the Collective Administration of Copyright*, organized by the Canadian Conference of the Arts, The Canadian Literary Arts Association (ALIA Canada), The Copyright Board of Canada and The Faculty of Administrative Studies, Arts & Media Administration Program, York University, Toronto, 31 October 1994, 9-41 at 11.

institutions and libraries in Canada since the 1988 *Copyright Act* reforms occurred, it is the suddenly increasing involvement of the Copyright Board that has radically changed the landscape for institutions involved in education and provision of library services. Despite its increasing importance and activity, the role of the Copyright Board has been relatively little examined in the literature.¹⁸

Once a collective exists, the Canadian *Copyright Act* gives the collective more leverage in controlling the nature of the relationship between users and collectives than it gives the users. While in many cases a collective and a group of users may choose to negotiate blanket licences,¹⁹ the collective society alone has the option, instead, to apply for a tariff from the Copyright Board:

A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,

- (a) file a proposed tariff with the Board; or
- (b) enter into agreements with users.²⁰

18 See Knopf, above note 10; Daniel Gervais, “A Uniquely Canadian Institution: The Copyright Board of Canada” in Ysolde Gendreau, ed., *An Emerging Intellectual Property Paradigm: Perspectives from Canada* [Queen Mary Studies in Intellectual Property] (Cheltenham: Edward Elgar, 2008) c. IX; and Mario Bouchard, “Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia,” in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer, 2006), 197–223. See also Margaret Ann Wilkinson, “The Copyright Regime and Data Protection Legislation,” in Ysolde Gendreau, ed., *Copyright Administrative Institutions: Conference Organized by the Centre de recherche en droit public (CRDP) of the Faculty of Law of the Université de Montréal, 11 & 12 October 2001* (Cowansville, PQ: Les Éditions Yvon Blais Inc., 2001) 77–100. Howard Knopf makes the same comment about collectives, above note 10 at 131, as is here being made about the Copyright Board: “Despite the importance of the collective movement in Canada and the enormous amount of money at stake, there is surprisingly little analytical analysis of collective activity in Canada.”

19 There are a number of different schemes governing the collective administration of copyrights embedded in the *Copyright Act*. With respect to certain rights, the collective process is mandatory, not voluntary: the retransmission of distant radio and television signals and reproduction and public performance by educational institutions, except for educational and training purposes, of radio and television signals (contained in Part VII of the *Copyright Act*, “Copyright Board and Collective Administration of Copyright,” ss. 66–78 at ss. 71–76) and the special situation of compensation for the private copying of sound recordings (in its own new Part VIII of the Act, since the 1997 amendments to the *Copyright Act*, ss. 79–88). In all other cases, the collective management of rights is voluntary.

20 *Copyright Act*, above note 10, s. 70.12. On the other hand, once negotiating, if a collective and a potential user are unable to agree to license terms, either may apply to the Board (s. 70.2(1)). See note 33 below.

While most schools and school/libraries in the country have found themselves involved with Access Copyright before the Copyright Board already, as will be further described below, increasing numbers of libraries find themselves now in the same position (government libraries and academic libraries, for example). It may be important to note here that, *at the option of Access Copyright*, greater numbers of libraries may find themselves also involved in processes before the Board (for example, public libraries).

Having perhaps become used to the process of *negotiating* with copyright collectives for licences (including blanket licences),²¹ institutions will discover that the process that ensues when the collective applies to a quasi-judicial tribunal, the Copyright Board, is fundamentally different. Once a tariff is issued, it will apply to all subsequent transactions between the collective and a class of potential users for the duration of the tariff. As the Federal Court of Appeal has said, under the tariff application system, “The Board . . . [has] to regulate the balance of market power between copyright owners and users.”²²

Many institutions involved in education and provision of library services in Canada now find themselves in a transitional phase from voluntary negotiation to mandatory appearances before the Copyright Board of Canada — just at the same time as Bill C-32 is being proposed by the government. Access Copyright, the print collective for English language rights for reproduction, which was just expanding its network of licences back in 2005,²³ is now, in 2010, engaged in aggressively shifting its focus from the consensual negotiation of licences to the forum of the Copyright Board and the tariff process.

The initial signal of what has become evident as a wholesale change in Access Copyright’s strategy was the decision to take all the Ministers of Education (except Quebec)²⁴ to the Board for a Tariff for public schools

21 Or a “model license” such as Access Copyright created with the Association of Universities and Colleges of Canada some years ago and which Access Copyright then used as the basis for individual contracts entered into between Access Copyright and the various colleges and universities across Canada.

22 *Canadian Association of Broadcasters v. SOCAN* (1994), 58 C.P.R.(3d) 190 at 196.

23 And in 2006, Howard Knopf reports its revenue as over \$34 million, with another \$12 million for COPIBEC, its French language counterpart (above note 10, at.123, citing to the organization’s respective websites).

24 Including the Ministers in all three territories. Access Copyright and its French language counterpart COPIBEC have reciprocal agreements in place — according to the News Release of the Copyright Board of Canada dated 26 June 2009 “Access Copyright administers the rights for all of Canada except Quebec, where the repertoire is administered by *La Société québécoise de gestion collective des droits de reproduction* (COPIBEC).”

right through to grade 12, covering the years 2005–2009.²⁵ The decision of the Copyright Board on that tariff application was just released in June 26, 2009.²⁶ The tariff itself was published the next day.²⁷ It replaced the Pan Canadian Schools/Cancopy Licence Agreement which was negotiated without recourse to the Copyright Board and which governed relationships between the schools and the reprographic collective from 1999 until 2009.²⁸ Under the original agreement, Cancopy/Access Copyright was paid \$2.56 per full time student equivalent (FTE) per year for every educational institution in Canada (except Quebec). Under the new tariff, Access Copyright is to receive \$5.16 per FTE student per year.

All those Ministries (and, through them, the school boards everywhere except in Quebec) are now coping with Access Copyright's decision to take the Ministers of Education to the Board for a Tariff for 2010–2012.²⁹ Under this tariff, Access Copyright is seeking \$15.00 per FTE student per year. At least part of the reason for the increase sought is that, in addition to those works covered by the 2005–2009 Tariff, Access Copyright will now include permissions to copy sheet music and to make digital copies of paper works.³⁰ This expansion of its offerings must mean that its members have given it a greater array of rights in their English language print works than they had heretofore.

One of the additional users' rights which the government intends to give "educational institutions" under Bill C-32 is the right to make digital reproductions of paper forms for any educational institution which has

25 "Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire in the Years 2005 to 2009 (Provincial and Territorial Governments) (Educational Institutions) Supplement," *Canada Gazette*, Part I, 24 April 2004, www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2004/20040424-r-b.pdf

26 *Ministers of Education v. Access Copyright* (26 June 2009,) [/www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf](http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf)

27 *Access Copyright Elementary and Secondary School Tariff, 2005–2009*, above 29 (see para. 1).

28 Cancopy was the original name under which the organization now known as Access Copyright was known.

29 "Statements of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire: Educational Institutions (2010–2012); Provincial and Territorial Governments (2010–2014)" *Supplement to the Canada Gazette* Part 1, 9 May 2009, at 4–12, which is to be known as the *Access Copyright Elementary and Secondary School Tariff, 2010–2012*, <http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2009/20090509-r-b.pdf>

30 See definition of "copy" in s. 21 of *Access Copyright Elementary and Secondary School Tariff, 2010–2012*, *ibid.*

a reprographic reproduction licence for a collective society's repertoire.³¹ If Bill C-32 passes, it would surely be incumbent on the Copyright Board, in considering the additional cost (\$5.16 to \$15 per FTE student per year) of the new Tariff for 2010–2012 sought by Access Copyright, to consider that one of the new “rights” purporting to be sold by Access Copyright appears to have been rendered without value by the government by extending users' rights for educational institutions under licence to include precisely these rights.

In the government sector, Access Copyright has applied to impose a Tariff for 2005–2009, and one for 2010–2012, for uses by all the provincial and territorial governments.³² This will affect all library services within those government civil services. The proposed tariff here is \$24.00 per FTE civil servant. Since the coverage in this proposed tariff is the same as that being proposed by Access Copyright in the 2010–2012 “school” tariff just described and proposed for schools at \$15.00 per FTE student, it must be assumed that Access Copyright believes that the provincial and territorial civil servants have access to fewer users' rights under the *Copyright Act* than do students and their agents.

Meanwhile, all the Universities and colleges in Canada (other than those in Quebec) are affected by the recent decision by Access Copyright to abandon individual negotiations with universities and colleges (or with organizations representing them)³³ and to apply instead for a Tariff before

31 Bill C-32, above note 4, s. 27, adding to the *Copyright Act*, above note 1, s. 30.02.

32 These two proposed tariffs are curiously difficult to locate: there is a notice on the Copyright Board website about “Access Copyright - Provincial and Territorial Governments Tariffs (2005–2009 and 2010–2014)” advising that there will be a “Hearing beginning Tuesday, September 13, 2011 at 10:00 a.m., Copyright Board's hearing room” in the matter. See www.cb-cda.gc.ca/home-accueil-e.html. There is also a document of what is to be styled the *Access Copyright Provincial and Territorial Governments Tariff, 2010–2014* which, curiously, appears beginning at page 13 of a document that begins with a proposed tariff entitled *Access Copyright Elementary and Secondary School Tariff, 2010–2012*, just discussed. See “Statements of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire: Educational Institutions (2010–2012) Provincial and Territorial Governments; (2010–2014),” *Supplement Canada Gazette*, Part I, 9 May 2009, www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2009/20090509-r-b.pdf.

33 In the winter of 2009–2010, colleges and universities across Canada received individual letters from Access Copyright indicating that the existing individual licenses between each of these institutions and the collective were going to be terminated and negotiations begun for new licenses. The letters mentioned that the new license terms and conditions might be created either by agreement of the parties (this is,

the Board.³⁴ This is the highest tariff yet proposed by Access Copyright: \$45.00 per FTE student.³⁵ However, under this tariff Access Copyright proposes to give rights in both print and digital works. The difference between this proposed tariff and those proposed for the schools 2010-2012 and the provincial and territorial governments, then, must be, in Access Copyright's eyes, the difference between the value of rights to reproduce print and convert print to digital (under the latter proposed tariffs) and the higher value of the rights to reproduce print, convert print to digital, and work with original digital (in the former proposed tariff).

The Copyright Board, in setting the first Tariff sought by Access Copyright,³⁶ has described the formula it intends to apply to such matters going forward. This formula can be displayed as shown in Figure 2.

Access Copyright and the university or college to whom the letter was addressed) or by the Copyright Board. It is apparently the case that Access Copyright has shifted the process into the realm of the Copyright Board under the *Copyright Act*, above note 1, s.70.2 which provides that

Where a collective society and any person [including any organization]. . . are unable to agree on the royalties to be paid for the right to the act [which otherwise than under license only the copyright holder represented by the collective has the right to do]. . . either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

- 34 “Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire: Post-Secondary Educational Institutions (2011–2013),” *Supplement Canada Gazette*, Part I June 12, 2010, to be known as *Access Copyright Post-Secondary Educational Institution Tariff, 2011–2013*. Under this proposed tariff, “educational institution” has been given the following meaning: “an institution located in Canada (except in the Province of Quebec) that provides postsecondary, continuing, professional, or vocational education or training.” (www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/2009-06-11-1.pdf)

- 35 *Access Copyright Post-Secondary Educational Institution Tariff, 2011–2013*, para. 7

Royalties: The Educational Institution shall pay an annual royalty to Access Copyright calculated by multiplying the number of its Full-time-equivalent Students by the royalty rate of

(a) \$45.00 CAD for Universities; or

(b) \$35.00 CAD for all other Educational Institutions.

- 36 “Reprographic Reproduction 2005–2009: Reasons for the decision certifying Access Copyright tariff for educational institutions” (26 June 2009) (Justice William Vancise, Francine Bertrand-Venne, and Sylvie Charron): www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf [Copyright Board decision].

Figure 2: The Copyright Board's Formula for Setting Tariffs

Take all copying done within the institution

(determined by actual surveying, using statistically robust sampling^[1])

Subtract all copies for which the rightsholders should not be compensated

(a) because the materials in question were not "works" or not works in which the rightsholders in the collective have rights (e.g., materials created by schools for themselves, in which they hold copyright)^[2] AND

(b) because, although the materials in question are prima facie materials in which the collectives' members have rights, there are users' rights (exceptions) which mean the rightsholders are not exercising their rights for these uses (fair dealing, rights for "educational institutions" or "LAMs")^[3]

SUB- TOTAL: NUMBER OF COMPENSABLE COPIES

MULTIPLY by the value of each copy as determined on economic evidence by the Copyright Board^[4]

EQUALS THE AMOUNT OF THE TARIFF EACH INSTITUTION IS TO PAY TO THE COLLECTIVE

Notes:

[1] The study for the Tariff 2005–2009 for schools is described by the Board at paras. 29–35.

[2] See, in this connection, the Board's reasons at para.136 and para.139 and Table 2 thereto.

[3] See, in this connection, the Board's reasons at para. 137 and Table 1 thereto.

[4] The Board stated, at para.135, "The parties agree to set the tariff using a three-step methodology. First, they estimate the total number of photocopied pages triggering remuneration in all of the institutions involved. Next, they determine the value of a photocopy, followed by the total value of the photocopies, which is the product of the number of photocopied pages multiplied by the value of each. The tariff itself is obtained by dividing the total value of the photocopied pages in one year by the number of FTE [full-time equivalent] students"

As mentioned, under the previous *negotiated* licence, schools had been paying approximately \$2.45 per FTE student per year. Under the Board's tariff, the full rate for 2005–2009 would rise to \$5.16 per FTE student per year—but the Board imposed a 10 percent discount on this rate for the first four years, bringing the rate from 2005 to 2008 to \$4.64 per FTE student per year, and \$5.16 per FTE student only for 2009.

The Copyright Board held that copies made within the categories of exception found in the fair dealing provisions of the Act, but made for instruction or non-private study for a group of students, do *not* fall within the criteria to be considered within the users' rights to fair dealing.³⁷ In this context, it should be noted that such situations will seldom apply to those working within institutions providing library services.

Indeed, only section 29.4(2) was discussed at any length. The Board articulates clearly the position that the special exemptions for "educational institutions" and "libraries, archives and museums" have statutory condi-

37 Copyright Board decision, above note 36, para.118.

tions which are different from the criteria for falling within users' rights to fair dealing.³⁸

Discussing section 29.4(2) with respect to "educational institutions" involved the Copyright Board in analysis of the notion of "commercially available" which is defined in section 2 of the Act, since 1997³⁹ as meaning:

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.

The Copyright Board noted that the term "commercially available" was also used both in an exception for "libraries, archives and museums" when making copies of works for preservation⁴⁰ and in an exception for any person (individual or organization) making a copy for a perceptually disabled user (individual or organization).⁴¹ However, the Board noted that the meaning ascribed to the term "commercially available" was rendered different on the occasion of its use in connection with the perceptually disabled than in connection with "educational institutions" or "libraries, archives and museums." In the case of the perceptually disabled, the presence or absence of available licences is irrelevant while in the cases of the "educational institutions" and "libraries, archives and museums" it is relevant.⁴² Thus the current *Copyright Act* has made it more frequently open to the perceptually disabled to use works because they are not deemed to be commercially available than will be the case for uses for "educational institutions" or "libraries, archives and museums."

Altogether the Board found that there had been about 10.3 billion copies made in schools in 2005–2006, of which roughly 250 million (or, only

38 *Ibid.*, para. 128. Although the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [*CCH v. Law Society*] held that availability of a license is irrelevant in assessing whether the criteria for fair dealing have been met, the definition of "commercially available" for "educational institutions" and "libraries, archives and museums" statutorily requires that the availability of a license be considered relevant.

39 *An Act to Amend the Copyright Act*, S.C.1997, c. 24, s. 1(5).

40 *Copyright Act*, above note 1, s.30.1

41 *Ibid.*, s.32(1).

42 Copyright Board decision, above note 36, para.127

2 percent) related to uses which triggered remuneration: 98 percent of photocopying in schools was found to be photocopying for which copyright holders were *not* entitled to any compensation.

3) The Loss of the Indemnification from Access Copyright

One of the features of the licences into which organizations have previously entered with Access Copyright has been a clause which has indemnified the user organizations from legal costs and damages associated with any lawsuits brought against the organizations by copyright rightsholders who were not represented by Access Copyright.⁴³ Apparently the clause has never been invoked.⁴⁴ One of the challenges in the current state of Canada's copyright law, which is not addressed by Bill C-32, is that the collectives do not represent those rightsholders who choose not to join them.⁴⁵ The Copyright Board has taken the position, in its recent schools tariff decision, that the indemnity clause has no place in the tariff between Access Copyright and the schools.⁴⁶ The Copyright Board took this position despite acknowledging both that Access Copyright's argument that it represents more than 99 percent of works reproduced by K-12 educational institutions was without evidence⁴⁷ and that the Ministers of Education argued that many rights holders are still not affiliated with Access Copyright.⁴⁸

4) The Copyright Board under Review

Given the dollar value of the tariff announced between Access Copyright and the schools and the fact that this tariff was the first amongst a num-

43 Since Access Copyright has no control over the actions of rightsholders who are not its members or affiliated with it in any way, it could not prevent such rightsholders from bringing actions against organizations or individuals with whom it had contracts. Nor could it prevent courts from making orders including injunctions and damages against the organizations that were sued.

44 Information provided by Access Copyright to the Copyright Board, see the Copyright Board decision, above note 36, at para. 181.

45 This shortcoming has been noted by Daniel Gervais (2008), above note 18 at 220. In Europe, the "extended licensing" or "extended repertoire" system has been common for some time. Under it, those who do not wish to be represented by the appropriate collective bear the burden of opting out.

46 *Ibid.*, above, para. 183.

47 *Ibid.*, para. 179.

48 *Ibid.*, para. 182. The Board also notes that the Ministers of Education believed they would be detrimentally affected because they would be vulnerable to proceedings without the indemnity.

ber of tariffs now being sought by Access Copyright, it was perhaps inevitable that this decision of the Copyright Board would be challenged.

The Copyright Board cannot be appealed, but, as a quasi-judicial administrative body, it is subject to judicial review by the courts, specifically the Federal Court of Appeal.⁴⁹ The Ministers of Education applied to have the Copyright Board's decision reviewed in *Alberta v. Access Copyright*.⁵⁰ On 27 November 2009, the Canadian Association of University Teachers sought leave to intervene in the action. Leave was granted on 23 December 2009. At this point, a publishers' group comprised of the Canadian Publishers' Council, The Association of Canadian Publishers, and the Canadian Educational Resources Council sought leave to intervene (on 7 January 2010). This leave was also granted (on 18 February 2010).⁵¹ The review application itself was argued in Montreal before Chief Justice Blais, Justice Noël and Justice Trudel on 8 June 2010, just after Bill C-32 was introduced in the House of Commons. The decision was reserved.⁵² It was released on 23 July 2010.

In reasons written for the Court by Justice Trudell, the Court upheld the Board's decision on one ground and remitted the Copyright Board's decision back to it on another.⁵³

Turning to the first ground on which judicial review was sought by the Ministers of Education, the Court found that the Board had not erred in finding not only that photocopying excerpts from textbooks for use in

49 "The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of . . . the Copyright Board established by the *Copyright Act*" *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(1)(j).

50 *The Province of Alberta et al v. Canadian Copyright Licensing Agency et al*, 2010 FCA 198, <http://decisions.fca-caf.gc.ca/en/2010/2010fca198/2010fca198.html> [*Alberta v. Access Copyright*].

51 The presence of intervenors in the Federal Court of Appeal is exceedingly rare in intellectual property cases — indeed, almost without precedent. It appears that since 2000, other than in this present case, there have only been 11 applications involving interventions — none in trademark or industrial design cases. Of the 11, in 9 cases intervention was denied. In the case of *Eli Lilly and Co. v. Apotex Inc.* [2005] F.C.J. No.964 the Commissioner of Competition was statutorily entitled to status but was denied the opportunity to file a particular affidavit in the proceedings. Thus, other than in the present case, only in *Apple Canada v. Canadian Private Copying Collective*, [2007] F.C.J. No.1441 was an application to intervene allowed. In that case the Canadian Recording Industry Association was given leave to address the court on 3 major issues relating to digital audio as a medium.

52 This information is all available from the court docket at www.fca-caf.gc.ca/Docket-Queries/dq_queries_e.php.

53 See *Alberta v. Access Copyright*, above note 50 at paras. 68–71.

classroom instruction was for an allowable purpose under fair dealing (a position which neither party to the action opposed) but also that the taking was nevertheless *not* fair and thus such copies were compensable. The Federal Court of Appeal found the question of the fairness of the taking to be a purely factual question which presented “no reviewable error” and, therefore, it did not disturb the Copyright Board’s decision in this respect.⁵⁴

However, the Ministers of Education also argued that certain copies from textbooks found by the Board to be compensable were actually “work or other subject-matter as required for a test or examination” where the work is not “commercially available in a medium that is appropriate for the purpose” and thus not compensable.⁵⁵ The Court found that although the Board considered the commercial availability of the works, it did not consider the availability and appropriateness of the media.⁵⁶ This decision does not disturb the formula for calculation set out in Figure 2 above. It does, however, require the Board to re-assess its assessment in this instance of the figure to be subtracted from the total amount of copying done in the institutions: the Court found the Board missed an element in assessing how many copies for which the rightsholders should not be compensated. This, in turn, will require the Board, in this case, to re-calculate the subtotal number of compensable copies (to something less than the 2 percent found compensable in the original decision of the Board). This, in turn, will ultimately reduce the amount of the tariff each school is to pay to the collective Access Copyright. No doubt the final amount will be determined to be something less than the \$5.16 per FTE student the Board had established in its original decision.⁵⁷

It is clear that the Federal Court of Appeal approves of the approach, outlined above in Figure 2, that the Board is taking to establishing Tariffs. It is also clear that, whether or not there are court interventions, there is an important shift occurring in relationships between institutions providing education and library services in Canada and Access Copyright: at the instigation of Access Copyright, these relationships are shifting away from negotiation and into the jurisdiction of the Copyright Board.

54 *Ibid.*, para.5.

55 *Ibid.*, at para.4.

56 *Ibid.* at paras. 7, 69 & 70.

57 At the time of writing, it is not certain whether or not either of the parties will seek leave to appeal the decision of the Federal Court of Appeal from the Supreme Court. Nor has the Copyright Board had time to consider the matter again as directed by the Federal Court of Appeal.

C. BILL C-32

1) Key Proposals in Bill C-32

a) Enlarging Fair Dealing

The first recital of the Preamble of Bill C-32⁵⁸ provides

Whereas the *Copyright Act* is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy

This sounds like the language of Justice Binnie, for the Supreme Court, in *Théberge v. Galerie d'Art du Petit Champlain Inc.*:⁵⁹

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).

And the sixth recital in Bill C-32⁶⁰ acknowledges that “the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and [that] some limitations on those rights exist to further enhance users’ access to copyright works or other subject-matter.”⁶¹ This sounds a great deal like the Chief Justice’s view, for the Supreme Court, in *CCH v. Law Society*, that

[t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a users’ right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.⁶²

58 Like the earlier Bill C-61, introduced by the previous Conservative minority government in 2008.

59 [2002] 2 S.C.R. 33 at para. 30, www.canlii.org/en/ca/scc/doc/2002/2002scc34/2002scc34.html

60 Again just as recited in the Preamble to Bill C-61, above note 3.

61 Sixth recital in the Preamble to Bill C-32. The Preamble to Bill C-61 was virtually identical to that of Bill C-32. The only change in Bill C-32 occurs in the third last paragraph where the new Bill C-32 uses the phrase “technological protection measures” whereas Bill C-61 said “technological measures.”

62 *CCH v. Law Society*, above note 38, at para. 48.

Although the Conservatives have made the same overtures in previous draft legislation, never before has the government so clearly indicated it acknowledges and respects the position of the Supreme Court that “Canada’s *Copyright Act* sets out the rights and obligations of both copyright owners and users,”⁶³ as it does in Bill C-32. This is most strongly indicated by the fact that Bill C-61 of 2008 ignored the “fair dealing” provisions of the Act, whereas Bill C-32 plans to dramatically extend the scope of fair dealing.⁶⁴

Fair dealing was defined in 1921, in the original version of the current *Copyright Act*, as “[a]ny fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.”⁶⁵

A Liberal majority government narrowed the scope of fair dealing exceptions in 1997⁶⁶ as follows:

29 Fair dealing for the purpose of research or private study does not infringe copyright.⁶⁷

29.1 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 names 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

63 *Ibid.*, at para.11.

64 There are other provisions which extend the rights of copyholders. For instance, ss. 10 and 13(2) of the *Copyright Act* which gave idiosyncratic treatment to photographs will be repealed by ss. 6 & 7 of Bill C-32, above note 4, if it passes, which will give photographs exactly the same treatment under the *Copyright Act* as is given to other works. In general, this chapter has focused on provisions of Bill C-32 which themselves will have consequences specific to institutions involved in education and provision of library services. It should also be noted that the Liberal attempt in Bill C-60 in 2005 also failed to make any changes to the fair dealing provisions, but note s. 32 creating a new s. 32.2(1)(f) that will continue special treatment for private or non-commercial use of commissioned photographs.

65 *Copyright Act*, S.C. 1921, c. 24, s. 16(1)(i), www.digital-copyright.ca/static/Copyright1921.pdf. This provision was actually an exact duplication of s. 2(1)(i) of the *United Kingdom Act, 1911*: Guiseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008) 53 McGill L.J. 309–63 at para 13.

66 *An Act to amend the Copyright Act*, S.C. 1997, c. 24, s. 18(1). By pure coincidence, this Act was introduced as an earlier Bill C-32! (That Bill C-32 was in the 35th Parliament of 17 January 1994 to 27 April 1997.)

67 *Copyright Act*, above note 1, s. 29.

(iv) broadcaster, in the case of a communication signal.⁶⁸

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

- (a) the source; and
- (b) if given in the source, the names 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.⁶⁹

The Supreme Court clearly annunciated a broad vision of “fair dealing” in *CCH v. Law Society*.⁷⁰ Nevertheless, it is evident that fair dealing is not infinite.⁷¹ For instance, the Federal Court of Appeal has just clearly stated that “[p]rivate study’ presumably means just that: study by oneself . . . [w]hen students study material with their class as a whole, they engage not in ‘private study’ but perhaps just ‘study.’”⁷² This interpretation of the existing fair dealing provisions (together with certain other comments)⁷³ makes it very important that the government is planning to extend fair dealing explicitly to education.

Now, in a dramatic expansion, Bill C-32 will extend section 29 so that, without any conditions about source or names, fair dealing will encompass uses for the purposes of “research, private study, *education, parody or satire*.”⁷⁴

There are other proposed extensions of fair dealing proposed in Bill C-32.⁷⁵ One extension permits institutions to create back-up copies of works

68 *Ibid.*, s. 29.1.

69 *Ibid.*, s. 29.2.

70 Above note 38.

71 See Wilkinson (2005) above note 6.

72 *Alberta v. Access Copyright*, above note 53 at para. 38.

73 The Court explicitly finds reasonable the Copyright Board's interpretation that “since the students in question did not request the photocopies themselves, given the instructional setting, it is likely that the purpose of the photocopying was for the instruction of the students, not for private study” and “the Board was entitled to find that when a student is instructed to read the material, it is likely that the purpose of the copying was for classroom instruction rather than the student's private study.” (para.46).

74 Bill C-32, above note 4, s.21.

75 For instance, Bill C-32, s.22, amending the *Copyright Act*, above note 1, by adding s.29.22, permits “an individual” — and thus, presumably, not institutions engaged in education and library services, *per se* — to reproduce works for “private purposes” under certain conditions (including that any technological protection measures

or other subject matter under given conditions.⁷⁶ One of them, however, upon closer examination, appears to be better characterized with defences to infringement actions rather than positive extensions to the rights of rightsholders. The new exception for “non-commercial user-generated content”⁷⁷ initially looks as though it will not be “an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists”⁷⁸ but the creation and use of the new work is only permitted where four conditions apply:

1. the use . . . is done solely for non-commercial purposes; and
2. the source of the [original] existing work is mentioned, if it is reasonable to do so; and
3. the person had reasonable grounds to believe that the [original] existing work was not infringing copyright; and
4. the use of the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the [original] existing work or its market.⁷⁹

The language of “reasonable grounds to believe” (in the third condition) is language most frequently reserved in statutes for defences, as is evident in the language of the courts in interpreting it. “Reasonable grounds to believe” has been defined by the Federal Courts as “a *bona fide* belief in a serious possibility based on credible evidence.”⁸⁰ The definition was adopted by the Supreme Court which then went on to state that “The Federal Court of Appeal has found, and we agree, that the “reasonable grounds to believe” standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance

in place are not circumvented), and, by adding s.29.23, permits individuals to time shift broadcasts under certain conditions. Query whether libraries would be able to act as agents for their patrons in making use of these new users’ rights.

76 Bill C-32, s. 22, amending the *Copyright Act*, above note 4, by adding s. 29.24, which applies to “a person” and thus would include institutions.

77 The label in the margins for the new section to be added by s. 22 of Bill C-32 (amending the *Copyright Act* by adding a new s. 29.21).

78 Bill C-32, s.22, in the wording of the first part of the new s. 29.21(1).

79 Paraphrasing from Bill C-32, s. 22, in the latter half of the new s. 29.2(a)–(d).

80 *Chiau v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 131, [1998] 2 F.C. 642 (T.D.) at para. 60, www.canlii.org/en/ca/fct/doc/1998/1998canlii9042/1998canlii9042.html, aff’d [2000] F.C.J. No. 2043, [2001] 2 F.C. 297 (C.A.), www.canlii.org/en/ca/fca/doc/2000/2000canlii16793/2000canlii16793.html.

of probabilities.”⁸¹ Thus, the most important change to fair dealing in Bill C-32 is the addition of parody, satire and education as categories of exception.

The inclusion of parody and satire in fair dealing will no doubt be useful because it will settle an ongoing debate⁸² in Canadian copyright law about whether the category of “criticism” in Canada’s fair dealing provisions was as wide as the category of “comment” in the American legislation, where the United States Supreme Court settled some time ago that comment includes criticism.⁸³ It will be an important addition to the statute from the point of view of bringing further certainty into Canadian copyright law, but, depending upon your point of view on the existing debate, it will or will not be extending the scope of Canadian concept of criticism in Canadian fair dealing.

It is the extension of fair dealing to cover uses for the purpose of education that is *the* unprecedented and most important extension to users’ rights in Bill C-32.⁸⁴

The term “education” used in the new section 29 is not currently defined by the *Copyright Act*. Nor is there a definition proposed in Bill C-32. This means that fair dealing uses for the purpose of education will not be lim-

81 *Mugesera c. Canada (Ministre de la Citoyenneté & de l’Immigration)*, [2005] 2 S.C.R. 100 at 114, approving *Sivakumar v. Canada (Minister of Employment & Immigration)* (1993), [1994] 1 F.C. 433 (C.A.), at 445; *Chiau v. Canada (Minister of Citizenship & Immigration)* (C.A.), *ibid.* at para. 60. The Court in *Mugasera* went on to say, at para. 116, that “the ‘reasonable grounds to believe’ standard of proof applies only to questions of fact,” approving *Moreno v. Canada (Minister of Employment & Immigration)* (1993), [1994] 1 F.C. 298 (C.A.), at 311.

82 In *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306, Teitelbaum, J., concluded that since parody does not fall under the category of criticism, it should not be considered part of the defence of fair dealing. He felt that Canadian courts should be cautious in adopting the reasoning of American courts with respect to the open-ended American “fair use” when interpreting the fixed categories in the Canadian “fair dealing.” More recently, however, the Supreme Court’s decision in SCC released the more liberal interpretation of the fair use provisions in *CCH v. Law Society of Upper Canada*, above note 38, which holds that even though the number of enumerated categories in fair dealing is fixed in the Canadian *Copyright Act*, new purposes may exist within each enumerated category.

83 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

84 Interestingly, Justice Trudel alludes to this extension in Bill C-32 in his recent reasons reviewing the Copyright Board’s *Elementary and Secondary Schools Tariff* 2005-2009, above, stating “this amendment [adding education, parody or satire] only serves to create additional allowable purposes, it does not affect the fairness analysis.” *Alberta et al v. Access Copyright et al*, above note 53 at para. 21.

ited to any particular institutions or sector: it will apply to any individual or institution engaged in education. As such, education will have to be given its usual meaning in law.

In *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*,⁸⁵ Justice Iacobucci, speaking for the majority of the Supreme Court, considered the definition of education in the context of asking whether a society could be considered to be advancing education (in the context of making a determination about a charity) and made the following statements:

There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view.⁸⁶

. . . there is no good reason why non-traditional activities such as workshops, seminars, self-study, and the like should not be included alongside traditional, classroom-type instruction in a modern definition of “education.”⁸⁷

To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise. . . . The law ought to accommodate any legitimate form of education.⁸⁸

Justice Iacobucci’s definition of education will give a wide ambit to the proposed extension of fair dealing in the *Copyright Act*. Just as fair dealing has been interpreted by the Supreme Court from the users’ point of view in recent copyright decisions, education has been interpreted by the Supreme Court from the point of view of a “legitimate, targeted attempt at educating others,” a notion not reserved for particular institutional actors but, rather, for any actor undertaking to educate. It is probable, then, that just as the Great Library of the Law Society of Upper Canada was able to justify all its activities under fair dealing even though there are now particular exceptions in the statute for certain “libraries, archives and mu-

85 [1999] 1 S.C.R. 10, <http://csc.lexum.umontreal.ca/en/1999/1999scr1-10/1999scr1-10.html>. Note the Federal Court in *McKay v. Canada (AG)*, 2010 FC 856 recently (27 August 2010) interpreted “education” broadly.

86 *Ibid*, at para. 168.

87 *Ibid*, at para. 170.

88 *Ibid*, at para. 171.

seums,” schools, colleges and universities will all be able to justify most activities as fair dealing under education, despite the fact that Parliament provides specific exceptions to a certain class of educational institution.

b) Additional Rights for “Educational Institutions” and “Libraries, Archives And Museums”

Since 1997 “educational institutions,” as defined in the *Copyright Act*, have certain additional users’ rights beyond those given to all by the fair dealing sections of the Act.⁸⁹ Since the decision of the Supreme Court in 2004 clarifying the application of the fair dealing provisions and their relationship with this type of institution-specific exception, it is evident that these exceptions are not as important as perhaps might have been thought when they were first introduced.⁹⁰ Nonetheless, the government has proposed to extend these rights through Bill C-32.

It is interesting to note that these special exemptions for educational institutions did not appear to play a great part in the tariff-setting by the Copyright Board for schools 2005–2009, as discussed above.⁹¹ On the other hand, as discussed above, it is on just such a “special” exception that the Federal Court of Appeal has remitted the Copyright Board’s Decision back to it for reconsideration.

Bill C-32 makes significant amendments to the rights of “educational institutions.”⁹² For example, Bill C-32, if passed, will allow an “educational institution” to take a work or other subject matter from the Internet and communicate it to a public primarily consisting of students provided the original author and source are referenced⁹³ unless the educational institution knows or ought to know that the source from which the taking is being done did not have the copyright holder’s permission.⁹⁴ This user right will be subject to either of two limitations: the copyright holder may protect the subject matter with legally enforceable technological protection

89 See Wilkinson (2005), above note 6 at 352–55.

90 *Ibid.*

91 They appear to have only engaged the Board’s attention briefly in the reasons, see Copyright Board decision, above note 36, paras. 123–29 and 148. A total of 6,995,451 pages were added to the total number of compensable copies (2.8 percent of the total) as a result of analysis of these exceptions and rejection of their applicability to certain copies made (of 246,001,462 pages triggering remuneration, see para. 150).

92 See Bill C-32, above note 4, s. 25, amending the *Copyright Act*, above note 1, s. 29.6; Bill C-32, s.26, amending the *Copyright Act* by removing s. 29.9(1)(a); and Bill C-32, s. 27, adding to the *Copyright Act* after s. 30, ss. 30.01–30.04.

93 Bill C-32, *ibid.*, s. 27, amending the *Copyright Act*, *ibid.*, by adding s. 30.04.

94 Bill C-32, *ibid.*, s. 27, amending the *Copyright Act*, *ibid.*, by adding s. 30.04(5)

measures⁹⁵ or the copyright holder may provide explicit notice (beyond just a notice of copyright) that the material should not be used for educational purposes.⁹⁶

Bill C-32 will allow a “library, archive or museum” to make copies for patrons without the need for the institution to satisfy itself that “the person will not use the copy for a purpose other than research or private study,”⁹⁷ requiring rather that that institution “informs the person that the copy is to be used solely for research or private study and that any use of the copy for a purpose other than research or private study may require authorization of the copyright owner of the work in question.”⁹⁸ As was the case with amendments proposed for inter-library loan back in 2005, it is probable that this change for “libraries, archives and museums,”⁹⁹ while laudable as a clarification to the drafting of the *Copyright Act*, is really unnecessary in light of the language of the Supreme Court in interpreting the ability of all libraries to act as agents for their patrons in the *CCH v. Law Society* case.¹⁰⁰

Bill C-32 also codifies, in the case of interlibrary operations involving “libraries, archives and museums,”¹⁰¹ a principle of agency¹⁰² that would appear to apply to all libraries in any case, pursuant to *CCH v. Law Society*: that one library, acting as agent for another, would be also the agent of the patron for which the first library is acting. It may be helpful to make the clarification, but not if other libraries, not falling within the statutory definition of “libraries, archives and museums” provide less service to patrons because they do not realize they already have the same powers under

95 Bill C-32, *ibid.*, s. 27, amending the *Copyright Act*, *ibid.*, by adding s. 30.04(3)

96 Bill C-32, *ibid.*, s. 27, amending the *Copyright Act*, *ibid.*, by adding s.30.04(4)

97 As required under the current s. 30.2(4)(a).

98 Bill C-32, above note 4, s.29, replacing section 30.2(4) of the current Act.

99 The current s. 30.21 applies particularly to “archives” (presumably to all archives and not just those archives included in the statutorily defined term “library, archive or museum”) and applies to the copying of unpublished works. Bill C-32 would eliminate the same requirement as under the current s. 30.2(4)(a) and replace it with the requirement that the patron be informed. See Bill C-32, above note 4, s. 30(2).

100 See Wilkinson (2005), above note 6 at 360–62.

101 Bill C-32, above note 4, s.29, replacing s. 30.2(5) of the current Act.

102 Floyd R. Mechem, *Outlines of the Law of Agency*, 4th ed. (Chicago: Callaghan, 1952) at 51.

By delegation . . . the agent is permitted to use agents of his own in performing the function he is employed to perform for his principal, delegating to them the discretion which normally he would be expected to exercise personally. These agents are known as subagents to indicate that they are the agent's agents and not the agents of the principal. Normally (though of course not necessarily) they are paid by the agent. The agent is liable to the principal for any injury done him by the misbehavior of the agent's subagents.

the authority of the *CCH v. Law Society* case interpreting the fair dealing provisions of the statute. It bears repeating that the Supreme Court has said “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.”¹⁰³ Bill C-32 would purport, in this connection, to impose fairly onerous requirements on “libraries, archives and museums” acting as agents for other libraries (i.e., in inter-library loan situations) to establish “measures” to ensure that patrons receiving *digital* copies of works or other subject matter from such institutions make only one copy and so on.¹⁰⁴ It seems probable, that, here again, the government is unnecessarily complicating rights which *all* libraries already hold pursuant to the Supreme Court’s interpretation of existing users’ fair dealing rights in the *Copyright Act* and libraries’ roles as agents of their users.¹⁰⁵

Bill C-32 does clarify one aspect of a right given to a library, archive or museum under the *Copyright Act* that does not seem to be available in any event and to other “libraries, archives and museums” under the interpretation of fair dealing provided by the Supreme Court: this is with respect to the ability of statutory libraries, archives and museums to transfer materials to new formats not only when technology becomes obsolete, as under the present law, but also when such technology is *becoming* obsolete.¹⁰⁶

Bill C-32, therefore, if it becomes law, will amend provisions dealing with “libraries, archives and museums” to a limited extent and, even more, extends the statutory exceptions for educational institutions” but it goes far beyond its predecessor bills, as discussed herein, by creating the extension of fair dealing to education.

There is one aspect of Bill C-32 and its application to “libraries, archives and museums” which deserves particular mention. Much will be made in discussion of Bill C-32 of its articulation of proposed enactments concerning “technological protection measures” (TPMs), which Bill C-32 defines as

any effective technology, device or component that, in the ordinary course of its operation,

¹⁰³ *CCH v. Law Society*, above note 38, para. 49, quoted in Wilkinson (2005), above note 6, at 357.

¹⁰⁴ Bill C-32, above note 4, s.2 9, amending the *Copyright Act*, above note 1, replacing s. 30.2(5), *inter alia*, by adding s. 30.2(5.02).

¹⁰⁵ See, in this connection, Wilkinson (2005), above note 6, at 355–57

¹⁰⁶ Bill C-32, above note 4, s. 28, amending the *Copyright Act*, above note 1, s. 30.1(1)(c).

- (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
- (b) restricts the doing—with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording—of any act referred to in section 3, 15, or 18 and any act for which remuneration is payable under s. 19.¹⁰⁷

The important point to note here for our purposes is the proposed s.41.2 which will provide:

If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened s.41.1(1) [circumventing a TPM or offering services in relation to those purposes or dealing with making available technology for those purposes] and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.¹⁰⁸

This partial defence is only made available to “libraries, archives and museums.” It will not apply to other libraries, archives or museums (those which operate for profit or do not maintain appropriate collections). If passed, its existence will become part of the copyright world of some institutions and not others. It appears to be a special acknowledgment on the part of the government of the role which at least non-profit libraries, archives and museums, which maintain the requisite collection, can play in the lives of their patrons. It is, of course, a shame that the role played by other libraries, archives and museums is not equally recognized. It must also be recognized that a court would almost certainly order the library, archive or museum to stop its activities if found liable in such an action — so this is not an exception for libraries, archives or museums.

2) Omissions from Bill C-32

a) The Continuing Problem with “Educational Institution” and “Library, Archive or Museum” Exceptions

One important contribution that Bill C-32's inclusion of “education” in the fair dealing provisions will make is that it can diminish somewhat a

¹⁰⁷ Bill C-32, above note 4, s. 47, amending the *Copyright Act*, above, by adding s.41.

¹⁰⁸ *Ibid.*

growing problem under the *Copyright Act* which was begun by the Liberal reforms of 1997.¹⁰⁹ This problem was the creation of two special statutory classes of institutions in Canada: “educational institutions” and “libraries, archives and museums.”¹¹⁰

As commonly understood (and described everywhere except in the current *Copyright Act*), “libraries,” “archives,” “museums,” and “education institutions” describe a class of institutions which can be found in both the public and private sectors and which can be operated either on a for-profit or not-for-profit basis. However, under the *Copyright Act* since 1997 “library, archive or museum” and “education institution” comprise only a limited, defined subset of those institutions we normally understand to be included in those terms. Public sector educational institutions are covered under “educational institution” and private sector, non-profit educational institutions are included in “educational institution”¹¹¹ — but private, for-profit educational institutions are not.¹¹² Meanwhile an even more limited group of libraries, archives and museums fall within the statutory

109 *An Act to Amend the Copyright Act*, S.C. 1997, c. 24, s. 1(5), amending s. 2 of the *Copyright Act* to add and define “educational institution” and “library, archive or museum”

110 Although in the singular “library, archive or museum” and “education institution” which is defined in s. 2 of the *Copyright Act* (see below), it has become common to refer to these statutorily defined organizations in the plural in quotes, to distinguish those falling with the *Copyright Act* exceptions from other libraries, archives, museums and educational institutions which are not entitled to the exceptions. Indeed, “libraries, archives and museums” within the exceptions are referred to in common parlance as “LAMs.”

111 Note that private, non-profit educational institutions are included in the ambit of these special exceptions to the *Copyright Act*, but are not included in the *Access Copyright Elementary and Secondary School Tariff, 2005–2009* just established before the Copyright Board. On the other hand, public schools both benefit from the statutory exceptions for “educational institutions” and are covered, except in Quebec, by the *Access Copyright Elementary and Secondary School Tariff, 2005–2009*. See “Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire: Educational Institutions (2005–2009),” *Supplement Canada Gazette*, Part I, 27 June 2009, to be known as “Access Copyright Elementary and Secondary School Tariff, 2005–2009”: www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2009/20090626-b.pdf

112 *Copyright Act*, s. 2,

“educational institution” means

- (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 or a province and that provides continuing, professional or vocational education or training. [or]

definition than is the case with educational institutions because, to be considered a “library, archive or museum” under the *Copyright Act*, not only do these institutions have to fall strictly within the non-profit sector (whether publicly or privately owned) but they must also, unless specially included by regulation, hold and maintain “a collection of documents and other materials that is open to the public or researchers.”¹¹³

One problem which arose in the case of Bill C-60’s then proposed extensions to users’ rights in 2005 was that the Bill did not speak to general extensions of fair dealing but rather concentrated entirely on extensions to the rights of “libraries, archives and museums” and “educational institutions” as defined in the Act.¹¹⁴ The problem would also have been exacerbated had the subsequent Bill C-61 in 2008 become law.¹¹⁵ Amendments of this type can only exacerbate the gaps between types of schools, universities, colleges, archives, museums and libraries in Canada¹¹⁶ — and drive unnecessary wedges between public and private, for-profit and not-for-profit institutions. This problem continues to be present in the proposed reforms of Bill C-32 — but is less prominent because of the proposed general amendments to fair dealing just discussed.

-
- (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 the regulations.

113 *Copyright Act*, s. 2 “libraries, archives and museums” means

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 any other non-profit institution prescribed by regulation.

114 Wilkinson (2005), above note 6 at 337–38, 372–73.

115 Bill C-61, above note 3, in 2008 would have amended the “educational institution” exceptions with respect to the following sections of the *Copyright Act*: ss. 30.01(3)–(5), 30.02, 30.03, 30.04, 38.1(3), 41.19, and 41.2(2). It would have amended the “library, archive or museum” exceptions with respect to the following sections: ss. 30.1(1), 30.2(5), and 41.19.

116 It should be noted that the federal government itself has recently re-structured its own Health Canada Library such that it is now closed to “outsiders” — which will result in its falling outside the *Copyright Act* definition of a “library, archive or museum” and, thus, despite being operated not for profit and being part of the public sector, being ineligible for the rights Parliament has given to a “library, archive or museum.”

As the Copyright Board has recently stated “all exceptions provided in the Act are now users’ rights.”¹¹⁷ Surely, as a policy matter, Parliament should not make user resources dependent upon whether users choose to access those resources through the institutions in the for-profit sector or the non-for-profit sector.¹¹⁸

It is indeed ironic that if you as a consumer choose to obtain services from an institution that, in one way or another, is profiting from the services offered and therefore for which people pay, you will be additionally penalized by the federal government by not being able to benefit from copyright rights which you would have enjoyed had you patronized institutions which already are limited to charging only that which does not bring them a profit. And, again, the increasing prevalence of public-private partnerships in the delivery of services to Canadians means that these kinds of distinctions in the availability of user rights in copyright will become unwieldy at best.

b) Clarifying the Representativeness of Collectives in Canada

As discussed above, Bill C-32 does not solve the problem in Canada currently that the collectives do not represent those rightsholders who choose not to join them.¹¹⁹ This makes the absence from the new tariffs of the previous indemnification clause in blanket licences obtained from Access Copyright particularly of concern to institutions considering their options in the emerging copyright environment (as discussed above). It would appear that the government needs to clarify whether Canada is operating on an “extended repertoire” system, especially given the various extensions of privileges to users who have entered into agreements with collectives that already exist in the statute and that Bill C-32 would extend.¹²⁰

¹¹⁷ Copyright Board decision, above note 36 at para. 76.

¹¹⁸ An argument equally made in respect of Bill C-60, see Wilkinson (2005), above note 6 at 172.

¹¹⁹ This shortcoming has been noted by Daniel Gervais (2008), above note 18, at 220. In Europe, the “extended licensing” or “extended repertoire” system has been common for some time. Under it, those who do not wish to be represented by the appropriate collective bear the burden of opting out.

¹²⁰ See, for example, in Bill C-32, s. 27, which would add to the *Copyright Act* s. 30.02 and create an exception for digital reproduction of works only for an “educational institution that has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society’s repertoire for an educational or training purpose.”

D. INSTITUTIONS INVOLVED IN EDUCATION AND LIBRARY SERVICES AND BILL C-32

How will institutions involved in education and the provision of library services experience the reforms in Bill C-32, given their current copyright worlds?

Bill C-32 does seem to indicate that the current Canadian government is recognizing the necessity of balancing user and creator needs, as discussed above. But will institutions involved in education and the provision of library services in Canada directly experience the new emphasis on balance?

It would seem that this will depend very much on the individual institutions, their governance, their assessments of their users' needs, and their collections.

If an institution primarily providing *library* services looks at the users' rights already extant in the *Copyright Act*, augmented by Bill C-32 if it passes, and decides that, in the light of its users' needs and its collection, it can meet its users' needs without any dealings with collectives, then that institution may very well decide that it can ignore the availability of licences through collectives such as Access Copyright (whether negotiated directly or created through the processes of the Copyright Board). In making this decision, of course, such an institution would consider what proportion of its collection or services was already constrained by individual vendor licences that would be unaffected by any blanket licence obtained by a collective such as Access Copyright. The greater the proportion of the library's "holdings" that are actually regulated under individual licences with the copyright holders (such as vendor subscriptions from online publishers), the less the impact of any blanket licence from a collective such as Access Copyright will be. Another factor that would affect the considerations of such an institution is the fact that, if an institution makes the decision to forgo obtaining a blanket licence from a collective, then the scope of the exceptions to the rights of rightsholders under the *Copyright Act* as extended, if Bill C-32 passes, will form the boundary of the services to patrons which these institutions can offer. An institution making this kind of decision might be guided to some extent by the finding of the Copyright Board, in its deliberations over the *Access Copyright Elementary and Secondary School Tariff, 2005–2009*, that, of all the photocopying done in schools, only 2 percent was compensable. If an institution changed the way it delivers services such that that 2 percent was eliminated, then the need for that type of blanket licence would also be eliminated.

It is interesting to note that the individual licences institutions negotiate directly with rightsholders are also only indirectly affected by changes to the scope of users' rights exceptions in copyright. Such contracts typically involve more than just copyright, virtually always involving access rights to various databases and, often, patent rights with respect to various systems. Changes in copyright legislation enlarging users' rights, then, would only affect the strength of the user institution's negotiating position — not, in any way, the legality of the contract between the institution and the vendor once the parties have signed or otherwise entered into the contract.¹²¹

Thus, for institutions such as public libraries in Canada, where they are not the target of current tariff proceedings before the Copyright Board, the enlarged scope of users' rights which Bill C-32 would create should provide an enhanced bargaining position from which to negotiate for blanket and individual licences from Access Copyright and other copyright holders. Should any of these libraries decide, in any case, that they do not need to purchase rights to uses from collectives or individual rightsholders because the institution's uses all lie within the users' rights provisions of the *Copyright Act* (either currently or as they would be expanded by Bill C-32), then such institutions might well make decisions not to enter into various licences with respect to works and other subject matter where users' rights are sufficient to their needs. In making those decisions, these institutions would be directly affected by the state of their users' rights under the *Copyright Act* and would directly benefit from the extensions in Bill C-32.

Other libraries, such as academic libraries in post-secondary institutions and government libraries, no longer have options for negotiated blanket licences in respect of rights represented by the Access Copyright collective because Access Copyright has placed their institutions (and, therefore, these libraries) before the Copyright Board. The decisions of these institutions (for themselves and, consequently, for their libraries) are limited to deciding between three current options:

- 1) keeping their activities within statutory users' rights bounds and not acquiring licences for more uses as offered by Access Copyright,¹²² or

121 There are no provisions in the *Copyright Act* similar to those, for instance, found in Ontario *Consumer Protection Act*, which specifically provides "The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary." (S.O. 2002, c.30, Sched. A, s.7(1)).

122 The proposed Tariff anticipates that post-secondary institutions may decide from time to time whether to avail themselves of the licenses from Access Copyright that

- 2) while planning to enter into licences with Access Copyright, passively accepting the tariff proposed by Access Copyright (or accepting it as imposed by the Board after others have opposed it and the Board has ruled), or
- 3) while planning to enter into licences with Access Copyright, actively opposing the tariff as proposed and participating in the processes of the Board.

With respect to schools, it would, of course, be possible for the Ministers of Education to decide, on behalf of public schools, not to deal further with Access Copyright for reproduction or other rights in the future but rather to rely upon schools to manage their affairs so that the services offered to students lie within the exceptions to copyright holder's rights (the users' rights), given in the *Copyright Act* and affirmed by the courts, particularly the Supreme Court, especially including the enlarged scope which passage of Bill C-32 would grant. Such a decision, if ever taken, would inevitably reflect the enlarged scope of the users' rights which Bill C-32 will give if passed.

Currently, however, public schools across Canada find themselves within the umbrella of the two proceedings before the Copyright Board initiated by Access Copyright with respect to the entire education process.¹²³ These educational institutions do not have the opportunity to make individual judgments about the rights which Access Copyright represents. On the other hand, private schools, whether operated for profit or non for profit, do have this opportunity to make individual judgments with respect to entering into blanket licences with Access Copyright or not.¹²⁴

will be governed by the *Access Copyright Post-Secondary Educational Institution Tariff*, 2011–2013, once finalized: s. 5(4) provides, for example, that

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

123 In the *Access Copyright Elementary and Secondary School Tariff*, 2005–2009, “educational institution” is defined as “an institution providing primary, elementary or secondary school programming funded by a minister, ministry or school board and operated under the authority of a minister, ministry or school board” [emphasis added]. Presumably privately funded schools are therefore not covered by this tariff and must seek their own blanket licenses with Access Copyright, whether operated for profit or not for profit.

124 Access Copyright explicitly recognizes this decision-making process for “Independent and Tutorial Schools” on its website and offers such schools an opportunity to

Thus, for public schools, on the one hand, and for those libraries targeted by Access Copyright's current tariff applications whose institutions decide to avail themselves of the tariffs once ordered by the Board, on the other, the extensions to users' rights represented by Bill C-32 will become only indirectly relevant to many of their operations. For them, the effect of extensions to users' rights will be felt as part of the calculations done by the Copyright Board in establishing the tariffs payable from time to time through decisions of the Board.¹²⁵ At this moment, the most active collective focusing on educational institutions at all levels and governments (and thus affecting many libraries) is Access Copyright. However, as indicated in Figure 1 above, many other uses that could affect educational institutions and libraries fall under aegis of collectives which might in future target these same institutions in tariff proceedings before the Copyright Board.

Even where the effect of *Copyright Act* amendments are only felt indirectly by educational institutions and libraries (because proceedings before the Copyright Board or negotiations directly with copyright holders for licences are the primary experience of the institutions), it will still be important for such organizations to make their views known on the amendments to the *Copyright Act* which will be created under Bill C-32: extensions to users' rights will affect the bottom line for these institutions because of their effect on the Copyright Board's formula for tariffs and on their negotiating positions with rightsholders. However, the effect of these changes to the *Copyright Act* will not be direct and may not be easily measured because the Board's tariff determinations reflect factors other than just statutory rights just as direct negotiations with rightsholders often involve complex bargaining positions. Recall, in this connection, that although the Copyright Board found only 2 percent of uses of

enter into blanket licenses. However, it is not obvious from the public information provided on its website that Access Copyright, in setting the prices of these blanket licenses, differentiates between those schools which are "educational institutions" within the *Copyright Act* exceptions, although not within the meaning of "educational institution" under the *Access Copyright Elementary School Tariff, 2005–2009* (non-profit schools which are not publicly funded) and those schools who do *not* enjoy the benefits of the "educational institution" exceptions under the *Copyright Act* but are also not covered by the *Access Copyright Elementary School Tariff, 2005–2009* (for-profit private schools). Presumably the former should be asked to pay less for a blanket license than the latter if the breadth of potential uses requiring purchase is the only criterion involved in setting the prices for these licenses. See www.access-copyright.ca/Default.aspx?id=99

125 Recall that the Copyright Board dealt with the existing limits of fair dealing in paras. 57–114 of its decision on the school tariff for 2005–2009, above.

photocopied material to be compensable under the recent *Access Copyright Elementary and Secondary School Tariff, 2005–2009*, given the value ascribed to that 2 percent, the Board set the tariff at double the rate set by the earlier voluntarily negotiated licence fee (\$5.16 per FTE student as opposed to \$2.56).

The fact that Bill C-32 leaves unchanged the role of the Copyright Board of Canada and the definitions of “educational institution” and “library, archive or museum” under the *Copyright Act* must be seen as indications that the government is satisfied with the separation of copyright worlds which is occurring across various types of institutions providing education and library services in Canada. The government must be relying on these institutions themselves to manage within their own individual ‘copyright worlds’ to provide maximum educational and library benefits to their students and patrons, despite the growing differences in their copyright worlds. Bill C-32, if it passes in the form in which it was introduced, will make changes to various ‘copyright worlds’ but differences between the copyright worlds experienced by various institutions have developed largely because of the reforms of 1997 and are not diminished directly by anything in Bill C-32, despite the leveling that the addition of education as an aspect of fair dealing would add. Therefore, the fragmentation of educational institutions and institutions providing library services into those involved under tariffs decided by the Copyright Board and those not, and those affected by “educational institution” or “library, archive, or museum” exceptions under the *Copyright Act* and those not, and those affected by neither and those affected by both, will continue in any event, even if Bill C-32 does not pass. The collection patterns of libraries and the proportion of services offered under contracts made directly with copyright holders, rather than copyright collectives, will vary institution by institution and will likely change according to the offerings made available by copyright holders directly or through collectives. Users’ needs evolve constantly and must be evaluated continuously by libraries and educational institutions and these evaluations will affect the uses that these institutions will make of works and other subject matter subject to copyright. Much, therefore, rests in the hands of those who govern our Canadian institutions of education and library services to continually evaluate their environments with respect to copyright (of which Bill C-32, if it passes, will form only one aspect) and take appropriate actions in light of those evaluations.