THIRTEEN

The Changing Landscape of Academic Libraries and Copyright Policy:

Interlibrary Loans, Electronic Reserves, and Distance Education

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A. INTRODUCTION

This essay examines the relationship between the development of copyright law and policy, and the changing nature of academic library and instructional services in the digital environment. The subject is particularly relevant in Canada, because the federal government has been undertaking consultation and study geared toward amending the *Copyright Act*,[1] which recently culminated in the tabling of Bill C-60.[2] The Bill contains a number of proposed amendments to the Act that are of interest to librarians, educators, administrators, and students. Before delving into the details of these proposals, some general background on the importance of copyright issues to the academic and library communities will be discussed.

Traditionally, copyright issues were somewhat peripheral to the operation and functioning of the typical college or university. Students read textbooks and went to classrooms where lectures were the usual mode

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1 R.S.C. 1985 c. C-42, <www.canlii.org/ca/sta/c-42> [the Act].

2 *An Act to Amend the Copyright Act*, First Reading, June 20, 2005 <www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF>.

of instruction, supplemented by discussion groups, lab sessions, or fieldwork. The campus represented a sense of place, segmented into classrooms, offices, and libraries, each with their own particular function. The library performed various set services, but mainly provided the academic community with a collection of books which could be borrowed; a collection of magazines, newspapers, and periodicals which could be read in the library; and an array of reference materials and services to help the patron find her way. Some larger libraries also housed collections of government documents, special collections and archives, or other matters of local interest. In this environment, copyright issues were not generally of great concern to administrators, faculty, library staff, and students.

The introduction of the photocopy machine began to raise concern and awareness about copyright matters. As stated by the Association of Universities and Colleges of Canada (AUCC), engaging in the act of copying is central to the activities of the modern college or university:

> Every day across Canada, university professors, staff and students make thousands of photocopies. Books, journal articles, speeches, sections from plays — they're all being copied. The copies help students learn, assist professors in their teaching and research, and facilitate the smooth running of the university. [3]

Nevertheless, compared to the challenges posed by the digital environment, photocopy issues remained relatively simple and contained. In recent years however, copyright issues have become wide-spread in many aspects of campus library services. The breakdown of traditional functions through the convergence of libraries, classrooms, and living space, concurrent with the introduction of computer networks, has made the circulation and flow of digital information resources pervasive in the networked university. As well, the boundaries between separate campuses are also blurring as more libraries enter joint arrangements and consortia, and distance education allows students to obtain educational services regardless of their physical location.

Much public attention has focused on the downloading of music files by students through university networks, and indeed much of the press attention given to copyright revision has centered on music file-sharing. However, most of the emerging academic and library-related copyright is-

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3 "COPYING RIGHT: A guide for Canada's universities to copyright, fair dealing and collective licensing" (2002), <www.aucc.ca/_pdf/english/publications/copying2002_e.pdf>.

sues involve the delivery of educational content. There are many examples of how new applications of modern information and communications technology intersects with copyright issues in the campus environment. The infusion of multimedia resources into the classroom through direct Internet hookups that enable in-class web browsing, the use of sophisticated presentation software packages, and the presence of VCRs, CD-ROM, and DVD players all converge to make the modern classroom very different from the traditional low-tech world of the lecture, chalkboard, and flip-chart. In the library, the physical card catalogue has been replaced by online catalogues, which are increasingly linked to the content itself through a complicated web of electronic networks and licensing agreements. Likewise, the introduction of electronic course reserves, together with the availability of a variety of courseware packages and the instructors' growing ability to create their own course-specific websites, continue to magnify the complexity of campus copyright issues with respect to the delivery of course content.

Add to this mix the ability of students to seamlessly access the Internet in a variety of locations, first through Internet hookups and more recently through wireless networks, and it is evident that the educational experience can be enriched by technology-enabled means of interaction and communications. At the same time, the instances of potential copying, communicating, distributing, or performing works that are protected by copyright are greatly magnified.

A full discussion of the copyright implications of all of these changes in educational technology is beyond the scope of this essay. However, it is important to begin with recognition of the magnitude of these changes in higher education. Policymakers who are grappling with amendments to the *Copyright Act* need to proceed with extreme caution lest the potentials of this wide range of technology-enhanced learning opportunities be stifled. It is an overly simplistic analysis to look at modern technological changes with respect to the issue of music file-sharing, and reach the conclusion that expanding copyright restrictions are imperative across the board.

This expansionary argument starts with the assumption that as technology makes it easier for users of information resources to share content, there is a corresponding need to match such technological changes with increased restrictions on user access through new forms of technological controls, increasing the scope and reach of copyright, restricting exceptions and limitations on enforcement, and increasing penalties as well as modes of enforcement. Unfortunately, this line of reasoning has been prevalent throughout much of the policy discussions leading up to the ta-

bling of specific amendments to the *Copyright Act*. This tendency was most notable throughout the discussion and recommendations contained in the *Interim Report on Copyright Reform* (the *Bulte Report*),[4] which was issued by the Standing Committee on Canadian Heritage in May of 2004. This document stands as an exemplar of the type of one-dimensional, overly simplistic, and unbalanced reasoning that should be rejected as a mode of policy analysis. In each of the areas it considers, the *Bulte Report* engages in an analysis that inevitably reaches the conclusion that more copyright restrictions are needed in order to keep pace with the threats posed by modern information technology. A better approach would recognize that modern information technology provides many opportunities for advances in learning, teaching, research, and scholarship. Rather than attempt to inhibit the use and further development of these new educational tools and strategies that leverage such advances, public policies should be crafted to encourage innovation by carefully balancing the needs of creators, users, and rights holders. As recently noted by the Canadian Federation for the Humanities and Social Sciences (CFHSS):

> Balancing the rights of users and creators is difficult, not only because they are often the same persons in different capacities, but because the distribution of their works increasingly depends on transferring copyright interests to third party rights-holders who are not necessarily involved in the creative process .... Humanists and social scientists take as their primary objects of study works that are or have once been copyrighted. The dissemination of knowledge, through teaching, publication and conferences, is the core outcome of our disciplines. Our primary products, beyond the education of graduate and undergraduate students, are in the form of copyrighted works.[5]

The deeper level of policy analysis needed to achieve this balance requires an accounting of the social costs and losses that result from an overly-ambitious copyright regime, and a recognition of the costs of "over-protection." To simply focus on the "under-protection" that large right-

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4 **Standing Committee on Canadian Heritage,** *Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage* (May 2004) <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf>. The Report is popularly referred to as the *Bulte Report*, named after Sarmite Bulte, the Chairperson of the Committee [*Bulte Report*].

5 **Canadian Federation for the Humanities and Social Sciences,** *Position on Copyright Reform* (March, 2005), <www.fedcan.ca/english/pdf/advocacy/CFHSS-CopyrightPosition-e.pdf>.

holders claim is destructive of their revenue streams only considers part of the problem. As the Canadian Supreme Court observed in 2002, the proper balance to be applied to copyright policy "lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."[6] The court also made it clear that "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[7] More recently, the court continued this line of reasoning; in a unanimous decision they reiterated that "the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." [8] In ruling on the appropriate threshold of originality required for copyright to subsist, they rejected setting the standard too low because it would "tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation."[9] This logic carried into their discussion of fair dealing, where they made this very significant pronouncement:

> . . . it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[10]

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6 *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, <www.canlii.org/ca/cas/scc/2002/2002scc34.html> at para. 31.

7 *Ibid*. at para. 32.

8 *CCH v. Law Society of Upper Canada*, 2004 SCC 13, <www.canlii.org/ca/cas/scc/2004/2004scc13.html>, [2004] 1 S.C.R. 339, at para. 23 [*CCH* cited to S.C.R.].

9 *Ibid*.

10 *Ibid*. at para. 48.

The court goes on to quote David Vaver for the proposition that "[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[11] These recent judicial pronouncements all demonstrate the need for such a deeper level of policy analysis when trying to balance the tension between new forms of information technologies and existing proprietary interests.[12]

Without undertaking the massive task of cataloguing and evaluating all of the emerging forms of educational technologies and strategies, which are often referred to as "technology enhanced learning,"[13] this essay will focus on the provision of electronic interlibrary loan services by academic libraries and will also address similar issues being raised by electronic course reserves and technology-enabled distance education.

All of these areas provide examples of how policy issues arise as universities enter the electronic networked environment. The ability of library and educational institutions to effectively utilize and implement technology-enabled strategies such as electronic interlibrary loan, electronic reserves, and distance education programs is especially acute for Canada's remote and rural communities,[14] particularly in the North.[15]

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11 *Ibid*., citing Vaver, below note 21 at171.

12 See also *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, at para. 40 ("The capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.").

13 See Ronald Hirshhorrn, *Assessing the Economic Impact of Copyright Reform in the Area of Technology-Enhanced Learning* (2003, prepared for Marketplace Framework Policy Branch, Industry Canada), <strategis ic.gc.ca/epic/internet/inippd-dppi.nsf/ vwapj/hirshhorn_final_e.pdf/$FILE/hirshhorn_final_e.pdf>.

14 In order to facilitate online access in underserved areas, Industry Canada has established the Community Access Program (CAP), which "plays a crucial role in bridging the digital divide; contributing to the foundation for electronic access to government services; encouraging on-line learning and literacy; fostering the development of community based infrastructure; and, promoting Canadian e-commerce." <http://cap.ic.gc.ca/pub/about_us/whatiscap.html>.

15 See Patricia Doucette, "Incorporating Inuit Qaujimajatuqangit into Library Service and Programs — or Vice Versa?" *Feliciter* 2003(5): 260, 261 (the librarian at Nunavut Arctic College noting: "both students and staff felt that traditional interlibrary loan was failing them. Courses at the College are taught in three week modules, so by the time an interlibrary loan arrives by mail (an average wait of two and a half weeks) the course is over.") See also, Yvonne Earle, "Mak-

With respect to these issues, I will argue that the provisions of Bill C-60 fall short of promoting the balance necessary in copyright reform, and fail to account for the broader scope and nature of the fair dealing provisions that exist already. The Bill also introduces an unacceptable level of complexity and uncertainty into the *Copyright Act* at a time when more people need to be able to understand it.

It is hoped that this discussion will contribute to an understanding that music-file sharing is neither the only, nor the most significant copyright issue facing Canadian higher education and its stakeholders. Music file sharing is merely one use of technology that is present in the copyright landscape and those that are used to promote teaching and research should not be painted with the same brush. It is important that copyright policy be viewed through a multidimensional lens, and never be reduced to a simple one-size-fits-all example, regardless of how interesting or controversial that example might be.

B. INTERLIBRARY LOANS AND COPYRIGHT POLICY

1) Interlibrary Loan Services

Interlibrary loans form an integral part of modern library services. As the American Library Association has noted:

In the interest of providing quality service, libraries have an obligation to obtain material to meet the informational needs of users when local resources do not meet those needs. Interlibrary loan (ILL), a mechanism for obtaining material is essential to the vitality of all libraries.[16]

In describing the purposes of ILL services, the ALA states it "is intended to complement local collections and is not a substitute for good library collections ... [and] is based on a tradition of sharing resources between various types and sizes of libraries ...."[17]

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ing Resources go Further: A Resource Sharing Project in Nunavut," *Feliciter* 2003(3): 150.

16 American Library Association, Reference and User Services Association, *Interlibrary Loan Code for the United States*, <www.ala.org/rusaTemplate.cfm?Section=referenceguide&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3157>.See also Bibliographical Center for Research (BCR), *Reciprocal ILL Agreements: BCR Interlibrary Loan Code*, (2002) <www.bcr.org/resourcesharing/illcd.html>.

17 Interlibrary Loan Code for the United States Explanatory Supplement (section 2), <www.ala.org/ala/rusa/rusaprotools/referenceguide/interlibraryloancode.htm>.

Interlibrary loan services take on a number of forms. One form of the service is where a patron wishes to borrow a book and their home library does not hold it. In that case the home library tries to obtain a circulating copy of the work from another library with which it has an interlibrary loan agreement. This type of interlibrary loan transaction does not involve any additional copyright-relevant events.

The second, and more common, form of interlibrary loan is where the patron needs an article, or a passage from a book, and the work that contains it is unavailable in their home library. In this case, the interlibrary service will attempt to procure a copy of the work for the patron, just as if it were held in the home library. Rather than send out a non-circulating item such as a journal or magazine, the providing library will send a copy of the requested material to the requesting library. The decision to make a copy of a journal article rather than send the journal volume itself to the requesting institution is a matter of sound library policy. It is based on the overall assessment that the interests of patron access are best served if certain types of materials are not removed from the library. Furthermore, if the article is available electronically, sending it on to the requesting library in electronic format will avoid delay as well as the expense of duplication and postage. Whether the requesting library may in turn provide the requesting patron with the electronic file is another question, which will be addressed below.

Another variant of interlibrary loan service is the document delivery service. In this case a library has created a special department that handles external requests, either from other libraries or directly from patrons, and fills requests for a fee. This type of fee-based premium service is often utilized in special libraries serving specialized clientele. In *CCH v. Law Society of Upper Canada,* the controversy was premised on the activities of a document delivery service operated in a law library, which provided materials to the legal community for a fee.

2) Interlibrary Loan Services and Copyright Policy

The provision of the second and third variants of interlibrary loan services does involve additional copyright-relevant events since copies are being made of protected works. However, the act of copying in order to satisfy an interlibrary loan request will probably not be actionable infringement for a number of reasons. First, the particular instance of copying might not amount to a substantial reproduction, in which case, there is no implication for the owners' reproduction right. Section 3 of the *Copyright Act*

gives the owner of the copyright the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatever."

Second, there might not be an infringement because the consent of the owner of the copyright might have been obtained. Section 27(1) of the Act provides "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do."

Accordingly, there is always a factual question as to whether the allegedly unauthorized act was based on some form of consent. This consent might be expressed or implied, and it might be based on the existence of contracts or licenses between the copyright owner or their representative and the institution. Assuming the act of copying falls under section 3 and assuming that there is no consent, then there is a *prima facie* case of infringement under section 27.

However, the analysis does not stop there because Part III of the *Copyright Act* contains a series of provisions that permits certain types of reproductions that would otherwise constitute infringement. The most important of these exceptions, or justifications, are the fair dealing provisions contained in section 29 (with respect to research or private study), section 29.1 (with respect to criticism or review), and section 29.2 (with respect to news reporting). In addition to the general fair dealing provision, the Act goes on to set forth a number of specific exceptions that are applicable to particular situations. For example, sections 29.4 through 29.9 contain exceptions that are applicable to certain defined educational institutions.[18] Sections 30.1 through 30.4 provide additional specific exceptions that are available only to certain "libraries, archives and museums."[19]

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18 **Under s. 2 of the** *Copyright Act*, "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,
- (*b*) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,
- (*c*) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (*a*) or (*b*), or
- (*d*) any other non-profit institution prescribed by regulation;

19 **Defined by s. 2 as (a) "an institution, whether or not incorporated, that is not** established or conducted for profit or that 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

While any institution may try to use section 29, only certain institutions qualify for the special exemptions. It is crucial to understand this interrelationship between sections 29, and the special exemptions such as section 30.2. Otherwise, one runs the risk of reading sections such as 30.2 as being the exclusive exception under any and all circumstances. In such a case, the benefits to users and institutions provided by section 29 would be lost.

The special educational and library exemptions were added to the *Copyright Act* in the last round of statutory revision in 1997,[20] often referred to as the "Phase II amendments." Speaking about the background of the 1997 library amendments, David Vaver writes:

> For some time, copyright owners had claimed that many activities carried on by or in LAMs [libraries, archives or museums] infringed owner rights. After 1988, collective societies began to form and to press institutions to enter agreements with them to cover photocopying practices. Some LAMs — especially those in schools, colleges, and universities — became included in agreements with collective societies like CanCopy and Union des écrivaines et d'écrivains québécois (UNEQ), under which fees were paid for library photocopying.[21]

Given the increasingly aggressive posture of agencies such as CanCopy, many librarians were hesitant to rely on the fair dealing provisions to protect their activities. As librarian Judith McAnanama wrote in 1991, [t]he dilemma faced by the library community is that revisions to the *Copyright Act* which allow for the establishment of collectives have been enacted whereas the legislation to provide for library exceptions has not yet even been drafted."[22] As Convenor of the Canadian Library Association Copyright Committee, she was well positioned to understand the concerns of librarians at the time. She went on to state that "further amendments to the *Copyright Act* to include the exemptions outlined in this article [i.e. those added to the Act in 1997] will remove current confusion over the interpretation of fair dealing and will provide a fair and reasonable envi-

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and other materials that is open to the public or to researchers, or (b) any other non-profit institution prescribed by regulation."

20 *An Act to amend the Copyright Act,* Assented to 25 April 1997, <www.parl.gc.ca/bills/government/C-32/C-32_4/C-32TOCE.html>.

21 **David Vaver,** *Copyright Law* (Toronto: Irwin Law, 2000) at 200.

22 **Judith McAnanama, "Copyright Law: Libraries and Their Users Have Special** Needs," 6 I.P.J. 225, 237.

ronment in which collectives can operate."[23] The library community's interpretation that further specific amendments were needed as a backup to the fair-dealing provisions seemed reasonable at the time, and Vaver's observation, that "[t]he 1997 Act will require robust interpretation if the structure it sets up is to work smoothly" was prescient. I would argue however that the 1997 amendments were not interpreted robustly by librarians. It would seem as if these exceptions were read literally as limitations that rendered section 29 inapplicable.

The fair dealing doctrine became submerged by the minutiae of the 1997 amendments, and it took the Canadian Supreme Court to rescue it from its state of latency. In *CCH v. Law Society of Upper Canada*,[24] a case dealing with a document delivery service operated by a law library, the court specifically addressed the relationship between one of the special exemptions and fair dealing:

> As an integral part of the scheme of copyright law, the section 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.[25]

Accordingly, whenever one approaches a problem involving copyright analysis (i.e., would doing x, y, or z result in actionable copyright infringement?) it is important to remember that there are several levels to the analysis. It is not appropriate to simply locate a section that seems particularly applicable, and then try to apply that one section in isolation from all of the others. Instead, the *Copyright Act* consists of a series of inter-related provisions that need to be read together as a coherent and integrated whole. This holistic approach can often yield a very different result than reading one isolated section out of context, and it results in an interpretation of the sections that represents the balance between user and owner rights that Parliament intended..

Table 1 summarizes the differences between the general fair dealing sections (29, 29.1, and 29.2) and the special exception contained in section 30.2.

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23 *Ibid*.
24 **Above note 8.**
25 *Ibid*. at para. 49.

Table 1: Comparison of Fair Dealing with Special Exemption for Interlibrary Loan

	Fair dealing			Special exemption
	s. 29	s. 29.1	s. 29.2	s. 30.2
Available to what institutions?	No express limitation. Fair dealing is available to any institution (although the nature of the institution may be a factor in the determination of whether the dealing was "fair")			Limited to statutorily defined "Libraries, Archives and Museums" as per section 2 definition
Applies to what materials in the library's collection?	No express limitation, can apply to any material (although the nature of the work may be a factor in the determination of whether the dealing was "fair")			Subsection 30.2(2) distinguishes between types of periodicals, the date of publication, and the type of work
Patron's purpose must be …	Research or private study	Criticism or review	News reporting	Research or private study
Factual inquiry?	Dealing must be "fair" under the circumstances. The criteria are enumerated in *CCH v. LSUC*.			No additional factual inquiry is required
Record-keeping requirements	No express record keeping requirements (although the library's practices and policies may be considered a factor in the determination of whether the dealing was "fair")			Per regulations. Former requirements expired December 2003
Delivery to patron	No express limitation on manner in which materials may be delivered to patron (although the manner of distribution may be considered a factor in the determination of whether the dealing was "fair")			Patron may not be given electronic copy per subsection (5)
Bill C- 60 proposed amendment	Not explicitly mentioned			Patron may be given electronic copy if certain specified criteria are met

While section 29 does not contain specific technological limitations on the availability of the exception to infringement, section 30.2(5) provides

that electronic copies may not be provided to the patron. [26] Similarly, while section 29 does not expressly distinguish between the different types, or genres, of works within its scope, section 30.2(2) distinguishes between a "scholarly, scientific or technical periodical" and a "newspaper or periodical, other than a scholarly, scientific or technical periodical." Further, the newspaper or other periodical is then differentiated based on date of publication and then again by the type of work. For instance, under section 30.2(2), it is not an infringement of copyright for a library, archive, or museum, or someone acting under its authority, to make by reprographic reproduction (for any person requesting to use the copy for research or private study), a copy of a work that is, or that is contained in, an article published in a scholarly, scientific, or technical periodical, or a copy of a work that is in a newspaper or periodical published more than one year before the copy is made. The distinction created here between an article in a "scholarly, scientific or technical" periodical and one in an ordinary magazine or newspaper is unfortunate since it adds a large degree of complexity to what should be a simple matter. Although this distinction (and others under section30.2) might seem significant at first glance, when we consider how much section 29 overlaps with section 30.2, it becomes clear that in most cases, s. 30.2 does not provide libraries with much in the way of additional protection.

Since the limitation to patron uses which constitute research or private study seems co-extensive with section 29, there does not appear to be any reason to make the genre-based distinction under section 30.2 where section 29 applies. The limitation also seems redundant when we consider that if the patron's intended use is either criticism, review, or news reporting, (and the dealing is "fair") they would be able to make copies under sections 29.1 and 29.2 respectively, regardless of the distinction made in section 30.2 between scholarly, scientific, or technical periodicals and ordinary magazines and newspapers.

To complicate matters even more, under section 30.2(3), you can't use the protection afforded by 30.2(2) in the case of a newspaper or magazine where the item constitutes "a work of fiction or poetry or a dramatic or

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26 Section 30.2 (5) provides: "A library, archive or museum or a person acting under the authority of a library, archive or museum may do, on behalf of a person who is a patron of another library, archive or museum, anything under subsection (1) or (2) [permitting certain copying by or for patrons of the library] in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons, but the copy given to the patron must not be in digital form."

musical work" (even if it is more than one year old). In addition, section 30.2(6) allows for the promulgation of regulations to define what is meant by terms such as "newspaper," "periodical," and "scholarly, scientific and technical periodicals"; as well as for the establishment of record keeping requirements.[27]

It seems evident that so long as the patron is dealing fairly with the materials for purposes of research or private study, the use falls within the protection of section 29, which provides that "[f]air dealing for the purpose of research or private study does not infringe copyright." Section 29.1 and 29.2 apply the same rule, subject to certain attribution criteria, to criticism or review and news reporting, respectively. If the use falls within one of the categories (research, private study, news reporting, criticism, or review), then the inquiry turns to the factual question of whether the dealing was fair under the circumstances. This two-part fair dealing analysis applies regardless of the genre of the work, its date, or the manner in which content is delivered to the patron.[28]

Since the fair dealing provisions are always available to a library, and the evaluation of the use will be based on that as made in the hands of the end-user patron, it seems that section 30.2(5) is redundant and should not be used, except in those situations where the defence of fair-dealing under section 29, 29.1, or 29.2 is for some reason unavailable. It is very difficult to conceive of a situation in which section. 30.2 would apply and section 29 would not. Combine this with the fact that the limitations in section.30.2 are highly specific, and it is easy to see how section.30.2 can be misconstrued as a limitation on the section 29 fair-dealing provisions with respect to interlibrary loans.

To reiterate this crucial point, interlibrary loan services, to the extent that they involve copyright-relevant activities, may be justified under both the general fair dealing exceptions (sections 29, 29.1, or 29.2) as well as under the specific library exception (section 30.2). These sections do not conflict with each other, since they are all an integral part of a statutory scheme and need to be read together. If something can be done under section 29, then the fact that it cannot be done under section 30.2 is not relevant unless the protections of section 29 are for some reason unavailable to the library or to the patron. At that point, the library, archive, or mu-

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27 See: *Exception for Educational Institutions, Libraries, Archives and Museums Regulations* (SOR/ 99-325) <www.cb-cda.gc.ca/info/regulations/99325-e.html>.

28 First, fit the reproduction within a category; second, determine whether the dealing was fair.

seum may make use of the special provisions in section 30.2, presuming of course that they meet the statutory definition contained in section 2. But since the exemptions contained in section 30.2 are rife with counter-exceptions and severely limited, it is very hard to conceive of an example of where 30.2 would be necessary to make any difference in the outcome of a case. Unfortunately, the limitations of 30.2 tend to be read out of context, to the point where the limitations contained in the section are being conflated with the limitations of the Act as a whole. And to emphasize the crucial point, such a reading results in an interpretation that upsets the balance of users' and owners' rights that should exist.

A process of ongoing review was mandated by section 92 of the *Copyright Act,* added as part of the Phase II amendments in 1997.[29] Unfortunately, the Section 92 Report failed to seriously address the confusion raised by the disparity between the general fair dealing section and the specific sections pertaining to libraries or educational institutions. The report failed to discuss the interrelationships between general fair dealing and the subsequent specialized exemptions for libraries and educational institutions. Of perhaps greater significance, the *Report* failed to grasp the significance of the *Théberge* case[30] in terms of the policy direction that the Court was setting, which was to balance users' and owner's rights so as to allow for innovation and avoid obstacles to necessary uses of works.

While an earlier section of the Report referenced the *Théberge* decision, it did so only with respect to the issue of reproduction of artistic works, raising the issue of whether new statutory rights should be considered in light of the case.[31] This failure of the report to acknowledge the broader policy direction set in *Théberge* resulted in an inappropriate analysis that

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29 Section 92 (1) provides that "[w]ithin five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to this Act." This Section 92 Report was tabled in the House in December 2002. Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (October 2002), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html> [the Section 92 Report].

30 Above note 6.

31 Section 92 Report, at 20. The Report asked "[w]hether the Act should be amended to change the definition of "reproduction" as it relates to artistic works." (*ibid*., at 20). The Report indicates that "[a]rtists have expressed concern that the reproduction right may be inadequate to protect what they view as their right to prevent such copying of their works by people who can take advantage of new technologies to transfer works without producing additional copies." (*ibid*.)

was carried forward through subsequent policy documents. As a result, these documents never did properly take the ongoing statements from the courts about the importance of users' rights into account. The lack of appreciation for the recent writings of the Supreme Court certainly was evident throughout the *Bulte Report*, as remains evident throughout the text of Bill C-60 itself.

To read the source materials leading up to the statutory text as tabled, one gets the impression that section 30(2) is the sole section governing interlibrary loans and that section 29 does not even exist.

3) From the Section 92 Report to Bill C-60

Under the requirements of section 92(2)[32] the recommendations of the Section 92 Report were eventually taken up by the House Standing Committee on Heritage. The final report of the committee, issued in May of 2004 (the *Bulte Report*) clearly situates the authority for interlibrary loan activities in section 30.2 of the *Copyright Act*, which allows a library, archive, or museum to make a copy of certain periodical articles for a patron for the purposes of research or private study.[33] The Report went through a description of the current state of section 30.2 without reference to the fair dealing provisions, which are also clearly applicable. The Report framed the policy options as if section 30.2 existed in isolation and was not part of a broader statutory regime, which includes sections 29, 29.1, and 29.2.

The *Bulte Report* acknowledged that the "no electronic delivery requirement" as contained in section 30.2(5) is considered problematic by the library and research communities because it is inconsistent with the manner in which research is actually being conducted and because it introduces needless delay and expense into the process.[34] The *Report* also noted that in contrast, rights-holders "are concerned that electronic delivery of copyright material to library patrons will undermine the publishing in-

32 Which subsection provides: "(2) The report stands referred to the committee of the House of Commons, or of both Houses of Parliament, that is designated or established for that purpose, which shall (*a*) as soon as possible thereafter, review the report and undertake a comprehensive review of the provisions and operation of this Act; and (*b*) report to the House of Commons, or to both Houses of Parliament, within one year after the laying of the report of the Minister or any further time that the House of Commons, or both Houses of Parliament, may authorize."

33 *Bulte Report*, above note 4, section G at 18–21.

34 Librarians are extremely concerned about the costs of interlibrary loan services and are always thinking of ways to drive down the costs of providing this service.

dustry and result in loss of income ... [and] are further concerned that digital delivery of their works will result in the loss of control over further dissemination of their material."[35] At this point, the Committee missed a good opportunity to engage in some substantive policy analysis, as these conflicting stakeholders' claims could have been further assessed.

Without such further analysis, the *Bulte Report* set out two possible options that were derived from items 44(a) and 44(b) as contained in the *Status Report on Copyright Reform*,[36] dated March 24, 2004. The *Status Report* asked the question, "[h]ow to adapt existing exceptions for non-profit libraries, archives and museums to allow the electronic delivery of copyright material to patrons of other libraries," and offered two options.

The first option was reflected in the subsequent *Government Statement on Proposals for Copyright Reform*,[37] and a more detailed version of it was incorporated into Bill C-60*:*

Amend the Act to extend existing exceptions to the electronic delivery of copyright material to library patrons, provided that there are adequate technical safeguards to prevent the recipient from forwarding it to others or making multiple copies. Consideration would also be given to allowing viewing only, with no possibility of making a copy. There have been significant advances in the ability to deliver material electronically in ways that the recipient cannot forward to another person or make more than one copy.[38]

The second option, although somewhat tentative in its wording, formed the basis of the recommendation that was adopted by the *Bulte Report*:

> Encourage licensing of the electronic delivery of copyright material to library patrons. Rights-holders would retain the ability to decide for themselves whether technological safeguards adopted by libraries are sufficient to adequately protect against the unauthorized dissemination of their material. Work would continue with all interested

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35 **Above** note 4 at 19.

36 *Status Report on Copyright Reform* (submitted to the Standing Committee on Canadian Heritage by the Minister of Canadian Heritage and the Minister of Industry (24 March 2004), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01134e.html> [*Status Report*].

37 **Industry Canada and Canadian Heritage,** *Government Statement on Proposals for Copyright Reform* (24 March 2005) <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html> [Government Statement].

38 *Status Report*, above note 36, at para. 44(a).

> parties to promote this approach in a manner that enables rights-holders to have effective control over use of their material. [39]

The *Bulte Report* itself recommended that interlibrary loan services be subsumed under an extended licensing regime, as reflected in Recommendation 7:

> The Committee encourages the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study. Where appropriate, the introduction of an extended collective licensing regime should also be considered. [40]

In carefully comparing the language of *Status Report* section 43(b) with Recommendation 7 of the *Bulte Report*, we see that the Heritage Committee added an important clause. This reliance on extended licensing (which cuts across many of the other recommendations in the report) creates a discrepancy with the rights of users under section 29. This problem was recognized by public interest advocates, who rejected the notion that library patrons should have to pay a fee for access to materials that were to be used for research or private study, and that such restrictions put Canadian researchers at a disadvantage.[41]

By introducing the notion of extended licensing into a section of the Act that purports to be an exception, the exception itself is essentially being vitiated. In drafting any amendment to section 30.2, the close relationship between section 29 and section 30.2 needs to be kept in mind. While general and special exemptions need not be coextensive, they should not conflict with each other. By interjecting extended licensing into the interlibrary loan process, the *Bulte Report* falls into this trap by creating what would amount to a conflict with section 29. At the very least, a great deal of confusion would be created and the net result would be the elimination of many interlibrary loan transactions by risk-adverse institutions that

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39 *Ibid*., para. 44(b).

40 **Above note 35, Recommendation 7 at 19.**

41 **See** *CIPPIC/PIAC Response to Bulte Report* (21 June 2004) at 5–6, <www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf>. The response also noted at 6 that "[l]ibraries should not have to pay for the right to distribute electronic copies of materials to patrons that they are permitted to distribute in hard-copy form for free … [and that] Increasing the cost of access to library materials by Canadians is not in the public interest."

would be prone to follow the more restrictive of the two sections. As a practical matter, the broad protections under section 29, as well as whatever section 30.2 adds, would be vitiated without respect to interlibrary loan transactions.

While Recommendation 7 lacks specificity and cannot be interpreted directly as statutory text, it appears that its intention was indeed to weaken the exemptions for interlibrary loans in their entirely because the uses would be subject to licenses. The *Report* fails to account for the reality that most library resources are already subject to a direct license, that the library is already paying for a subscription, and that the license already contemplates a certain level of copying.

The subsequent *Government Statement on Proposals for Copyright Reform*[42] somewhat ameliorates this tension by suggesting statutory text that recognizes the realities of library licensing practices and which would be consistent with section 29:

> The electronic desktop delivery of certain copyright material directly to the patron would be permitted, provided that effective safeguards were in place to prevent the misuse of the material or of the interlibrary loan service.[43]

In response to the above passage from the Government Statement, the Canadian Library Association said:

> CLA is pleased to see recognition in your announcement that the desktop delivery of copyrighted content by libraries should be permitted by legislation. It is recognized that the use of effective safeguards to limit subsequent dissemination may be required. There will be resistance to attempts to unduly limit what content may be provided in this way. If a library or individual can lawfully make a copy for research or private study, the library should be permitted to provide this content electronically. This right should not be limited to "certain copyright material, notably academic articles." Why should constraints be placed on how a library provides a copy of a 50-year-old obituary from a local newspaper to a genealogist when the same constraints are not placed on providing an article from a history journal to the same user? This makes no sense and will lead

42 **Industry Canada and Canadian Heritage,** *Government Statement on Proposals for Copyright Reform* (24 March 2005) <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html> [Government Statement].

43 *Ibid*.

> to significant conflict between libraries and their users. It is inappropriate for legislation to hinder the application of technology in this arbitrary manner.[44]

The language from the Government Statement was clearly preferable to Recommendation 7 in the *Bulte Report*. It was also preferable to the text in Bill C-60, which seems to be an attempt to find a middle ground between the *Bulte Report* and the Government Statement. The text from the Bill provides:

> (5) Subsections (1) and (2) do not apply with respect to the making of a copy in digital form of printed matter and its provision to a person who has requested the copy through another library, archive or museum unless the library, archive, museum or person providing the copy takes measures that can reasonably be expected to prevent the making of any reproduction of the copy other than a single printing, its communication, or its use for a period of more than seven days.[45]

The difference between this text and the Government Statement version is one of level of detail. While the Statement provides a general guideline, the bill supplies additional detail in the form of three technical requirements; the prevention of copying, the limitation to a single printing, and the seven-day destruction requirement.

But several questions should be raised about the need for this added detail and its potential for negative effects.

Would these specific requirements hamper the effectiveness of the interlibrary loan service? Are they in keeping with how library patrons actually go about conducting research? These sorts of questions need to be asked in order to grapple with the policy issue as it has been framed.

Regardless of the strengths of the Government Statement when read in comparison to the *Bulte Report* and the text of Bill C-60, its weaknesses should not be overlooked. As the Canadian Library Association (CLA) tries to articulate in its letter, there are still problems with section 30.2 that none of the reports address. Unfortunately, none of the relevant policy documents grapple with the serious and recurring confusion caused from the two tracks of exceptions. The various reports never confront the more basic question of whether or not section 30.2 is even needed in light of

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44 *Letter from CLA to Ministers Liza Frulla and David Emerson* (21 April 2005), <www.cla.ca/issues/copyright_letter_april_21_2005.htm>.

45 **Above** note 2, at s. 19.

the Supreme Court's broad interpretation of section 29 in *CCH* let alone whether or not an extended-licensing system is necessary.

A purposive approach to policy analysis would require a careful assessment of the interests of all of the stakeholders. Why does it matter to library patrons in what format they receive their interlibrary loan materials? Why does it matter to libraries if they can deliver interlibrary loan content digitally or whether they must print it out first? And why do these issues matter to content owners or their representatives? Why should the interlibrary loan exception be limited based on type, date, or genre of the requested material? And most importantly, how are these different interests to be balanced in light of operative policy objectives?

Taken as a whole, the Section 92 Report, the *Bulte Report*, and the Government Statement fail to ask these questions. More significantly, they fail to explicitly address the operative policy objectives set by the Supreme Court in *Théberge*, *CCH*, and *SOCAN*. If the objectives were simply to increase the control of the types of works that are the subjects of interlibrary loans on the part of rights-holders, then the *Bulte Report* has selected the appropriate policy tool by opting for a pay per licensing approach.

However, if part of the policy calculus is to enhance the ability of libraries to provide services to their patrons, to leverage the vast expenditures already placed in our library systems, and to enable library users to obtain the full value of library collections regardless of which particular collection they happen to have most immediate access to, then the *Bulte Report* recommendation entirely misses the mark. Further, while the other option as set forth in the Government Statement[46] does less damage, and does not create an irreconcilable conflict with section 29, it still is not the optimal solution. The purpose of the special library exemptions, as best understood through the lens of the *CCH* decision, is to provide qualifying institutions with a second chance at being able to provide the service to the patron even in a situation where fair dealing would not be generally available. None of the policy documents to date attempt to discuss, much less readily identify and provide a justification for, the limitations that were placed in section 30.2 with respect to type of work, date of work, and genre of work as well as format of delivery. Accordingly, section 30.2(5) should be drafted in a form that is technologically and genre neutral, if it needs to remain in the Act at all.

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46 **Which is reflected in the text of Bill C-60 as submitted for First Reading.**

4) Conclusion to Interlibrary Loans and Copyright

The text as presented in the first reading version of Bill C-60 with respect to interlibrary loans should, at the very least, be reworded to reflect the language as presented in the Government Statement. Further, the limitations contained in section 30(2) as to type of work, genre of material, and date of publication need to be reassessed as well. In the end, we need to ask the question: What purpose is served by including section 30(2) as a special exception, separate and apart from section 29, 29.1, and 29.2? The current statutory scheme creates a dual track for finding exceptions to infringement. If one of the purposes of copyright reform is to simplify the act and make it comprehensible to those communities affected by it, simplicity demands the elimination of superfluous sections. Somehow, the entire "copyright reform process" got off-track at some point. The original intent of section 92 would have been better served by revisiting some of the fine-points written into the 1997 amendments, taking into account both improvements in technologies as well as specific institutional practices. Educators, students, librarians, and administrators would have then been more central to the consultation process supporting the Phase III amendments. Instead, the consultation process became side-tracked by the needs of one specific stakeholder group, that being a subset of rights-holders and their representatives. How the needs of large rights-holders, many of which are based outside of Canada, and their representatives were able to so influence the process of statutory revision needs to be the subject of careful reflection.

In the case of interlibrary loans, the dual track that has come to exist between fair dealing and the specific exception has become a source of uncertainty and confusion. The net result is that many acts that would fall well within the parameters of fair dealing are not being done because of the express limitations on technology found in section 30.2. This same dynamic of confusion cuts across the other library and educational exemptions. While the proposed amendment to section 30.2(5) (which would somewhat expand the range of allowed technologies in interlibrary loans) does not help clear the thicket out of the dual track, compared to other sections of Bill C-60 pertaining to library and academic exceptions, they are the paragon of clarity. Before turning to the thicket of proposed sections 30.01 and 30.02, some background on electronic course reserves and distance education will be provided.

C. ELECTRONIC COURSE RESERVES AND DISTANCE LEARNING

1) E-Reserves and Copyright

One of the most promising aspects of modern information technologies in the academic setting is the enhanced ability to deliver course materials directly to students in an efficient, clear, and cost-effective manner. In many courses, the use of traditional textbooks is being replaced or supplemented by alternative forms of course materials. Many professors find that there is not one textbook that best represents the goals of the course and need to put together collections of readings from various sources. Traditionally, print based course-packs (or "readers") have been used along with the placement of selected articles or books on physical reserve in the library.[47]

The possibility of digitization creates many potential benefits to a course content delivery system regardless of whether the course materials are to be printed out and distributed as physical course readers, as paper or electronic course reserve materials held in libraries, or through various forms of web-based course delivery. The ability of libraries to support a system of electronic course reserves becomes all the more crucial where the institution is also offering distance education opportunities.

Paper-based course reserves have plagued students, faculty, and librarians alike. Consider these familiar scenarios:

- Students are unable to access course reserves because there is only one copy and someone else has it checked out. There is also a back-up for the two-hour reserve folders inasmuch as there is an exam scheduled for the next day.
- When the student finally gets her turn at the folder, she finds that the copy is of poor quality because on previous occasions students have taken the copy in the file and returned the copy they made, with a bit of degeneration of quality for each copying. Or perhaps the original is secured to the folder and remains intact, but getting

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47 Placing an item on "reserve" in the library means that it will not circulate outside of the library. There are "open reserves," where the patron can browse the shelves, or "closed reserve" where items are kept behind a desk and staff assistance is needed. In either event, the patron is given the item for a short period of time. Usually, students will take reserve items directly to a photocopy machine so the materials may be read off-site.

quite tattered around the edges and much the worse for wear and tear. Where the original is not secured to the folder, the materials are often found out of order. Of course actually reading the article in the library wouldn't work well, a copy has to be made; the acquisition of the artifact being an integral part of the knowledge acquisition process.

- Library staff spending inordinate amounts of time dispensing two-hour reserve folders, taking ID cards, monitoring return times and assessing fines for late returns, responding to complaints about the photocopy machine, dispensing change, clearing paper jams, and the like.
- Faculty members hearing complaints from frustrated students that the readings are neither readily available nor in good order.
- Librarians hearing complaints from faculty members who have been hearing complaints from their students.[48]

For purposes of copyright analysis, the transaction was simple: an individual end-user made a single copy for personal use. The paper-based course reserve presents a classic case of "fair-use" or "fair-dealing." Law librarian and copyright scholar Laura Gasaway wrote that "librarians see the library as an extension of the classroom with the creation and maintenance of reserve collections, including electronic reserves under the section 107 fair use provision."[49] And as the American Library Association has stated:

> For decades libraries have provided access to materials selected by faculty that are required or recommended course readings in a designated area of the library, with materials available to students for a short loan period and perhaps with additional restrictions to ensure that all students have access to the material. Libraries have based these reserve reading room operations on the fair use provisions of the Copyright Law (Section 107). [50]

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48 These scenarios are not an exhaustive list.

49 Laura Gasaway, "Values Conflict in the Digital Environment: Librarians Versus Copyright Holders" (see text following note 29), <www.unc.edu/~unclng/Columbia-article3.htm>. The term "fair-use" is used in the United States under s. 107 of the US *Copyright Act* (17 U.S.C. sec 101, *et. seq*). "Fair-dealing" is the Canadian usage under ss. 29, 29.1, & 29.2 of the Canadian *Copyright Act* (R.S.C. 1985, c. C-42). While there are substantial differences between the scope of fair-use and fair-dealing, there are substantial similarities as well.

50 American Library Association, "Applying Fair Use in the Development of Electronic Reserves Systems," <www.ala.org/ala/washoff/WOissues/copyrightb/

The result is no different than if the student actually went into the stacks, pulled the original book chapter or journal article off the shelf and made the copy. The main difference is that due to anticipated high demand for the item on account of it being required or supplemental for a course, a copy is made in advance, thereby sparing the original artifact much wear and tear.[51]

Not everyone was worse for the efforts required. The photocopy machine supplier benefited, as did the vendors of paper, toner, and other supplies. For the most part, this system of distribution was inconvenient, environmentally wasteful, and expensive. Enter modern information technology, as noted by the American Library Association:

Within the past decade many libraries have introduced electronic reserves (e-reserves) systems that permit material to be stored in electronic form rather than storing photocopies in filing cabinets. Depending on the particular electronic reserves system, student access may occur in the library or remotely. Students who wish to have a copy of the reading can print it from the e-reserves systems rather than having to take the original volume to a photocopy machine.[52]

It is no longer necessary to line up for a single copy of an article or book chapter, as everyone in a class can get their own copy in digital form through electronic access. It is no longer necessary to use a photocopier at a particular point in time and space, thereby freeing up library staff for more scholarly pursuits than taking ID cards, monitoring usage times, assessing fines for late returns, making change, and clearing paper jams. While the end-user will likely want to print out the file in order to possess that all-important, underliner-ready artifact, they now have a range of choices as to when and where to print it out (or even to forego such physical reproduction if they're willing to read on screen). The end result, though, is the same. The end user gets access to the article or chapter just as surely as if they had gone to the stacks, pulled the item off the shelf, and made a physical reproduction by way of a mechanical coin-operated

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fairuseandelectronicreserves/ereservesFU.htm>. The result should be the same under the Canadian fair-dealing provisions.

51 **See Gasaway, above note 49 (tracing back the history of reserves, stating:** "[t]raditionally, library reserve collections contained materials such as restricted circulation collections of original volumes, journals, etc. After the photocopier arrived in libraries, libraries quickly adopted photocopying to reproduce copies of articles, book chapters and the like for the reserve collection so that the original work would not be removed from the general collection").

52 **Above** note 50.

device. One would think that the copyright result should be the same, especially if technological neutrality is seen as a desired goal of any copyright policy regime.

For many years, the question of how electronic reserves would be treated for purposes of copyright analysis was left murky, unsettled, and contingent on many factors.[53] Much like the rock that is best left unturned, the protagonist stakeholders in the copyright policy arena did not address the matter head-on. However, continuing advances in information technology, the general diffusion of these advances throughout the academic community, and the widespread availability of digital information resources, have converged to bring this latent policy issue to the surface.

2) Distance Education and Copyright

Distance education programs have become widespread in recent years. A convergence of technological, economic, geographic, and demographic factors account for this increase. In a study prepared for Industry Canada, Ronald Hirshhorn estimates that "participants in distributed learning account for about one of every nine university students — a ratio that if applied at the national level leads to an estimate of almost 65,000 full course equivalent registrations for 1998/99."[54] Hirshhorn identifies three changes underway in distance education that have significance for copyright policy. The first is that distance education in the post-secondary sector is growing rapidly. This increase is attributed to a number of factors "including technological changes that have made it feasible for nine out of every ten students to have a computer at home and the trend to a increasingly knowledge-based economy in which jobs require problem-solving ability and continued learning."[55]

The second factor is that "a wider variety of materials and of resources is being used in distance education courses," which Hirshhorn attributes to "the expanding role of distance education technologies, which now

53 See Gasaway, above note 49 (pointing out that while "[p]ublishers and librarians have disagreed quite vigorously over electronic reserves … there has been no litigation, nor even a reported cease and desist letter, over electronic reserves." This state of affairs may be changing in the United States given the escalation of a current dispute between the American Association of Publishers and the University of California at San Diego. See Anick Jesdanun, *Publishers Bemoan Online Postings* (Associated Press: May 29, 2005), <www.registerguard.com/news/2005/05/29/f3.bz.campusonline.0529.html>.

54 *Assessing the Economic Impact of Copyright Reform*, above note 13 at 6.

55 *Ibid.* at 9.

includes delivering materials that supplement in-class instruction and supporting advanced research training."[56] As a third factor, Hirshhorn cites the globalization and intensification of competition among various providers of educational services. He concludes that "[t]o the extent they affect course content and quality or the costs of delivery to distant education students, copyright policies will affect the ability of Canadian institutions to compete in this growing market."[57]

Distance education presents special copyright problems, because above and beyond whatever copyright issues are present in the physical classroom, these issues are magnified when the class is further distributed via some form of communications technology. While there are a series of special exemptions in sections 29.4 through 29.9 of the *Copyright Act*, it is generally felt that these exceptions do not apply beyond the physical premises of the institution.

3) From the Section 92 Report to Bill C-60

While the Section 92 Report does not directly address electronic course reserves or distance education as such, there are numerous references to the special exemptions for educational institutions as well for libraries, museums, and archives. In addressing the issue of interlibrary loans and the proposed revisions to section 30.2 in the previous section, I argued that these special exemption sections need to be read as a whole along with the general fair dealing provisions of section 29. I also argued that by creating limitations on special exemptions, an unnecessary level of confusion is created and the practical result might be to vitiate the purpose of fair dealing, a result that should be avoided. The gist of these arguments are also applicable to a whole range of other educational issues, including

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56 *Ibid*.

57 *Ibid*. at 10. It is unclear why Hirshhorn's report was not utilized to a greater degree by the various committees and policy analysts involved in working on the educational exceptions. Hirshhorn compared the option of using a conditional exception until such time as a blanket license is available with the option of extending the scope of the exceptions already in the Act, and concluded that the latter would be a better policy. Much of the difficulties that result in ss. 30.01 and 30.02 could have been avoided had Hirshhorn's analysis been given more consideration. In particular, s. 30.02(7), which nullifies the previous six subsections when an electronic blanket is available, runs directly counter to Hirshhorn's recommendations.

electronic course reserves, classroom use of the Internet,[58] and distance education.

In the March 2004 *Status Report on Copyright Reform*,[59] there is a section entitled "Technology Enhanced Learning," which raises the issue: "How to facilitate the use of the latest information and communications technologies (ICTs) to extend the reach of the classroom beyond its physical limits."[60]

As in the case of interlibrary loans, the *Status Report* sets forth two policy options. The first option would be to:

> Amend the Act to exempt educational institutions from additional copyright liability for use of ICTs (in lieu of or in addition to the classroom) as a medium for delivering curriculum content, provided that there are appropriate safeguards, including special consideration for material specifically created for the education market. Existing copyright rules applicable to fundamental educational uses of copyright material would continue to apply.[61]

The second option involved licensing, although it was vague as to how such licensing would be carried out:

> Encourage licensing of ICT use of copyright material for educational purposes. Work would continue with all interested parties to promote this approach to meet the objectives of technology-enhanced learning, including consideration of the tools necessary to support new licensing models.[62]

The *Bulte Report* set forth five options in its section entitled "Technology Enhanced Learning." The first option, to "[a]mend the *Copyright Act* to clearly state that the 'fair dealing' defence in section 29 applies to education and teaching purposes, in addition to research or private study, review or news reporting,"[63] was not given any further discussion or analysis.

Options 2 and 3 respectively set forth the two options from the Status Report.[64]

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58 **See chapter 12 in this volume (re educational use of Internet).**

59 **Above note 36.**

60 *Ibid*. at 10.

61 *Ibid*. at para. 42(a).

62 *Ibid*. at para. 42(b).

63 **Above** note 4 at 17.

64 **Above notes 61 and 62. There was one significant textual difference, in that** option 3 was qualified as "voluntary" licensing whereas the Status Report para.

Option 4 was to "[a]mend the Act to provide for extended licensing which would allow collective societies to negotiate with respect to uses involving information and communication technologies. Individual authors could opt out of the collective society," and option 5 would amend the Act" to institute compulsory licensing to cover technology-enhanced learning.[65]

Consistent with the approach taken in other areas, the *Bulte Report* opted for the collective licensing model. Recommendation 6 stated:

> The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material (as defined in Recommendation 5 of this report).[66]

As for its rationale, the Committee noted; "that collective licensing regimes that are already in place are capable of providing the same broad service in a digital environment that they do in the paper-based environment."[67] It is not clear how the committee was able to make this claim in such an absolute matter, as there are indeed significant problems with so replicating print-based services. But the broader question, why such licensing was preferred over extending fair dealing, was not given any analysis. The committee's rationale continues by stating that, "[s]uch a regime would protect rights holders' economic interests by ensuring fair and reasonable compensation for access to material."[68] Yet no mention is made of the interests of users and the intermediaries that serve them, other than to end the *rationale* section by stating that the "Copyright Board can resolve disputes concerning an appropriate fee for access."[69]

42(b) spoke generally of "licensing" without specifying whether it was voluntary or extended.

65 *Ibid*.

66 *Ibid*. at 18. The CIPPIC/PIAC Response to Recommendation 6 was that it "suggests that teachers should have to pay a fee in order to deliver copyrighted materials over the Internet for distance learning applications. CIPPIC's concerns here are the same as for Recommendations 4 and 5." Above note 41 at 5. For a full discussion of Recommendations 4 and 5, see chapter 12 in this volume.

67 *Bulte Report*, above note 4 at 17.

68 *Ibid*.

69 *Ibid*.

Following the same pattern as in the interlibrary loan discussion, the March 2005 Government Statement ameliorated the harshness of the *Bulte Report*. In a section entitled "Use of Copyright Work for Remote Learning" the government sets out two proposed amendments, although they are not in statutory textual form. The first proposal is:

> Current educational exceptions permit the performance or display, within the classroom, of certain copyright material as part of a lecture. The requirement that the performance or display be confined to the classroom would be removed to enable remote students to view the lecture using network technology, either live or at a more convenient time. Educational institutions would be required to adopt reasonable safeguards to prevent misuse of the copyright material.[70]

If the intention here is to apply the educational exceptions contained in sections 29.4 through 29.9 to the distance education environment, then a minimalist drafting strategy would focus on adapting the definition of "premises" in section 2 as necessary.

The second proposal states:

> Material that may be photocopied and provided to students pursuant to an educational institution's blanket licence with a collective society would also be permitted to be delivered to the students electronically without additional copyright liability, unless the licence in question provides for such delivery. Educational institutions would be required to adopt effective safeguards to prevent misuse of the copyright material.[71]

These two proposals are reflected by the additions of new sections 30.01 and 30.02 in Bill C-60. Section 30.01 seems to be an elaborate and overly complex way of extending the educational exemptions to the distance education environment. First by defining a rather cryptic category of "lesson,"[72]

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70 *Government Statement on Proposals for Copyright Reform*, above note 43 (n.p.). This proposal follows the reasoning contained in Ronald Hirshhorn's report prepared for Industry Canada, above note 13 at 16.

71 Above note 43.

72 Proposed s. 30.01(1) provides: "In this section, 'lesson' means any lesson, test or examination in which a work or other subject-matter is copied, reproduced, translated, performed in public or otherwise used on the premises of an educational institution or communicated by telecommunication to the public situated on those premises." (Bill C-60, s. 18).

then by creating what seems to be an exception to infringement,[73] only to be subject again to a broad counter-limitation,[74] the section as a whole appears to do very little to help the educational institution.[75] If the intention of the section is to extend the general exceptions into the distance education context, the same result could be met by amending the section 2 definition of premises to read:

> "premises" means, in relation to an educational institution, a place where education or training referred to in the definition "educational institution" is provided, controlled or supervised by the educational institution, or received by the student.[76]

Some assistance in trying to understand the purpose of sections 30.01 and 30.02 may be gleaned by the "Frequently Asked Questions" accompanying the release of Bill C-60.[77] The response to the question, "What is in this Bill to ensure that users' interests are equitably addressed?" [78] states:

> ... there are provisions that facilitate the use of digital technologies for educational and research purposes. Specifically, educational in-

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73 Proposed s. 30.01(2) provides:

> (2) Subject to subsections (3) and (4), it is not an infringement of copyright for an educational institution or a person acting under its authority to communicate a lesson to the public by telecommunication, if that public consists only of its students enrolled in a course of which the lesson forms a part and instructors acting under the authority of the educational institution; to make a fixation of the lesson for the purposes of an act referred to in paragraph (*a*); or to perform any other act that is necessary for any such acts.

74 Subsection 3 appears to place strong limitations on the applicability of the exception granted in ss. 2:

> (3) Subsection (2) does not apply so as to permit any act referred to in any of paragraphs (2)(*a*) to (*c*) with respect to a work or other subject-matter whose use in the lesson constitutes an infringement of copyright or for whose use in the lesson the consent of the copyright owner is required.

After one accounts for instances of infringement as well as instances where consent of the copyright owner is needed, it is not at all clear that anything of much substance remains in the exception.

75 The complexity of the section is replicated by the inclusion of a new s. 27(2.2) that creates a new category of secondary infringement with respect to lessons (Bill C-60, s. 15).

76 One could reach the same result without an amendment simply by reading the word "provided" in the broad sense to include where the student receives the instruction. However, amendment makes this explicit for clarity.

77 <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01146e.html>.

78 *Ibid.*, Question 11 (n.p.).

> stitutions and libraries will be able to benefit from digital technology to permit classroom activities to be conducted in remote locations and documents to be electronically delivered. To prevent abuse, the provisions will only apply if appropriate safeguards preventing the unauthorized transmission of works have been put in place. Should these safeguards prove to be ineffective, the educational institutions and libraries will not be able to benefit from these provisions until such time as their effectiveness is restored.

Will this language doesn't tell us much; it does belie a general approach that any new exceptions will be accompanied by substantive limitations. This feature cuts across sections 30.01, 30.02, and 30.2(5).

D. CONCLUSION

The same advanced information technologies that could enable more equitable access, greater distributional efficiencies, and sensitivity to the environment are also capable of enabling heightened surveillance and control along with finer-grained metering of individual transactions. While technology enables information to be released from the physical constraints of its container in an access-enhancing manner, it also constrains these potentials by enabling access-destructive control mechanisms. The implications for how the regulatory environment corresponds with changes in technology are particularly acute in the case of the electronic delivery of library resources, course reading material, and the course instruction itself.

The Response prepared by CIPPIC/PIAC to the *Bulte Report* closed with the observation that:

> The recommendations made in the Bulte Report call for sweeping fundamental changes to Canadian copyright law that reflect the positions of certain vested interests rather than the public interest. They ignore key evidence and submissions provided by public interest groups. They lack reasoning in some key respects. The Bulte report should be rejected and a more balanced approach to copyright reform adopted by the new government of Canada.[79]

To a lesser extent, these comments may be generalized to the entire Phase III Copyright Reform Process, spanning from the initial consultation papers and ending with the tabling of Bill C-60. While the *Bulte Report*

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79 Above, note 41 at 6.

certainly represented an extreme moment in the process, I would argue that the process itself was flawed and the difference between the *Bulte Report* and other documents are more of quantity than quality. When the policy process picks up again, presumably after second reading of the Bill, three criteria should guide further action.

First, full consultation across the spectrum of stakeholders needs to be undertaken. In the case of library and educational exemptions, it is an oversimplification to have heard from a rightholders group and an educational association. The range of stakeholders is much more complex than that and requires consultation with students, teachers, and administrators in a wide variety of contexts, through a wide assortment of associations. Second, the recent writings of the Canadian Supreme Court need to be taken into better account. Reading through the complete set of policy documents, one is left with the uncomfortable impression that the court is not being heard in this process. One is left with the feeling that what the court says is irrelevant, wrong, or not worthy of consideration. To the extent the court based its decisions on principles of statutory interpretation, Parliament may be free to differ and disapprove of any particular rule resulting from a holding. But if this is to be the case, coherent policy formulation requires an acknowledgment that it is indeed Parliament's intention to overrule a particular holding. For example, the *CCH* court made it clear that the special exemptions are to be read together with the fair dealing provisions in section 29. If Parliament wants to render fair dealing inapplicable to particular situations, then they should explicitly say so.[80]

Finally, legislative drafting should be precise, clear, and economical in its wording. As copyright issues take on more importance in the day to day lives of library users, students, teachers, librarians, administrators, and researchers, then it is all the more important that the *Copyright Act* be an understandable and coherent document. This goal has not been well served in the Phase III reform process to date.

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80 **The issue of whether user rights are rooted in** *Charter* principles such that Parliament may be constrained in such limitations is beyond the scope of this essay, but a question worthy of much further consideration.