

# Fair Dealing or Fare Stealing?: Implications of Canadian Copyright Law Reform on the Online Classroom

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## INTRODUCTION

Property law is the fulcrum of our modern system of social organization. Copyright law, as a subset of property law, is just as important. The pith of Canadian copyright law is the striking of a balance between users and owners of legal title. The Canadian *Copyright Act* [CCA]<sup>1</sup> is meant to govern this symbiotic relationship. If owners had absolute control over their “bundle of rights”, it would be mutually disadvantageous for both authors and users of copyrighted material. Fortunately, the law has developed in a way that facilitates the free flow of information to inspire innovation, and also furthers creativity.

Unfortunately, the CCA is woefully outdated. The CCA became law in 1985, with the last major amendment occurring in 1997. It protects “works” that are created, through appeal to the definition in s. 2 of the CCA, or through relevant jurisprudence. Artistic, choreographic, musical and dramatic works are all protected by the CCA as well as university literary works, which form the basis of academic articles and educational courses. For example, lectures have been considered a specific type of “work” in Canada since the instillation of the 1921 *Copyright Act*.<sup>2</sup> Normand Tamaro also notes that lectures are interpreted as a literary “work” in Canada in compliance with s. 2(1) of the Berne Convention.<sup>3</sup>

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<sup>1</sup> *Copyright Act*, R.S.C., 1985, c. C-42 [CCA].

<sup>2</sup> *An Act to amend and consolidate the Law relating to Copyright*, S.C. 1921, c. 24.

<sup>3</sup> Normand Tamaro, *The 2009 Annotated Copyright Act* (Toronto: Thomson Carswell, 2008).

Since 1997, new media and communications technologies, enabled by the Internet, have transformed the way human beings work and study. Computerised learning systems have fundamentally shifted the way information is accessed and disseminated to students. The concept of “distance education” is now practically interchangeable with the idea of online courses. However, Canada’s copyright law does not reflect this new reality, as evidenced by the *CCA*’s failure to address digital transfers and the use of the Internet as a mode of communication. This article focuses specifically on copyright law as it pertains to distance education. It grapples with the question of how best to amend the *CCA* so as to not dilute the necessity of an education exemption to copyright infringement.

Many universities are exploring the opportunity to provide distance education offerings. In most cases, distance education is offered as a self-directed program, monitored by professors at the host institution. Often these programs are offered through self-contained business units that operate on a cost recovery basis in the university.<sup>4</sup> This potentially impacts students because any increase in fees will ultimately be passed on to them.

In making use of new technology, university classes are moving toward relying on Internet-based delivery as opposed to the older text and paper-based course pack method. Additionally, distance education students often have the ability to remotely access libraries, networking and learning systems and use e-mail to correspond with professors and other students. These methods, however, raise new issues with respect to copyright that are largely ignored under current legislation. When making copies of documents for educational purposes, the current law assumes a world where students rely on photocopies, while remaining silent on the legality of transmitting digital copies. Proposed changes have included provisions to limit the number of digital copies a person may hold. However, this becomes an issue when technology is introduced into the equation. When files are transferred between programs, computers and mobile data devices, many copies of a document are then created. Professors and students who work at their office, home and on the go may inadvertently be violating copyright. As well, given the distance nature of the program, students may be directed to videos and websites to elucidate concepts. Copyright law is not clear on the legality of using such tools or what exactly constitutes public domain on the Internet. Finally, issues may arise due to the fact that the students may access library and other class materials from remote locations. Again, this is technically increasing the number of copies as the document passes through many servers.

In an area of law with such fractured and cross-cutting interests, it is inevitable that there will be differences of opinion on the correct way to amend the *CCA*. In contrast, all parties agree that the law must be updated to reflect the digital age we are living in. As it stands now, our country’s foremost educators and students are using materials publicly available on the Internet as pedagogical tools without the benefit of clear legislative guidelines. Professors, in particular, face a curious polemic of interests with respect to both using copyrighted works in the classroom and protecting their own copyrighted lessons and lectures. This raises the question of whether or not we are a country rife with inadvertent pirate professors and

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<sup>4</sup> Athabasca University, online: Athabasca University <<http://www.athabascau.ca/>>.

swashbuckling students who stand poised to loot the coffers of rights owners through any digital means possible. Most would dismiss this notion as ludicrous. However, if past copyright reform attempts had passed into legislation, they would have created an entire crew of inadvertent digital-pirate professors attempting to legally access works licensed to universities. As such, the purpose of this article is to explore how current Canadian copyright law might be amended to accommodate the reality of modern technology, in the context of distance education, and to address how universities, professors and students may prepare and respond to legislative reforms.

Strict anti-circumvention laws and digital rights management (DRM) requirements have the potential to affect how a professor may acquire and disseminate copyright works to distance education students. New copyright laws should also address online methods of communication and the transfer of knowledge-based products. Inevitably, laws affecting online and distance education will also need to be altered. As such, a professor must be mindful of protecting their own online classrooms while ensuring any content published in such a “classroom” will not be considered in violation of any new laws or a DRM circumvention attempt.

Aside from professors as users of copyrighted works, this article has also taken into account other stakeholders within the distance education realm who will be affected by changes to copyright law as it relates to the Internet. Although this is not an exhaustive list, the stakeholders specifically considered in the potential outcomes from copyright reform include students, university administrative bodies, license holders and licensing organizations such as Access Copyright, and content creators (including professors). Their interests have all been taken into account in the following analysis of how copyright reform may evolve in Canada.

This article first examines Canadian copyright law as it pertains to distance education with a detailed review of literature, legislation and jurisprudence, including a comparison with influential law from the United States. Included in this analysis are the opinions of specialists and experts on distance education and copyright in the university environment, who were interviewed during this research. Based on the research findings, we have identified three distinct legislative outcomes. For each, we provide recommendations on how a university and other stakeholders might best protect their interests when confronted with any of these three possibilities.

## **I. COPYRIGHT LAW IN CANADA**

### **(a) Copyright Rationales**

Since its inception, the concept of copyright has included the inherent conflict between protecting creators of content and the importance of allowing users to disseminate that content to adapt and evolve new works. Adaptation is needed to help further growth and progress in a society as a whole. To evolve as a whole, academically, intellectually and technically, the academic foundation currently in place must be available for adaptation. However, John Locke’s seventeenth-century natural law approach to property advocates that a creator has a natural right to exclude others from benefiting from their work, and the Lockean viewpoint, applied to cop-

right, would also help to consider that limits should be imposed on copyright to allow growth in society and its collective knowledge.<sup>5</sup>

Jeremy Bentham's utilitarianism philosophy can be applied to copyright as an argument that the determination of what should be subject to copyright is best left in the hands of the government, which shall use copyright as a tool for the greater good. Current theories on copyright law draw elements from both the utilitarian philosophy and natural law concepts developed by Bentham and Locke, and adopt an economical approach to justifying copyright. The market system is seen as the most appropriate tool for disseminating and creating knowledge and copyrighted works and, thus, it is recognized that information and knowledge based products will not continue to be produced without financial incentives.<sup>6</sup>

In sum, since its inception, copyright has accepted the inherent conflict between protecting the rights of authors to exclude others from the benefits arising from their own creations, while also allowing society to benefit and grow from such creations. Those who are pro-user rights are wary of public interference that will limit a third parties' right to borrow and adapt creative works for the furtherance of society. Those who are pro-author rights are concerned that a lack of government interference with online appropriation of content will financially stunt creativity, as authors will lose any financial incentive to create.

### **(b) Holes in Canadian Copyright Legislation and Methods of Avoiding Infringement**

As it stands, there is a lacuna in the law. The *CCA* assumes students are still bound to physical academic texts and do not have the convenience and freedom of researching scores of academic works from the comfort of their living room. In fact, current legislation does not contemplate the use of online materials at all. The *CCA* leaves distance educators with nothing but questions rather than a solid understanding of applicable laws relating to the Internet. New legislation threatens to either validate current practices, or outlaw them. Currently, three methods are available to professors to mitigate any allegations of piracy:

- 1) the education exemption;
- 2) the fair dealing exemption; and
- 3) the payment of licensing and royalty fees.

#### **(i) The Education Exemption**

The *CCA* specifically exempts traditional learning through hard copy texts and in-class lectures in its educational exemption found in section 29.4(1). Section 29.4(1) allows an educational institution or professor to reproduce a copy of a work manually onto a dry erase board, flip chart or other similar surface, or to reproduce a work through the use of an overhead projector or similar device. Clearly, this does not apply to online education, as it specifically states that reproduction of

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<sup>5</sup> Laura J. Murray & Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007) at 10 [*Citizen's Guide*].

<sup>6</sup> *Ibid.* at 13.

works must be “for the purposes of education or training on the premises of an educational institution.” Given this language, it is unlikely s. 29.4, in its current form, will aid a professor accused of piracy while facilitating courses in the online environment.

### (ii) *Fair Dealing Exemption*

An alternative exception available to a professor attempting to facilitate distance education is the assertion that the course materials may fall within the concept of fair dealing in sections 29, 29.1 and 29.2 of the *CCA*. These provisions specifically state that a fair dealing exemption will only be granted if the use of the work falls within one of five categories: research, private study, criticism, review and news broadcasting. Case law has established that no allowable use will fall within one of the listed exemptions unless it can be qualified by the accused that the dealing was in fact “fair” and done in good faith.<sup>7</sup>

Canada’s restrictive use of a closed list of “fair dealing” exemptions is distinct from the United States’s equivalent “fair use” provisions, which are much more open-ended. Rather than providing a closed list of exemptions in their respective copyright act, the U.S. fair use provisions contain an illustrative list of the types of categories that may fall within fair use. The U.S. provisions also contain a specific education exemption for teaching, including the consideration that multiple copies are used in classrooms.<sup>8</sup> It would be easier to argue that distance learning includes the online classroom from this framework. It also contains a test used to determine if a certain use should be considered fair use or not. This test has given rise to much more litigation on the matter in the U.S. compared to Canada, with each case further clarifying the law.

As the Canadian government has yet to advance any copyright law consistent with the changing spectrum of information dissemination, it has been left to the judicial system to interpret the *CCA* in novel ways to ensure that copyright regulation does not become obsolete. The Supreme Court of Canada (SCC) recognized the utility of the Internet for its capacity to disseminate “works of art and intellect” in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers (SOCAN)*<sup>9</sup> and encouraged its facilitation. The SCC also showed its commitment to maintaining a balance between both users’ and authors’ rights in the current context through the decision in *CCH Ltd. v. Law Society of Upper Canada*.<sup>10</sup> The decision in *CCH* established that the defence of fair dealing is available to all, as it is a user *right*. As a result, fair dealing claims

<sup>7</sup> *Zamacois v. Douville* (1943), 3 Fox Pat. C. 44 (Can. Ex. Ct.), *Cie générale des établissements Michelin — Michelin & Cie v. CAW-Canada* (1996), 71 C.P.R. (3d) 348 (Fed. T.D.).

<sup>8</sup> *Copyright Act*, 17 U.S.C. §107.

<sup>9</sup> *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (S.C.C.) [*SOCAN*].

<sup>10</sup> *CCH Ltd. v. Law Society of Upper Canada*, 2004 CarswellNat 446, 2004 SCC 13 (S.C.C.) [*CCH*].

are now analyzed on a case-by-case basis. The SCC laid out the appropriate test to be applied when determining what will fall within the fair dealing exemption.<sup>11</sup>

Murray and Trosow make the strong argument that, since *CCH*, an education institution may rely on the fair dealing exemption in addition to the special education exemptions in the *CCA*. However, they also acknowledge that it may be difficult for an educational institution to pass the “character of the dealing”<sup>12</sup> aspect of the test to determine what constitutes fair dealing, which likely refers to the use of material within one of the five specified fair dealing exemptions. Despite the courts’ willingness to stretch the fair dealing exemptions, universities still bear the burden of arguing that distance education falls within fair dealing. Education in its very nature is closest to the criticism and review exemption as outlined in s. 29.1. Courts will also look to common industry practices to determine benchmarks of “fair” use.<sup>13</sup>

### *(iii) Payment of Licensing and Royalty Fees*

If a copyrighted work that a professor wishes to present to a class does not fall within the education exemption and is not qualified as a fair use exemption, a professor must obtain permission from the author to use the work unless they only intend to make a “manual reproduction” of a work onto a dry erase board, flip chart, or projector, as noted in the *CCA* education exemption (*CCA*, 29.4(1)). Thus, any printed copy of a work likely requires payment of royalty fees.<sup>14</sup> Figure 1, shown below, illustrates how the education exemption, fair dealing, and the payment of licensing fees act as alternative modes of preventing copyright infringement.

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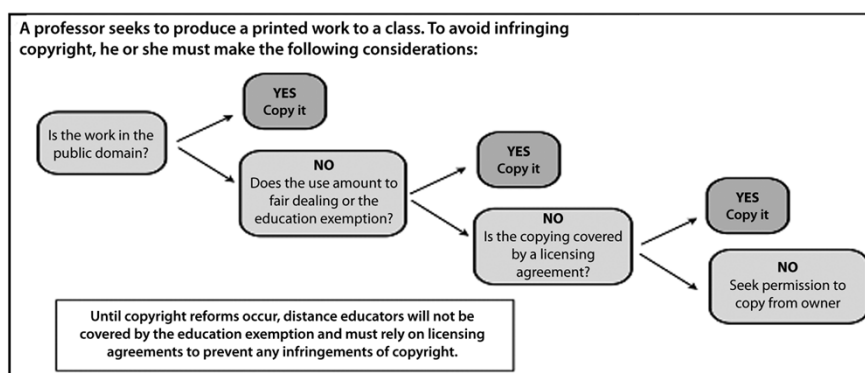
<sup>11</sup> Tamaro, *supra* note 3 at 529, explains the test as a list of factors to take into account when determining if a particular use falls within the realm of fair dealing. As noted by the Court, such a determination is made on a case-by-case basis. The factors to consider include: 1) the purpose of the use; 2) the nature of the use; 3) the scope of the use; 4) the nature of the work; 5) the effect of the use on the work. The importance given to each of these factors depends on the facts of any given scenario.

<sup>12</sup> *Supra* note 5.

<sup>13</sup> Canadian Association of University Teachers, “*Fair Dealing*” (December 2008) *CAUT Intellectual Property Advisory No. 3* [CAUT 2008].

<sup>14</sup> Dalhousie University Copyright Office, *Frequently Asked Questions*, online: Dalhousie University Copyright Office <<http://copyrightoffice.dal.ca/cancopym.html>>.

Figure 1: Use of copyright exemptions and licensing requirements to avoid infringement.



Source: Dalhousie University Copyright Office, online: <<http://copyrightoffice.dal.ca/copyright/cpnygrt.html>>

Rather than seek out authors individually, the CCA provides for copyright collectives such as Access Copyright (formerly CanCopy) to provide licensing services to universities. Access Copyright is a collective that serves as a clearing house for copyright and simplifies the process by which copyright licensing fees can be paid and collected. For example, Access Copyright charges a university a blanket yearly fee of \$3.38 for every full time equivalent student, which is full time students plus 3/5 of part time students based on the numbers reported to Statistics Canada.<sup>15</sup> In addition, a university must pay 10 cents per page for any copied material given to students. When making up course packs, these fees apply even if the library holds a license for the material and the students could theoretically access it.

Given the limiting language of the CCA, a reproduction of an article onto a course website would not fall within the education exemption and, therefore, a digital license for every student will need to be obtained. As it stands, universities are paying extra licensing fees to compensate for the use of materials in distance education, whereas an equivalent course instructed in a class setting would not require such fees to be paid. For example, if a professor produced 100 pages of copyrighted works on overheads or projectors to a class of 50 students throughout the year, no fees for these reproductions would be charged as all teachings occurred within a classroom as a qualified “manual reproduction.” However, had these courses occurred online, a university would have to compensate for each work published, thus resulting in extra course expenses of \$500 (50 students × 100 pages at \$.10/page). For a large university, with multiple online courses, these extra costs would quickly escalate and would presumably have to be passed on to the students.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) fears the weight given to licensing. CIPPIC believes licensing undermines the potential and purpose of the fair dealing and education exemption. These fears appear to be man-

<sup>15</sup> Dalhousie University Copyright Office, *Dalhousie University Access Copyright Agreement*, online: Dalhousie University Copyright Office <<http://copyrightoffice.dal.ca/cancopym.html>>.



dated by the current lack of reliance given to these exemptions by universities.<sup>16</sup> Currently, universities offering online and distance education do not even appear to consider the options of fair dealing and the education exemption, paying their licensing fees without argument to prevent any accusations of copyright infringement. Universities are very aware of the grey area surrounding the education exemption and the use of the Internet and other modes of information communication, but opt not to pursue these exemptions without further clarification.

Although copyright exemptions for the purpose of education exist specifically in the *CCA* and through fair dealing, it is a common response for institutions to pay unnecessary licensing fees to avoid any potential retribution. Protected material is used quite frequently in distance education and needs to be paid for. However, there are also many situations within a distance education course that could arguably be considered fair dealing uses. New standards could serve to increase the licensing requirements, thereby increasing fees payable to copyright holders. In such a case, universities and professors may look more closely at the fair dealing provisions as a way to mitigate increasing costs of education. The legislation must be updated to clarify both protection and user rights in the digital world.

### (c) Canadian Copyright Legislation's (Lack of) Conformance to International Standards

In its preamble, the *World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)* states its purpose as fulfilling "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information."<sup>17</sup> The *WCT* reaffirms the 1886 *Berne Convention for the Protection of Literary and Artistic Works* in a new digital era.<sup>18</sup> Balance is still required between the rights of owners and users. Also, the right for access to copyrighted materials for the purposes of education is to be sacrosanct, irrespective of technological advancement.

Article 11 of the *WCT* addresses obligations concerning technological measures to mitigate the pirating of copyrighted material.

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the authorized authors concerned or permitted by law.<sup>19</sup>

The issue of technological measures mentioned in the *WCT* has figured significantly in the national lawmaking that it inspired. Broadly speaking, this treaty should have served as the starting point for subsequent legislation in Canada. Unfortunately the Canadian legislative process has struggled to retain the core purpose

<sup>16</sup> Canadian Internet Policy and Public Interest Clinic, *Bill C-30: Legislative Summary*, online: CIPPIC <[http://www.cippic.ca/index.php?page=bill-c-60-copyright-revision/#faq\\_bC-60-distance-edu](http://www.cippic.ca/index.php?page=bill-c-60-copyright-revision/#faq_bC-60-distance-edu)>.

<sup>17</sup> *World Intellectual Property Organization, Copyright Treaty*, 12 April 1997, S. Treaty Doc. No. 105-17 (1997) [*WCT*] at Preamble.

<sup>18</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1 B.D.I.E.L.

<sup>19</sup> *Ibid.* at Article 11.



of the *WCT* and an agreement has yet to be reached regarding the extent of WIPO ratification required, if any.

**(d) American Legislation: A Polemic of Inspiration and Punitive Threat to Canadian Copyright Law**

Throughout the 1990s, the United States began taking steps as a sovereign nation to safeguard American copyrighted material in the digital age and to fulfill its obligations under the *WCT*. In 1998, the *Digital Millennium Copyright Act (DMCA)*<sup>20</sup> was brought into force. The *DMCA* was developed at the behest of publishing houses and information providers who were concerned with protecting the integrity of their title. The argument of copyright holder lobbyists turned on the ease of copyright violation in a digital age when laborious photocopying was no longer a requirement. Importantly, the *DMCA* establishes the right of copyright owners to use sophisticated technological means to enforce restrictions on their property.<sup>21</sup> This early U.S. attempt at protecting digital copyright was overly protective of owner rights at the expense of fair use purposes for education. This led to the development of the *Technology, Education and Copyright Harmonization Act* of 2002 [*TEACH Act*].<sup>22</sup>

The *TEACH Act* codified the balance between owner and user rights specifically as they pertain to distance education. This balancing is reasonable and readily evident. For example, the *TEACH Act* suggests that distance education should occur only in discrete installments, each within a confined space of time, in an integrated package.<sup>23</sup> In this way, an institution would be better able to regulate the digital distribution of copyrighted material for educational purposes. The *TEACH Act* goes even further in demanding that institutions distributing copyrighted material digitally implement at their own expense technological measures that limit student access to materials.<sup>24</sup> Despite this attempt by American legislators to strike a balance between the rights of users and owners, it is not a perfect instance of lawmaking.

It is true that the *TEACH Act* allows for the use of copyrighted work in distance learning; however, as noted above, this use for distance educational purposes necessitates the implementation of new policies, technological measures and other conditions. Furthermore, not all copyrighted works can be used in full under the *TEACH Act*.

In both the United States and Canada, the onus of copyright protection for distance education falls on the institution and not on the professor. Ultimately the institution is liable for breaches of copyright. Therefore, the institution is expected

<sup>20</sup> *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-304, 112 Stat. 2860 [*DMCA*].

<sup>21</sup> Thomas Leonhardt, *Handbook of Electronic and Digital Acquisitions* (Binghamton, NY: The Haworth Press, 2006) at 7.

<sup>22</sup> *Technology, Education, and Copyright Harmonization (TEACH) Act*, Pub. L. No. 107-273, §13301 (Nov. 2, 2002), incorporated into H.R. 2215 *21st Century Department of Justice Appropriations Authorization Act* (2002).

<sup>23</sup> Leonhardt, *supra* note 21 at 8.

<sup>24</sup> *DMCA*, *supra* note 20 at s. 110.

to discharge due diligence to ensure that digital copyright violation is not committed. This requirement necessitates the need for implementation of expensive institutional policies, professor re-education, technological controls and strict adherence to reproduction limits. These newly incurred costs will inevitably be passed on to the student in cost recovery distance education programs, thereby placing the cost on the party least able to bear it.

## II. ONGOING CANADIAN COPYRIGHT REFORM

### (a) Bill C-60

An initial attempt at legislative updating occurred in June of 2005 when Bill C-60, *An Act to amend the Copyright Act* [C-60]<sup>25</sup> received its first and last reading in the House of Commons. In the language of the drafters, the legislation's overall purpose was to, "implement the provisions of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to clarify the liability of network service providers, to facilitate technology-enhanced learning and interlibrary loans, and to update certain other provisions of the Act."<sup>26</sup> It could not be more obvious that C-60 was meant to satisfy the *WCT*. It may well have done so, if it had not been struck down in the House of Commons.

Regarding education, Bill C-60 codified the test laid down in *CCH*. As explained above, *CCH* is an essential piece of judicial response on the topic of copyright and fair dealing. C-60 went even further, and acknowledged "technology enhanced learning" as covered by the educational exemptions of the *CCA*. This would have legitimized the use of digital media as teaching aids;<sup>27</sup> however, C-60 also stipulated that it would ultimately be up to institutions to adopt reasonable measures to ensure copyrighted material is not misused. Such measures would have notably included the destruction of copyright material at the conclusion of the course and strict record keeping ensuring that this had been done. These provisions demonstrate an attempt at even-handed compromise between owner and user in a bill that was far from perfect.

C-60 drew criticism from both ends of the political spectrum. It was variously condemned as both too restrictive and too lenient. For example, representatives from Access Copyright were concerned that an additional fee over and above that of a paper license would eliminate the right holders' choice as to whether something is or is not published online.<sup>28</sup> This same collective voiced concern over the possibility of statutorily imposed price lists. These lists would restrict market efficiency in price determination. The fact that the bill failed to clearly delineate what

<sup>25</sup> Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005 [Bill C-60].

<sup>26</sup> Government of Canada, *Bill C-60: Summary*, online: Parliament of Canada <[http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=38&Ses=1&Mode=1&Pub=Bill&Doc=C-60\\_1&File=19](http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=38&Ses=1&Mode=1&Pub=Bill&Doc=C-60_1&File=19)>.

<sup>27</sup> S. Banks & A. Kitching, *Bill C-60: An Act to Amend the Copyright Act — Legislative Summary*, online: Parliament of Canada <<http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/38/1/c60-e.pdf>>.

<sup>28</sup> K. O'Malley, "Industry players to fight changes to omnibus Copyright Bill", *The Hill Times* (18 July 2005).

mid-July to mid-September of 2009. The government of Canada presents the consultation period as follows:

The Government of Canada has committed to modernizing Canada's copyright laws, to provide meaningful rights for creators and promote the use of digital technology by its citizens. We are consulting to ensure that all perspectives are taken into account in an open and transparent process, to help deliver new legislation in the fall that is forward-looking, reflects Canadian values, and strengthens Canada's ability to compete in the global digital economy.<sup>32</sup>

This forum, if properly used, is a laudable attempt by the Conservative government towards stakeholder inclusion. A transparent, collaborative and holistic legislative process is the best way for the correct balance between owners and users to be struck. While this consultative approach is theoretically sound, the proof of its success or failure will be in the legislation it creates.

### III. CONSIDERING THE FUTURE: COPYRIGHT REFORM SCENARIOS

The three subsequent scenarios examine how stakeholders will be affected in a world where different degrees of copyright reform come. These scenarios range from heavy handed legislation to purely judicial reform. Consideration of these extremes highlights stakeholders' concerns about copyright. The first scenario outlined is one where C-60 was enacted in its entirety, followed by the second scenario where C-61 holds authority. The third scenario considers the impact that continued novel and expansive judicial interpretation would have on distance educators if the CCA was left to the Canadian judiciary to evolve.

The hypothetical C-60 and C-61 scenarios assume the proposed bills are enacted in their entirety. Analyses have been conducted considering both the policies behind the provisions and the specific provisions themselves. Further assumptions underpinning the judicial reform analysis will be provided in the subsection itself.

#### (a) Scenario One: Effects of Copyright on Distance Education had Bill C-60 been Enacted

Bill C-60 was an attempt to balance creators' rights to remuneration with consumers' increasing self-entitlement to a vast amount of copyrighted materials.<sup>33</sup> C-60 was Canada's first attempt to conform with WIPO requirements and was enacted at the behest of the 2004 Standing Committee on Canadian Heritage report on copyright in Canada.<sup>34</sup> Introduced by Paul Martin's Liberal government, C-60 was intended to establish copyright law as a set of principles, leaving the ultimate determination of what constituted infringement up to the judiciary. C-60 was meant to

<sup>32</sup> Government of Canada, *Copyright Consultations*, online: Government of Canada <<http://copyright.econsultation.ca>>.

<sup>33</sup> Interview of Marc Garneau, (21 May 2009), *Globe and Mail Tech Reporter*, online: YouTube <<http://www.youtube.com/watch?v=TSVjkqZ3yBQ>>.

<sup>34</sup> Banks & Kitching, *supra* note 27.

be flexible and was never intended to be bound by strict rules applicable to defined scenarios or situations.

Although C-60 followed the *DMCA* in requiring technological locks and circumvention measures to be taken by distributors of works such as libraries, the bill did not go as far as its American counterpart in targeting circumvention outright. C-60 only targeted circumvention for the purpose of infringement.<sup>35</sup>

With the C-60 provisions, a flexible, principle-based copyright act would evolve over time and would not grow obsolete, as the current *CCA* is threatening to become, thus benefitting all stakeholders with respect to copyright. Marc Garneau (2009), the Liberal critic for industry, science and technology, believes it is important to “nail down your principles” with respect to copyright law, as each copyright case is so particular, and then apply the principles to a broad range of scenarios.<sup>36</sup> This type of flexibility would likely fill any of the current holes in *CCA* legislation, as it relates to professors and their potential “pirating of works.”

C-60 was widely approved by those in the education industry for extending the meaning of a “lesson” within the education exemption to lessons conveyed through the Internet or “telecommunication.” Based on C-60 wording, distance educators would be able to communicate lessons to students online as they would convey any lesson to students in a traditional classroom. In addition, the proposed bill allowed universities to make digital copies of works as they would paper copies, so long as a fee, equivalent to that paid for paper copies, was made through a copyright collective. This would increase the utility of online learning for students, while decreasing the costs of preparation to educators and universities for facilitating these courses online.

The use of a statute based on principles is good in its flexibility, but is likely to follow the trend in the United States where litigation is pursued quite frequently, seeking a determination of what constitutes an infringement and negatively impacting any costs associated with copyright in a given university. Many education groups such as CIPPIC, the Canadian Federation of Teachers and the Council of Education Ministers were quite disappointed with C-60’s silence on the use of freely available Internet services and information, as the Government’s inaction would likely cause universities and professor to continue to pay unnecessary licensing fees for online materials, as these works could fall within a fair dealing exemption.<sup>37</sup> While many were happy that the Canadian Government did not follow Canadian Heritage’s recommendations that an extended licensing program for educators be made for general and day to day uses of Internet services, this matter needs to be addressed to allow universities to facilitate the use of the Internet within their programs without fear of infringement.

Although the extension of the education exemption was met with approval, many education institutions were unhappy with the restrictions placed on distance education. C-60 required that any lessons communicated by telecommunication may only be used for the purpose of that particular lesson and must be destroyed

<sup>35</sup> Bill C-60, *supra* note 25 at s. 27 as it pertains to s. 34.02(1) of the *CCA*.

<sup>36</sup> Garneau, *supra* note 33.

<sup>37</sup> Laura Murray, “Commentary: Bill C-60 and copyright in Canada: Opportunities lost and found” (2005) 30 *Canadian Journal of Communication* 649.

within 30 days of its initial conveyance. In addition, a professor would be required to keep records of the publishing date of online lessons, and the subsequent removal date of these lessons for three years following the end of the course.<sup>38</sup> Universities were also unsure of the extent of the required “measures” needed to prevent further republication of class materials by students and the necessary measures to restrict access to works to students only.

Further, Access Copyright expressed concern regarding C-60’s mandatory licensing requirement for digital versions of works, while the licensing requirements for paper copies continued to remain optional. Access Copyright was concerned that this mandatory requirement took away from the rights of authors to choose to have their works made publicly available online.<sup>39</sup>

On balance, C-60 highlighted the Government’s interest in broadening fair dealing exemptions; however, it ultimately failed to take action on the matter, preferring to let the recent decisions of the Supreme Court of Canada, such as *CCH*, maintain authority until further consultations could occur. Organizations such as CIPPIC refer to Bill C-60 as “a lost opportunity”<sup>40</sup>; C-60 reflects a solid attempt by Parliament and the Department of Industry to balance user rights with commercial interests. However, its actions with respect to distance education, while positive, were far from complete.

### **(b) Scenario Two: Effects of Copyright on Distance Education had Bill C-61 been Enacted**

The recent failure of C-61 was not unforeseeable, given the complexity of copyright issues and the volatility of Canadian politics at the time. That said, it is reasonable to assume that an incarnation of C-61 will someday reappear. The Canadian political climate has cooled somewhat and, though the copyright consultation process might provide new avenues to explore, if not taken seriously, it may still result in legislation that favours owners and is heavy on punishment. However, in the context of distance education, a C-61 style approach has its merits.

The legislation would have benefit for educators, students and copyright holders. The first major advantage is an explicit recognition of a digital education exemption to publically available Internet materials. In the opinion of the Association of Universities and Colleges of Canada, this is a policy that will allow Canadian education to remain competitive with international standards.<sup>41</sup> A legislative regime that does not prohibit educational use of publically available materials is a sensible solution that allows teachers and students to teach and learn without fear of reprisal.

A C-61 type law would also benefit copyright holders through its provisions regarding Internet service providers (ISPs). The “notice and notice” system in this

<sup>38</sup> Bill C-60, *supra* note 24 at s. 18 as it pertains to s. 30.01 of the *CCA*.

<sup>39</sup> *Supra* note 28.

<sup>40</sup> *Supra* note 16.

<sup>41</sup> Association of Universities and Colleges of Canada, Media Release, “Proposed copyright law amendments: some very good changes but some cause for concern” (June 2008), online: AUCC <[http://www.aucc.ca/publications/media/2008/copyright\\_06\\_13\\_e.html](http://www.aucc.ca/publications/media/2008/copyright_06_13_e.html)> [AUCC].

legislation would require ISPs to notify their subscribers of copyright infractions that they have committed. This would discourage further violations at a reasonable cost.

The rights of owners would be further safeguarded by three exceptions to the digital education exemption. The first exception would be that the digital education exemption is negated by any licensing agreement to the contrary. Second, the exemption would not excuse the payment of general tariffs levied by the copyright board on specific materials. Last, owners reserve the right to withhold the educational exemption on their copyrighted materials at their discretion.<sup>42</sup>

A Canadian intellectual property regime governed by the principles of C-61 would not constitute a balanced approach. Educators and students argue that this type of legislation is overly favourable to rights owners. A complete prohibition on technological circumvention measures would be a very hard line to take. Such a stance would stifle access to materials that would better the educational atmosphere.<sup>43</sup> A complete prohibition goes far beyond the WIPO requirements.

Statutory damages for violation of copyright would apply even to those educators who believed that their distribution of copyrighted materials would be protected by fair dealing. This, then creates a disincentive for educators to use digital mediums for educational purposes. Effectively, educators are therefore coerced into abandoning innovative educational techniques in the interest of self-preservation, under this proposed situation.

Implementation of C-61 also leaves open the possibility of regulatorily imposed obligations such as expensive DRM systems, self destructing files and perhaps even mandatory employee re-education programs. An educational institution would be expected to conform to any newly created regulation. However, any regulation created in this scenario would not be subject to the usual legislation and therefore could be altered at any time.

Under CGI, the onus of copyright protection for distance education would continue to fall on the institution and not the professor. Therefore, the institution would be expected to discharge its due diligence to ensure that digital copyright violation is not committed. This requirement also necessitates the need for the implementation of expensive institutional policies, professor re-education, technological controls and strict adherence to reproduction limits. These newly incurred costs will inevitably be passed on to the student in cost recovery distance education programs, thereby placing the cost on the financially weakest party.

### **(c) Scenario Three: How Continued Copyright Reform through the Judiciary Could Affect Distance Education**

Given the current political climate in Canada, it is a possibility that copyright reform will continue to face delays. The split in public opinion across the country, on a wide range of issues, precipitates a split in parliamentary opinion as well. Given the multiparty system, minority governments are a likely outcome of any election. As it stands now, the last two attempts to reform the *Copyright Act*,

<sup>42</sup> Canadian Internet Policy and Public Interest Clinic, *Bill C-61: Copyright Revision*, online: CIPPIC <[http://www.cippic.ca/Bill\\_C-61/#HwBCatnopsvde](http://www.cippic.ca/Bill_C-61/#HwBCatnopsvde)>.

<sup>43</sup> AUCC, *supra* note 41.



through C-60 in 2006 and C-61 in 2008 have died on the table after the fall of both Liberal and Conservative minority governments. The effect of these failures on stakeholders, with respect to copyright issues and distance education, would be governed by the current mix of statutes and the evolution of case law.

For the purpose of this discussion, this scenario will adopt a variety of assumptions; specifically, liberalized judicial interpretation with respect to the Fair Dealing provisions will continue. The SCC released a trio of decisions in 2004 that affirmed the need for copyright law to balance the rights of both users and creators.<sup>44</sup> If the *CCA* is left as is, copyright law, as it pertains to the Internet, will likely be left to evolve through the judicial system rather than through the government. The SCC has clearly established its commitment to balancing the public interest in encouraging and disseminating creative and knowledge-based works with the author's interest in receiving appropriate compensation for such works (*SOCAN* and *CCH*). It is likely that the SCC will continue to interpret the *CCA* in novel ways to ensure the continued applicability of the *CCA*, as was shown in *SOCAN*<sup>45</sup>, where the SCC expanded the scope of the fair dealing exception to protect Internet service providers (ISPs) from the actions of their customers.

Additional assumptions include pressure to reform from the international intellectual property community. In its current state, the *CCA* is not sufficient to satisfy the requirements of the *WCT*. Even if the government does not move on copyright reform, there will be continued pressure to do so from the international community. Additionally, as new technologies have changed the way in which information is created and presented, new situations and challenges that strain the applicability of the outdated statutory law will arise. Creators and users of digitally provided distance education classes are then left at a loss as to how to determine how copyright law will affect courses.

Overall, a great state of uncertainty overarches the enforcement of copyright and the application of Fair Dealing in Canada. This, in turn, affects the stakeholders in varied ways. Continuing to rely on Canada's current copyright act will continue to leave gaping holes in the Canadian legal system. As knowledge acquisition and dissemination continues through the use of the Internet, and this use continues to go unchecked, distance educators may become "copyright pirates." They will download and distribute copies of papers and videos to students through online portals and database systems, such as Blackboard Learning System, without regard to any potential infringement, as the government clearly has no intention to establish such cases of infringement. The Internet will exist in a grey zone in regards to copyright, making it the perfect environment for professors to illegally disseminate intellectual property. But, then again, are such actions truly illegal? The law does not attempt to answer such a question, and jurisprudence progresses slowly and incrementally.

Professors are the predominant players in the distance education realm; they are at the crossroads of the copyright debate as they are required to both use and create copyrightable material in their professional capacity. With the uncertainty of

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<sup>44</sup> The trio includes: *CCH*, *supra* note 10; *SOCAN*, *supra* note 9; *Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34 (S.C.C.).

<sup>45</sup> *SOCAN*, *supra* note 9.



the fair dealing parameters, educators may shy away from using fair dealing for fear of having to defend themselves in court. However, there are benefits as well. Currently there are fair dealing provisions in place for the professors in the role of users. The Canadian Association of University Teachers (CAUT) has argued that academia is essentially research, private study, review and criticism.<sup>46</sup> The current situation offers professors and CAUT the opportunity to explore myriad fair dealing exceptions as they are challenged, which, in the end, may offer a better balance of rights than a set dictated by the government would.

Students and institutions will also potentially be affected in both positive and negative ways. If uncertainty abounds and professors and universities simply pay licenses where fair dealing might apply, it is the students who will ultimately pay the price in higher fees for education. However, the uncertainty may also benefit them as they push the limits of fair dealing, especially if stricter restrictions are imposed at a later date.

License holders, like many publishers, may be affected by a change in copyright law through fair dealing and education exemption clarifications; however, there is no way to know how until the laws are changed. They may benefit from collective licensing because professors and institutions simply want to pay the licensing fees to avoid hassles and the pitfalls of copyright law.<sup>47</sup> This idea, of making it easier to pay, also came up in our discussions with those involved with distance education delivery and was seen as a way to deal with the current uncertainty.

#### IV. RECOMMENDATIONS: “THE BLENDED SCENARIO”

##### (a) Expected Legislative Reform as a Blended Approach of All Three Worlds

The three cases that were presented were extreme cases used to demonstrate many of the issues surrounding copyright reform. Going forward, it is likely that none of the three cases presented will come to fruition in their entirety. As with many things in life, a balanced, blended approach will likely occur. The rest of the article will suggest an appropriate blending of ideas as well as offer suggestions to professors, universities and other stakeholders as to where they should focus their efforts in trying to bring about the new copyright order.

The blended approach to copyright law will have to consider multiple levels; it must balance a principled approach with legislative regulations and it must balance the rights of both creators and users. An ideal reform to copyright law should incorporate the following:

- *Expansion of the Education Exemption*

The current education exemption specifically refers to learning in a physical classroom. Classrooms are taking digital form with the rising use of technology, so the new educational environments need to be specifically referenced in the revised *Copyright Act*. Both C-60 and C-61 included

<sup>46</sup> CAUT 2008, *supra* note 13.

<sup>47</sup> Michael Geist, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2006).

this amendment. Distance educators and universities alike should expect a revised s. 29.4 of the *CCA* to be extended to include online learning.

- *Limited Statutory Damages to Academia*

One of the positive aspects of both proposed C-60 and C-61 copyright reform was the limitation of statutory damages for educational institutions. That is, if a member of the academic community were found to be in violation of copyright, the penalty would be no more than paying for the use of that copyrighted material. This provision would be important to keep in any new reform bill.

- *Broadening of the List of Fair Dealing Exemptions*

As was mentioned earlier, the law in the United States differs from that in Canada in that the fair use provisions are left open ended. There, the term “such as” precedes the list of exemptions, which allows the court more flexibility in adapting to changing uses and technology. Although the judiciary has taken strong steps to expand the limited fair dealing exemptions to their fullest extent, an argument for fair dealing for distance education may still be an upward battle without the presence of a legislative amendment. Open ended wording describing fair dealing in the *CCA* would be a significant step for distance education, as it would potentially allow the judiciary to consider academic use as fair dealing use of material.

- *Outline of a Framework for Public Use of Material Posted Online*

The use of the Internet is still a grey area in many aspects of law. A new bill should have regulations outlining when it is acceptable to use material found on the Internet, and how to reproduce that material legally. As an example, suppose a video is placed, in violation of copyright, on an Internet website hosted by a third party, like YouTube. A professor then finds the video, supplements a lesson with it, and then assigns the video to students to watch. Which parties would be responsible for the copyright violation in this scenario? Obviously, the individual who posts the video is violating copyright, but what of the professor and students who accessed the video on a public website? The law is silent on this and many other scenarios involving content placed on the Internet, and situations like these need to be addressed as the use of technology in learning increases.

- *Digital Rights Management and Fair Dealing*

The big flaw in C-61 was the punitive measures imposed on anyone who tried to circumvent DRM locks on works, even if those circumventions were engaged to gain legitimate access. Any reform that institutes penalties on the circumvention of digital locks should also contain a provision specifying that it does not apply in cases where the uses are covered by fair dealing. Otherwise, an individual could be found not in violation of copyright, yet still face criminal sanctions if they broke a digital lock to use copyright fairly. C-60’s approach, imposing punitive measures on individuals who demonstrated intent to infringe copyright, was much more reasonable and consistent with Canada’s system of due process. What

both C-60 and C-61 clearly establish is that the users who circumvent DRM locks will be punished, and publishers of copyrighted works such as universities must prepare to install such digital locks on all works.

**(b) Precautions Universities Can Take to Mitigate Effects of Copyright Reform and Allegations of Infringement**

Before legislative reform takes shape, there are many steps that stakeholders can take to protect themselves, prepare themselves and mitigate the chance of copyright infringement. Beyond copyright reform, there are many other ways that stakeholders can ease the burdens of copyright; recommendations are outlined below:

- *Licensing Agreements with Access Copyright Should be Reviewed and Universities Should Prepare for Renegotiation of Terms*

Universities should review the terms of their agreement with Access Copyright to weed out excessive licensing payments. If institutions are paying for access to materials through bulk licensing agreements, professors should direct students to those resources before suggesting they pay a second time for the resources.

In the same respect, as education costs are increasing, students should seek out resources that are covered through licensing agreements, or are available through means of fair dealing. If resources are available through other means, students should explore these before paying for course packs or other material through Access Copyright.

The requirement for licensing fees in s. 29.4(3) will likely remain. While some expansion of fair dealing is suggested and inevitable, there will always remain the need for creators to be compensated for their work where appropriate. Given the pressure from publishers, it is likely that the definition of “manual reproduction” will continue to exclude online publishing or availability. Professors and universities will still have to continue to pay licensing fees for whole works accessed online. In such cases, industry groups should coordinate the collection of royalties for digital copies of works, much like Access Copyright, to simplify the process.<sup>48</sup>

- *Universities Should Ensure the Use of the Most Efficient and “Reasonable” Measures to Convey Copyrighted Work to Students*

While the issue of what exactly is public domain on the Internet is still unresolved, there are a few principles professors and universities can abide by to protect themselves. If material is password protected or proprietary, it is generally not acceptable to disseminate it further. Also, if a work specifically has copyright markings, it should also not be passed on. If material is available online, or available to students through a password protected database, such as through library services, it is safer and more efficient for professors to post a link to that material rather than publish the material directly on a course website themselves. However, if profes-

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<sup>48</sup> *Supra* note 16.

sors prefer to publish the work on the course website, they should mark the posted material with instructions regarding how students may use the material, and caution against further publishing. These types of knowledge and forewarning are also best suited for course outlines and syllabuses given to students at the start of each semester.

These types of practices tend to be considered standard throughout online education institutions, and will likely be considered benchmark policies in future litigation surrounding any sort of required “preventive measures” asked of universities conducting distance education courses. The posting of links to DRM protected material also avoids any allegation of circumvention, which, under C-61, would amount to strict liability of professors.

## CONCLUSION

Overall, the interaction between distance education and copyright law is a complex and muddled issue. Current law has not kept up with technology, which has left many users and creators of material uncertain as to how to approach the use of said material. The only certainty that remains is that copyright legislation will change sooner rather than later. Past attempts to reform the *Copyright Act* died on the table in Parliament due to political tension, but it is that same political division that will likely lead to a balanced approach to copyright reform. This article has identified some of the issues that will certainly need to be addressed in any legislative reform. As well, the recommended steps that professors and other copyright stakeholders can take to mitigate copyright issues are applicable both to the current copyright regime, as well as future copyright regimes as these steps take into account the concern of punishing copyright infringers and DRM circumventers, and are also based on current copyright practices conducted in universities. With the work of an increasingly knowledgeable stakeholder population, copyright reform clarifying Internet usages and copyright infringement, as it relates to online and distance education courses, will inevitably occur.

### (a) Limitations and Further Research

It should be noted that this article is not intended to be legal advice, and should not be read in that respect. Additionally, all the commentary as to the effects of new legislation is purely speculative as said legislation has not been implemented.

Further research could be conducted to determine the degree to which duplicate fees are being paid by universities for access to copyrighted material. Once new legislation is enacted, this could become a greater issue as requirements for stronger digital locks and stricter digital licensing emerge.

Biases against digital versions of copyright exemptions could impede educational institutions’ efforts to become paperless businesses in the course of their efforts to comply with voluntary carbon market initiatives. It would be useful to conduct an in-depth examination around educational copyright exemptions and their impact on paper use in classrooms. This might suggest a new set of implications and issues that need to be accounted for when reforming copyright legislation.

In the meantime, readers should use this opportunity to contemplate how potential changes to the *Canadian Copyright Act* might affect their involvement with distance education programs, and take the opportunity to consider how they might become involved with the shaping of future copyright law.