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Managing Change in the Copyright Environment

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Managing Change in the Copyright Environment

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CLA Copyright Committee Peer-Reviewed *Felicitator*

columns (fully footnoted; I am General Editor) – accessible from

http://www.cla.ca/AM/Template.cfm?Section=Copyright_Information:

1. Jeannie Bail & Brent Roe, “**Copyright and the Trans-Pacific Partnership**,” 59(5) October 2013 at 15
2. Rob Tiessen, “**The Definition of ‘Commercially Available’**,” 59(6) December 2013 at 14
3. John Tooth, “**Copyright for Schools and School Libraries**,” 60(1) February 2014 at 6
4. Sam Cheng & Christina Winter, “**Copyright Skills in Academic Libraries**,” 60(2) April 2014 at 8
5. Margaret Ann Wilkinson, “**Copyright Users’ Rights in International Law**,” 60(3) June 2014 at 7
6. Robert Glushko, Rumi Graham, Ann Ludbrook & Heather Martin, “**Understanding ‘Large and Liberal’ in the Context of Higher Education**,” 60(4) August 2014 at 14
7. Victoria Owen, “**The Librarian’s Role in the Interpretation of Copyright Law: Acting in the Public Interest**,” 60(5) October 2014 at 8
8. Carolyn Soltau & Adam Farrell, “**Copyright and the Canadian For-Profit Library**,” 60(6) December 2014 at 8
9. Bobby Glushko & Rex Shoyama, “**Unpacking Open Access: A Theoretical Framework for Understanding Open Access Initiatives**,” 61(1) Spring 2015 at 8-11, 20.
10. John Tooth, Becky Smith, Jeannie Bail, “**Unravelling the Complexity of Music Copyright**,” 61(2) April 2015 *forthcoming*

Look forward to further columns on the Public Lending Right, on the rights of Interviewees & Oral Histories, on Photographs, etc.

Reviewing Access Copyright – AUCC Relationship

1994

- First “model” licence negotiated by the AUCC (now Universities Canada) & CanCopy (now Access Copyright).
- “Model” accepted for licenses actually signed across Canada (except Quebec where Copibec represents these types of works)...

2010

- Negotiations through AUCC for ‘model’ for latest upcoming licence renewals breaks down.
- Access Copyright files for a tariff.
- The institutional licences across Canada expire August 31.
- A “mini” 4 month licence is negotiated to December 31 through AUCC.
- Board announces interim tariff December 23.

Access Copyright – AUCC Relationship continues:

2012

- Despite Access Copyright's Tariff application at the Copyright Board, it enters into negotiations with Toronto and Western for blanket licenses – and these are concluded at prices roughly ½ of the Tariff rates Access Copyright is seeking before the Board.
- AUCC then negotiates a “model” licence with Access Copyright
 - Discount for backpaying licence for 2011 is 85% if signed by June 30th; 50% if by Sept 1; 35% if by January 1, 2013.
- *Copyright Modernization Act* receives Royal Assent – June 30
- Supreme Court Pentalogy (5 decisions on copyright released simultaneously) – July 12
- K-12 institutions announce that they are opting out of engaging in business involving Access Copyright as of December 31 because of the Supreme Court decision in *Alberta v Access Copyright* (one of the Pentalogy of decisions)

Our research studies that moment in time when Canadian universities faced 3 decisions:

1. Remain active in the **Tariff** proceedings before the Copyright Board brought by Access Copyright.
2. Enter into the **licenses** being proffered by Access Copyright, despite its own tariff proceeding before the Copyright Board.
3. **Opt Out** of any relationship with Access Copyright

First presentation of our preliminary findings last year at CLA Conference, see Scholarship Western at works.bepress.com/ma_wilkinson/

ALL institutions moved away from the Tariff option:

However, the Access Copyright Tariff remains before the Copyright Board (see Part VII of the *Copyright Act*)

This creates a procedural dilemma for the Board –

- The Board expects evidence tendered (a) from the collective seeking the Tariff AND (b) participants who will be paying the Tariff in order to come to its statutorily mandated decision to create a fair tariff.
- The Board has no statutory power to investigate and so cannot provide its own information to inform its decisions – and there is no process in the statute to govern a one-sided hearing
- A Tariff hearing before the Copyright Board has been put off until 2016.

Academic librarians, through their institutions, have thus highlighted the incomplete nature of the 1988 amendments to the Copyright Act and will thus contribute to legal reform...

Copyright Board's Provincial & Territorial Tariffs: May 22, 2015 (Ontario & NWT had previously withdrawn)

Access Copyright Sought

- **\$15/employee/year**
2005-2009
 - Later reduced to \$5.56
- **\$24/employee/year**
2010-2014
 - Later reduced to \$8.45

Board Ordered:

- Access Copyright wanted
11.56 cents/employee/year
2005-2009
 - \$14,000/year royalties
- **49.71 cents/employee/year**
2010-2014
 - \$60,000/year royalties

Board explicitly adverted to “recent amendments to the Copyright Act” ie the addition of “education” to the categories of Fair Dealing.

Board seems to be inviting **judicial review** of its decision to be requested by either party-- thus seeking clarity from the courts on procedural and substantive issues **BEFORE** it tackles the Access Copyright Tariff for post-secondary institutions.

From remaining 2 options, Canadian Association of Research Libraries (CARL) members made choices:

	Decision Made	# of Institutions
2012	Opt Out (excluding Quebec)	12
	License (excluding Quebec)	11
	Quebec (dealing with Copibec)	6
2014	Opt Out (including Quebec 1)	15
	License (including Quebec 5)	14

Our approach to studying what led institutions to the choices they made and what roles librarians played:

1. Examining the objective characteristics of the institutions involved and the university leaders at the time (see our presentation at last year's CLA Conference, cited here earlier, works.bepress.com/margaret_wilkinson/).
2. Examining the reasons institutions gave publicly for their choices (presented last year, works.bepress.com/margaret_wilkinson/).
3. Interviewing librarians and copyright officers (including librarians) in CARL institutions right across the country in 2014 about the 2012 decisions. Ethics approval was received from the University of Calgary and interviews were conducted between April and July, 2014.

Methodology of the interview portion of our research:

- Our institutional **population** was the 29 University Libraries that are members of CARL
- This **population** would have yielded 53 interviewees:
 - 29 University Librarians
 - 24 Copyright Officers (1 at every institution where one was identified as having been appointed to these newly created positions as of 2013)
- From all 53 approached to help provide the interview data for our study, 20 people (**38%**) from across the country consented to participate as interviewees (for which we are profoundly grateful):
 - 11 at opt out institutions.
 - 9 at institutions with licenses.

Questionnaire

We interviewed participants through questions appearing in 6 sections:

1. Background of the individual being interviewed
2. Background about the institutional establishment of the Copyright Office
3. Impact production/non-production of coursepacks on decision
4. Interpretation of copyright law (especially fair dealing) and indemnification
5. Decision making processes: procedures, who was involved
6. Separate sets of questions for licenced and opt out institutions about lessons learned, the future, etc.

This analysis presentation focuses on:

1. Background of the individual being interviewed
2. Background about the institutional establishment of the Copyright Office
- 3. Impact of production/non-production of coursepacks on decision**
- 4. Interpretation of copyright law (especially fair dealing) and indemnification**
- 5. Decision making processes; procedures, who was involved**
- 6. Separate sets of questions for licenced and opt out institutions about lessons learned, the future, etc.**

What The Press Releases Said in 2012

“OPT OUT”	# PR mentions	Access Copyright Licence	# PR mentions
LEGAL EXTERNALITIES			
Copyright compliance system	4	Copyright compliance	3
Changing legal situation	3	No real changes in legal system	1
Insufficient legal protection	1	Legal protection	5
Fair dealing & other exceptions	1	Rights beyond Fair dealing/ digital rights	2
FISCAL MANAGEMENT			
Duplicating existing licenses	6	Cost certainty	4
Cost-benefit ratio/affordability	5	Buying time to develop copyright compliance system	4
Open Access	3	Heavy user of coursepacks	1
		Retroactive payments	1
ACADEMIC ISSUES			
Academic freedom	2	Protection of Academic freedom & privacy	2
Feedback from community	2		

Interviewees from **licensed** institutions made comments including the following:

“ In the end we decided that we would sign and take 3 years to work on our procedures and compliance. ”

“ We want to be good citizens and obey the law. We don't want to pay unnecessary costs. Different institutions will make different decisions based upon taking greater or lesser risks. ”

“ [Copyright] used to be straightforward (pre 2010). ”

“ [We are a] heavy user of coursepacks. ”

“ [There is] no specialized expertise on campus. ”

Interviewees from **Opt Out** institutions made the comments including the following:

“ The big impacts were adding education as a purpose for fair dealing. The Supreme Court Pentalogy [July 12, 2012] was also a major influence. “

“ Cost. Duplication of licencing with electronic; repertoire not clear; fair dealing; SCC decisions; the Copyright Modernization Act.”

“ The rise in cost made it more than a business decision. [The] chance to review and decide to go it alone...We were conservative. We waited until we thought that opt outs had shifted to the majority. The university took a hard look at the tariff.”

Press Release Reasons versus Interviews

“OPT OUT”	# PR mentions		Access Copyright Licence	# PR mentions
LEGAL EXTERNALITIES				
Copyright compliance system	4		Copyright compliance	3
Changing legal situation	3		No real changes in legal system	1
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ACADEMIC ISSUES				
Academic freedom	2		Protection of Academic freedom & privacy	2
Feedback from community	2			

In interviews, while a number of “press release” reasons were mentioned, **main reasons for opting out** were:

Fair Dealing

- *Alberta v. Access Copyright* [a pentalogy decision] and other Supreme Court decisions
- The fact that “education” had been added as an allowable purpose

Poor value from the Access Copyright licence

- The increase in the cost of the license
- The institution’s existing licences for e-journals and e-books.
- Linking and other “questionable” license additions.

The existence of a campus system for copyright compliance.

Not being alone.

- Decisions of UBC & Queens a major influence on uncertain institutions.

In interviews, while a number of “press release” reasons were mentioned, **main reasons for signing** licenses were:

Copyright Compliance Concern

- Respondents were very concerned about what faculty will do, but don't feel that student actions bring liability.

Copyright Complexity Concern

- Respondents said they didn't have the right expertise on campus.
- Respondents said they didn't have the right procedures (compliance).

Fair Dealing Concern

- These respondents appeared to have more conservative or uncertain positions on Fair Dealing interpretation than those from Opt-Out institutions.

A focus on risk and liability assessment.

Whether an institution owned a copyshop was an important predictor of the choice to license:

- The interviews reveal that institutions which owned their own copyshops were more likely to enter into a licence, believing that they had a higher risk of liability because they created print coursepacks themselves.
- The interviews also reveal that opting out was perceived to be an easier choice to make if all “copyshop functions” were contracted out.

Access Copyright does NOT have exclusive agreements with its members and the [American] Copyright Clearance Centre (CCC) now sells licenses for Canadian uses of works.

Licensing Institutions:

- Heavy users of CCC to license uses of material that go beyond the limits permitted under the Access Copyright blanket license.

“ Publishers [also a source (other than Access Copyright or the CCC) for permissions] are too slow to respond. Faculty get their readings in late and the only way to get a quick clearance is via the CCC. Even though we have signed the [Access Copyright] license, publishers won’t respond.”

Opt Out Institutions:

- The CCC was cited by interviewees as an important safety valve. The ability to get quick transactional licencing made life much easier.

Key finding: decision to **license** was **mostly not seen as final** but one made as part of transition plans to become Opt Out

- More than 2/3 of interviewees at Licensed institutions in 2012 (7 of 9 interviewees) said institutions would use license period to build institutional capacity to Opt Out

“ We are currently double systeming [sic] and recording use both under the Access Copyright licence and also for fair dealing.”

- 3 more institutions had transitioned to Opt Out by 2014.
- Interviews revealed Licenced institutions commonly tracked material as if in an Opt Out institution, despite the Access Copyright licence. Some were even purchasing transactional licences from the [American] CCC (an important strategy mentioned by Opt Out institutions, see above).

Interestingly only 1 interview cited Open Access substantively during the interview --

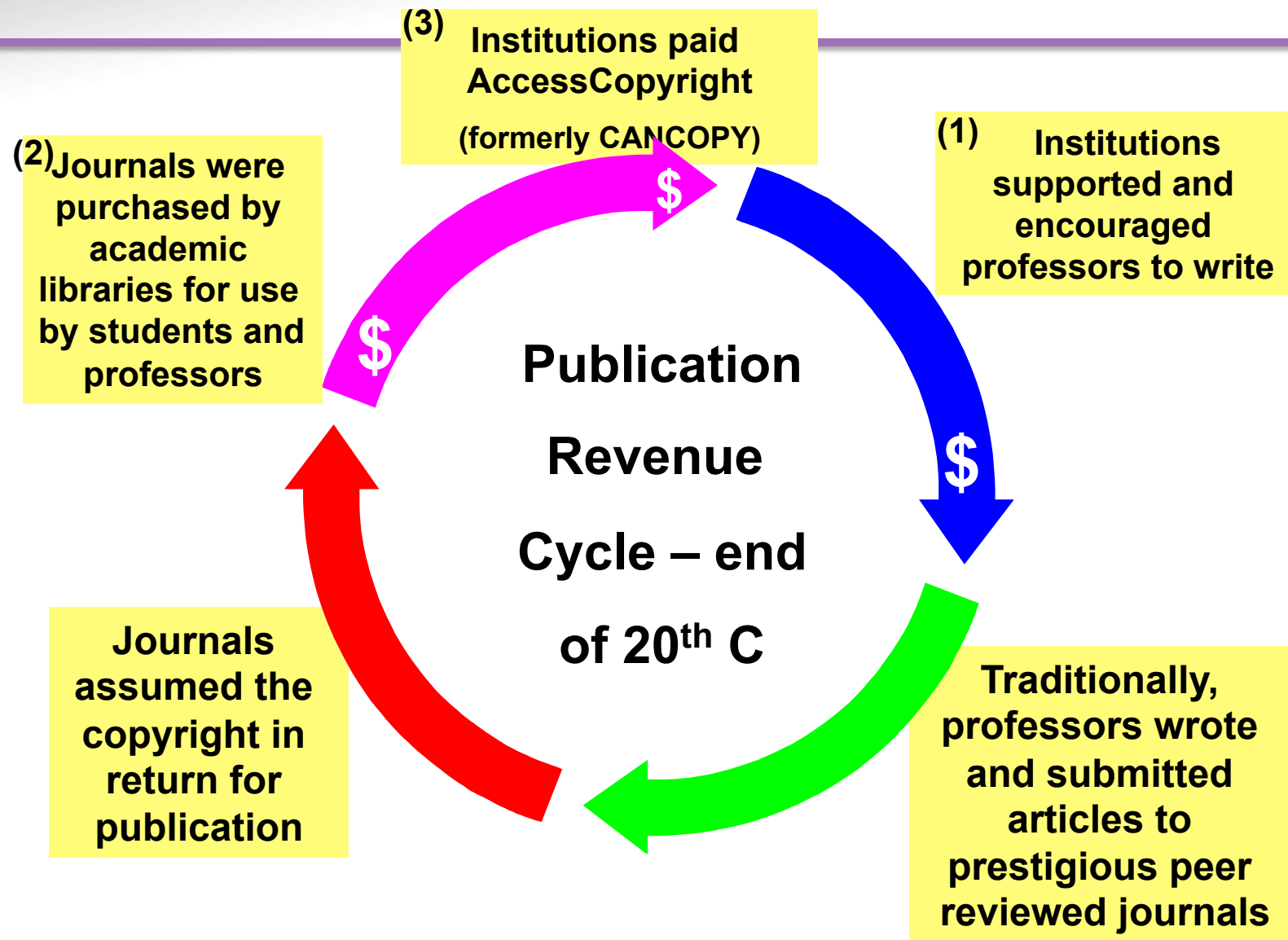
Whereas one might have thought that “Opt Out” institutions would have taken the availability of Open Access sources into consideration in making the Opt Out decision, it was an institution that decided to go with a licence that explicitly referenced the role of Open Access:

*“ We have a 5 [sic] step decision map. (1) Is it in the Public Domain? (2) Is it a substantial copy? (3) Do we have a license via the library or is it **Open Access**? (4) Work through the CCH factors. ” [Emphasis added]*

Open Access Movement may frustrate Legislation Against Circumvention of TPMs & MRI

- While we would have expected Opt Out institution interviewees to mention availability of Open Access source as a factor supporting the decision to Opt Out, we might have expected interviewees from an institution with a license to have mentioned in connection with assessing the value of the license offered by Access Copyright in light of the fact that open access sources do not require permissions;
- It may also be noted that open access may detract from the over-balance toward corporate power created by the recent imposition of legal protection of TPMs & MRI (Management Rights Information) – because open access necessarily means TPMs will not be installed – and avoidance of problems with TPMs can be a reason to license (another point we might have expected would be mentioned in interviews, especially in institutions which decided to license, but was not).

At the **end of the 20th Century**, when Academic Publishers, assigned rights by authors, joined Collectives to assert *their* assigned rights: Academic Institutions ended up Paying 3 Times for Written Product n!



One reason interviewees may not have mentioned “open access” is that its literature is fragmented – and indeed, its nature is ill-defined.

Reasons for adopting (from Glushko & Shoyama (2015))

- Enlightened self-interest
- Enlightened group interest
- Neo-Marxist rationale
- Taxpayer rationale
- Social justice rationale

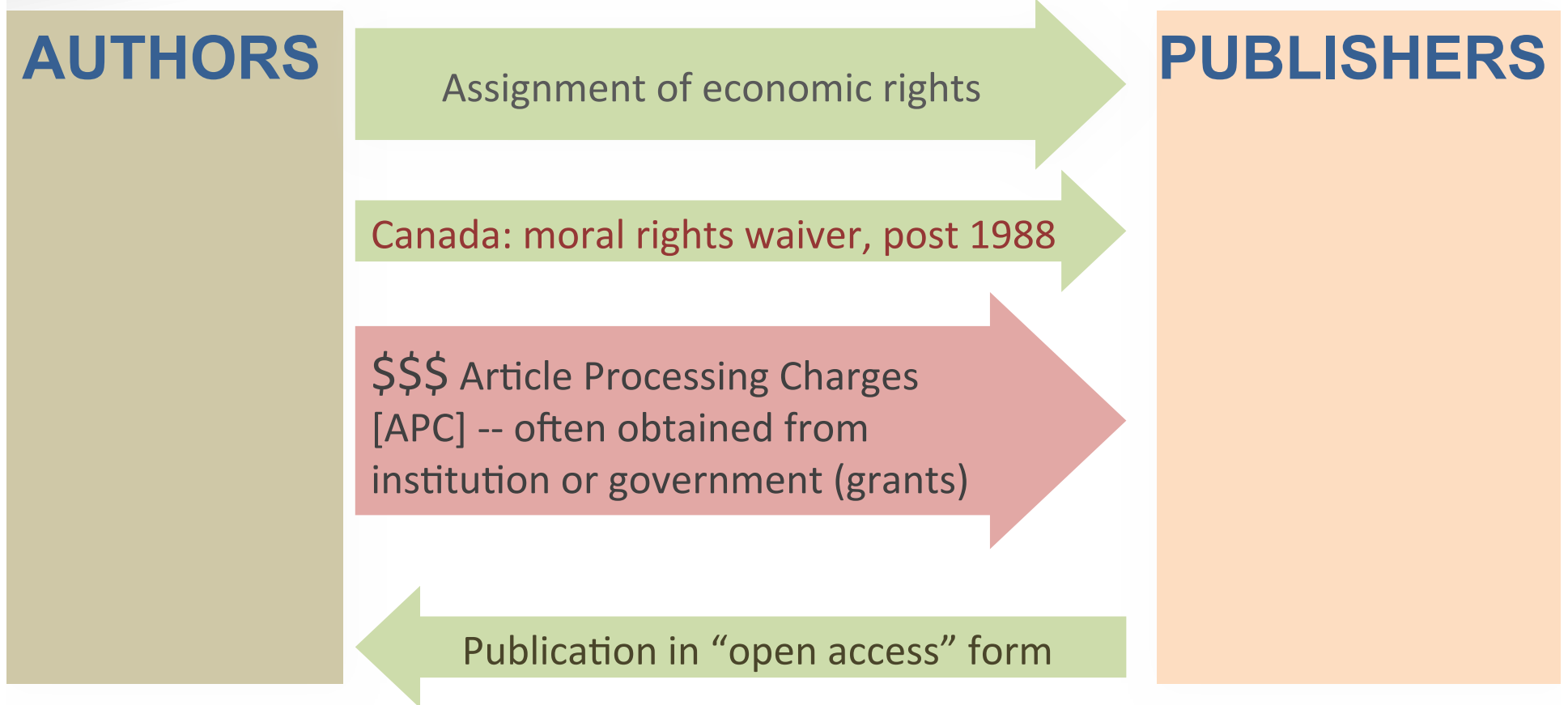
“while one can support open access for some or all of these reasons, these rationales do not always operate in concert, and supporting ... certain ... forms may advance ... some... without advancing the objectives of others”

What happens when a grass-roots movement becomes mandated?

- Tri-Agency Open Access Policy on Publications (effective from May 1, **2015**)

“Grant recipients are required to ensure that any peer-reviewed journal publications arising from Agency-supported research are freely accessible within 12 months of publication ... [through] Online Repositories [or] Journals.”

Contract for Open Access in “hybrid” publication:



Under the Tri-Council-influenced model 2015, authors may PAY publishers to publish their works as dictated by Tri-Council influenced institutions and the Tri-Council itself: Academic institutions can end up Paying 4 Times for works and other subject matter!

(4) Universities pay Access Copyright for reproduction rights where not open access

(3) Hybrid journals are purchased by academic libraries (with both open access and non-open content), in order to preserve full publications for use by students and professors

(1) Academic institutions support and encourage professors to write

**Publication
Revenue
Cycle**

(2) Authors pay Article Processing Charges [APC] to publishers, using “public” funds, to release articles with “open access” permissions

Professors write and submit articles to prestigious peer-reviewed journals or venues

QUEBEC

- Interviews in Quebec confirmed that most universities deliberately adopted a common stance to sign **licenses with Copibec** 2014-17: only Université Laval chose to **Opt Out**...
- The decisions to license were influenced by the perception that *“ If the Quebec universities had opted out, Copibec would have filed for a tariff. ”*
- Also *“ the license evolved to allow format shifting and digital rights. ”*
- Events have transpired to change the landscape for those in Quebec making both choices...

Instead, most seeking **2014-17** contractual stability, Quebec sees **Copibec** moving for a tariff from the Copyright Board:

- “Statement of Proposed Royalties to Be Collected by Quebec Reproduction Rights Collective Administration Society (COPIBEC) for the Reproduction and Authorization to Reproduce, in Canada, for the Years **2015-2019**, the Works in its Repertoire by Universities and Persons Acting Under Their Authority,” [June 28, 2014] *Supplement Canada Gazette*, Pt.1.
- Now in the Copyright Board process.

Laval, opting out, finds itself sued: *Copibec v Université Laval*

- Launched in Quebec Superior Court by Société québécoise de gestion collective des droits de reproduction, operating as Copibec; framed as an application for a **class action lawsuit** to be brought against Laval “on behalf of authors and publishers from Quebec, the rest of Canada and other countries around the world.”
- Claim filed in the application to be certified as a class action highlights the fact that only Laval did not sign a Copibec license.
 - See “Copibec: \$4 Million Class Action Lawsuit Against Université Laval for Copyright Infringement,” (November 10, 2014)
 - Awaiting certification as a class action...
 - Proceedings (and documents) can be viewed at services.justice.gouv.qc.ca

Those outside Quebec also face post-2012 change: *Access Copyright v York University*

- Federal Court T-578-13
 1. Statement of Claim (Access Copyright) April 8, 2013.
 2. Statement of Defence and Counterclaim (York) September 8, 2013.
 3. Statement of Defence to Counterclaim (Access Copyright) October 4, 2013.
 4. Reply to Statement of Defence to Counterclaim (York) October 18, 2013
- Noted on the court docket as an **infringement** action but
 - The “**Fair Dealing Guidelines** for York Faculty and Staff” (adapted from the AUCC model guidelines) are attached as Schedule A to the Statement of Defence and Counterclaim
 - The lawsuit also involves York University’s position vis-à-vis the **Tariff** proceedings that were launched by Access Copyright in respect of Canada’s post-secondary institutions – and involves the status of the Interim Tariff ordered by the Copyright Board in that connection –

Lawsuit is active:

- Eventually, on July 30, 2014, Prothonotary Aalto decided to **GRANT** York's application for the case to be split in two (bifurcated)
- Case Management process continues with frequent Case Management Conferences
 - **By April, 2015, it is clear from the record that differences had arisen between the parties over sampling questions and these occupied multiple conferences into May...**
 - **There are 3 upcoming conferences ordered by the Court: June 29, July 10 and August 19**

Since early 2014, increasingly clear there is an advantage, both institutionally and sectorally, in making and adopting institution-centred decisions.

- For copyright decisions to license, participate in tariff proceedings or quit doing business with a collective: Laval's isolation from other Quebec institutions is being alleged as evidence relevant to Copibec's claim against it: the attempt is being made by a collective to turn the cohesion of the other universities against their fellow institution.
- For written policies:
 - This is not negligence law: in negligence, a branch of tort law, evidence of meeting the standard of a competent professional (that you have not been negligent) can mean pointing standard of similar professionals: national, sectoral or regional policies to which you adhere can provide this evidence. **Strict adherence to AUCC Guidelines can create risk for litigation like that against York..**
 - This is copyright: the Great Library's policy in **CCH v LSUC** assisted the Law Society to establish evidence of *its institutional* general practice instead of having “to adduce evidence that every patron uses the material provided for in a fair dealing manner” (para 63)
“Persons or institutions relying on ... fair dealing... need only prove... their own practices and policies were research-based [for s. 29] and fair” (para 63, emphasis added)

Collectives – universities relationships: what's next?

Access Copyright remains locked in litigation with York University (and its “sister” organization Copibec with Laval).









As discussed earlier, there is still a Tariff hearing scheduled before the Copyright Board for 2016 – but there is some doubt about its future.

Universities Canada (the successor organization to AUCC) is no longer going to negotiate with Access Copyright.

- Is there a role for a “model” license in the future?
- If there is, who will negotiate one?

Libraries Face a Changing Judicial Environment:

Wilkinson, "The Context of the Supreme Court's Copyright Cases," chapter 3 in Michael Geist (ed) *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), 71-92. See Scholarship Western: works.bepress.com/ma_wilkinson/

Wrote	Decided with
 Majority	 Majority
 Dissent	 Dissent
 Concurred	 Concurring
 Did not sit	 Not appointed at time of hearing

Legend for following Table

	<i>Théberge</i> 2002	<i>CCH</i> 2004	<i>SOCAN v CAIP</i> 2004	<i>Robertson</i> 2006	<i>Toblerone</i> 2007	[LIBEL] <i>Crookes</i> 2011	<i>ESA</i> 2012	<i>Rogers</i> 2012	<i>Bell</i> 2012	<i>Alberta (Education)</i> 2012	<i>Re: Sound</i> 2012	<i>Re: Musical Works</i> 2012	<i>Re: Broadcasting</i> 2012	<i>Robinson</i> 2013	<i>National Gallery [STATUS OF THE ARTIST]</i> 2014	
McLachlin	✓	M	✓	x	x	C	✓	✓	✓	✓	✓	✓	✓	M	✓	
Major	✓	✓	✓	✓	M	✓	D	M	✓	D	✓	D	M	✓	M	???
Binnie	M	✓	M	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	N/A	N/A	
Iacobucci	✓	✓	✓	x	●	✓	M	✓	✓	✓	✓	M	✓	✓	✓	
Bastarache	N/A	✓	✓	✓	C	✓	x	✓	✓	x	✓	x	D	✓	✓	
Gonthier	N/A	✓	✓	✓	✓	C	✓	✓	✓	x	✓	✓	✓	N/A	✓	
LeBel	x	✓	C	M	●	✓	x	✓	✓	✓	M	x	✓	✓	✓	Côté
Arbour	N/A	✓	✓	D	D	M	M	C	C	M	✓	M	D	✓	✓	
L'Heureux Dubé	x	✓	✓	M	C	C	x	✓	✓	x	✓	x	✓	✓	?	Gascon

The Supreme Court is transformed since 2004:

- Only Chief Justice McLachlin remains from the 9 judges who unanimously agreed in the “library” ***CCH v LSUC*** decision (she wrote the judgment).
- Only 5 judges remain of those who sat on the “pentalogy” ***Alberta v Access Copyright*** decision of 2012:
 - 4 from the majority, included Justice Abella who wrote that decision, and 1 from the dissent
 - Rothstein, who wrote the dissent, is retiring this summer and no replacement has yet been named
- 2 of the existing members of the Court have not taken part in a copyright decision at the Court: thus 3 of the 9 member Court going forward hold unknown attitudes towards copyright law.

Thank you!

- Questions?