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OLA Copyright Workshop

Margaret Ann Wilkinson
Western University, mawilk@uwo.ca

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Copyright

Dr. Margaret Ann Wilkinson

Professor, Faculty of Law
(with graduate supervisory status
in Health Information Science,
Library & Information Science, and Law)
Western University

CLA's new Copyright Column in *Feliciter*

Each issue: CLA Copyright Committee author(s) -- peer-reviewed by the CLA Copyright Committee (general column editor, M.A. Wilkinson):

Jeannie Bail & Brent Roe, “Copyright and the Trans-Pacific Partnership” 59(5) October 2013 *Feliciter* 15

Rob Tiessen, “The Definition of “Commercially Available”” 59(6) December 2013 *Feliciter* 14

John Tooth, “Copyright for Schools and School Libraries,” 60(1) February 2014 *Feliciter* 7

Christina Winter & Sam Cheng, “Copyright Skills in Academic Libraries” April issue *Feliciter* – *just about to appear*.

In Press, Margaret Ann Wilkinson, “Copyright Users’ Rights in International Law,” forthcoming June issue *Feliciter*...

Topics raised by you:

- **Impact of Changes to the Copyright Act on Libraries**
- **Libraries as Copyright Holders**
 - Managing the institution's copyrights
- **Protecting your institution from litigation**
- **Users Rights, including**
 - Educational exemptions
 - ILL
- **Copyright and education roles of the institution:**
 - Continuing education
 - In-service training
 - Patient education
- **Access Copyright licenses (purpose and pros, cons)**
- **Unlocatable copyright holders.**

The players creating Canada's copyright environment:

Government

Legislature

In Canada, the federal government –

NO provincial interest –

Judiciary- **since 2002 steadily confirming a large “public domain”**

In Canada, Parliament has tried to limit the role of the courts: s. 89 Copyright Act

The Canadian Charter of Rights and Freedoms has never yet been applied directly to an intellectual property law situation (but the Supreme Court in the Harvard Mouse case in patent, for example, has indicated a willingness to apply it)

How will “users’ rights” be expressed and preserved in the future?

International Treaties

Are Perceived, once entered into, as limiting Domestic National Policy Options

19th Century Co-ordination (e.g. Berne, Paris)

1990's World Trade Agenda Coercion (e.g. NAFTA, TRIPS)

Are irrelevant to Charter concerns, are not binding on Canadian legislatures; non-compliance runs the risk of sanctions in the trade context

Intellectual Property Owners, Themselves

Canadian Governments -- As Crown Copyright Holders

Copyright holders working together through Canadian Collectives – AccessCopyright taking institutions to the Copyright Board for a Tariff instead of negotiating ... begun in 2010

Other individual copyright holders – both domestic and foreign

Not users – except indirectly as lobbyists and electors influencing the legislative process...

All COPYRIGHT law in Canada is statutory

Copyright Act,
Revised Statutes of Canada 1985, c.C-42, as amended

In keeping with the international principle of “national treatment” in international copyright agreements, all materials in Canada, for all practical purposes, are governed by Canadian law.

According to s.89 of the Act, there is no “common law” of copyright –
“No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament...”
Indeed, no common law of copyright since the 1921 Copyright Act came into force in Canada January 1, 1924.

Copyright Modernization Act amendments to the *Copyright Act* not yet in force:

All appear to be to do with the WIPO Performances and Phonograms Treaty (WPPT):

- **s. 15(2.2)**
- **s. 15(4)**
- **s. 18(2.2)**
- **s. 18(4)**
- **s. 19(1.2)**
- **s. 19.2**
- **s. 19.2**
- **s. 20(1.2)**
- **s. 20(2.1)**
- **Replacement s.22(1)**
- **Replacement s.22(2)**
- **Replacement s.58(1)**

Possible Regulations from the *Copyright Modernization Act*

Cabinet (“Governor in Council) can only make regulations under the Copyright Act where Parliament has indicated in the Act that regulations can be made.

Where Cabinet does make regulations pursuant to a power given in the Act, the regulations cannot be inconsistent with the statutory provisions and cannot go beyond the regulatory power given.

- There is no power given to make regulations concerning “fair dealing” 00 there is for TPMs (s.41.21)
- There is a new regulatory power given in respect of Educational Institutions in s.30.04(4(b)) and s.30.04(6)
- There is a new regulatory power given in respect of Libraries, Archives and Museums for archives in s.30.21(4)
- There is a regulatory power that can be exercise in respect of new s.30.1(c) for LAMs under s.30.1(4) and new parts of s.30.2 under s.30.2(6)...

The government is actively considering regulations and CLA’s Copyright Committee has been involved in making submissions

Last year's Bill C-56 is now **Bill C-8**

March 1, 2013: Introduction and first reading of *An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts – to be known as the Combatting Counterfeit Products Act*

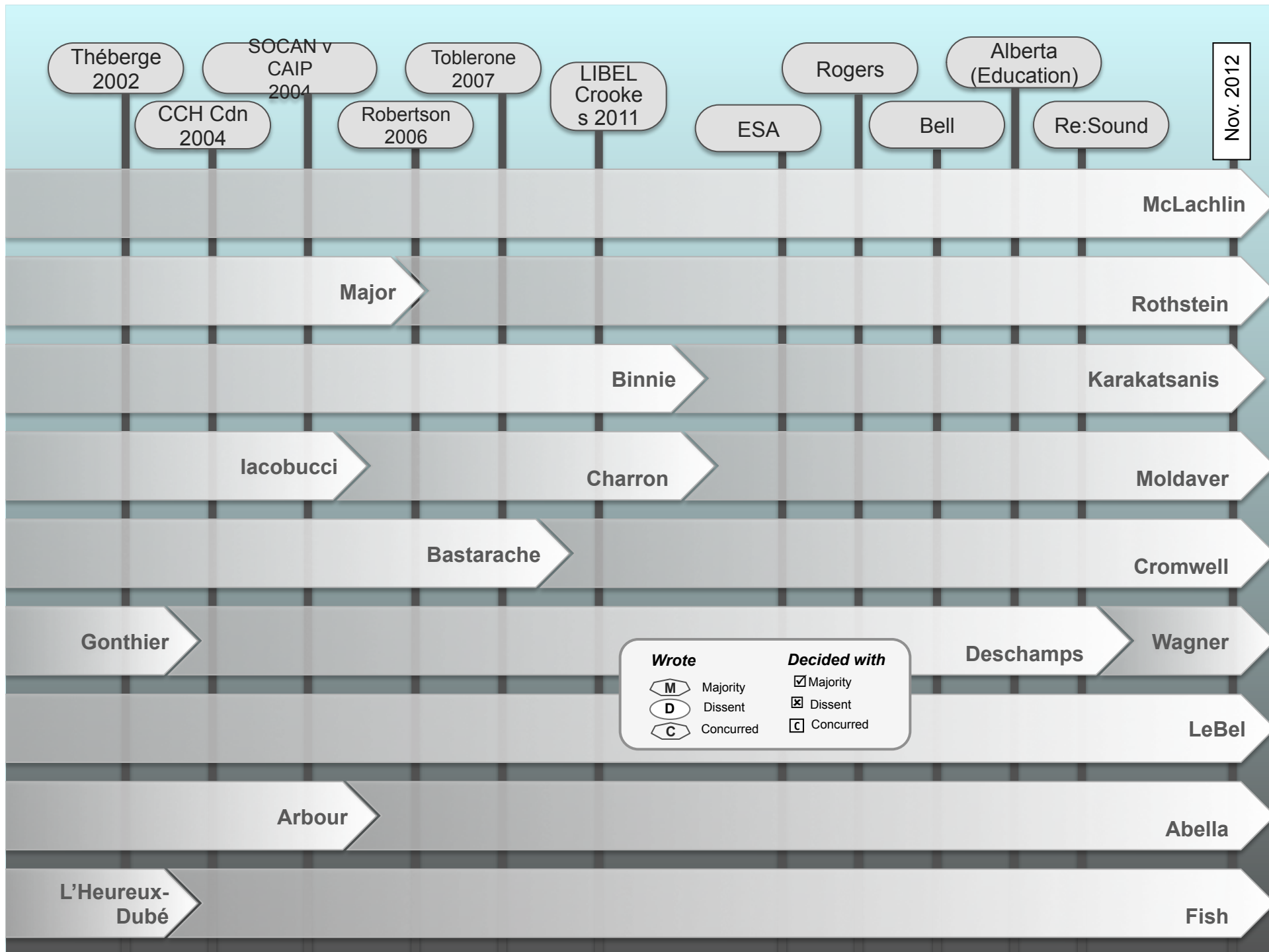
- *2nd reading June 3, 2013 as Bill C-56*
- *41st Parliament 1st sitting dissolved; returned to 41st Parliament 2nd sitting as Bill C-8*
- *Consensus at Report Stage January 31, 2014 means into 3rd Reading and probably through soon*

The Effect of “National Treatment” means --

Your libraries use rights in Canada and therefore must seek and find the holders of the rights for Canada;

Getting permission (whether free or paid) from the holders of rights in other countries is useless and will leave the user in Canada vulnerable to lawsuits from the holder of the Canadian rights;

The Halifax *Chronicle-Herald* reported on August 27, 2013 that a bookstore in Dartmouth, NS, has filed a complaint with the Nova Scotia government because that government had selected an American book supplier for its schools – and that American book supplier did not hold the distribution rights for Canada.



	Théberge 2002	CCH Cdn 2004	SOCAN v CAIP 2004	Robertson 2006	Toblerone 2007	LIBEL Crooke s 2011	ESA	Rogers	Bell	Alberta (Education)	Re:Sound	Nov. 2012
McLachlin	✓	M	✓	✗	✗	C	✓	✓	✓	✓	✓	
Major	✓	✓	✓	✓	M	✓	D	M	✓	D	✓	Rothstein
Binnie	M	✓	M	✗	✓	✓	✓	✓	✓	✓	✓	Karakatsanis
Iacobucci	✓	✓	✓	✗	C	✓	M	✓	✓	✓	✓	Moldaver
n/a	n/a	✓	✓	✓	C+2	✓	✗	✓	✓	✗	✓	Cromwell
Bastarache	D	✓	✓	✓	✓	C	✓	✓	✓	✗	✓	Wagner
Gonthier	✗	✓	C	M	C	✓	✗	✓	✓	✓	M	LeBel
Deschamps	n/a	✓	✓	Arbour	D	D	M	M	C	M	M	Abella
L'Heureux-Dubé	✗	✓	✓	M	C	C	✗	✓	✓	✗	✓	Fish

Although the Supreme Court released important decisions in 2012 –

THE “Pentalogy” RELATES TO THE LAW AS IT STOOD IN CANADA BEFORE THE *COPYRIGHT MODERNIZATION ACT* AMENDED THE *COPYRIGHT ACT*...

1. *SOCAN v Bell* (related to 2004 “Tariff 22” SCC decision)
2. *Rogers v SOCAN* (SCC calls it “companion” to *SOCAN v Bell* case, also related to the 2004 “Tariff 22” SCC decision)
3. *Entertainment Software Assoc [“ESA”] v SOCAN* (also related to the 2004 “Tariff 22” SCC decision)
4. *Re:Sound v Motion Pictures*
5. *Ministers of Ed [“Alberta”] v Access Copyright* (the K-12 tariff decision)

ABOUT THE SUPREME COURT and COPYRIGHT

The Court's decision-making patterns in these copyright-related areas differ from the overall patterns of Supreme Court judgments in a number of ways:

- the lack of solo dissents;
- the good number of concurring reasons being written,
- both where there is a dissent and where there is not;
- the relatively low number of unanimous judgments.

Based on data since 1949, McCormick saw a decline in these patterns when the major questions raised by the Charter had “been answered.” In copyright, on the other hand, we see evidence of McCormick's patterns --- which means the Supreme Court recognizes Copyright as important and yet in a dynamic state; one that requires the Court to canvass and welcome a diversity of policy divergent responses from amongst its members.

NOW, Justice Fish retired; Justice LeBel will retire; appointment of Justice Nadon (from Federal Court and FCA) controversial and, ultimately, held unconstitutional...

Parliament's tightrope:

If it broadens users' rights too much?

TRIPS and other agreements Canada has signed privilege copyright holders over users:

Members [states] shall confine limitation or exceptions to exclusive rights

To certain special cases
which do not conflict with a normal
exploitation of the work
And do not unreasonably prejudice
the legitimate interests of the right
holder

(the “3 step” test)

If it narrows users' rights too much?

The SCC, beginning some years ago in the Théberge case, and continuing forward to the 2004 decision in the Law Society case, has spoken of users' rights needing to be respected as well as those rights created under the copyright regime for copyright holders.

Such “rights” language may be interpreted as invoking the protection of the Charter value of freedom of expression (s.2(b)) – Parliamentary attempts to extend the rights of copyright holders might be found to be unconstitutional.

Canada has not had a decision like the American's SC in *Eldred v. Ashcroft* (2003) – and the outcome here could well be different...

Key international development

Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled

Adopted by the World Intellectual Property Organization (WIPO) – an agency of the United Nations – June 27, 2013

To come into force as soon as 20 nations have ratified it (see Article 18).

60 countries have signed (not Canada yet) – but there are not yet ratifications to bring it into force...

Designed to be acceptable under, and compatible with, existing copyright treaties in force at WIPO, at the World Trade Organization [WTO], and elsewhere (see paragraph 10 of the Preamble)

If it comes into force and Canada is signatory, it will then bind Canada just as other UN obligations bind Canada and Parliament should be expected to ensure that Canada's *Copyright Act* is brought into compliance with it.

See www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8.pdf

A Library WIPO Treaty is pending

Proposed treaty on “Limitations and Exceptions for Libraries and Archives”

Now at committee stage (Standing Committee on Copyright and Related Rights (SCCR)) at WIPO

**Next meeting (27th session of SCCR) next week in Geneva –
The International Federation of Library Associations will be there
(IFLA) -**

For progress so far see http://www.wipo.int/meetings/en/details.jsp?meeting_id=29944

It is impossible to eliminate uncertainty in change --

How to approach all this change?

- Understand **YOUR** institution
- Focus on the meeting the needs of your users – professional responsibility –
- Don' t be afraid when there are differences in direction between different institutions -- focus on *your* users...
- No actions by any institution with respect to copyright can be criticized fairly unless there is proof that that institution has failed to meet the needs of its users for the widest possible access to sources which meet those users' needs...

“[Library staff have] individual and collective responsibility to:

...

3. Facilitate access to any or all sources of information which may be of assistance to library users.” [CLA Code of Ethics(1976)]

It is becoming very clear that there is no “one size fits all” -
BUT WHAT “SIZE” fits your library?

Libraries differ along at least four dimensions:

- 1. What is the governance structure of your institution (not the library, the institution in which it is situate)?**
- 2. How the library has been building its collection (by purchase or by license);**
- 3. Whether there a copyright collective associated with any of the kinds of things that the library wants to do and which represents the works that the library is trying to doing those things with;**
- 4. What the library's users' information needs are and how they can be best satisfied given the library's resources.**

What is the governance structure of your institution?

For example:

Is your library a **“Library, Archive or Museum” (LAM)** under the Copyright Act?

Is it an **“Educational Institution” (EI)** as defined by the Copyright Act?

See Definitions in s.2 of the Act

What is the governance structure of your institution?

Is your library a “**Library, Archive or Museum**” (LAM) under the Copyright Act?

Is it an “**Educational Institution**” (EI) as defined by the Copyright Act?

If it either or both of these, you have some special privileges under the Act that your fellow librarians in other institutions cannot access—

- Libraries in private, for-profit colleges and universities, for example, are neither LAMs nor EIs;
- Public libraries are LAMS but not EIs; Special libraries in government are also LAMs but not EIs;
- Libraries in Canada’s non-profit, publicly supported universities and colleges are both LAMs and EIs, as are K-12 schools in the publicly supported school boards.

Sometimes differences in governance are unique to copyright matters!

Public libraries in Ontario are each governed by a Library Board –
Schools in Ontario are governed by School Boards –

Do boards control decisions about copyright in both public libraries and school libraries?

NO – for different reasons – both a result of actions taken by the provincial government, which has jurisdiction over both:

Public library boards individually control decisions about copyright BUT the *Education Act* was amended in 1991 so that **School boards** retain the right to make decisions for copyright uses except those involving the right to “copy” where

s.8(1) The Minister [of Education] may...

23.1 enter into a licence agreement to permit boards **to copy**, under the terms of a license agreement, works protected by copyright, and to

(a) extend the rights under the license agreement to boards, and

(b) require boards to comply with the terms of the license agreements.

But, despite s.8(1), Ontario currently chooses to delegate decisions to the school boards and thus, whereas Ministers of Education fronted the appeals of school tariffs for other provinces, for Ontario all boards were involved.

Why is knowing the governance of your institution important?

For Example, if your “sector” has been targetted by the AccessCopyright collective, you are now concerned about the tariff process:

This process has so far targetted certain sets of types of libraries but not other libraries which librarians would classically have considered similar:

Government libraries owned by provinces and territories are part of current proceedings before the Copyright Board initiated by AccessCopyright but federal government libraries and local government libraries are not...

K-12 schools were targetted by Access Copyright first and separately from the post-secondary sector – but both colleges and universities were targetted together by Access Copyright in a second tariff application...

Canadian Copyright Act – 4 sets of rights now enshrined

PROHIBITIONS ON CIRCUMVENTION (of Technological Protection Measures & Digital Rights Management- 2012)

Theoretically limited to periods of protection of works and other subject matter – but, practically, indefinite.

ECONOMIC RIGHTS (from the beginning)

Life of the author + 50 years on works; 50 years generally for “other subject matter”

Fully assignable (owned from the outset by employers in an employment situation)

MORAL RIGHTS (Canada 1st common law country to introduce; fully articulated in 1988)

Life of the author + 50 years on works & performers’ performances; **ALWAYS** remain with the author – but can be waived

USERS’ RIGHTS (expressed by the SCC in 2004 – but based in the statute)

technological protection measures

Since 2012 it has become illegal in Canada to circumvent a digital lock (s.41.1 (a)) with the following exceptions:

encryption research (s.41.13)

law enforcement (s.41.11)

to allow interoperability between programs where a person owns or has a license for the program and circumvents its TPM (s.41.12)

where a person is taking measures connected with protecting personal data (s.41.14)

verifying a computer security system (s.41.15)

making alternative format copies for the perceptually disabled (s.41.16)

“Fair Dealing” is not one of the listed exceptions and therefore does not apply to TPM circumvention.

Indeed, it seems TPM provisions will in fact apply whether or not the works or recordings or performances “behind” the locks are older and thus out of copyright because although the Act defines TPMs in terms of works, performer’s performances and sound recordings (which would be those within copyright as defined in the Act), how could a user ever know when there is no exception for circumventing to check?

Circumvention of TPMs is **not** about infringement – it is about contravention-

Under **s. 42 (3.1)** ordinary Canadians, but not libraries, face

(a) *on conviction on indictment*, ... a fine not exceeding \$1,000,000 or ... imprisonment for a term not exceeding five years or ... both; or

(b) *on summary conviction*, ... a fine not exceeding \$25,000 or ... imprisonment for a term not exceeding six months or ... both.

However, for libraries, s.41.2 says

If a court finds that a defendant that is a library ... has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.” – other defendants may find themselves paying damages [\$]\$ or facing other remedies.

Theoretical question whether TPM and related Digital Rights Management (DRM) provisions are copyright at all – but now in Copyright Act.

Canadian Copyright Act – 4 sets of rights now enshrined

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What is copyright? A set of rights which arise once expressions are created

Expressions receive copyright protection; not data or facts per se

Expressions take the form of either--

Works:

- Literary - Includes computer programs, tables
- Artistic - includes photographs, diagrams, maps, charts, etc.
- Musical
- Dramatic -Includes cinematographic works, with or without soundtrack

Compilations of works and Collective works

- Works resulting from the selection or arrangement of data or of other works or parts of other works and any work incorporating the work

-- or --

Other subject matter (sometimes referred to as “neighbouring rights”):

- Sound recordings
- Performers’ performances
- Broadcasts

But the copyright Act only protects substantial portions or the whole of original expressions -

➤ In Canada, copyright holders have only the rights to produce, reproduce, publish or perform in public substantial portions or the whole of works:

- If you are producing, reproducing, publishing or performing in public only insubstantial portions of copyrighted works, then you are not violating copyright

- Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty ahead of time...

Recent Supreme Court Decision:

But it also arises from facts occurring before the recent changes to the Copyright Act and will be decided on the law as it stood in Canada before the *Copyright Modernization Act* created the current state of the *Copyright Act*.

Robinson et al v France Animation S.A. et al – cases numbered 34466, 34467, 34468, 34469 –

1982 sketches created for proposed children's TV series "Robinson Curiosity"

1985 Copyright Office issued certificate of copyright registration for "Robinson Curiosity"

1995 first episode of "Robinson Sucroe" was broadcast in Quebec

Rightsholders in "Robinson Curiosity" are suing those involved in "Robinson Sucroe" for infringement

Plaintiffs' success at trial reduced by Quebec CA (2011 QCCA 1361)

One issue: What is a "substantial taking" from a work?

Appeal heard by SCC February 13, 2013 – judgment reserved...

Decision for the plaintiff: later "Robinson Sucroe" infringed.

Case confirms as problematic the argument that users' rights, as rights, trump copyrights, since both have claim to human rights status...

***Cinar Corporation v Robinson* 2013 SCC 17**

[para 114] ...

Copyright infringement is a violation of s. 6 of the [Quebec] *Charter*, which provides that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”: see *Construction Denis Desjardins inc. v. Jeanson*, 2010 QCCA 1287 (CanLII), at para. 47. Additionally, the infringement of copyright in this case interfered with Robinson’s personal rights to inviolability and to dignity, recognized by ss. 1 and 4 of the *Charter*.

This is consistent with the United Nations Universal Declaration of Human Rights which also declares, in Article 27(2):

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

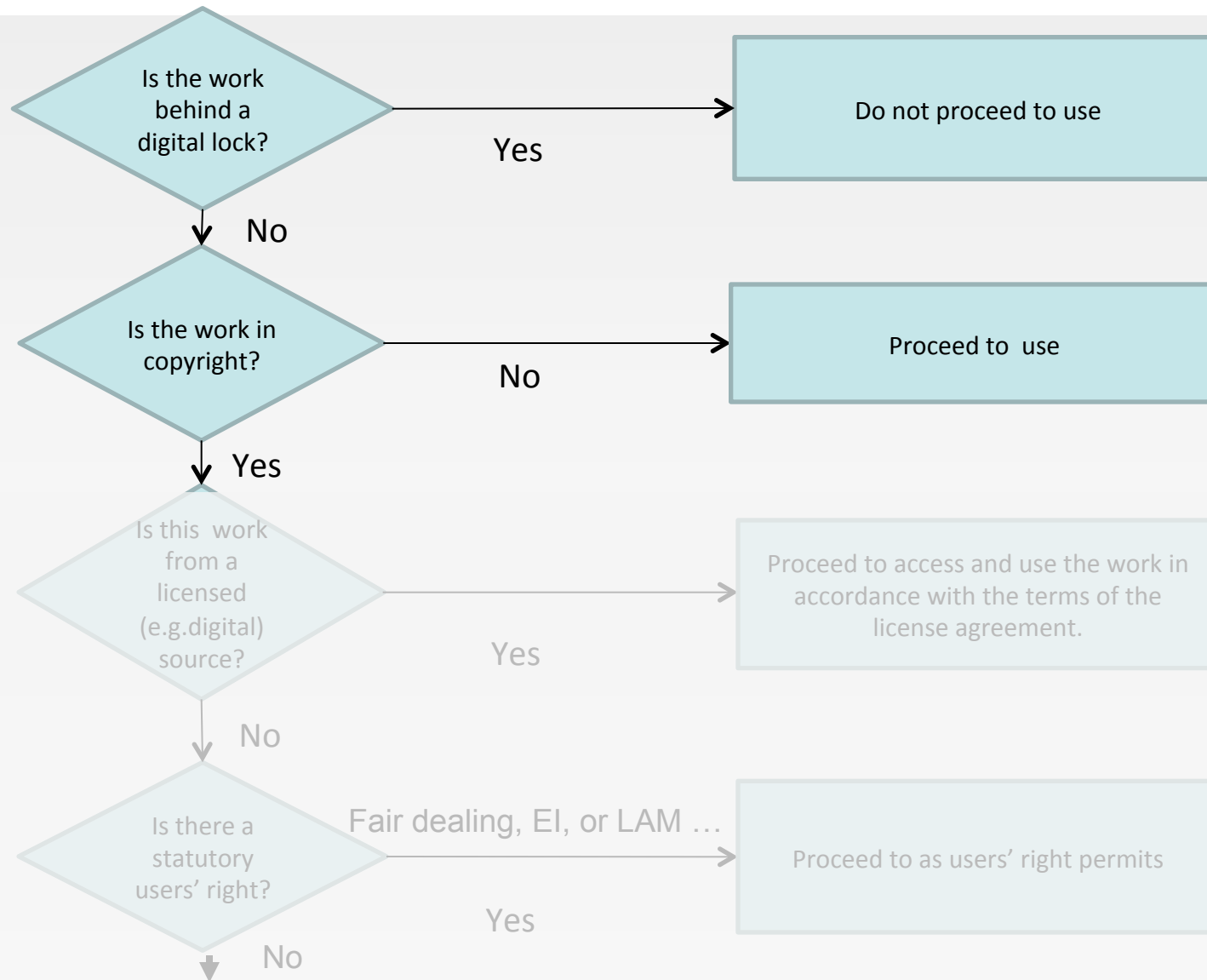
Creating your own new materials, instead of using those of others:

Writing or otherwise creating your own entirely new materials, without using diagrams or photos or overly lengthy quotations from other works.

One possibility should you err in some slight way by including, without permission, something copyrighted, in a larger project:

New since 1997: s. 30.7 Incidental inclusion defence

Flowchart for Use of Information



Recall the basic rights given copyright holders under the Copyright Act:

Economic rights in works

to produce, reproduce

to perform in public

to translate

to convert from one type of work to another

to make sound recordings or cinematographs

to communicate the work by telecommunication

to present art created after 1988 in public

to rent computer programs

to authorize any of the above

**AccessCopyright
focused here for
English print
works**

Economic rights in “other subject matter”

to communicate a **performer's performance** by telecommunication

to “fix” a **performer's performance**

to reproduce a fixed **performance**

to rent out a sound recording of the **performance**

to publish, reproduce or rent a **sound recording**

to fix a **broadcast signal**

to retransmit a **signal**

to authorize any of the above

Converting Work to a Digital Format is a Copyright Holder's Right – and Transmitting it anywhere is also a Copyright Holder's Right...

a) Converting a Work to a Digital Format is a Copyright Holder's Right:

Robertson v. Thomson 2006 Supreme Court

- “Converting” a work to digital is an act of reproduction that only a Copyright Holder has the right to do
- A copyright holder holds the same rights in a digital work as would be held in a work in traditional form.

Robertson et al v. Proquest et al

- Class Action Lawsuit in Ontario spring 2009
- **3rd party claims** being made by Proquest et al against journals, since the journals originally published the articles that Proquest et al later digitized
- Similar lawsuit in Quebec: **Electronic-Rights Defence Committee v. Southam et al**, certified class action Que SC April 15 2009

(b) Uploading or Downloading a Digital Work involves a Copyright Holder's Right:

SOCAN “Tariff 22” decision 2004 Supreme Court

- Posting a work on the net is authorizing its communication (ONE RIGHT) – and communication occurs when the item is retrieved by an end user (A SECOND RIGHT)
- When a content provider intends the public to have access, that is a communication by telecommunication to the public (THAT SECOND RIGHT)...

Canadian Wireless Telecommunications Association v. SOCAN (Federal Court of Appeal)

- Transmission of ring tones to cellphone customers, even when each transmission is separately triggered by the customer, is a right of the copyright holder (AGAIN, that SECOND RIGHT)

On the other hand, if you are not doing anything the copyright holder controls, you can do it without involving copyright: consider linking

Defamation (libel) case, not copyright, but about “publication” –Crookes v Newton (2011 SCC 47)

The majority, Abella, Binnie, LeBel, Charron, Rothstein and Cromwell, were clear that linking does not constitute publication:

“Making reference to the existence and/or location of content by hyperlink... is not publication of that content.” [para.42 (Abella)] Justice Abella analogized between a traditional paper publishing world “reference” and the link in the new digital internet realm and said they perform the same function and therefore “a hyperlink, by itself, is content neutral”[para.30]

only 2 of 9 (Chief Justice McLaughlin and Justice Fish) endorsed any of “contextual” approach taken in the courts below ... though a 3rd judge, Justice Deschamps (retired this past August), also took a nuanced approach...

Although copyright is not mentioned, the way in which the majority expresses itself leaves little doubt that this Court would think the same way in a copyright case.

So, who initially owns the copyright interests ...

The **individual authors**, who were not employees at the time of creation of the works, if they have not assigned those rights, own the rights in works – and, even if they were employees or assigned their economic rights, unless they have waived them, they continue to hold moral rights.

Employers who employed authors who created works will own the copyrights, but not the moral rights, in those works, unless they have assigned them.

Sound recording rights and rights in **performances** by performers will be owned by the makers and performers, respectively (unless assigned to others), even though the sound recordings or recorded performance may also carry other copyright interests, for example in musical works or film, that are owned, at least originally, by others.

Photographs used to be owned in Canada by the person commissioning them (if paid for) rather than the photographer – since 2012, the photographer but the commissioning party gets rights for certain private uses . Similarly, pre-2012, if photographs were owned by corporations, the term was only 50 years: now, in all cases (with some transition provisions), the term is the life of the photographer + 50 years.

LICENSES and Permissions need to be sought to exercise copyright holders' economic rights

It is the copyright holder's prerogative -

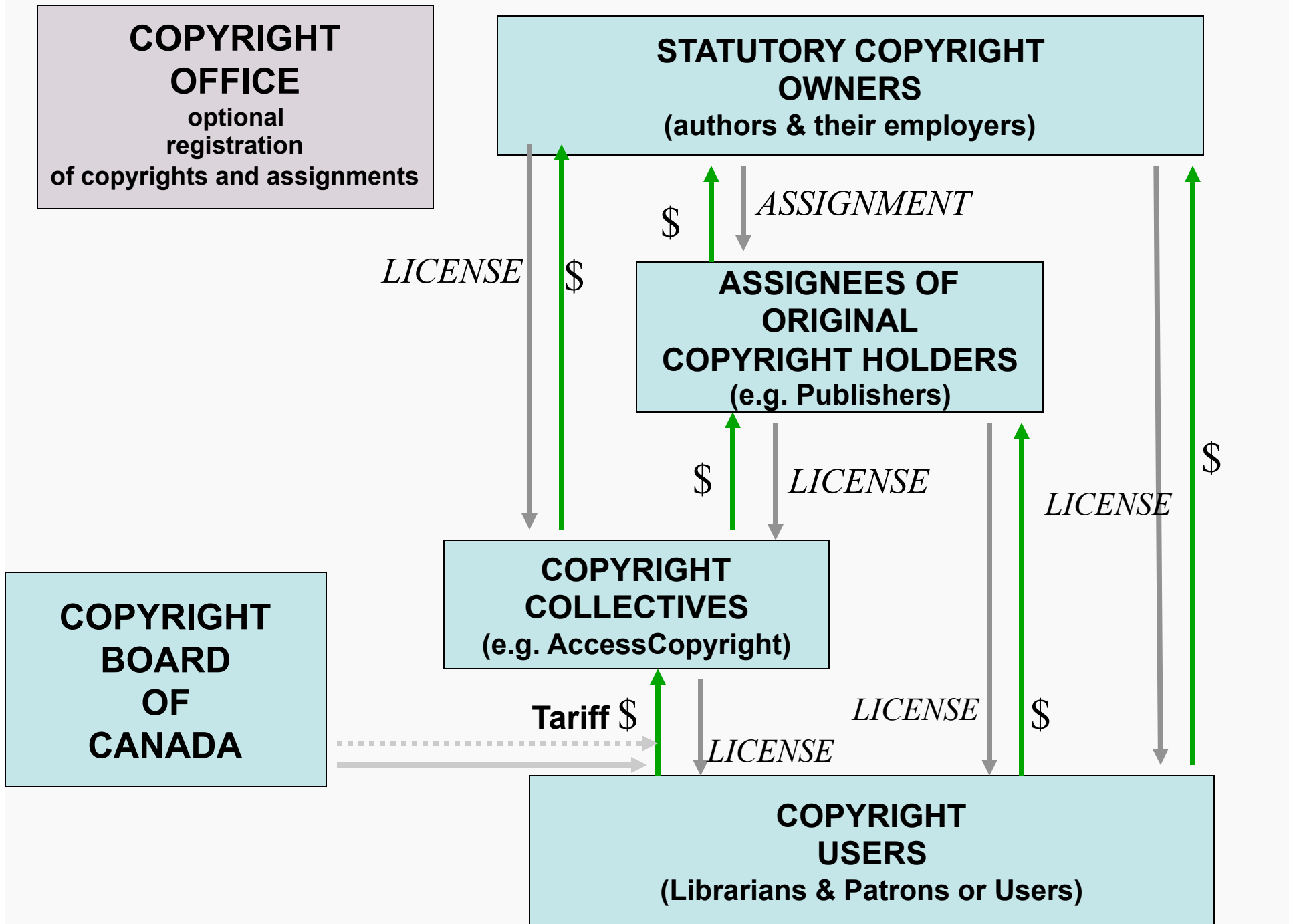
(a) to decide whether or not to grant permission (a license) to a requestor to make any particular use of a work (or other subject matter); and

(b) if granting permission, to charge or not charge for that permission.

The charge for making use of materials is termed the **TARIFF** if it is an amount established by the Copyright Board in a situation involving a blanket license obtained from a copyright collective organization or a **ROYALTY** in an individual license or negotiated blanket license.

Licenses are required to be in **writing** (s.13(4)): best to get all permissions in writing.

Merely acknowledging source and author may satisfy moral rights requirements but does not provide a defense to a lawsuit for copyright infringement.



Licenses are contracts ... and can be sought from anyone entitled to license the rights (collectives in some cases and not in other cases)

- How much of your institution's collection is actually obtained through licenses from vendors?
- The more digital your collection, the more likely it is to have been acquired through ongoing licensing arrangements rather than outright purchases...
- In some libraries, up to 95% of the collection is subscriptions to databases...
- To the extent this represents your library, the changes to the *Copyright Act* and the cases decided by the Supreme Court under the *Copyright Act* will not directly affect your library because these changes do not directly affect your licensed collection... you only get the rights under the license which are specified in the license...

In a 2011 case study, without further licensing, five of the following eight films were legally able to be shown in class at Western, but only one, under certain conditions, could be posted

Film	Situation at UWO
Milgram Experiment Tough Guise Brown Eyes, Blue Eyed The Angry Eye	Western purchased, with rights to show but not post (see Media Booking Service, Western Libraries)
Why Ordinary People Do Evil... or Good	TED Talk – covered by Creative Commons license to show and post if conditions met...
Who Gets In	National Film Board – Western has rights to show; rights to post available from NFB by license
Human Behaviour Experiments	YouTube – not for reproduction or display without prior written consent
Media and Society – Track 3, The Corporation	Pearson Publishing Canada – not for distribution or copying without license

Even within its library sector, a library may find it can be differentiated from other libraries of its type:

Libraries differ along at least four dimensions:

1. What is the governance structure of your institution (not the library, the institution in which it is situate)?
2. How the library has been building its collection (by purchase or by license);
3. Whether there a copyright collective associated with any of the kinds of things that the library wants to do and which represents the works that the library is trying to doing those things with;
4. What the library's users' information needs are and how they can be best satisfied given the library's resources.

Part VII of the Copyright Act (1997)

- Collective societies for the performance of music and sound recordings (e.g. SOCAN) MUST file Tariffs before the Copyright Board
 - Copyright Act, s.67.1 – old provision, modified in 1997
- On the other hand, collective societies such as Access Copyright
 - MAY file Tariffs before the Board (s.70.12 (a)) OR
 - MAY enter into agreements with users (s.70.12(b))
 - s.70.12 a new provision 1997
- Over the course of 2012 Access Copyright moved into the position of *simultaneously* seeking a Tariff for post-secondary institutions AND entering into agreements... unprecedented

Collectives for “Works”:

Other collectives administer rights for sound recordings, broadcasts and performers’ performances – no collective administers any moral rights –

- 1. Access Copyright, The Canadian Copyright Licensing Agency**
- 2. ACF – Audio Cine Films**
- 3. AVLA – Audio-Video Licensing Agency**
- 4. CARCC – Canadian Artists’ Representation Copyright Collective**
- 5. CCC – Copyright Collective of Canada (representing US independent film & tv)**
- 6. CMRRA – Canadian Musical Reproduction Rights Agency**
- 7. Criterion Pictures**
- 8. COPIBEC – Societe quebecoise de gestion collective des droits de reproduction**
- 9. CRC – Canadian Retransmission Collective**
- 10. ERCC – Education Rights Collective of Canada**
- 11. FWS – FWS Join Sports Claimants**
- 12. MLB – Major League Baseball Collective of Canada**
- 13. SOCAN – Society of Composers, Authors and Music Publishers of Canada**
- 14. SACD – Societe des auteurs et compositeurs dramatiques**
- 15. SODRAC – Society for Reproduction Rights of Authors, Composers and Publishers in Canada**
- 16. SoQAD – Societe quebecoise des auteurs dramatiques**

Collectives have formed only around certain rights:

s.3(1) Right (applies to works, not sound recordings, broadcasts, performers' performances)	Associated Collective Societies
Produce or Reproduce the Work	Access Copyright (writing) COPIBEC (writing) AVLA (music: videos & audio) CMRRA (audio & music) SODRAC (music & visual arts) CARCC (visual arts)
Perform the Work in Public	ACF (films) AVLA (music: videos & audio) Criterion Pictures (films) ERCC (tv & radio – education only) SOCAN (music) SoQUAD (theatre – education only) SODRAC (music & visual arts)
...[rights not represented by collectives]	
(f) Communicate the Work by Telecommunication	CRC (tv & film) CCC (US movies and tv) FWS (sports) MLB (baseball) SACD (theatre, film, radio) SOCAN (music) SODRAC (music & visual arts)
...[rights not represented by collectives]	

The institutional lure of sticking with the Tariff process-

- **70.17** ... no proceedings may be brought for the infringement of a right referred to in section 3... against a person who has paid or offered to pay the royalties specified in an approved tariff.

K-12 in Quebec; all provincial & territorial governments; some post-secondary colleges

The advantage to the whole community is that someone is “fighting” the evidence brought by Access Copyright to support their “price”

There is not always a collective that represents a rightsholder's right – where there is no collective, a tariff is not a possibility

The collectives each represent only one or two rights, in respect of certain kinds of works. Some rights have no collective to represent them. Some works do not find themselves in collective repertoires...

The Copyright Board of Canada lists about 35 Canadian collectives on its website: <http://www.cb-cda.gc.ca/societies-societes/index-e.html>

National Film Board – represents its own repertoire (without being part of a collective)

CBC – represents its own repertoire (without being part of a collective)

FEDERAL GOVERNMENT CROWN COPYRIGHT POLICY DEVELOPMENT

Since 1997 Reproduction of Federal Law Order, SI/97-5, has permitted free use of the federal government's primary legal materials -- without charge or request for permission, provided that due diligence is exercised to ensure the accuracy of reproduction and that the reproduction is not represented as an official version.

Though it has been urged, the government has not expanded this license but, since 2010, had posted a statement that permissions were not required for personal, non-commercial reproduction – and permissions were otherwise handled through the Publications & Depository Services Office.

November 18, 2013 this was changed and users are advised to contact each department or agency created information individually.

The CLA Copyright Committee is advising CLA on this issue.

Getting a License from the Copyright Board For Uses of Works where Owner cannot be Located

- **Unique Canadian statutory provision – s.77**

(1) Where, on application to the Board by a person who wishes to obtain a license to use [material] in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a license to do the act mentioned in s.3, 15, 18 or 21 as the case may be [ie – anything the copyright holder has rights to do].

- **Royalties *may* be fixed by the Board under the license (see s.77 (2)).**

AS WELL AS DEALING WITH COPYRIGHT, LICENSES CAN (AND USUALLY DO) DEAL WITH OTHER MATTERS WHERE THE PARTIES WANT LEGALLY BINDING AGREEMENT BETWEEN THEM

A licence, like any contract, can deal with more than one area of agreement between the parties—

It can have provisions dealing with copyright interests, it can have provisions dealing with patent interests, it can have provisions dealing with TPMs or RMI, it can have provisions dealing with ensuring physical (or electronic) access to works (apart from the copyright interests in the works)...

[Recall that a contract cannot transfer moral rights away from the author – but waivers can be secured.]

Because there are no statutory exceptions like fair dealing in respect of TPMs, RMI, or moral rights, a user might choose to enter into a contract with a vendor in order to be certain not to circumvent TPMs or RMI or infringe moral rights – even where the contract was not needed to ensure the contemplated uses of the economic rights because these were ensured as non-infringing under statute through users' rights provisions.

What contract override statutory clauses look like -

Construction Lien Act, RSO 1990, c.C.30,

- s.4 An agreement by any person [corporation or individual] who supplies services or materials to an improvement that this Act does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void.**
- s.5 (1) Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.**

Residential Tenancies Act, SO 2006, c.17

- s.3(1) This Act... applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary.**

There is no contract override section in the *Copyright Act*.

Because the *Copyright Act* does not say any of the “users’ rights” provisions override contract, where a contract is in place, statutory “fair dealing” is not available.

In the context of a tariff from the Copyright Board, “users’ rights” become part of the Board’s calculations of the compensation owing to the rightsholders.

The Copyright Board's formula for setting tariffs:



- **Take all copying done within the institution**
(determined by actual surveying, using statistically robust sampling)
 - **Subtract all copies for which the rightsholders should not be compensated**
 - (a) because the materials in question were not “works” or works in which the rightsholders in the collective have rights (eg materials created by schools for themselves, in which they hold copyright)
- AND
- (b) because although the materials in question are *prima facie* materials in which the collectives' members have rights, there are users' rights (exceptions) which mean the rightsholders are not exercise their rights for these uses (fair dealing, rights for educational institutions or LAMs)

SUB- TOTAL: NUMBER OF COMPENSABLE COPIES

x the value of each copy as determined on economic evidence by the Copyright Board

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

Obtaining rights for users where a copyright holder's right is involved -

 <p>CANADA</p> <p>CONSOLIDATION</p> <p>CODIFICATION</p> <p>Copyright Act</p> <p>Loi sur le droit d'auteur</p> <p>R.S.C., 1985, c. C-42</p> <p>L.R.C., 1985, ch. C-42</p> <p>Current to December 10, 2012</p> <p>A jour au 10 décembre 2012</p> <p>Last amended on November 7, 2012</p> <p>Dernière modification le 7 novembre 2012</p> <p>Published by the Minister of Justice at the following address: http://laws-lois.justice.gc.ca</p> <p>Publié par le ministre de la Justice à l'adresse suivante : http://lois-laws.justice.gc.ca</p>	<p>11th June 2004</p> <p><u>Emerald</u></p> <p>Emerald & the Ontario Council of University Libraries License Agreement</p> <p>THIS LICENSE IS AGREED on the 12 day of August, 2004 BETWEEN Emerald Group Publishing Limited of 40-62 Toller Lane, Bradford, West Yorkshire BD9 5BY, England, (hereinafter referred to as "EMERALD") and the Ontario Council of University Libraries, c/o University of Waterloo, Library, 200 University Ave. W., Waterloo, ON N2L 3G1, Canada (hereinafter referred to as "OCUL MEMBERS").</p> <ol style="list-style-type: none"> EMERALD grants to OCUL MEMBERS the right to use the Licensed Materials subject to the terms set out herein. EMERALD shall provide electronic access to the Licensed Materials (as detailed in Schedule 1) via the Internet. This License is subject to EMERALD's Standard Terms and Conditions (including the definitions therein) which are attached hereto as Schedule 2 and made a part of this License. This License shall commence on 01/01/2004 and shall terminate on 31/12/2006, unless the parties agree in writing to renew or extend the License on terms that may be agreed in writing at the time. The Fee payable is detailed in Schedule 3. Each Member Institution as listed in Schedule 3 is entitled to 150 free document delivery credits to use per annum in order to retrieve Fulltext articles of abstract held on the licensed materials. To use this facility the Member Institution must access the online form hosted on www.emeraldinsight.com. Any document delivery credits that are not used in any 12 months may not be carried over to the next period. <p>Access to the Licensed Materials shall be provided by EMERALD via the www.emeraldinsight.com web site and from 1 January 2004, OCUL MEMBERS shall receive the Licensed Materials in the format specified in Schedule 4, supplied by EMERALD to be hosted locally on OCUL MEMBERS' server as well. Access via this server shall be provided for the 13 institutions as identified as OCUL MEMBERS in Schedule 5. If other OCUL MEMBERS would like to participate they can do so at a fee to be negotiated.</p> <p>6. The terms and conditions of this License apply only to the Licensed Materials. Separate license agreements are available for EMERALD's other products and services (Emerald Management Reviews and Emerald Abstracts databases) and a discount can be negotiated should all members participate.</p> <p><u>AS WITNESS the hands of the parties the day and year below first written</u></p> <p><u>FOR Emerald Group Publishing Limited</u></p> <p>Name (in block capitals): WILLIAM RUSSELL Date:</p> <p>Signature: _____</p> <p>Position / Title: Sales & Marketing Director, Emerald Group Publishing Limited</p> <p><u>FOR The Ontario Council of University Libraries</u></p> <p>Name (in block capitals): GWENDOLYN EBBETT Date:</p> <p>Signature: _____</p> <p>Position / Title: University Librarian University of Windsor on behalf of OCUL</p> <p>1</p>	<p>Copyright Board Canada</p>  <p>CANADA</p> <p>Commission du droit d'auteur Canada</p> <p>Collective Administration in relation to rights under sections 3, 15, 18 and 21</p> <p>Gestion collective relative aux droits visés aux articles 3, 15, 18 et 21</p> <p>Copyright Act, subsection 70.15(1)</p> <p>Loi sur le droit d'auteur, paragraphe 70.15(1)</p> <p>File: Reprographic Reproduction, 2005-2009</p> <p>Dossier : Reproduction par reprographie, 2005-2009</p> <p>STATEMENT OF ROYALTIES TO BE COLLECTED BY ACCESS COPYRIGHT FOR THE REPROGRAPHIC REPRODUCTION, IN CANADA, OF WORKS IN ITS REPERTOIRE</p> <p>TARIF DES REDEVANCES À PERCEVOIR PAR ACCESS COPYRIGHT POUR LA REPRODUCTION PAR REPROGRAPHIE, AU CANADA, D'ŒUVRES DE SON RÉPERTOIRE</p> <p>(Educational Institutions – 2005-2009)</p> <p>(Établissements d'enseignement – 2005-2009)</p> <p>DECISION OF THE BOARD (Redetermination)</p> <p>DÉCISION DE LA COMMISSION (Réexamen)</p> <p>Reasons delivered by:</p> <p>Motifs exprimés par :</p> <p>The Honourable William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry</p> <p>L'honorable William J. Vancise M^r Claude Majeau M^r J. Nelson Landry</p> <p>Date of the Decision</p> <p>Date de la décision</p> <p>January 18, 2013</p> <p>Le 18 janvier 2013</p>
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granted by statute

purchased by license

imposed by tariff

Canadian Copyright Act – 4 sets of rights now enshrined

PROHIBITIONS ON CIRCUMVENTION (of Technological Protection Measures & Digital Rights Management- 2012)

Theoretically limited to periods of protection of works and other subject matter – but, practically, indefinite.

ECONOMIC RIGHTS (from the beginning)

Life of the author + 50 years on works; 50 years generally for “other subject matter”

Fully assignable (owned from the outset by employers in an employment situation)

MORAL RIGHTS (Canada 1st common law country to introduce; fully articulated in 1988)

Life of the author + 50 years on works & performers’ performances; **ALWAYS** remain with the author – but can be waived

USERS’ RIGHTS (expressed by the SCC in 2004 – but based in the statute)

Remember that the **moral rights** exist, separately from the **economic rights**, in WORKS AND, since 2012, PERFORMERS' PERFORMANCES

In Canada, the author of a work has a right :

- to the **integrity** of the work (i.e. to prevent the work from being distorted, mutilated or otherwise modified *to the prejudice of the honour or reputation of the author*)
 - where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym (as well as the right to remain anonymous) [often referred to as the right to **paternity**]
 - to prevent the work from being used in association with a product, service, cause or institution *to the prejudice of the honour or reputation of the author* [commonly referred to as the **right of association**].
- Not transferable... licensing not an option; cannot be exercised by anyone other than the original author...
 - No exceptions apply: e.g. **“fair dealing” uses can infringe.**
 - “Moral” in “personal,” not as in “ethical/moral”

What is the difference between Copyright and Plagiarism?

COPYRIGHT is a legislated set of rights;

PLAGIARISM is a question of literary and cultural norms:

Certain institutions and groups, using contract law, can make plagiarism a wrong for which a person can be sanctioned. For example, at Western, as at other post-secondary institutions, plagiarism exists as an “academic offence”:

Vis-à-vis **students**, it has been declared by Senate as an offence and enforced under the terms of the contract between the student and the university;

Vis-à-vis **faculty**, it was negotiated as an academic norm by the faculty union, The University of Western Ontario Faculty Association (UWOFA), and the University and is defined in the Collective Agreement and enforced by the University against faculty members through the disciplinary process created in the Agreement.

Other than in such special arrangements, plagiarism that does not amount to copyright or moral rights infringement is not actionable in law in Canada.

The risk in CANADA -

Section 27 (1) It 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.

Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

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Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

**BUT there are also USERS (and intermediaries')
RIGHTS in the Copyright Act...**

Canadian Copyright Act – 4 sets of rights now enshrined

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USERS’ RIGHTS (expressed by the SCC in 2004 – but based in the statute)

What are users' rights?

The concept of “users’ rights” is a Canadian innovation fixed in Canadian copyright law in 2004 in the unanimous judgment of the Supreme Court in *CCH v Law Society of Upper Canada* (written by the Chief Justice)

In other countries and in international instruments, these “rights” are discussed as “exceptions to the rights of copyright holders”

These “users’ rights” or exceptions are legislated into the Copyright Act and include

Exceptions for certain kinds of institutions – for instance, TPL is a “LAM”

Exceptions for “fair dealing”

As mentioned above, none of these exceptions overrides TPM or RMI protections or moral rights or patent interests or rights to control physical (or electronic) access, they only override the economic rights interests in copyright...

SCC said Great Library had access to users' rights of its users:

The Supreme Court recognized agency in the copyright context... para.64

“Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process...”

Canada has an exceptions or “users’ rights” hierarchy -- because of *CCH v LSUC*, **“FAIR DEALING”** often “trumps” specific exceptions:

The Supreme Court said:

“a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the Copyright Act. It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the Copyright Act to prove that it qualified for the library exception.”
(para.49)

Under the LAMS Regulations
since 1997:

Approved by the Supreme Court in
the Law Society case:

WARNING!

Works protected by copyright may be photocopied on this photocopier only if authorized by:

the *Copyright Act* for the purposes of fair dealing or under specific exemptions set out in that Act;

the copyright owner; or

a license agreement between this institution and a collective society or a tariff, if any.

For details of authorized copying, please consult the license agreement or applicable tariff, if any, and other relevant information available from a staff member.

The *Copyright Act* provides for civil and criminal remedies for infringement of copyright.

Unnecessarily verbose

The copyright law of Canada governs
the making of photocopies or other
reproductions of copyright material.

Certain copying may be an
infringement of the copyright law.

This library is not responsible for
infringing copies made by the users
of these machines.

Notices for photocopiers

Notices are required of EIs exercising rights to photocopy that are legislated for them if they have a blanket license or are under a tariff with a collective – but, even if notices are not required for this reason, if the EI is attempting to within photocopy within “fair dealing” under s. 29, 29.1 or 29.1, the Supreme Court has said notices will provide appropriate evidence.

“Since schools (except in Quebec) no longer have an Access Copyright agreement or tariff and are now using fair dealing, except in Quebec they no longer have to comply with the *Copyright Act* section 30.3, which requires a poster beside photocopiers and system printers. On the other hand, in the 2004 *Law Society of Upper Canada v CCH Canadian Ltd.* case, the Supreme Court approved the Law Library’s sign posted by the library photocopier. Thus, for any school system, it would be smart idea to copy the CMEC fair dealing guidelines and to post this key copyright “can” and “cannot” list beside staff photocopiers and system printers. The poster clearly shows teachers that their school has a copyright policy but also serves to remind them of copyright limitations and continuing respect for creator rights.”

John Tooth, *Felciter* copyright column, in press.

**TURNING TO CONSIDER THE “USERS’ RIGHT”
to
“FAIR DEALING” IN CONTEXT –**

**“Fair Dealing” is defined by Parliament in the
Copyright Act in s.29,29.1, 29.2**

**The Supreme Court, in interpreting it, is
interpreting the *Copyright Act*, not creating
new law.**

Then what are the Six Fair Dealing Factors:

They are guidelines to interpret the word “fair” in the term “fair dealing” – which is used but not defined in the Act—

“In order to show that a dealing was fair under s.29 [or 29.1 or 29.2]... a defendant must prove:

- (1) that the dealing was for the purpose [stipulated in s.29, 29.1 or 29.2] and
- (2) that it was fair.”

The purposes are listed in the *Copyright Act* s.29, 29.1 and 29.2 but “whether something is fair is a question of fact and depends on the facts of each case” (para.52)

The Chief Justice, in ***CCH v LSUC***, approving Linden, JA in the Federal Court of Appeal, provided headings for the six factors but each is much more complex than its heading.

(i) The Purpose of the Dealing

**Not just a listing of the categories set out in s.29, 29.1 and 29.2
(whether within them is part 1 of the enquiry and this is part 2)**

“courts should attempt to make an objective assessment of the user/defendant’s real purpose or motive in using the copyrighted work” (para.54)

If, as in the “course pack” cases [from New Zealand and the UK], the copier hides behind the shield of the user’s allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will ... be relevant to the fairness analysis” *Alberta* (para 22) but teachers have no such purpose (para 23) – they facilitate the students’ research and private study.

“some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes” (para.54)

BUT in the section of the judgment on “Application of the Law to these Facts” (paras 61-73), the Court said the LSUC satisfied this requirement through its “*Access Policy*” (para.66)

“Education, parody or satire”

Added to Fair Dealing s.29 by Parliament in the *Copyright Modernization Act* [CMA], 2012.

No definitions of these terms are provided in the Act, nor any other explanation of them.

No case in the “pentology” released by the Supreme Court summer 2012 makes any reference to the CMA at all and all are decided on facts arising before the CMA and therefore are decided on the earlier law.

Nonetheless, our system of law presumes that these words have meaning in the Act but, unless and until the courts opine on their meaning, there is no way of knowing for certain what that meaning is: any lawyer or political scientist or anyone else is simply making an educated guess (and some “guesses” will be based on more education and experience than others, but no opinion on this, whether conservative or liberal, can anticipate the decisions of the courts; following any opinion on this will involve an institution in assessing its risk tolerance.

In the case of “education,” the word in other legal contexts has tended recently to be interpreted broadly by the courts; on the other hand, the rules of statutory interpretation suggest that the term in the Copyright Act should probably not be interpreted as robbing the concept of “Educational Institution,” also in the Copyright Act and also affected by Parliament’s amendments in the CMA, of any meaning – thus leaving a more narrow space of “education,” perhaps, in copyright than in the other statutes where it has been interpreted...

“research, private study”

We have clear jurisprudence from our top court about what these two terms mean –

In addition to CCH v LSUC, pentalogy *SOCAN v Bell* case says customers previewing music to decide whether to buy is “research” – and only commercial from the sellers’ point of view (para30), not the users, which is the relevant perspective

if we can manage within these categories, why worry about what “education” may mean?

But, can we manage?

First, we need to realize that the six factors are not satisfied by doing things within one of the [now] 8 categories of fair dealing – even the 1st step of the 6 factor test asks more than that:

“an objective assessment of the user/defendant’s real purpose or motive”
AND

an assessment of whether the dealing, though for an allowable purpose, is more

or less fair – with the understanding that if the user’s purpose is commercial, the

dealing may not be fair...

(ii) The Character of the Dealing

How the works were dealt with (para 55)

Multiple copies, widely distributed – tends to be unfair [note: not *is* unfair]

Single copy may be fair [note: not *is*]

If copy destroyed after use, may be fair [note: not *is*]

“custom or practice in a particular trade or industry” may be relevant: “study notes” published are unfair as criticism whereas literary criticism textbooks are [citing UK case]

SOCAN v Bell – where no copy kept by user and taking small, fair

- this factor is where you consider the “quantification of the aggregate dissemination” (para 42), not under (iii) the amount of the dealing

BUT, in the “Application of the Law to these Facts” section, the Supreme Court said the Law Society satisfied this criteria through the Great Library’s **Access Policy** (para.67)

(iii) The Amount of the Dealing

“Both the amount of the dealing and importance of the work ... should be considered” (para56, emphasis added)

“It may be possible to deal fairly with the whole work”[not, not *is*] –

eg probably whole photograph for the purpose of criticism or review

eg probably entire academic article for research or private study

eg probably entire judicial decision for research or private study

probably NOT whole work of literature for criticism

SOCAN v BELL – assess factor based on the individual use – proportion of excerpt in relation to whole work, not the amount of the dealing in the aggregate (para 41)

No percentages here – 10% is a figure which appears in the *Copyright Act* of Australia (s.40(5) – 10% of editions, works or adaptations not divided into chapters can be sued under fair dealing). Nothing similar in Canada.

BUT, in the “Application of the Law to these Facts” section, the Supreme Court said the Law Society satisfied this criteria through the Great Library’s **Access Policy** (para.68)

One patron with numerous requests for multiple reported decisions from the same reported series over a short period of time might not be fair – but there was no evidence before the courts of this occurring.

(v) Nature of the Work (note order change)

“if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could head to a wider public dissemination” (para.58)

If a work is confidential, this may make the dealing unfair [citing UK case]

SOCAN v Bell – “the fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and indentify a work he or she wants to buy, the work will not be disseminated.” (para 47)

BUT, in the “Application of the Law to these Facts” section, the Supreme Court said the Law Society satisfied this criteria through the Great Library’ s **Access Policy** (para.71)

Not all legal works are to be copied, regardless of the purpose to which they will be put – according to the Access Policy – only for research, private study, criticism, review or use in legal proceedings...

“It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained” [quoting Linden, JA]

(iv) Alternatives to the Dealing

If there is a non-copyrighted equivalent that could have been used, “this should be considered” (para.57)

Was “the dealing reasonably necessary to achieve the ultimate purpose”?

eg, if a criticism would be as effective without reproducing the work, may weigh against fairness

SOCAN v Bell – “short, low-quality streamed previews are reasonably necessary to help consumers research what to purchase” (para 46)

“buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks” **Alberta** (para 32) (Note the Court relies on the fact in *Alberta* that teachers were copying to supplement textbooks already purchased for each student.)

BUT, in the “Application of the Law to these Facts” section, the Supreme Court said the Law Society satisfied this criterion (paras 69-70) **BUT NOT THROUGH THE EVIDENCE OF THE Great Library’s Access Policy**

“patrons cannot reasonably be expected to always conduct their research on-site” ...

(vi) Effect of the Dealing on the Work

“neither the only factor nor the most important” (para.59)

“If the reproduced work is likely to compete with the market or the original work, this may suggest the dealing is not fair.”

SOCAN v Bell – previews (short and degraded quality) not in competition with the work; increase sales and therefore no negative impact on the work.

While textbook sales shrank 30% over 20 years, no evidence linked it directly to teachers’ photocopying – likely adoption of semester teaching, decrease in registrations, longer lifespan of textbooks, increased use of Internet and other electronic tools and more resource-based learning. **Alberta** (para 33)

BUT, in the “Application of the Law to these Facts” section, the Supreme Court said the Law Society satisfied this criterion (para 72) **BUT NOT THROUGH THE EVIDENCE OF THE Great Library’s Access Policy**

“no evidence was tendered to show that the market for the publishers’ works had decreased as a result of these copies

“Although burden to prove fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers’ markets...it would have been in publishers’ interest to tender it at trial... only evidence ... is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service’s operation.”

See Geist (ed). 2013. *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ottawa: University of Ottawa Press.

See <http://www.press.uottawa.ca/the-copyright-pentalogy>

SOCAN v. Bell

squarely fair dealing:

An offer to the public to “preview” 30 seconds or less of a musical work.

Is this a taking for which a Tariff should be set to compensate SOCAN’s members or is this a fair dealing for which no compensation (and thus no Tariff) should be set? Copyright Bd, FCA fair dealing; unanimous SCC agreed

Ministers of Ed [“Alberta”] v Access Copyright (the K-12 tariff decision)

squarely fair dealing:



Teacher-initiated copies for classroom use can be “research” or “private study” (2 of the 5 categories) and may be fair (meet the six factor test) – were they here?

Majority of court then said Board did not apply 6 factors properly and sent the determination back to the Board (minority would have accepted Board’s finding of fair)

The Copyright Board has completed these processes (the parties agreed on the facts and did not require the Board to determine the matter, after all – so the Supreme Court’s reasons were never actually applied by the Board to the facts in hand) in an order issued January 18, 2013 which reduced the tariff from \$5.16 per FTE per year to \$4.81.

The Supreme Court did not mention the then pending amendments to the Copyright Act, including amendments to “fair dealing” at all in the two judgments... guidance it could have given (as “obiter,” since the decisions did not require it) – as it did in CCH v Law Society (where the law had changed between the time the fact situation arose and the Supreme Court decided in 2004 (passage of the amendments creating special exceptions for “Library, Archive and Museum” (LAM) and “Educational Institutions” (EI) in 1997.

Obtaining rights for users where a copyright holder's right is involved -

<div> CANADA</div> <div>CONSOLIDATION</div> <div>CODIFICATION</div> <div>Copyright Act</div> <div>Loi sur le droit d'auteur</div> <div>R.S.C., 1985, c. C-42</div> <div>L.R.C., 1985, ch. C-42</div> <div>Current to December 10, 2012</div> <div>A jour au 10 décembre 2012</div> <div>Last amended on November 7, 2012</div> <div>Dernière modification le 7 novembre 2012</div> <div>Published by the Minister of Justice at the following address: http://laws-lois.justice.gc.ca</div> <div>Publié par le ministre de la Justice à l'adresse suivante : http://lois-laws.justice.gc.ca</div>	<div>11th June 2004</div> <div><u>Emerald</u></div> <div>Emerald & the Ontario Council of University Libraries License Agreement</div> <div>THIS LICENSE IS AGREED on the 12 day of August, 2004 BETWEEN Emerald Group Publishing Limited of 40-62 Toller Lane, Bradford, West Yorkshire BD9 5BY, England, (hereinafter referred to as "EMERALD") and the Ontario Council of University Libraries, c/o University of Waterloo, Library, 200 University Ave. W., Waterloo, ON N2L 3G1, Canada (hereinafter referred to as "OCUL MEMBERS").</div> <div><ol style="list-style-type: none">EMERALD grants to OCUL MEMBERS the right to use the Licensed Materials subject to the terms set out herein. EMERALD shall provide electronic access to the Licensed Materials (as detailed in Schedule 1) via the Internet.This License is subject to EMERALD's Standard Terms and Conditions (including the definitions therein) which are attached hereto as Schedule 2 and made a part of this License.This License shall commence on 01/01/2004 and shall terminate on 31/12/2006, unless the parties agree in writing to renew or extend the License on terms that may be agreed in writing at the time.The Fee payable is detailed in Schedule 3.Each Member Institution as listed in Schedule 3 is entitled to 150 free document delivery credits to use per annum in order to retrieve Fulltext articles of abstract held on the licensed materials. To use this facility the Member Institution must access the online form hosted on www.emeraldinsight.com. Any document delivery credits that are not used in any 12 months may not be carried over to the next period.</div> <div>Access to the Licensed Materials shall be provided by EMERALD via the www.emeraldinsight.com web site and from 1 January 2004, OCUL MEMBERS shall receive the Licensed Materials in the format specified in Schedule 4, supplied by EMERALD to be hosted locally on OCUL MEMBERS' server as well. Access via this server shall be provided for the 13 institutions as identified as OCUL MEMBERS in Schedule 5. If other OCUL MEMBERS would like to participate they can do so at a fee to be negotiated.</div> <div><p>6. The terms and conditions of this License apply only to the Licensed Materials. Separate license agreements are available for EMERALD's other products and services (Emerald Management Reviews and Emerald Abstracts databases) and a discount can be negotiated should all members participate.</p><p><u>AS WITNESS the hands of the parties the day and year below first written</u></p><p><u>FOR Emerald Group Publishing Limited</u></p><p>Name (in block capitals): WILLIAM RUSSELL Date: _____</p><p>Signature: _____</p><p>Position / Title: Sales & Marketing Director, Emerald Group Publishing Limited</p><p><u>FOR The Ontario Council of University Libraries</u></p><p>Name (in block capitals): GWENDOLYN EBBETT Date: _____</p><p>Signature: _____</p><p>Position / Title: University Librarian University of Windsor on behalf of OCUL</p></div> <div>1</div>	<div><div>Copyright Board Canada</div><div> CANADA</div><div>Commission du droit d'auteur Canada</div></div> <div>Collective Administration in relation to rights under sections 3, 15, 18 and 21</div> <div>Gestion collective relative aux droits visés aux articles 3, 15, 18 et 21</div> <div>Copyright Act, subsection 70.15(1)</div> <div>Loi sur le droit d'auteur, paragraphe 70.15(1)</div> <div>File: Reprographic Reproduction, 2005-2009</div> <div>Dossier : Reproduction par reprographie, 2005-2009</div> <div>STATEMENT OF ROYALTIES TO BE COLLECTED BY ACCESS COPYRIGHT FOR THE REPROGRAPHIC REPRODUCTION, IN CANADA, OF WORKS IN ITS REPERTOIRE</div> <div>TARIF DES REDEVANCES À PERCEVOIR PAR ACCESS COPYRIGHT POUR LA REPRODUCTION PAR REPROGRAPHIE, AU CANADA, D'ŒUVRES DE SON RÉPERTOIRE</div> <div>(Educational Institutions – 2005-2009)</div> <div>(Établissements d'enseignement – 2005-2009)</div> <div>DECISION OF THE BOARD (Redetermination)</div> <div>DÉCISION DE LA COMMISSION (Réexamen)</div> <div>Reasons delivered by:</div> <div>Motifs exprimés par :</div> <div>The Honourable William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry</div> <div>L'honorable William J. Vancise M^r Claude Majeau M^r J. Nelson Landry</div> <div>Date of the Decision</div> <div>Date de la décision</div> <div>January 18, 2013</div> <div>Le 18 janvier 2013</div>
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granted by statute

purchased by license

imposed by tariff

2012 LAM change Section 30.1- Preservation

Paragraph 30.1(1)(c) of the Act is replaced by the following:

(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete **or is becoming obsolete**, or that the technology required to use the original is unavailable **or is becoming unavailable**;

NOTE:

All the other restrictions in s.30.1 (commercially available) still apply
Library cannot use this provision for something that is protected by a digital lock.

2012 Changes in the restrictions in 30.2 for LAMs serving their own users:

- s.30.2(4) used to place restrictions on libraries copying for their own patrons...

The restrictions are slightly amended now: the **patron only gets a single copy and the library informs the patron the copy is only for research or private use and any other use may require the copyright holder's permission.**

2012 Changes in the restrictions in 30.2 for LAMs engaged in ILL:

- In addition to the things you can do for a patron in your own library, in a case of ILL you can also do more:
- 30.2(5.02) states that *the copy given to the patron may be in digital form*
 - If the user requesting is warned [“the providing library... takes measures to prevent the person who has requested it”]
 - From only making more copies than just 1 print copy, or
 - Giving the digital copy to anyone, or
 - Using the digital copy for more than 5 business days from the first use.

2012 Changes involving alternate format copies – for all libraries, not just LAMs and Els...

s.32 allows the creation of alternate format copies for folks with perceptual disabilities.

Under a revised s.32.01 not for profits can make copies for the perceptually disabled, as can other “persons” or the perceptually disabled person.

s.32.01 is a new addition which allows export of those alternate format copies for use by people in other countries.

There is also a section allowing very limited rights to circumvent digital locks for the perceptually disabled s.41.16

Contracts override the Copyright Act – but you can try to negotiate to import the wording of provisions of the Copyright Act into contracts

- The parties can specify what law will apply to a contract (law of Delaware, for instance)
- The only way Canada's *Copyright Act* will apply to the terms of a license is if you and the vendor agree that it will and put that in the license
- A vendor can refuse to agree to Canada's Act governing – and, even if agreeing to be bound by the *Act* -- can refuse to agree to any changes to the *Act* made during the lifetime of the contract applying to that contract
- A vendor can negotiate for a higher license fee in return for agreeing to have the Act apply or changes to it to apply
- Therefore “fair dealing” only gets into a license if it is agreed between the parties to be there and sometimes it can cost you money to negotiate it in...

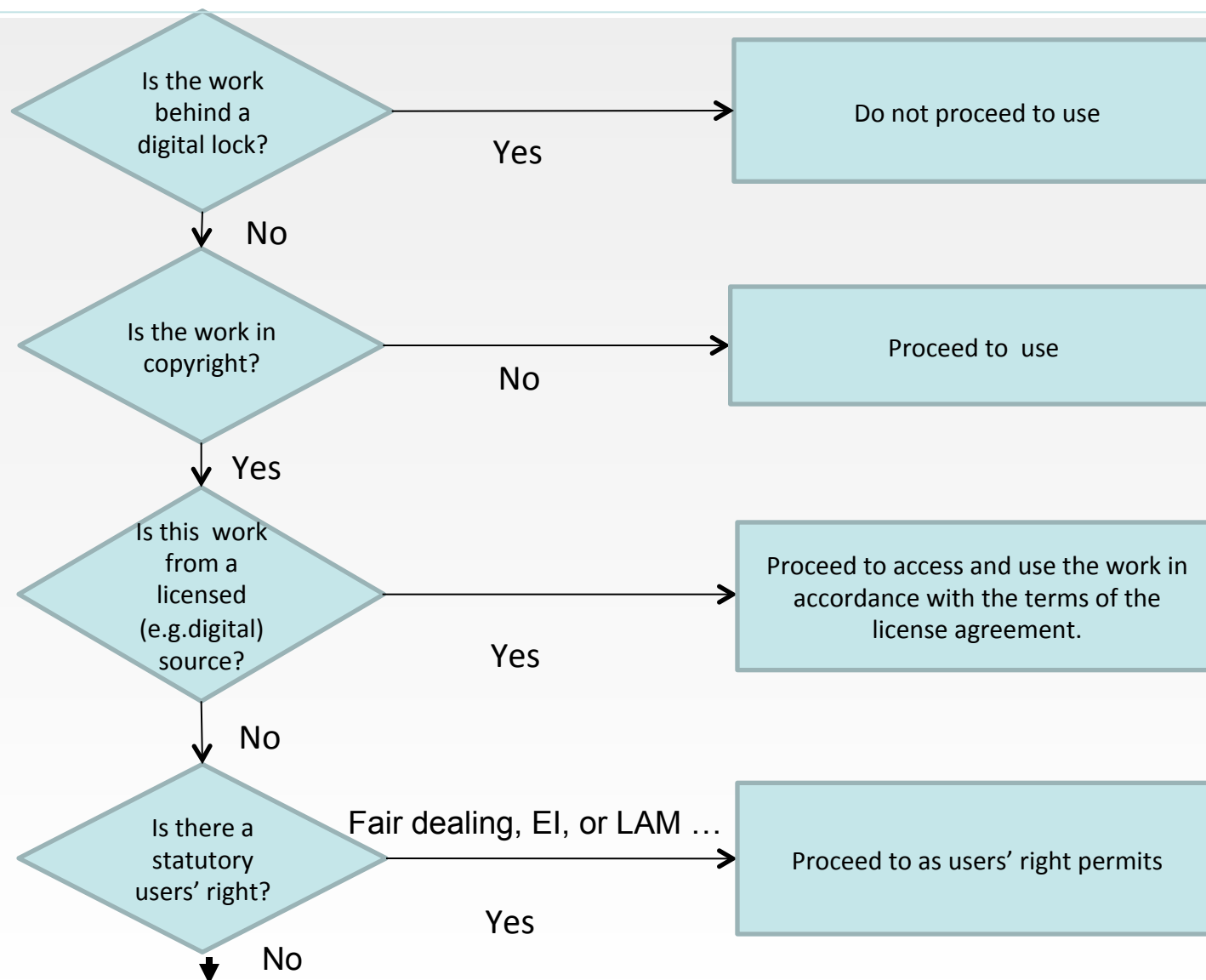
“Contracting in” users’ rights is not the same as relying on the statute:

These contracts achieve for the library’s users just as many rights in an information product as those users would have had had the product been purchased outright and not subject to an ongoing contract because users have the rights enshrined for them in the *Copyright Act* (in any exception section, including, but not limited to, fair dealing) BUT the institution may have had to pay to get this equivalence because Parliament has not made the statute override contract (as Ontario has done, for example, in many areas of landlord and tenant contract law).

So, this is not really STATUTORY fair dealing – it is institutions acting on behalf of users to ensure that users are not disadvantaged by license arrangements as opposed to purchases – and the institutions may have had to pay something to ensure this level of service...

- ◆ **Even if** your collection is 100% comprised of the print repertoire represented by the AccessCopyright collective,
- ◆ **if** your collection is 100% licensed directly from vendors,
- ◆ you need neither a blanket license from Access Copyright nor to accede to a tariff from it (if one has been ordered by the Copyright Board for your sector) –
- ◆ BUT nor will you be relying on statutory users' rights such as fair dealing ...
- ◆ You will be relying on what was negotiated into the contract.

Flowchart for Use of Information



Consider Licensing Use or Not Using (and, for example, seeking alternative source)

copying based on where your institution sits



Opt-Out

1. Materials licensed from creators or others will not be affected by the decision to opt-out of any relationship with Access Copyright;
2. Proceed to copy under the “Users’ Rights” exceptions in the Copyright Act, including
 - i. Fair Dealing
 - ii. Educational Institutions
 - iii. LAMs
3. Can use all materials, all formats, as permitted in these sections;
4. Guidelines may help your institution provide evidence of its compliance with the requirements of “Fair Dealing” under the Act
5. If Users’ Rights exceptions don’t apply, seek permission or do not use the material.

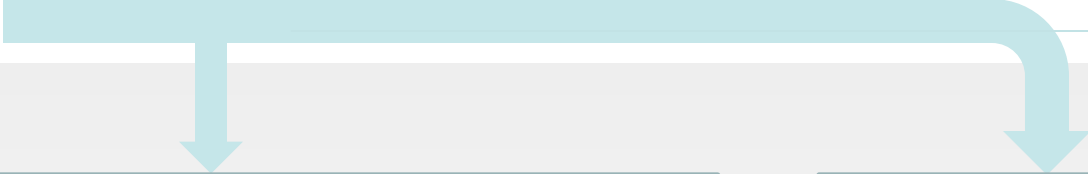
Tariff

1. Materials licensed from others not affected by this Tariff;
2. Proceed to copy under terms of the Tariff;
3. Can use only Access Copyright repertoire of materials under Tariff: no audio-visual, musical materials;
4. Guidelines may help your community understand how to comply with the terms of the Tariff;
5. “Fair Dealing” NOT in here directly but will factor into the Board’s valuation formula for setting the Tariff.

Access Copyright License

1. Materials licensed from others not affected by this License;
2. Proceed to copy under terms of the license agreement;
3. Can use only Access Copyright repertoire of materials under this License: no audio-visual, musical materials;
4. Guidelines may help your community understand how to comply with the terms of the license agreement;
5. “Fair Dealing” IS recognized under the current AC license and its extent may factor into renegotiation of the price of the license when the current license expires.

Whether operating with Access Copyright license or without, there is a risk of litigation:



Under a License from Access Copyright

- Infringement action from a rights holder of rights not represented by Access Copyright -- s.27(1);
- Infringement action for moral rights if moral rights holder has not waived rights, whether or not there is infringement or permission with respect to economic rights – s.28.1;
- Breach of contract action for violating the terms of the license;
- Infringement action for uses made beyond the terms of the license.

Relying on Users' Rights

- Infringement action from any rights holder whose rights are infringed, including Access Copyright – s.27(1);
- Infringement action for moral rights if moral rights holder has not waived rights, whether or not there is infringement or permission with respect to economic rights – s.28.1;

“Best Practices” as a Defence

Negligence is a branch of tort law, developed at common law by the courts...

In a lawsuit based on allegations that you have been negligent, showing that you are practicing to a level equal to or greater than your professional peers can establish that you have NOT been negligent...

Even in this branch of law, where a statute states a rule, evidence of customary practice will NOT exonerate someone who breaks that rule...

(Drewry v. Towns (1951), 2 WWR (NS) 217)

Copyright law is completely statute-based.

Although recent courts have relied on evidence of custom to establish who owns a particular copyright interest... (Robertson v. Thomson, 2006 SCC)...

AND good management practices can provide evidence to satisfy elements of the FAIR DEALING test (the Law Society case 2004 SCC)

... courts have NOT permitted evidence of custom to establish a defence to allegations of copyright infringement... (Gribble v. Manitoba Free Press Ltd. [1932] 1 DLR 169)

Risks in violating a software agreement:

The software agreement usually includes terms covering the copyright interests of the vendor – but it also covers other agreements (such as access through TPMs, the terms of access to updates and to online resources and so on)

Violating the terms of the agreement would put the genealogist at risk of either or both of the following claims in a lawsuit:

- Breach of contract

- Copyright and/or patent infringement

And violating the agreement can mean an end to access to an online product or to updates and so on from a vendor, who may also refuse to sell to the genealogist again if the opportunity arises...

Building an Institutional Policy

Why not adopt a national or provincial or sectoral policy approach?

This is not negligence law: in negligence, a branch of tort law, evidence that you have met the standard of a competent professional, which means you have not been negligent, can mean pointing to the standard of similar professionals - and national or sectoral or regional policies to which you adhere can help provide this evidence.

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)

About policies

AccessCopyright has launched a lawsuit against York University in the Federal Court (court file # T-578-13).

The Statement of Defence and Counterclaim was filed at the beginning of September.

One aspects of the lawsuit 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 --

The York Lawsuit also involves claims about notices posted

To this extent, the lawsuit may become relevant to the practices of many other libraries.

In para. 4 (c) of the Statement of Defence, York pleads that it “implemented appropriate fair dealing guidelines consistent with those of the Association of Universities and Colleges of Canada”[AUCC] – there is further detail of this defence in para.16 (c);

The “Fair Dealing Guidelines for York Faculty and Staff” are attached as Schedule A to the Statement of Defence and Counterclaim.

Like other guidelines adopted or adapted from the model provided by the AUCC, these guidelines are not the same as the Law Society’s Access Policy quoted and approved by the Supreme Court in 2004

Access Copyright v York University

Federal Court (court file # T-578-13).

- 1. Suit launched with Statement of Claim by Access Copyright April 8, 2013.**
- 2. The Statement of Defence and Counterclaim was filed by York September 8, 2013.**
- 3. Statement of Defence to Counterclaim filed by Access Copyright October 4, 2013.**
- 4. Reply to Statement of Defence to Counterclaim filed by York October 18, 2013.**
- 5. Case Management Conference meeting held January 13, 2014 –
“bifurcation” motion to be heard March 26, 2014... another Case Management Conference April 25, 2014, with ½ hour court appearance in Toronto scheduled – but if matter remains contentious, 2 hours scheduled for a hearing May 16, 2014...**
- 6. CMEC [Council of Ministers of Education] initiates a motion on January 21, 2014 to seek Intervener status in the lawsuit... April 1, 2014 decision that no interveners at present but can apply again later.**
- 7. Another Case Management Conference scheduled for August 25, 2014.**

“Price discovery” is a natural new product positioning process ---

- If libraries and librarians do not support each other in the face of uncertainty, it seems certain that their mutual adversary, Access Copyright, is the beneficiary of the dissention.
- All libraries, including the 3 groups of post-secondary institutions, are engaged in “price discovery” and making valid contributions to that process.
- In the face of uncertainty, and without a crystal ball, it is ridiculous to oppose ANY serious effort at price discovery.

How can you manage in uncertainty?

1. What is the governance structure of your institution (not your library: your institution)?
2. How have you been building your collection: by purchase or by license?
3. Is there a copyright collective associated with any of the kinds of things that you do, with works that are represented by that collective?
4. **AS ALWAYS IN LIBRARIANSHIP, FOCUS ON:**
What are your users' information needs and how are they best satisfied given your resources?

Thank you. Some resources:

1. Geist, M. (ed.). (2013). *The Copyright Pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law*. Ottawa: U. of Ottawa Press. <http://www.press.uottawa.ca/the-copyright-pentalogy> , including chapter 3, “The Context of the Supreme Court’ s Copyright Cases” by M.A. Wilkinson, 71-92.
2. Conclusions of WIPO SCCR 26 meeting December 2013 = http://www.wipo.int/edocs/mdocs/copyright/en/sccr_26/sccr_26_conclusions.pdf
- 3 . **Copyright Board of Canada** <http://www.cb-cda.gc.ca/>
4. **CLA Copyright Information** http://www.cla.ca/AM/Template.cfm?Section=Copyright_Information
5. Margaret Ann Wilkinson (2010), “Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries, in Michael Geist (ed.) *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*(Toronto: Irwin Law), 503-540.
6. The **Felciter** CLA Copyright Advisory Committee columns...