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Copyright Update 2014

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OLA Superconference Session
Saturday, February 1, 2014

Copyright Update 2014

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OLA Superconference 2014 comprehensive © program:

- 1. GLOBAL POLICY-SETTING, DEMOCRACY & THE LIBRARY (Thurs at 9:05))**
international trade and public law initiatives affecting copyright
- 2. PROCUREMENT BEST PRACTICES FOR DIGITAL CONTENT LICENSING (Thurs at 10:40)**
focus on CKRN & OCUL
- 3. CANADIAN COPYRIGHT: FROM THEORY TO PRACTICE (Thurs at 3:45)**
- 4. BEYOND BOOKS: PRACTICAL COPYRIGHT SOLUTIONS FOR DEALING WITH NON-TEXT FORMATS (Fri at 9:05)**
a look at sheet music, 3D printing, images & video games
presented by your OLA Copyright Users' Committee
- 5. COPYRIGHT UPDATE – this session (Saturday at 9:15)**

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

In Press: John Tooth, “Copyright for Schools and School Libraries,” February issue *Feliciter*

Forthcoming: Christina Winter & Sam Cheng, “Copyright Skills in Academic Libraries” April issue *Feliciter*

COPYRIGHT UPDATE 2014

1. Following up on changes connected with the **Copyright Act**

- *The effect of TPM and DRM additions to the Copyright Act*
- *What is not in force from the 2012 Copyright Modernization Act...*
- *What regulations are pending*
- *Changes through the Combatting Counterfeit Products Act (now Bill C-8)*

2. The litigation situation

- *In the courts*
- *At the Copyright Board*

3. Of notices, permissions and contracts

- *Posting notices*
- *Crown copyright developments*
- *S.77 for unlocatable owners*
- *Contracts and the Copyright Act*

4. Progress at the international level

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The effect of TPM and DRM additions to the Act -

YOU CANNOT, RISK-FREE, EXERCISE YOUR
USER'S RIGHTS UNDER COPYRIGHT

WHEREAS IT USED TO BE SAFE TO SAY

- *IF you can get access, you can copy –*
 - *ON THE BASIS OF YOUR RIGHT for PRIVATE STUDY AND RESEARCH (PART OF “FAIR DEALING” IN THE COPYRIGHT ACT (s.29))*
 - *On the authority of the 2004 Supreme Court of Canada decision in CCH et al v. Law Society of Upper Canada*

NOW

- *If you can get access without circumventing a digital lock, you can copy... for research and private study...*

What are technological protection measures?

Defined by Parliament in the new s.41:

“any effective technology, device or component that ... controls access to a work, ...[to a recorded performance] or to a sound recording ... [that is being made available under the authority of the copyright holders]”

AND

“any effective technology, device or component that... restricts the doing of any act [which is controlled by a copyright holder or for which the rightsholder is entitled to remuneration]”

There are similar protections in the new s.41.22 for “rights management information in electronic form” [usually referred to as DRM] – which cannot be removed or altered.

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)

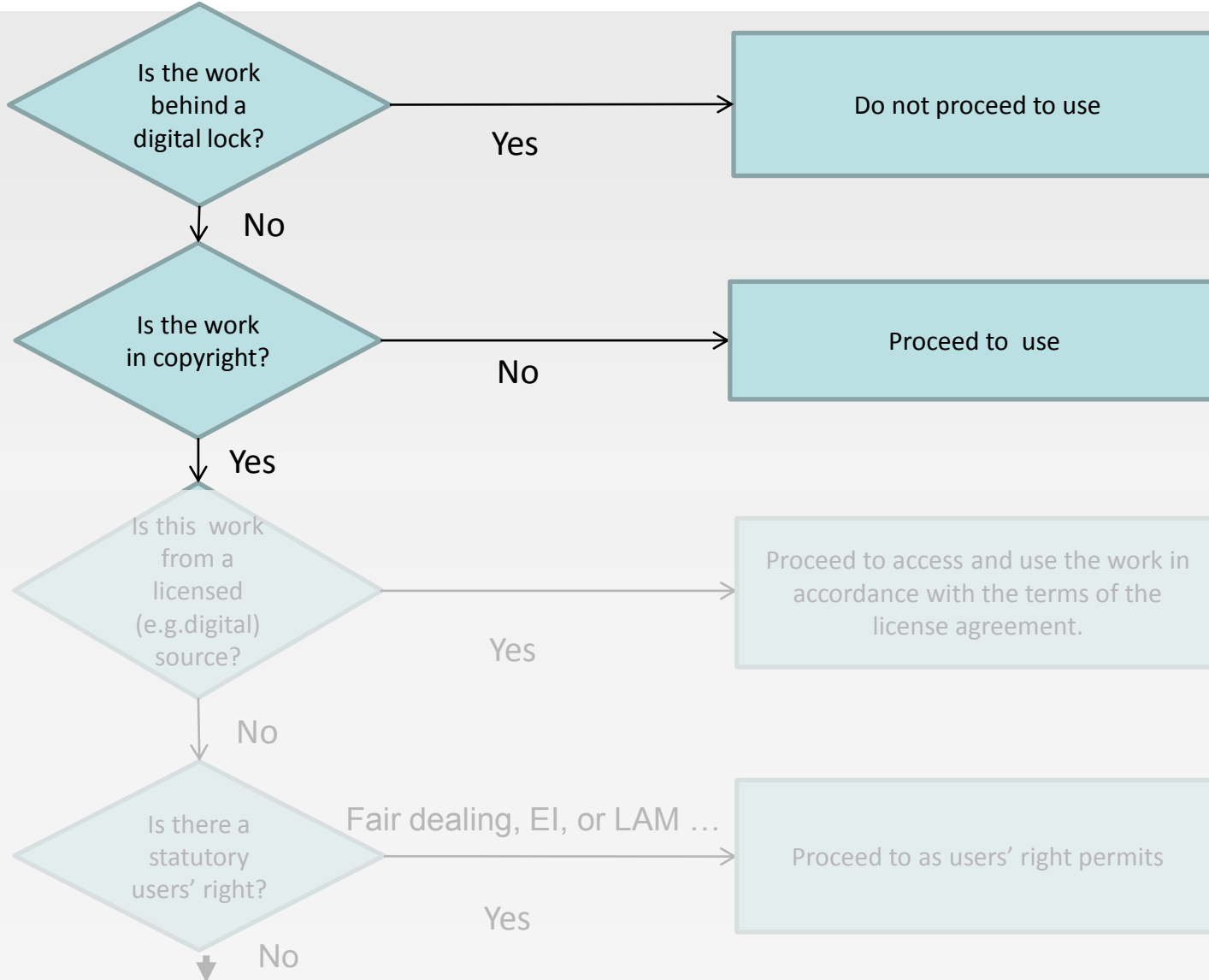
verifying a computer security system (s.41.15)

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?

Flowchart for Use of Information



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*

Probable connection with libraries from Bill C-8

Key copyright proposal: the *Copyright Act* would be expanded to further prohibit the exportation of protected works.

The addition of the provisions prohibiting the act of exporting works in violation of copyright might have an affect international inter-library loans.

BUT

The interaction of fair dealing and the rules around LAMs will also be factors. Each unique situation may need to be individually considered.

Bill C-56

3. Section 27 of the Act is amended by adding the following after subsection (2.1):

[Secondary Infringement]

(2.11) It is an infringement of copyright for any person, for the purpose of doing anything referred to in paragraphs (2)(a) to (c), to export or attempt to export a copy — of a work, sound recording or fixation of a performer's performance or of a communication signal — that the person knows or should have known was made without the consent of the owner of the copyright in the country where the copy was made.

[Exception]

(2.12) Subsection (2.11) does not apply with respect to a copy that was made under a limitation or exception under this Act or, if it was made outside Canada, that would have been made under such a limitation or exception had it been made in Canada.

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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...**
- 6. CMEC [Council of Ministers of Education] initiates a motion on January 21, 2014 to seek Intervenor status in the lawsuit...**

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 –

Access Copyright v York also involves claims about notices posted

To this extent, the lawsuit may become relevant to the practices of most 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

Last year awaiting clarification of substantiality – *Cinar Corporation v Robinson* 2013 SCC 17 – released this Christmas season

Robinson et al v France Animation S.A. et al – 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

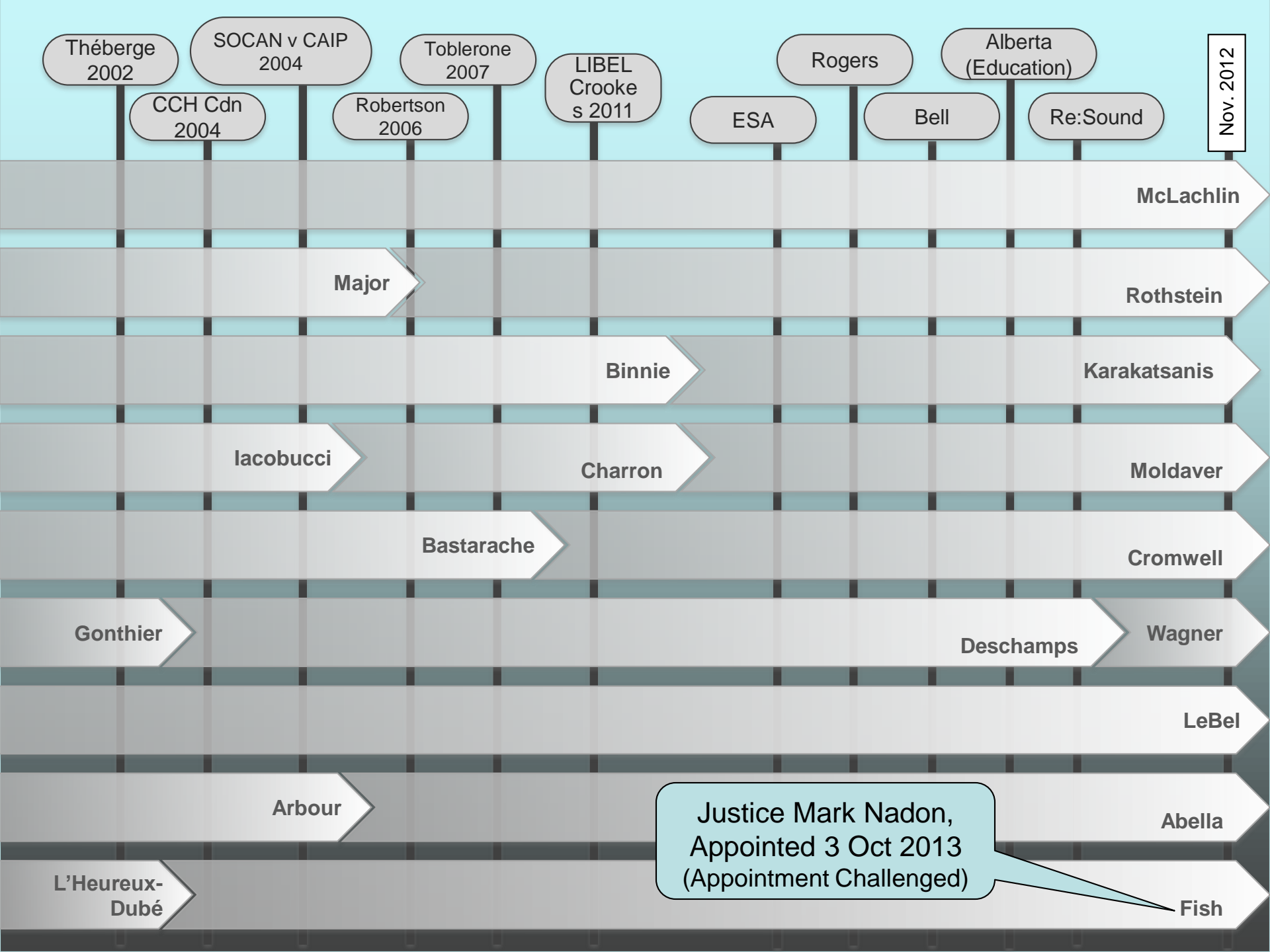
Rightsholders in “Robinson Curiosity” sued those involved in “Robinson Sucroe” for infringement

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



Although appeal heard February 13, 2013, the facts occurred before the *Copyright Modernization Act* and was decided on earlier *Copyright Act*.

“qualitative and holistic” approach to assessing substantiality –from the perspective of the “intended audience for the works at issue” – but placing the trial judge in the position of “someone reasonably versed in the relevant art or technology.”

McLaughlin, CJ, for LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver (7)



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

<div><p>CANADA</p></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>Emerald</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 60/62 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 defined 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 make 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 5 is entitled to 150 free document delivery credits to use per annum in order to retrieve fulltext articles of abstracts 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>AS WITNESS the hands of the parties the day and year before first written</p><p>FOR Emerald Group Publishing Limited</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>FOR The Ontario Council of University Libraries</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>Copyright Board Canada</div> <div><p>CANADA</p></div> <div>Commission du droit d'auteur Canada</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 Majean Mr. J. Nelson Landry</div> <div>L'honorable William J. Vancise M^{re} Claude Majean M^{re} 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

At the Copyright Board (Act Part VII (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

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”

Early fall 2013 –

All university post-secondary institutions had withdrawn from the Tariff process – leaving them either not using Access Copyright product OR operating under license

Late fall 2013 –

Western and Toronto abandoned contractual relations with Access Copyright and have joined the group of universities operating without using Access Copyright product

CMEC abandons relationships with Access Copyright and all schools except in Quebec now operating without using Access Copyright product

Where do the Tariffs before the Copyright Board sit?

- Access Copyright Provincial and Territorial Governments 2005-2009 AND 2010-2014
 - ✎ Heard by the Board; **decision pending (STILL)**
- Access Copyright K-12 2005 – 2009
 - ✎ Determination now completed (Tariff released Jan 19, 2013)
 - **\$4.81 per student per year; down from \$5.16 originally awarded by the Board...**
- Access Copyright K-12 2010-2012 (filed 2009); Access Copyright K-12 2013 – 2015 (published in Canada Gazette June 16, 2012) –
 - **May 29, 2013 Board Ordered an Interim Tariff 2010-2015**
- Elaborate process set up: <http://www.cb-cda.gc.ca/hearings-audiences/2013/access-copyright-elementary-secondarydirective-procedure.pdf>
CMEC will participate in the hearings scheduled for April 29, 2014 – though no schools will be affected by the outcome!
- Access Copyright Post-secondary 2011-2013
 - Association of Universities & Colleges of Canada (AUCC) AND Association of Canadian Community Colleges (ACCC) have withdrawn from the proceedings**
 - ✎ Set for hearing by the Board Feb 14, 2014 but, in mid-January, the Board adjourned the hearing “sine die” [to no fixed date and perhaps not to be brought back] – seeking input from Access Copyright before deciding how to proceed.

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.

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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.

Under the LAMS Regulations
since 1997:

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.

Approved by the Supreme Court in
the Law Society case:

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.

Adopting and Posting 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)

What are essential elements of the Great Library policy?

“The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for [an allowable] purpose... the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request.” (para 73, emphasis added)

The Law Society’s Great Library policy was directed to its users, not its employees. It was about making copies for those outside the organization, not for itself through its employees.

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)).**

Contracts and the Copyright Act

- **If digital locks are a problem with respect to accessing a given work –**
 - œ You cannot rely upon your statutory users' rights...
 - œ It may be best to negotiate a license to the work, into which you negotiate that digital locks be eliminated...

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...**

- **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.

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)

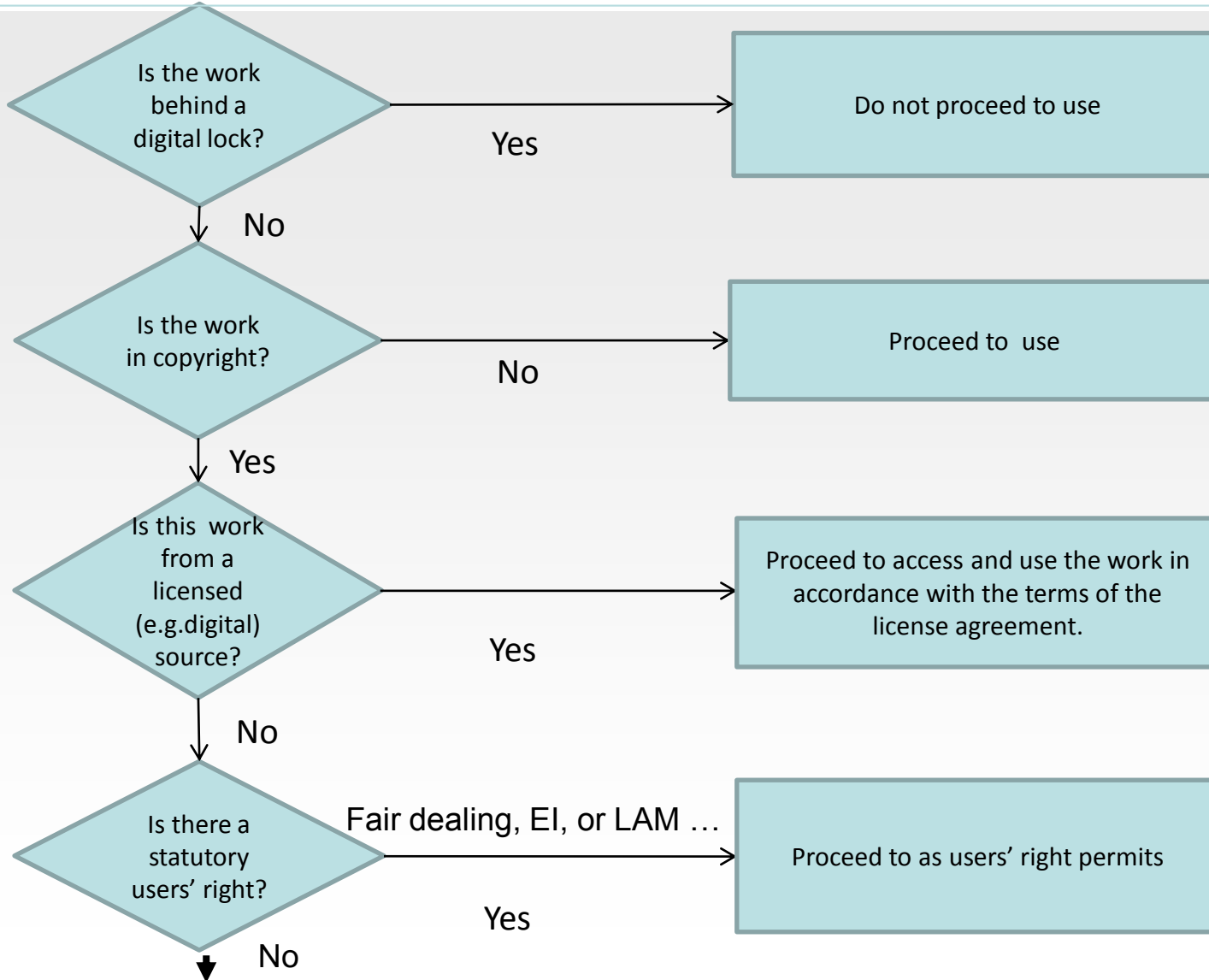
Violating the terms of the agreement would put the genealogist at risk of either or both of the following claims in a lawsuit:

- 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...

Flowchart for Use of Information



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

Contracts override the *Copyright Act* – but you can try to negotiate wording importing the wording of provisions of the Canadian *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...**

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*.

Nor can an argument be made that users' rights, as rights, trump copyrights, as copyrights have status as human rights

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.

COPYRIGHT UPDATE 2014

1. Following up on changes connected with the **Copyright Act**

- *The effect of TPM and DRM additions to the Copyright Act*
- *What is not in force from the 2012 Copyright Modernization Act...*
- *What regulations are pending*
- *Changes through the Combatting Counterfeit Products Act (now Bill C-8)*

2. The litigation situation

- *In the courts*
- *At the Copyright Board*

3. Of notices, permissions and contracts

- *Posting notices*
- *Crown copyright developments*
- *S.77 for unlocatable owners*
- *Contracts and the Copyright Act*

4. Progress at the international level

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

Another 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

26th session of SCCR was held at December 16-20, 2013 in Geneva – International Federation of Library Associations will be there (IFLA) as was CLA - M.A. Wilkinson was there as Legal Advisor to IFLA

There is controversy amongst nations about the nature of the international instrument that is suitable for Libraries and Archives – with some resisting the creation of a treaty and wanting something much less strong. But there is progress – see the Conclusions of SCCR 26 – and the next meeting (SCCR 27) is scheduled for April 27 – May 2, 2014 – with further meetings in 2014.

ONE “MODEL” TREATY ARTICLE PROPOSED IN IFLA’s “Treaty Proposal on Limitations and Exceptions for Libraries and Archives” [TLIB] is:

Article 15: Obligation to Respect Exceptions to Copyright and Related Rights

Any contractual provisions that prohibit or restrict the exercise or enjoyment of the limitations and exceptions in copyright adopted by Contracting Parties [i.e. nations] according to the provisions of this Treaty, shall be null and void.

What is the legal status of a “model”?

IFLA's TLIB?

TLIB has no legal status and never can have...

IFLA is an NGO and has no standing at the SCCR Committee of WIPO – only member states can propose treaty language...

IFLA's TLIB is a lobbying instrument, intended to attract the attention of member states – who can make treaties.

Just as “Model” contracts

... are not contracts...

a model contract is a document negotiated by parties who will not sign the document (if they did sign it, it would be a contract, not a model); it has no legal effect for anyone negotiating it;

the model expresses an intent which *can* give guidance to subsequent negotiations between parties who will actually sign legally binding contracts – but parties *can, and often do*, deviate from a “model” in their actual negotiations and final contract.

The following provision is *actually* proposed by members states for a library and archive treaty:

1. Relationship with contracts.

Contracts attempting to override the legitimate exercise of the provisions in Articles 2-5 shall be null and void as against the public policy justifying copyright and shall be deemed inconsistent with the goals and objectives of the international copyright system.

THIS PROVISION IS CURRENTLY “ON THE FLOOR”
AND BEFORE THE SCCR COMMITTEE OF WIPO
(ITSELF A UN AGENCY)

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.