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Copyright Update

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(research assistance by law students Justin Vessair, Dan Hynes and Dave Morrison)



There are 2 other copyright sessions:

TODAY at 3:45 pm: Licensing Digital Content in Room 202B with Joan Dalton and Victoria Owen

TOMORROW at 2:10 pm #1202 Collective Rights Management in Canada"

with me, Joan Dalton and Victoria Owen



Copyright Update: The Courts, Parliament, and the Copyright Board

The Courts

a) Supreme Court – 1 case to watch + 1 perhaps coming + tariff case perhaps coming
b) Federal Court of Appeal – 2 cases (leave to appeal to Supreme Court being sought in both, as above)

Parliament -

Bill C-32 The *Copyright Modernization Act* Introduced Tuesday, June 2, 2010...

The Copyright Board –

From 1 tariff proceeding in the past several years to 4 tariff proceedings now in play, at various stages, all affecting libraries ...



First to the Supreme Court (– file no. 33412)

Crookes v. Newton (2009 BCCA 392) Leave to Appeal granted on April 1, 2010... heard December 10, 2010... judgment being transcribed since Dec.22

a defamation (libel) case... copyright is not mentioned...on "publication"

• A website owner putting a hyperlink to another site will not automatically be considered "publication" of the material to which the link is made (and the majority in this particular case said there was no publication)...BUT

• Both the majority of the BCCA (Saunders, JA, for herself and Bauman, JA) and the dissenting judge (Prowse, JA) held that it *is* possible for the inclusion of a hyperlink to be publication

➢ "If it is apparent from the context in which the hyperlink is used that it is being used merely as a biographical or similarly limited reference to an original source, without in any way actively encouraging or recommending to the readers that they access that source then... this would not amount to publication." [Majority at para.59]

Factors tending toward a finding of publication, however, "would include the prominence of the hyperlink, any words of invitation or recommendation to the reader associated with the hyperlink, the nature of the materials which it is suggested may be found at the hyperlink..., the apparent significance of the hyperlink in relation to the article as a whole, and a host of other factors dependant on the facts of a particular case." [Majority atpara.61]constitute publication by the linking party of the material to which the link is made...



Federal Court of Appeal (Leave to appeal to SC sought – pending now – File No.33922)

Shaw Cablesystems v. SOCAN ("Tariff 22A") (September 2010) Pelletier for the Court

Our old friend from 2004 in the Supreme Court, "Tariff 22" on internet matters, sent back to be completed by the Copyright Board, has now been brought back to the courts on another aspect...

- The Federal Court has said that "publication to the public by telecommunication" will be found as a right of the rightsholder where (a) there is an intention to communicate to the public by the communicator and (b) there is reception of the communication by even one member of the public
- Point to point communication can, if there is intention by the communicator and reception by a member of the public, be within the rights of the rightsholder and not, as in the Law Society case, a matter of fair dealing – but it will not always be so found, as it was not in the Law Society case
- Communications from one source to many, however, are very likely to be found to lie outside fair dealing
- In this case, "any file iTunes offers to its clients is communicated to the public as soon as one client 'pulls the file'" (FCA para.61 quoting the Copyright Board at para.97 with approval)



The Copyright Board rendered its decision in the tariff proceeding between

The Ministers of Education (the users) and Access Copyright (the copyright holders)

June 26, 2009

Setting the amount schools needed to pay the owners of copyright in print materials for photocopying during the years 2005-2009 everywhere in Canada except in Quebec

This replaced the Pan Canadian Schools/Cancopy License Agreement agreed between the Ministers of Education and Cancopy (without going to the Board) that lasted from 1999 until 2009...

See: http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf



This year: Federal Court of Appeal (Leave to Appeal to the Supreme Court sought by the Ministers of Education – pending now – File no. 33888)

The Province of Alberta as Represented by the Minister of Education (and Others) – Applicants

And

The Canadian Copyright Licensing Agency Operating as "ACCESS COPYRIGHT" – Respondent

And

Canadian Association of University Teachers – Intervener (#1) (Leave to intervene sought November 27, 2009 and given December 23, 2009)

And

Canadian Publishers' Council, The Association of Canadian Publishers, and the Canadian Educational Resources Council – Interveners (#2) (Leave to intervene sought January 7, 2010 and given February 18, 2010)

The appeal was heard Tuesday June 8 and the decision released July 23, 2010 – Justice Trudel writing for Chief Justice Blais & Justice Noël



The Copyright Board's formula for setting tariffs – approved by Federal Court of Appeal:

• 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



Parliament

Bill C-32 – An Act to amend the Copyright Act

- Now in committee
- CLA, OLA and other library organizations have made and are making representations to government on it
- Future uncertain

cos It might pass without amendments but this is unlikely;

- It might pass with amendments and it is too soon to tell what might might be amended or what any amendments might look like;
- It might suffer the fate of its predecessor bills recently (Bills C-60 and C-61 which disappeared when their respective sessions of Parliament ended;

It might be defeated.

Unless and until it is passed in some form, the Copyright Act remains as it has been since last amended in 1997...



Parliament's tightrope in Bill C-32:

If it broaden 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 <u>Theberge</u> 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...



If passed, Bill C-32 will give the same protections to photographs as are now given to every other work under the Copyright Act – for the same period of life of the photographer + 50 years...

And, in general, ownership will lie with the photographer – but for certain private uses, a commissioning person will still have rights...



Bill C-32 would make it explicit that posting to the Internet is a right of the rightsholder (already decided by the Tariff 22 case in the Supreme Court)

Distributing "lessons" would be infringing copyright (secondary infringement)

Remember that the **moral rights** are separate from the **economic rights** in WORKS and non-transferable and therefore cannot be exercised by anyone other than the original author...



In Canada, the <u>author</u> 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].
- IF PASSED, Bill C-32 will give moral rights to performers (as well as the economic rights they were given in the 1997 amendments)
- Not transferable... licensing not an option.



Technological Protection Measures (TPMs) are given legal sanction by Bill C-32

BUT NOT IF THEY INTERFERE WITH

- Interoperability
- personal data protection or privacy rights
- Access needs because of perceptual disability

AND

• Libraries which are LAMs and Educations Institutions (as defined) have special defence provisions with respect to the TPM sections

Note: the definition of "Libraries, Archives and Museums" (LAMs) is not changed by Bill C-32 and therefore, to the extent that Bill C-32 provides privileges to LAMs it further divides libraries amongst themselves -- those who are owned by for profit entities (most special libraries and some educational institution's libraries, for example) will not have access to the increased exemptions of their LAMs colleagues... and, similarly, for "educational institutions"

Bill C-32 also legally protects Digital Rights Management information from interference if rightsholders have embedded it...



Users' Rights expanded – especially FAIR DEALING

Research

Private study

Criticism *

Review *

News reporting *

* if source and attribution mentioned

The Supreme Court has said:

"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 <u>Copyright Act</u> to prove that it qualified for the library exception." (LSUC case) Bill C-32 would expand FAIR DEALING to add Education Parody Satire

And a category of Noncommercial user-generated content (s.29.21)

And reproduction for private purposes – without circumventing Technological Protection Measures (s.29.22)

And time-shifting (s.29.23)

And back-up copies (s.29.24)



- The LAMs exceptions are not necessary if libraries can claim what they do under fair dealing (and Bill C-32 will could enlarge fair dealing even more, of course)
- The definition of LAMs remains unchanged so libraries in for profit institutions cannot claim them.



The Copyright Board of Canada & Libraries

- 1. In the education sector,
 - School boards everywhere except in Quebec have been affected by the decision of AccessCopyright to take the Ministers of Education to the Board for a Tariff for 2005-2009... (now at Supreme Court)
 - School boards everywhere except in Quebec are now being affected by the decision of AccessCopyright to take the Ministers of Education to the Board for a Tariff for 2010-2012
 - Universities and Colleges are affected by the recent decision by AccessCopyright to abandon individual negotiations with universities (or with an organization representing them) and to apply instead for a Tariff before the Board.
- 2. In the government sector, AccessCopyright has applied to impose a Tariff for 2005-2009 and another for 2010-2012 to the Provincial and Territorial governments...

If you are doing something only the copyright holder has a right to do – and you do not have a "user's right" under the Copyright Act to do it – then the following terms become relevant:



To get control of a use of a work:

- 1. Permission to use
- 2. Assignment of the right itself
- 3. License from the copyright owner or some collectives
- 4. Order of the Copyright Board where collectives are involved – some collectives can only go this route

- 1. Can be free or \$\$
- 2. Can be free or \$\$
- 3. \$\$ are termed royalties
- 4. \$\$ is termed the tariff

IF YOU DO HAVE A USER'S RIGHT, THEN YOU DO NOT NEED PERMISSION – And none of those terms are relevant --

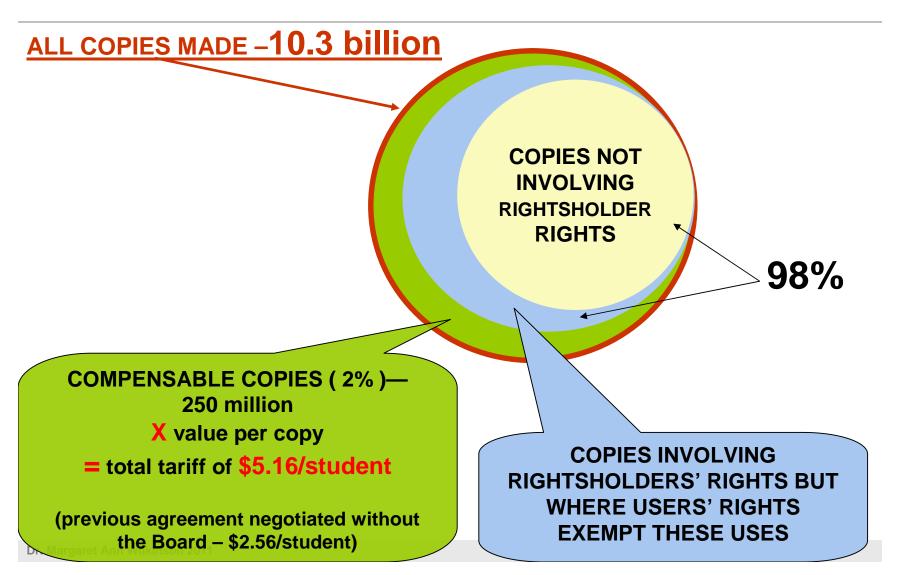
A Collective is, generally, a voluntary organization that represents the holders of a particular economic copyright *in terms of the administration and enforcement of selected rights associated with that copyright*



Music performing collectives SOCAN Retransmission collecting bodies SOCAN (also) Other reproduction collectives CMRRA (mechanical reproductions of music) CANCOPY and COPIBEC (successor to UNEQ) reproduction rights only

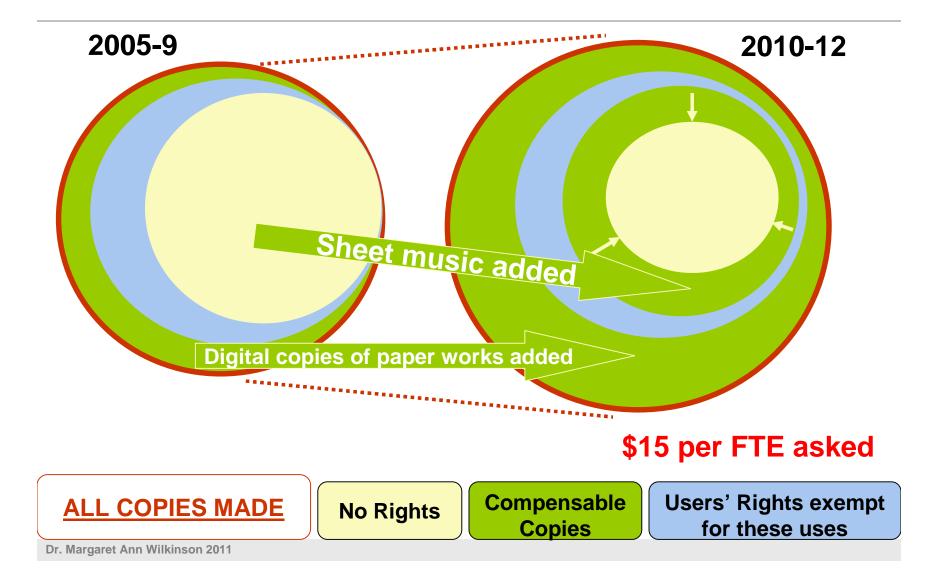
K-12 2005-2009 findings of the Copyright Board -







K-12 new 2010-2012 tariff before the Copyright Board







- Proposed fee is **\$24.00/FTE civil servant**
- Coverage of the proposed Tariff is similar to Schools Tariff

Presumably AccessCopyright expects less government copying to be identified as non-compensable because of the users' rights in the Act (the difference between seeking \$15/student and \$24/civil servant)

The Copyright Board has set this tariff for hearing September 13, 2011...

How might these future Tariff proceedings before the Board be affected by Bill C-32 if it passes?

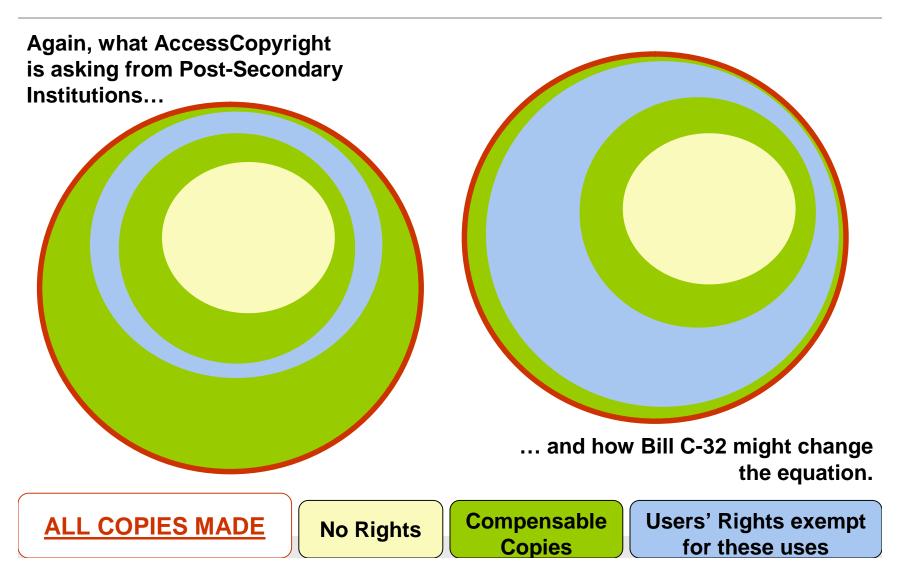


2011-2013 Post- Secondary Tariff as Proposed for \$45 per FTE Copies of works available digitally added beyond what the K-12 2005-2009 Tariff covers Digital copies of paper works added beyond what the K-12 2005-2009 Tariff covers



If Fair Dealing Users' Rights are enlarged and if Educational and LAMs Exceptions are expanded?







In the licenses negotiated by universities and colleges with AccessCopyright (without the intervention of the Copyright Board tariff process), there were typically 2 important clauses:

 There was a recital at the beginning that Access Copyright and the institution signing the agreement agreed to disagree on the extent of fair dealing...

And

2. There was an indemnification clause under which Access Copyright agreed to compensate the college or university if a copyright holder who was not a member of Access Copyright successfully sued the institution (because such a copyright holder would not be covered by the license).

Neither of these clauses can appear in a tariff created by the Copyright Board – and so they don't...



To give libraries the protection under tariffs that their instituions had negotiated under the earlier licenses, the Copyright Act would have to be changed

- To say that contracts cannot override fair dealing rights
 And
- 2. Where a collective exists, it represents that class of rightsholders on a worldwide basis unless the rightsholder specifically opts out (the extended repertoire or extended licensing system)

Bill C-32 proposed neither of these changes to the Copyright Act...



Thank you. Some resources:

- OLA's position and a summary of Bill C-32 as it affects libraries (prepared by Western Law students Justin Vessair, Dave Morrison and Dan Hynes) is at <u>http://www.accessola.com/ola/bins/content_page.asp?cid=1-99-3377</u>
- 2. Copyright Board of Canada http://www.cb-cda.gc.ca/
- 3. Margaret Ann Wilkinson, "Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries" in Geist (ed), From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010) <u>http://www.irwinlaw.com/store/product/666/from--radicalextremism--to--balanced-copyright-</u>
- 4. Margaret Ann Wilkinson, "**Open Access and Fair Dealing: Philanthropy or Rights?**" in Mark Perry and Brian Fitzgerald (eds) <u>Digital Copyright in a User-</u> <u>Generated World</u>.— Irwin Law, forthcoming.