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# Copyright: Bill C-32 and what is not there...

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## **COPYRIGHT: Bill C-32 and what is not there...**

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(with thanks for conversations with Dr. John Tooth  
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Dan Hynes and Dave Morrison)

# Parliament, the Copyright Board and the Courts...

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## **Parliament –**

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

## **The Copyright Board –**

**4 tariff proceedings are in play, at various stages, that affect  
various of our library communities...**

## **The Federal Court of Appeal –**

**1 of the 4 tariff proceedings was decided by the Copyright Board  
and has been judicially reviewed by this court...**

***These three copyright policy - developing areas are interrelated...***

## Why will I not just focus today on what is in the new Bill?

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- (1) As CLA has noted in its press release of June 3, Bill C-32 is probably not in its final form yet – and it has not yet affected the law in Canada because it is not yet passed. Bills C-60 and C-61 in the recent past, indeed, never did become law –**
- (2) Bill C-32 will not be changing the processes involving the Copyright Board in which many of our libraries are currently being engaged (because it does not present any changes to those areas of Copyright Act) --**
- (3) Because the copyright rightsholder collectives (chiefly Access Copyright) are taking the institutions in which many of our libraries are situated to the Copyright Board, libraries generally may experience the effects of Bill C-32, if it passes, in a new way...**

# What are the processes before the Copyright Board in which libraries have become engaged?

1. **In the educational sector**, there is increasing “action” related to the Copyright Board that affects libraries in the K-12 and post-secondary environment right across the country:
  - **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...**
  - **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** 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...
3. AccessCopyright has the option under the Act to apply to the Board for Tariffs in respect of **other sectors of libraries**, including public libraries...

# Collectives have long existed in the music industry --

**Canadian Performing  
Rights Society  
1926**

1935 – Copyright Appeal Board created for these rights

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**Composers Authors & Publishers  
Association of Canada  
CAPAC 1946**

**BMI Canada  
1940**

**PROCAN  
1978**

1988 - Copyright Act amendments

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**SOCAN  
1990**

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

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



**Economic rights in works**

**Economic rights  
in “other subject matter”**

- 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

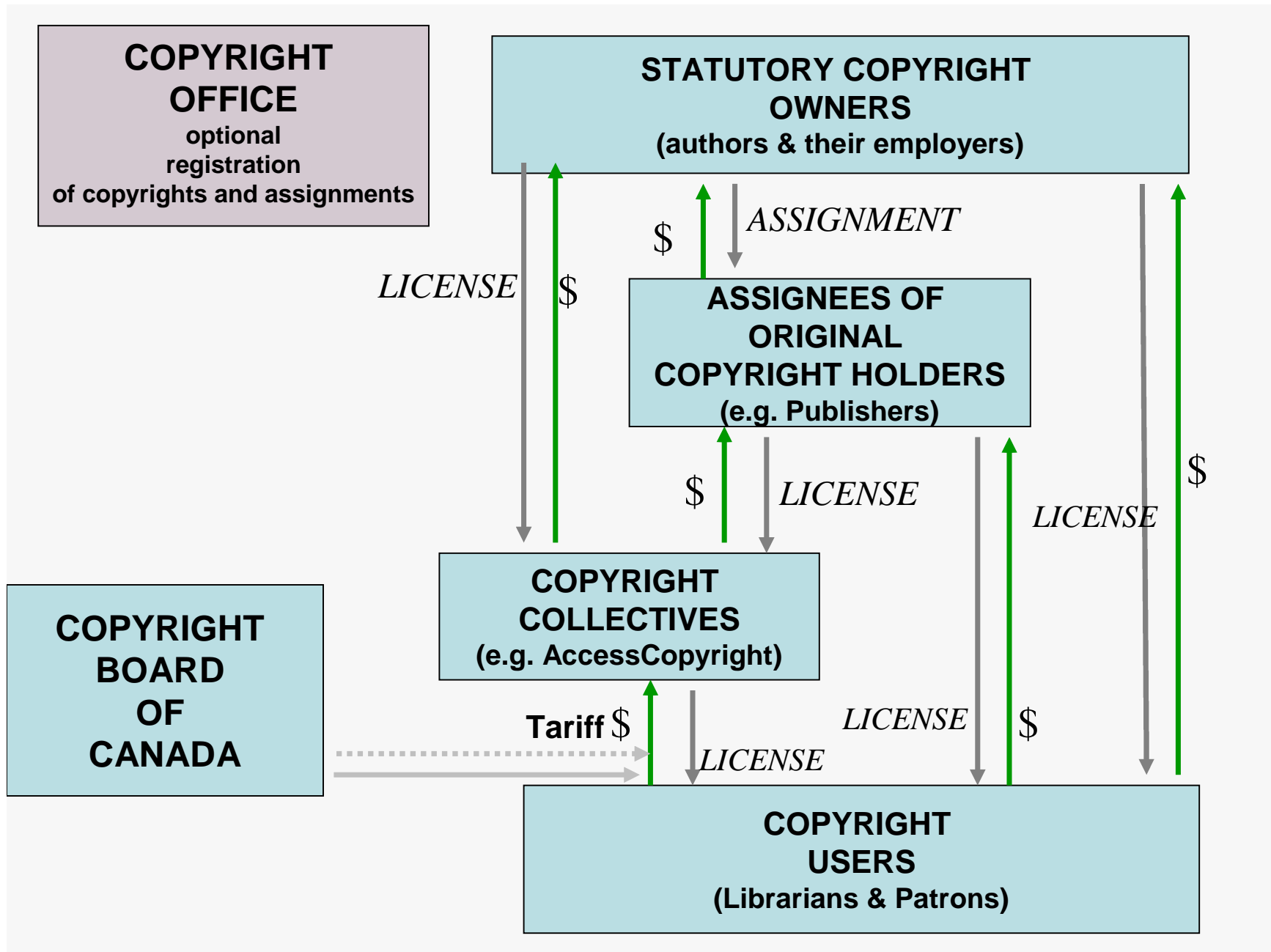
- to communicate a **performer’s performance** by telecommunication
- to “fix” a **performer’s performance**
- to reproduce a fixed **performance**
- to rent out a sound recording of the **performance**
- to publish, reproduce or rent a **sound recording**
- to fix a **broadcast signal**
- to retransmit a **signal**
- to authorize any of the above*



<b>3(1) Right</b>	<b>Associated Collective Society</b>
<b>(a) Reproduction</b>	<ul style="list-style-type: none"> <li>i) Access Copyright (print - English)</li> <li>ii) COPIBEC (print – French)</li> <li>iii) Canadian Musical Reproduction Rights Agency – CMRRA (music)</li> <li>iv) Society for Reproduction Rights of Authors, Composers and Publishers in Canada -- SODRAC (music)</li> <li>v) Criterion Pictures (film)</li> <li>vi) Canadian Artists' Representation Copyright Collective – CARCC (art and photography)</li> <li>vii) Producers Audiovisual Collective of Canada – PACC (film, television, and other audio-visual work)</li> <li>viii) Audio-Visual Licensing Agency – AVLA (audio and music videos)</li> </ul>
<b>(b) Conversion to non-dramatic work</b>	
<b>(c) Conversion to dramatic work</b>	

3(1) Right	Associated Collective Society
(d) Mechanical reproduction/performance	
(e) Adaptations	
(f) Telecommunicate to Public	<ul style="list-style-type: none"> <li>i) Societe civile des auteurs multimédias – SCAM (film - French)</li> <li>ii) Societe des auteurs et compositeurs dramatiques – SACD (theatre, music and radio - French)</li> <li>iii) Canadian Broadcasters Rights Agency – CBRA (television and radio)</li> <li>iv) SODRAC (music)</li> <li>v) Society of Composers, Authors and Music Publishers of Canada – SOCAN (music)</li> <li>vi) Criterion Pictures (movies)</li> <li>vii) PACC (film, movies and other audio-visual work)</li> <li>viii) Audio-Visual Licensing Agency – AVLA (audio and music videos)</li> <li>ix) Canadian Retransmission Collective – CRC (television and film)</li> <li>x) Canadian Retransmission Right Association – CRRRA (film and radio)</li> </ul>

3(1) Right	Associated Collective Society
(g) Public exhibition	<ul style="list-style-type: none"> <li>i) SOCAN (music)</li> <li>ii) Audio Cine Films (film)</li> <li>iii) Educational Rights Collective of Canada – ERCC (television and radio)</li> <li>iv) Criterion Pictures (movies)</li> <li>v) PACC (film, movies and other audio-visual work)</li> <li>vi) Audio-Visual Licensing Agency – AVLA (audio and music videos)</li> </ul>
(h) Computer programs	
(i) Renting musical work	



## Copyright Office

established under **s. 46**  
administered under  
Canadian Intellectual  
Property Office  
(CIPO) within  
Industry Canada

keeps registry of  
copyrights and  
assignments  
(optional process in  
copyright)

## Copyright Board

established under **s. 66**  
administrative tribunal  
must approve all tariffs and  
fees charged by  
collectives

can also set individual  
royalties when requested

also can grant non-exclusive  
licenses for use of works  
of unlocatable owners

increasing importance

**Not, of course, forgetting the role of the provincial courts and Federal Court in adjudicating infringement actions under the Act, and the Federal Court (trial and appeal levels) in adjudicating disputes under the Act involving registration, and sitting on review of these administrative tribunals, all determining rights created under the Act**

## The Copyright Board's formula for setting tariffs:

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- **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**

“subtract” materials that are not works and are not protected by copyright -



- the Act only protects substantial portions or the whole of original expressions -
  - **Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty**
- And the Act only protects works and other subject matter for specified lengths of time; generally for works, the life of the author + 50 years, and for other subject matter, generally, for 50 years... so, older works are not in copyright.

**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...**



“subtract” activities performed by users and intermediaries such as librarians that do not ever come into the realm of copyright holders’ rights...

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- Purchasing individual copies of materials from commercial publishers, to use or distribute to clients is fine
- Traditional ways of using and disseminating knowledge by looking it up and then re-expressing it in your own words is fine

Reading is not a use included in the copyright holders’ bundle of rights;

Borrowing is not a use traditionally included in the copyright holders’ bundle... (although that bundle does now include rentals of sound recordings and computer programs)

# The situation of the K-12 Tariff for 2005-2009

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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**

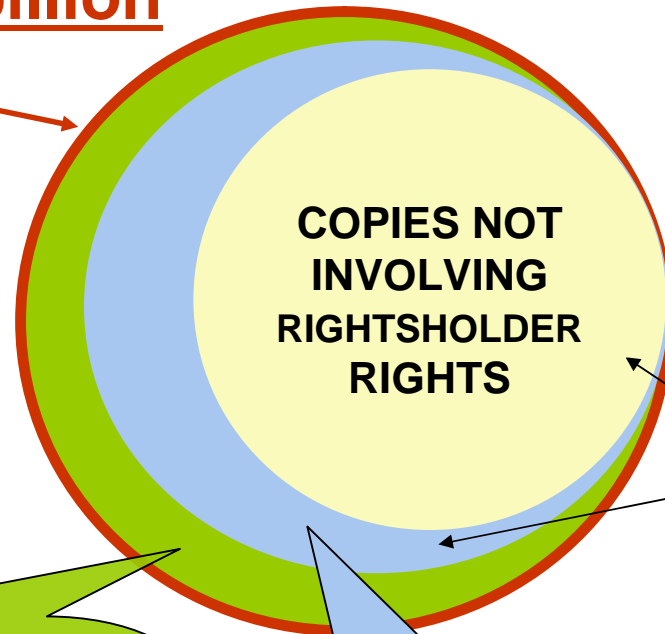
**This replaced the Pan Canadian Schools/Cancopy License Agreement  
agreed between the Ministers of Education and Cancopy (without  
going to the Board) that lasted from 1999 until 2009...**

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

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



**ALL COPIES MADE -10.3 billion**



**98%**

**COMPENSABLE COPIES ( 2% )—  
250 million  
X value per copy  
= total tariff of \$5.16/student  
  
(previous agreement negotiated without  
the Board – \$2.56/student)**

**COPIES INVOLVING  
RIGHTSHOLDERS' RIGHTS BUT  
WHERE USERS' RIGHTS  
EXEMPT THESE USES**

## At the Federal Court of Appeal – File No.A-302-09

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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

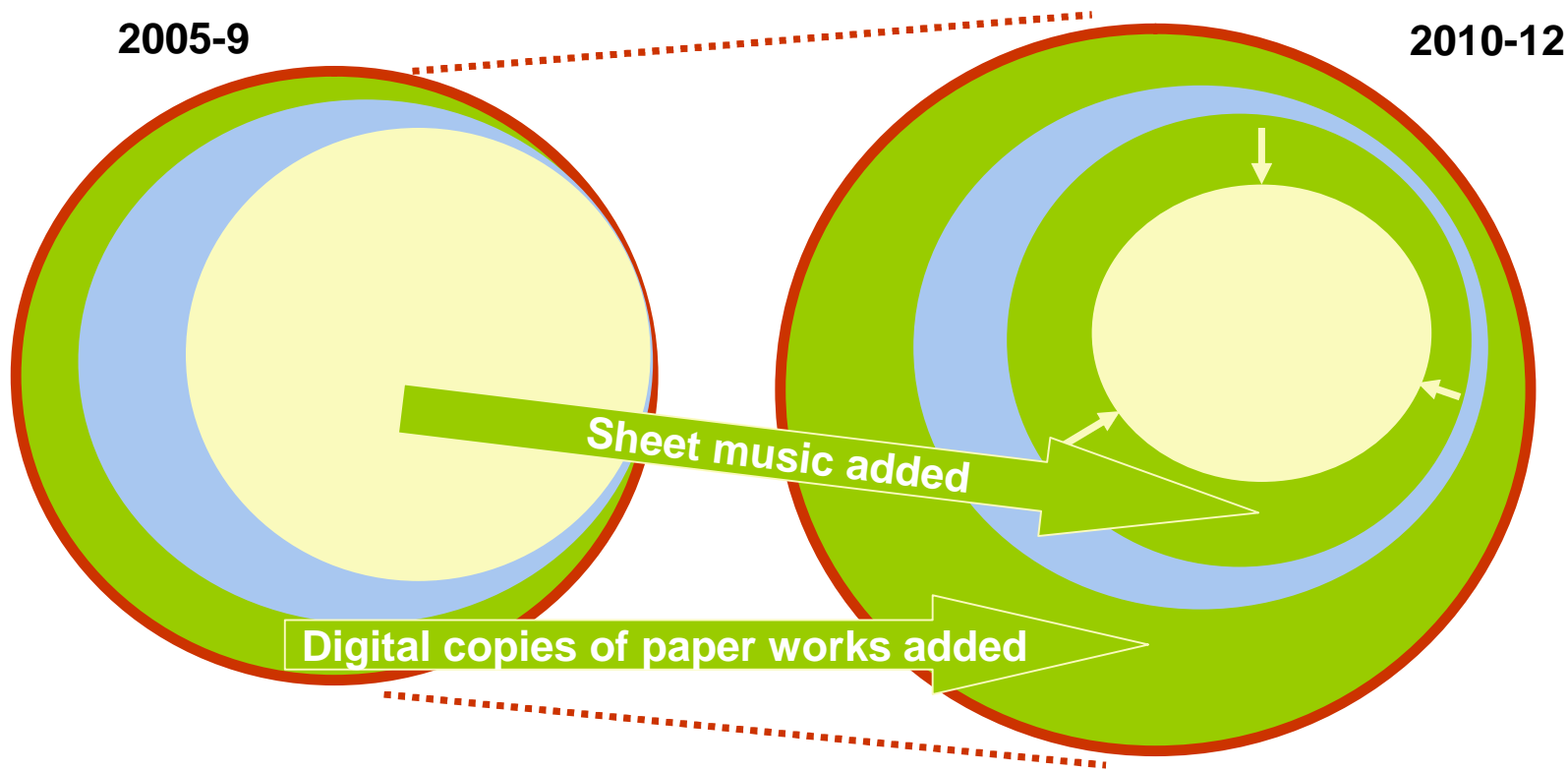
**Canadian Association of University Teachers – Intervener (#1)**  
(Leave to intervene sought November 27, 2009 and given December 23, 2009)

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

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



**ALL COPIES MADE**

No Rights

Compensable Copies

Users' Rights exempt for these uses

## What is Access Copyright proposing for the 2010-2012 tariff?

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**Tariff fee proposed is \$15.00/FTE student– up from the \$5.16/FTE student appealed to the Federal Court of Canada and to be adjusted slightly by remission back to the Board on the question of whether exam copying was actually not available in a medium that is appropriate for the purpose and thus not compensable (which would reduce the tariff now payable of \$5.16 a bit**

**(but note enlarged scope of “product” AccessCopyright is offering in the 2010-2012 tariff for schools)**

**Canadian Ministers of Education (CMEC) has indicated its intention to oppose...**

**Access Copyright has not sought a hearing date with the Copyright Board to pursue this new tariff**

## Access Copyright's proposed 2005-2009 and 2010-2014 Provincial and Territorial Government Tariffs

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- 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)

## What is happening between AccessCopyright and Post-secondary Institutions?

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- Back this past Winter, Access Copyright was writing to each college and university directly (since the actual signed licenses in place are individual to each institution and Access Copyright) giving individual notices of its intention to terminate the existing licenses and begin negotiations anew
- These letters mentioned that the new license terms and conditions might be created either by agreement of the parties (that is, Access Copyright and the university or college to whom the letter was addressed) OR by the Copyright Board...
- But, at any time, a collective CAN apply to the Board if the amount to be paid by a copyright user and a copyright owner cannot be agreed between them (s.70.2) ... and Access Copyright has decided now to abandon negotiation for licenses with individual universities and has now applied to the Board for a Tariff (as it has now done, as we have seen, for schools





## What is AccessCopyright's proposed Tariff for Post-Secondary institutions for 2005-2009?

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On March 30th, 2010, Access Copyright filed a proposal with the Copyright Board of Canada for a tariff for reproductions for course packs and day-to-day photocopying for Post-Secondary Educational Institutions

Unlike the 2005-2009 School Tariff, the proposed post-secondary tariff would include **both print and digital works** in its repertoire

The proposed tariff is \$45.00/FTE – presumably the difference AccessCopyright expects between the value of print and print to digital in the education and civil service tariffs and print and digital in this one for universities and colleges

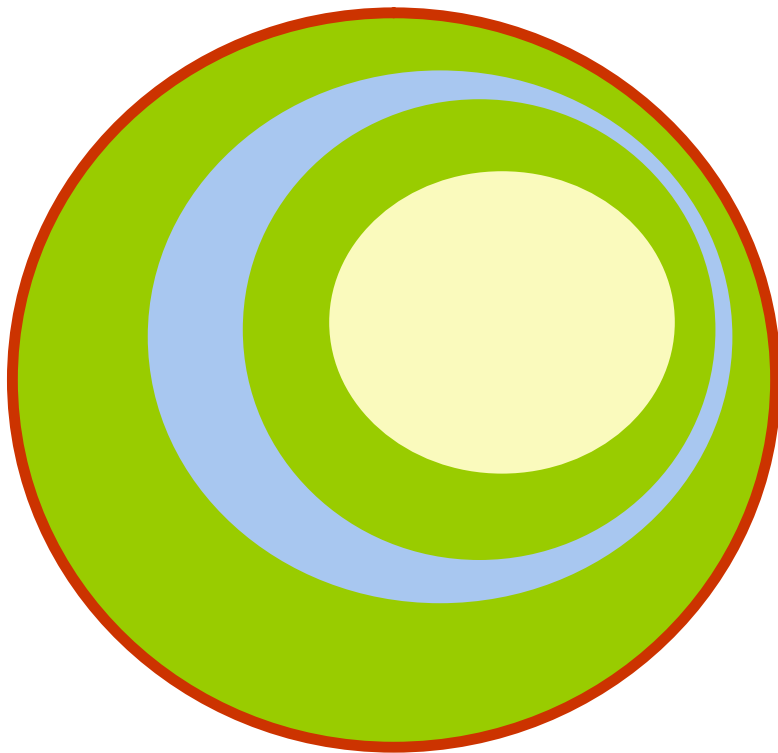
The proposed tariff is posted to the Copyright Board of Canada website

The Association of Colleges and Universities of Canada, on behalf of the individual institutions, has written opposing (July 15, 2010) – and other university-related organizations have written opposing (such as the Canadian Association of University Teachers (CAUT), although it does not represent institutions on which the tariff would be levied)

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



## 2010-12 K – 12 Tariff as Proposed



**ALL COPIES MADE**

**No Rights**

**Compensable  
Copies**

**Users' Rights exempt  
for these uses**

# The greatest area of exemption for library activities is 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 Copyright Act 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 Non-commercial 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)**

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

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**BUT NOT IF THEY INTERFERE WITH**

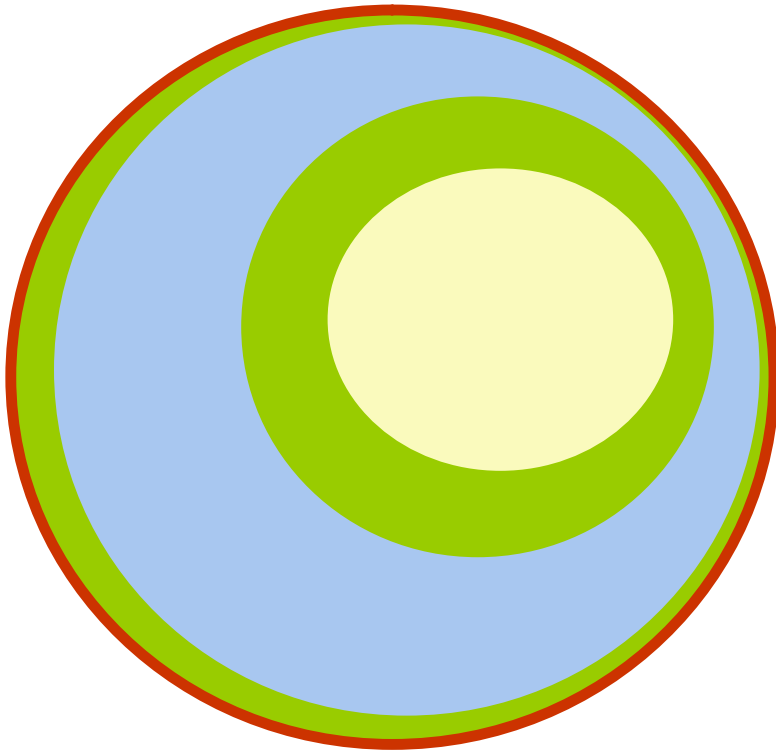
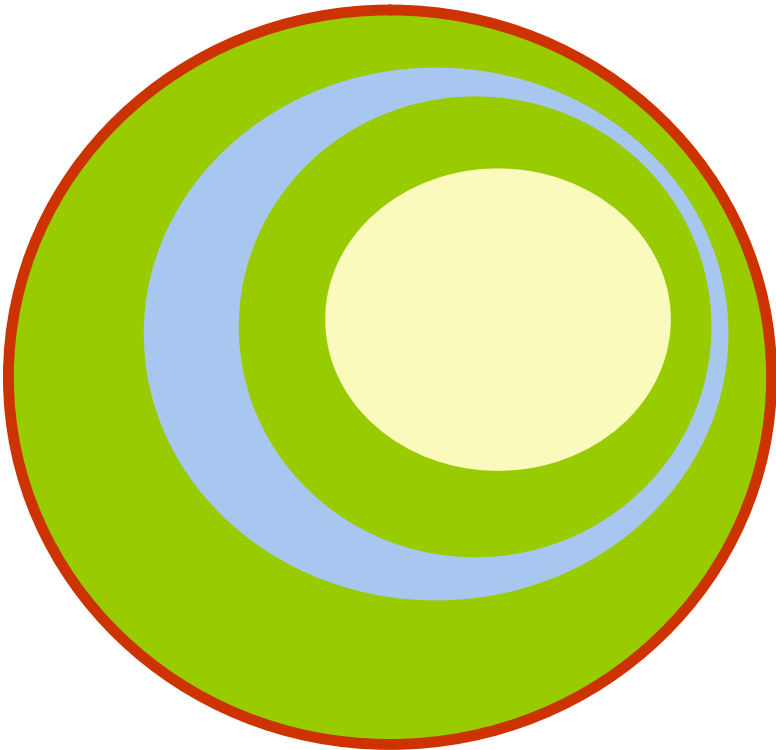
- **Interoperability**
- **personal data protection or privacy rights**
- **Access needs because of perceptual disability**

**AND**

- **Libraries which are LAMs 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...

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



**ALL COPIES MADE**

**No Rights**

**Compensable Copies**

**Users' Rights exempt for these uses**

## But recall that Bill C-32 is silent on collectives...

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

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

And

2. There was an indemnification clause under which Access Copyright agreed to compensate the library if a copyright holder who was not a member of Access Copyright successfully sued the library (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 they 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...

Remember that the **moral rights** are separate from the **economic rights** in WORKS and non-transferable and are not part of these proceedings before the COPYRIGHT BOARD...

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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**].
- **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.

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# Thank You

Further detail will be appearing shortly as Margaret Ann Wilkinson, **“Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries”** in a new collection edited by Michael Geist and published by Irwin Law (in the tradition of the earlier collection *In the Public Interest*).

I referred during our conversations together to two other resources:

1. Maskell, Catherine A., (2008) “Consortia: anti-competitive or in the public good?,” 26 (2) Library Hi-Tech 164-183.
2. Copyright Board of Canada <http://www.cb-cda.gc.ca/>