

Canadian Library Association
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Copyright in 2012 Workshop

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Copyright in 2012 Workshop

1. The Courts – **linking is probably not copying...**
2. Parliament – **Bill C-11**
3. The Copyright Board and Access Copyright–
4 tariff proceedings now in play, at various stages, all affecting libraries
4. What are the choices facing Post-secondary Institutions?
To Contract or Not to Contract: that is the question!
5. Library exceptions on the international stage
IFLA has put us there!

Tomorrow afternoon 4-5:30, session C-20, with the 2 of us again:

**Copyright - New Legislation and Its Impact;
Working With and Without Collectives;
Discussion of Recent Court Cases.**

Saturday afternoon 1-2:30, session I-65, with John Tooth:

Copyright Bill C-11 and its Implementation

Crookes v. Newton (2011 SCC 47) in the Supreme Court - on linking

Defamation (libel) case, not copyright, but about “publication”

- 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)]

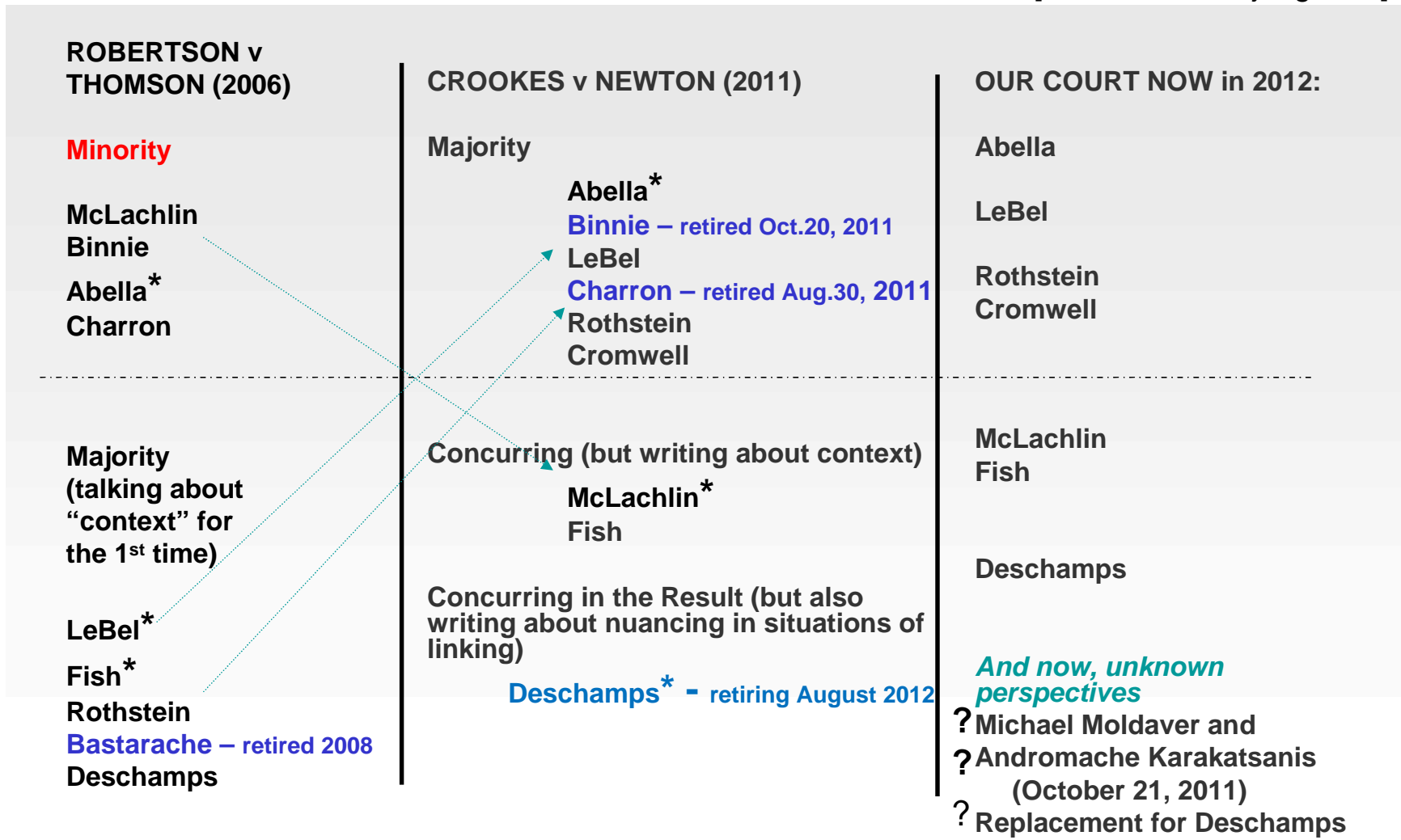
Justice Abella made the analogy between a reference in the traditional paper publishing world and the link in the new digital internet realm and said they perform the same function and therefore “a hyperlink, by itself, is content neutral”[para.30]

- **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 (retiring this August), also took a nuanced approach...**

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

Our Supreme Court and Copyright “context”

[* means wrote judgment]



Turning from “context” to “fair dealing”

Even the Supreme Court seems less interested in “context” than it once was, and the Copyright Act never uses the word...

But “fair dealing” is a concept embedded in our Copyright Act (s.29, 29.1 and 29.2) and is unique to Canada...

And there is a great deal of interest in what it means coming up this year...

FIRST – in the Supreme Court --

Tariff 22 (SC 2004) returns as Tariff 22A in a suite of cases to be watched for from the Supreme Court...

Internet decision, where, back in 2004, the Supreme Court used an information flow analysis as the way to analyze this new technological environment... An unusual case to have come to the Supreme Court in that the Copyright Board had “split” its job, asking first if there was any right of copyright holders involved and answering itself (a decision known as **Tariff 22**)– which was then appealed to the Federal Court of Appeal and Supreme Court – after which the Board planned to actually do its job, if there were rights involved, and set the appropriate tariff after a full hearing...

When the matter returned to the Copyright Board to actually set the Tariff, now that it was established that some parties, though not ISPs, were liable in the internet context for copyright and therefore would have to pay the tariff to the copyright holders, the case became known as **Tariff 22A**...

After the **Tariff 22A** decision was released, a number of affected parties separately sought judicial review of the Tariff (having different interests, they launched separate applications). Because all these applications arise from the same Tariff, the Federal Court of Appeal (Justices Létourneau, Nadon and Pelletier), heard them together in 2010. In two applications Pelletier wrote for all 3 judges, in the 3rd, Létourneau wrote for all 3. None of the parties was satisfied and all sought leave to appeal to the Supreme Court, which gave them all leave to appeal in them on March 24, 2011 – and then heard the 3 cases together on December 6, 2011. Decisions in all 3 are pending...

The Tariff 22A suite:

(1) *Shaw Cablesystems v. SOCAN (Pelletier for the FCA)* – File No.33922

In this case, will the Supreme Court agree that “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)?

(2) *Entertainment Software v. SOCAN (Pelletier for the FCA)*- File No.33921

On internet game sites and the music involved in them... Although game publishers argued that music plays a very small role in the games (an insubstantial role), the FCA has held that the amount of the use is a question for establishing the \$\$ value of the tariff but the use of the music in the games *is* the proper subject matter for a tariff.

(3) *SOCAN v. Bell (Létourneau for the FCA)* – File no. 33800 – **squarely about fair dealing:**

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

Is this a taking for which the 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?

FCA and Copyright Board thought fair dealing... will the Supreme Court agree?

More on Fair Dealing coming from the Supreme Court --

1. Schools – K-12 – 2005-2009 uses

1. \$5.16/student/year ordered by the Copyright Board* (from earlier negotiated license fee of \$2.56)

* To be phased in over the period of the contract.

The Copyright Board's formula for setting tariffs between Access Copyright and the schools (which the FCA approved):

- 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 EACH INSTITUTION IS TO PAY TO THE COLLECTIVE

And litigation over that 1st K-12 Tariff (2005-2009) has continued...

**1. Schools – K-12 – 2005-2009
uses**

The Ministers appealed to the Federal Court of Canada – minor changes to the Tariff were ordered July 23, 2010. The FCA

(a) confirmed the Copyright Board’s perspective on fair dealing and

(b) re-directed the Copyright Board on the treatment of reproduction for tests and exams

On the meaning of fair dealing, the Federal Court of Appeal said:

“Private study” presumably means just that: study by oneself... When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.” (P38)

The Federal Court of Appeal decision in the 1st K-12 Tariff, in turn, has resulted in two different subsequent proceedings:

1. On the question of the interpretation of **Fair Dealing**, the Ministers of Education sought Leave to Appeal to the Supreme Court – which was granted and the appeal itself was heard December 7, 2011 – we are now awaiting judgment (Case no.33888).

2. On the question of the value of reproduction for tests and exams, no one tried to appeal and so the matter is remitted back to the Board to re-evaluate the Tariff in respect of just that relatively small matter – no hearing date before the Board has been set.

- **So we await an imminent set of major pronouncements from the Supreme Court on “fair dealing”: the K-12 Tariff decision and the decisions in the Tariff 22A suite...**
- **And, we are awaiting Parliament...**

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Bill C-11

How amending the Copyright Act affects Libraries

Bill C-11:

How amending the Copyright Act Affects Libraries

- Changes to Fair Dealing
- Amendments to the Library sections of the Copyright Act
 - Print Disabilities
 - ISP Liability
 - Educational Rights
 - Collective Licencing
 - Digital Locks

Amending the Canadian Copyright Act

- The last major amendments to the Copyright Act were in 1997 by the Chretien Government.
- The last three bills to amend the Copyright act were in 2005 (C-60), 2008 (C-61) and 2010-2011 (C-32).
- All three bills failed to pass the House of Commons before the next election.
- The Minister of Canadian Heritage promised that the next bill would have the exact same text as Bill C-32 from 2010 – 2011.

Legislative History of Bill C-11

- First Reading – September 29, 2011
- Second Reading and Referral to Committee – February 13, 2012
- Committee Report with amendments to C-11 – March 15, 2012
- Report Stage – May 15, 2012

Summary of the Bill

This enactment amends the *Copyright Act* to

(a) *update the rights and protections of copyright owners...*

(b) *clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright,*

(c) *permit businesses, educators and libraries to make greater use of copyright material in digital form;*

(d) *allow educators and students to make greater use of copyright material;*

(e) *permit certain uses of copyright material by consumers;*

(f) *give photographers the same rights as other creators;*

(g) *ensure that it remains technologically neutral; and*

(h) *mandate its review by Parliament every five years.*

Fair Dealing

- Fair Dealing is a user's right. Sections 29 – 29.2
- Fair Dealing is for the purposes of research, private study, review, criticism and news reporting.
- A copy made for a fair dealing purpose does not infringe copyright.

2004 CCH Supreme Court Judgment

Fair dealing greatly expanded by Supreme Court with positive implications for individuals and libraries:

"Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the Copyright Act.
(Para 51)

The Six Factors

In the CCH judgment, six factors were provided for deciding whether something was a fair dealing or not. The six factors are:

1.purpose,

2.character,

3.amount,

4.alternatives,

5.nature, and

6.effect.

Changes to Fair Dealing under Bill C-11

Three new purposes are added to fair dealing:

- Education
- Parody
- Satire

New Consumer Rights

- s.29.21 – Non-commercial User Generated Content (mashups)
- s.29.22 – Reproduction for Private Purposes (format shifting)
- s.29.23 – Fixing Signals and Recording Programs for Later Listening or Viewing (time shifting)
- s.29.24 – Back up Copies

Mashups

s.29.21 – Non-commercial User Generated Content

- Take pre-existing works and combine them to create new content for posting to Youtube and similar social media.
- Have to be able to name the sources of your material.
- Legal, not pirated sources of original material.
- You cannot earn money from your mashups.

Time and Format Shifting

s. 29.22 – Reproduction for Private Purposes

- Ripping music to your MP3 player

s. 29.23 – ...Recording Programs for Later Listening or Viewing

- Using your PVR to record a program to watch later.

Format and Time shifting clearly legal in US since 1984.

Format and Time shifting clearly legal in Australia since 2006.

Back up Copies

s. 29.24 – Back up Copies

- In addition to backing up software (s. 30.6), Canadians can legally back up digital media that they own.
- Again no circumvention of digital locks is allowed.

Library Sections of the Act

Three Sections of the Copyright Act already give special rights to Libraries, Archives and Museums:

- Section 30.1 allows libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allows libraries to act on behalf of their users for fair dealing.
- Section 30.3 confirms the right of educational institutions, libraries, archives and museums to have self serve photocopiers, but they were required to have a licence from a reprographic copyright collective.

C-11 amends two of the Library Sections

- Section 30.1 allows libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allows libraries to act on behalf of their users for fair dealing.

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;

Implications of s.30.1

- Libraries no longer need to wait until format is officially obsolete before migrating something to a new format that our users can use.
- All the other restrictions in s.30.1 (commercially available) still apply
- No relief for something that is protected by a digital lock.

Fair Dealing and Libraries

Before 1997, it was assumed that libraries could act on behalf of their users under fair dealing.

- There was nothing equivalent for example to S. 108 of US Copyright Law giving specific rights to libraries.

Restrictions on Libraries in s.30.2

- 30.2(5) states that *the copy given to the patron must not be in digital form.*
- If an article is being photocopied from a newspaper or periodical other than a scholarly, research or technical periodical, the article has to be at least one year old.
- Works of fiction, poetry, drama or musical works in non-scholarly periodicals are not allowed.

Yet another reason for a licence

- The restrictions in 30.2 became another reason for libraries to sign licences with Access Copyright and Copibec. Otherwise interlibrary loan and copying services for library users were very restricted.
- In 1997, the reprographic collectives didn't have digital rights, so signing a licence didn't solve the digital delivery issue.
- S.30.2 only applies to libraries, archives and museums acting on behalf of individuals. The restrictions do not apply to fair dealing by individuals.

CCH v Law Society of Upper Canada

Great Library of the Law Society of Upper Canada sued in 1993 by legal publishers for:

- Providing a photocopy service for patrons
- Providing self-service photocopiers in the library
- Faxing photocopy requests to patrons

Relying on fair dealing not the library exemption

Para. 49 of the Supreme Court judgment in *CCH et al v Law Society of Upper Canada* (2004):

... the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

Interlibrary Loan since CCH

Since CCH, Canadian libraries have the option of operating directly under fair dealing as per CCH or still using section 30.2 of the Copyright Act.

Libraries seem to fall into three groups

- After a slow start, many libraries are now providing copies directly under fair dealing rather than using s.30.2 -- as per paragraph 49 of CCH.
- Another group of libraries appears to be reluctant to use the Supreme Court judgment, preferring to wait for Parliament to change the law in the future.
- A third group, in an interesting twist, has interpreted CCH as allowing digital delivery from a library's own collection to its clients, but not from other libraries (interlibrary loan).

Text of s.30.2 language from C-11

The Bill changes subsections (4) and (5) and adds subsections (5.01) and (5.02)

(5.02) A library, archive or museum, or a person acting under the authority of one, may, under subsection (5), provide a copy in digital form to a person who has requested it through another library, archive or museum if the providing library, archive or museum or person takes measures to prevent the person who has requested it from

- (a) making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;*
- (b) communicating the digital copy to any other person; and*
- (c) using the digital copy for more than five business days from the day on which the person first uses it*

Changes to s.30.2

- The digital prohibition is removed from (5), but the digital lock requirements are added in (5.02).
- No changes to the date and genre restrictions, so a licence is still required if you don't want to work around that.
- If you are a library that operates directly under Fair Dealing because of CCH, you aren't going to go back to operating under s.30.2.
- If your library has decided that it has to operate under s.30.2, you either need to work with digital locks or you will continue to deliver copies only in print.

New Library Section for Digital Locks

s.42(3.1) If a court finds that a defendant that is a library, archive or museum or an educational institution 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.

Notice and Notice for ISPs

Sections 41.25 & 41.26 provide a *notice and notice* regime for Internet Service Providers.

This contrasts with *notice and takedown* regimes in countries such as the US, Australia, and South Korea.

Public libraries, school boards, universities and colleges often serve as ISPs.

Exporting alternate format copies

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

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

The restrictions in s.32.01 are out of date compared with a proposed new WIPO treaty for people with print disabilities. CLA would like to see the law amended in light of that treaty.

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

Changes to Educational Rights

(only relevant to libraries within educational institutions)

- Changes to s.29.4 (3) – Reproduction for Instruction
- Changes to s.29.5 (d) – Performances
- Changes to s.29.6 – News and Commentary
- No changes to s.29.7 – Reproduction of Broadcast
- New s.30.01 – Allowing reproduction of copyrighted material for online courses.
- New ss.30.02 & 30.03 – Entrenching Access Copyright and Copibec in online learning
- New s.30.4 – Publically available material online

Performances in the Classroom

s.29.5 adds a new (d) with cinematographic works

- No more public or educational performance licensing for films, DVDs or videos.

Deletes s.29.6 (2)

- Can keep copies of news and commentary broadcasts permanently, not just a year.
- No more royalties.

No changes to s.29.7: Reproduction of Broadcasts

New Online Rights for EIs: s.30.01

(3) ...it is not an infringement of copyright for an educational institution or a person acting under its authority (a) to communicate a lesson to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course...

(5) It is not an infringement of copyright for a student who has received a lesson ...to reproduce the lesson in order to be able to listen to or view it at a more convenient time.

All copies of the lesson held by both the institution and the students need to be destroyed 30 days after the class is over.

New Online Rights for EIs: s.30.04

Educational institutions can take material freely available on the Internet and do the following:

- Reproduce it
- Communicate it to students via a secure network
- Perform it to students in the class

With the following restrictions:

- Have to acknowledge the source
- If it is protected by a digital lock, you cannot use it.
- If there is a clear notice prohibiting educational use, you cannot use it.
- If the instructor knows or suspects that the copy on the Internet is an infringing copy, you shouldn't use it.

Slight Weakening of s.29.4 (for EIs)

s.29.4 makes it clear that instructors can display copyrighted works in the classroom without infringing copyright.

Subsection (3) is changed to reinforce the use of a licence when possible. This is a subtle reinforcement of licensing for Access Copyright and Copibec.

This seems to directly conflict with the expansion of fair dealing to include education.

Collective Licensing for EIs: s.30.02

Allows instructors at educational institutions with a photocopying (reprographic) licence to make digital copies of print articles to post to a secure network for their students.

- This is not allowed
 - if the institution already has a separate license for digital rights in a work also covered by the reprographic license OR
 - if there is a Tariff which represents those digital rights OR
 - if the reprographic collective has notified the institution that its rightsholder does not wish the collective to represent the digital rights.
- Reprographic licences with Access Copyright and Copibec automatically give digital rights unless the copyright owner opts out.
- If the educational institution has a reprographic licence and mistakenly uses an unlicensed work, the court cannot award damages that exceed what the copyright owner would have received if the copyright owner had opted into the tariff.

Collective Licencing: s.30.03

If an institution pays transactional licences to a collective society and later opts into the blanket licence, the institution has to back pay the difference between the transactional licences and the blanket licence.

s.30.03 is designed to make it punitive for an educational institution not to opt into a blanket licence with Access Copyright or Copibec.

ss.30.02 and 30.03

- These two sections directly conflict with the addition of education as a purpose for fair dealing.
- They are designed to discourage educational institutions from opting out of a collective licence or a tariff.
- Reminiscent of section 30.3 which requires licensing of self serve photocopiers.

Digital Locks

Bill C-11 makes it illegal to circumvent a digital lock with the following narrow exceptions:

- cryptography research
- alternative format copies for the perceptually disabled
- law enforcement

The WIPO Copyright Treaty

The Digital Lock Provisions are to comply with Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Phonograms and Performances Treaty

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 11 of WCT

Digital Locks and Libraries

Digital Locks conflict directly with:

- Fair Dealing
- Library Preservation
- Works out of copyright

Digital Locks and the Perceptually Disabled

s.41.16 (2) ...to the extent that the services, technology, device or component do not unduly impair the technological protection measure.

There is no efficient way to remove the TPMs and restore them after an alternate format has been created.

New Library Section for Digital Locks

41.2 If a court finds that a defendant that is a library, archive or museum or an educational institution 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.

Limited Penalties for Circumventing Digital Locks

Libraries, Archives and Museums, and Educational Institutions have liability for circumventing a digital lock limited to a court injunction, if you can convince the court that you didn't realize you were breaking the law.

Ordinary Canadians get:

- (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.

CLA Proposed Amendment to s.41

The following definitions apply in this section and in sections 41.1 to 41.21.

“circumvent” means,

...

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition “technological protection measure”, to avoid, bypass, remove, deactivate or impair the technological protection measure for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

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The Copyright Board and Access Copyright

In 1988, the Mulroney Government dramatically strengthened the rights of copyright collectives in part VII of the Copyright Act.

Since 2005, we have seen Access Copyright use its powers to file for tariffs rather than negotiate licences with the following groups:

- K – 12 School Boards (through the Provincial Ministers of Education) – Quebec is separate as it deals with Copibec which is still engaged in licensing
- Provincial and Territorial Governments
- Post Secondary Educational Institutions

Bill C-11 will make no change to the Act Part VII

In particular CLA would like to see amendments to sections 70.12 and 70.2:

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,
(a) file a proposed tariff with the Board; or
(b) enter into agreements with users.

CLA recommended changes

A collective society must make application to the Board prior to proposing a tariff:

- it must present evidence that users of a proposed tariff have been approached to enter contractual relations.
- it must show that the collective society and the users have been unable to agree on the royalties.

If the Board agrees that the parties cannot establish royalties through negotiation, then the Board may permit the collective to file a proposed tariff.

Access Copyright has 3 newer Tariffs pending:

1. Schools – K-12 – 2005-2009 uses

1. \$5.16/student/year ordered by the Copyright Board* (from earlier negotiated license fee of \$2.56)

- - appealed to the Federal Court of Canada – minor changes ordered
- - Supreme Court decision awaited
- - one aspect pending Board re-hearing

2. Schools – K-12 – 2010-2012 uses

2. \$15/student/year sought by Access Copyright

- Some product added (sheet music + digital copies of paper)

3. Government institutions in all the provinces and territories – 2005-2009 and 2010-2014

3. \$24/employee/year sought by Access Copyright

- Same product as offered to schools for 2010-2012

4. Colleges and Universities – 2010-2012

4. \$45/student/year sought by Access Copyright

- Product as for civil servants but also enlarged to cover copies of digital works

There has been no movement on the more recent K-12 Tariff--

1. Schools – K-12 – 2005-2009 uses

1. \$5.16/student/year ordered by the Copyright Board* (from earlier negotiated license fee of \$2.56)

- - appealed to the Federal Court of Canada – minor changes ordered; Supreme Court decision awaited, Board re-hearing pending

2. Schools – K-12 – 2010-2012 uses

In abeyance, apparently pending the outcome of the K-12 2005-2009 litigation

2. \$15/student/year sought by Access Copyright

- Some product added (sheet music + digital copies of paper)

3. Government institutions in all the provinces and territories – 2005-2009 and 2010-2014

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The provinces are fighting back...

1. Schools – K-12 – 2005-2009 uses

Several **provinces** brought a motion before the Copyright Board arguing that it is not possible for a tariff to apply to provincial governments because they are entitled to Crown immunity –

2. Schools – K-12 – 2010-2012 uses

because of s.17 of the federal Interpretation Act, argued the provinces, the Board could not make an order covering them:

s. 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

3. Government institutions in all the provinces and territories – 2005-2009 and 2010-2014

On January 5, 2012, the Board decided against the provinces on this motion –

4. Colleges and Universities – 2010-2012

The hearing before the Board on the Tariffs is now set to begin October 23, 2012...

There is much activity in the College and University sector:

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To Contract or Not to Contract: that is the question!

First Rob Tiessen, taking the position that institutions ought not to contract:
arguing PRO-TARIFF

Then Margaret Ann Wilkinson, taking the position that institutions *should*
consider contract:

arguing Contract may be appropriate,
or alternative uses,
or opposing the Tariff at the Board

Tariff vs. Licence

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,
(a) file a proposed tariff with the Board; or
(b) enter into agreements with users.

Have to pay the Tariff

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

The new s.30.03 from C-11

30.03 (a) ...the institution shall pay to the collective society to which it paid royalties under that paragraph the difference between [the transactional licences and]

...

(ii) the amount of royalties that the institution paid to the society under paragraph 30.02(3)(a) *for the digital reproduction* of that work from the day on which that paragraph comes into force until the day on which they enter into the digital reproduction agreement

AUCC Memo and Infringement

Given that the Copyright Board has already ruled against a per-page or transactional licence within the tariff, universities operating without a licence that are found to have made infringing copies would have no alternative but to pay the annual rate per FTE student set by the Copyright Board.

April 16 email to AUCC Presidents

“Flora MacDonald has Librarians in a Huff”

Author Carol Goar. **Toronto Star** pA27. December 3, 1987.

"Not only are libraries at present not paying creative royalties to the author or the writer," she charged, "they are actually using his or her work to subsidize their other activities. I don't think that is defensible."

MacDonald admitted afterward that it had not been one of her more pleasant speaking engagements. "But they needed to hear the truth," she insisted. "Theft is theft. And theft of intellectual property is theft."

In theory, [authors] should receive royalty payments every time someone uses their work. In fact, they get nothing for the hundreds of photocopies of their material that teachers routinely hand out, or that library users make. MacDonald believes that creators deserve more control over their work. So she is proposing that the Copyright Act be amended to allow authors to set up a collective to keep track of the number of photocopies of their work being made and to collect royalties on their behalf.

Alberta [Mins of Ed] v Access Copyright (1)

I fail to see how the word “private” should be equated with “non-commercial.” “Private study” presumably means just that: study by oneself. If Parliament had wished to exclude only commercial exploitation it could have used words to the effect of “non-commercial” or “not for profit.” A large and liberal interpretation means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear. When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.”(FCA, p38)

Alberta [Mins of Ed] v Access Copyright (2)

Works displayed in the classroom require a licence:

Access submits that copies made for examinations trigger remuneration and should be subject to the tariff. A work is "commercially available" if a licence is available "within a reasonable time and for a reasonable price and may be located with reasonable effort". The certification of a tariff fulfils these three requirements. The price, which is set by the Board, is necessarily reasonable. The time and effort required to claim the benefit of the tariff are insignificant. (FCA, p124)

CCH and Licensing

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests. (para.70)

Education in Fair Dealing

...no one knows at this point what additional rights may be available under a new "educational fair dealing" right as contemplated in Bill C-11. Even in the event of favourable Supreme Court of Canada decisions and the passage of Bill C-11, there will not be certainty about the legitimacy of all university copying, meaning the risk of litigation by Access Copyright could remain. (U of Calgary Provost)

AUCC Dropping Out

In addition, costs for pursuing the case for AUCC were mounting quickly.

Access, too, was facing a pressure to agree to a negotiated settlement. They appeared more eager to reach consensus than they had previously, and acknowledged that they were feeling the financial impact of the institutions that had opted out of the tariff. Access was facing high legal costs, and continues to be involved in three other tariff cases, including two at the K-12 level. (AUCC Memo)

The Next Tariff

- AUCC has withdrawn from the tariff hearings and it appears that ACCC might follow.
- Tariff applications with no opposition are usually approved at the rate asked for by the collective society.
- After 2013, Access Copyright will be applying for a new tariff at a new price
- Tariff hearings will be about the difference between the old tariff and the proposed new tariff (not the difference of a new tariff and \$26 per FTE).

Mechanism for Avoiding the Copyright Board?

...a mechanism for negotiation of future agreements that would, to the extent possible, avoid another Copyright Board hearing (from AUCC Memo).

2. Term (a) *The initial term of this agreement is from January 1, 2011 to December 31, 2015. The initial term will be extended automatically by consecutive one-year terms unless, (i) no later than three months before any such extension would begin either party notifies the other in writing that it does not wish to extend this agreement...* (from the AUCC/AC Model Licence)

To Contract or Not to Contract: that is the question!

First, Rob Tiessen taking the position that institutions ought not to contract:
arguing PRO-TARIFF

Now, Margaret Ann Wilkinson taking the position that institutions *should*
consider contract:

arguing Contract may be appropriate,
or alternative uses,
or opposing the Tariff at the Board

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
- Now Access Copyright is *simultaneously* seeking a Tariff for post-secondary institutions AND entering into agreements... unprecedented

Pro Contract, Alternative, & Tariff Opposition

- **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.

Tariff for Post secondary institutions proposed at \$45 FTE

- Unless Tariff is withdrawn by Access Copyright, there will be a hearing and there will be a “fair price” ordered by the Board
- Various bodies have been given standing before the Board to participate in the Tariff proceedings and oppose Access Copyright’s proposed Tariff – both the \$\$ value and the license terms proposed
- Regardless, the Board will make an order as long as Access Copyright does not withdraw....

Institutions who do not use the rights which Access Copyright markets do not have to pay

- “Bold” post- secondary institutions, since the Tariff has been filed by Access Copyright, have chosen not to use the “product” Access Copyright is selling
- If an institution does NOT make use of works in ways covered by the rights Access Copyright sells, or buys only from rights holders not represented by Access Copyright, then the institution is outside the Tariff, does not have to pay it, or pay into Access Copyright through any other agreement

BOLD institutions could be at risk

- If an institution decides not to “buy” from Access Copyright, it must be certain that it does not use the rights Access Copyright sells or it will leave itself open to a lawsuit for infringement by Access Copyright...
- If an institution is highly distributed and therefore for that reason, or any other, cannot be certain its employees won't infringe Access Copyright's rights, it may well wish to pay the Tariff or enter into agreement with Access Copyright otherwise...

Access Copyright appears to have undermined its own Tariff process

- How can Access Copyright expect the Copyright Board to accept its evidence that the Tariff it seeks of \$45 per FTE is appropriate if it enters into contracts with institutions for lesser amounts?
- Under s.70.12, it is the collective, Access Copyright, not the user institutions, which controls the choice of proceeding by way of Tariff or by way of agreement.

Access Copyright moves from Tariff to Agreements...

- June 12, 2010, Access Copyright applies to the Copyright Board for the post-secondary tariff (\$45 FTE, 2011-2013)
 - Still pending before the Board
- End of January 2012, Access Copyright signs license agreements with Western University and University of Toronto (\$27.50 FTE)
 - Legally binding between the parties for the period January 1, 2011 to December 31, 2013 (there is a clause that now gives them \$26 since AUCC model agreement created)...
- Access Copyright, with AUCC, develops a “model license” for universities to consider (\$26 FTE)
 - Not binding but a basis for a legal agreement which a university (other than Western or Toronto) may seek with Access Copyright to cover January 1, 2011 to December 31, 2015
 - further negotiation between each university and Access Copyright (other than Western and Toronto) before signing a legal agreement may be possible...

Yesterday, Tuesday, May 29, 2012

- ACCC announces a model agreement with Access Copyright for \$10 FTE

Until January 2012, Access Copyright had left Post-secondary institutions with 2 choices:

1. Expect to pay the Tariff, OR
2. Arrange the institution so that the rights Access Copyright is selling are not used

NOW Access Copyright has created 3 options for Post-secondary institutions:

1. Expect to pay the Tariff, OR
2. Negotiate a license (presumably along the lines of the AUCC and ACCC models), OR
3. Arrange the institution so that the rights Access Copyright is selling are not used

What might motivate Access Copyright to undermine its own Tariff application by opening itself up to contract negotiation?

It is afraid the order of the Board will be much less than the \$45 FTE it seeks

- On the evidence of value it is able to muster before the Board,
- Because the fair dealing decision pending in the Supreme Court under its Tariff proceedings involving the Ministers of Education for the K-12 tariff 2005-2009 may go against Access Copyright
 - If multiple copies for classroom use is part of fair dealing, as the teachers claim, this will decrease the value of the product Access Copyright sells, and
- Because changes pending in Bill C-11 will reduce the value of the product it can sell to post-secondary institutions – especially if “education” is fair dealing

Why go for a contract, when made available, rather than being a “Bold” institution and not using the rights marketed by Access Copyright?

1. Being “bold” may make more sense if the Supreme Court decides multiple copies for classroom use is fair dealing
 - But no post-secondary institution can guess the Supreme Court’s mind any more than Access Copyright can
2. Being “bold” may make more sense if Bill C-11 includes “education” as fair dealing and the courts support it as a serious extension of fair dealing even in light of the Supreme Court’s tests added in interpreting the categories of fair dealing in the Law Society case
 - But no post-secondary institution can be certain of Parliament and the courts in the regard any more than Access Copyright can be
3. Institutions may know that they cannot organize themselves to be certain not to infringe rights administered by Access Copyright

Why go for a contract, when made available, rather than continuing to wait for the Board to determine Access Copyright's Tariff application?

Again, the institution does not know either

1. The outcome of the Supreme Court case involving whether multiple copies for classroom use is fair dealing OR
2. Whether Bill C-11 will add "education" as fair dealing and the courts will support it as a serious extension of fair dealing even in light of the Supreme Court's tests added in interpreting the categories of fair dealing in the Law Society case AND

Also

3. S. 13 of the model agreement (and Western's and Toronto's) is a return to the INDEMNIFICATION which was in the old Access Copyright – post-secondary contracts and cannot be a part of the Tariff since the Board does not have the power to order it.

Why would an institution wait for the Tariff rather than negotiating a contract (now made available by Access Copyright) or being bold and going without uses?

- The institution cannot guarantee that it will not infringe rights Access Copyright sells AND
- The institution believes that the Board's order will be less than the \$26 FTE rate Access Copyright is now making available by contract (or \$10 to colleges)...
 - The evidence will show the value to be less than \$26 (or \$10)
 - The Supreme Court will make multiple copies for classroom use fair dealing and the Board will correspondingly much reduce the Tariff
 - Bill C-11 will pass with “education” as fair dealing and the Board will correspondingly much reduce the Tariff

No one knows the future...

- If an institution can successfully operate without the rights marketed by Access Copyright
 - It saves itself money AND
 - It reduces the market value of Access Copyright's product overall, which benefits all post-secondary institutions (and other institutions)
- By negotiating licenses with Access Copyright in the face of Access Copyright's Tariff application, Toronto and Western helped open up a 3rd option for post-secondary institutions – a return to licensing
- By staying the course and opposing the Tariff application, post-secondary institutions help to ensure that the Board hears all sides of the valuation question and that the resulting tariff ordered is less than the \$45 FTE sought and, perhaps even less than the \$26 FTE (or \$10) negotiated in the model licenses

Who has created the current predicament for post-secondary institutions?

- ACCESS COPYRIGHT
- Not any one post-secondary institution or any one group of post-secondary institutions
- All 3 groups of post-secondary institutions (“bold”, “contracting” and “Tariff-opposing”) are contributing positively to the overall opposition to the potential over-valuing of rights being marketed by Access Copyright

All post-secondary institutions are playing valuable roles in the process:

- ACCESS COPYRIGHT is the prime mover all the way through this current situation:
 - Access Copyright proposed the Tariff in the first place
 - Access Copyright is the one with the right to either move by way of Tariff or agreement under s.70.12
 - Access Copyright is the party threatening litigation for infringement should “bold” institutions be found to be infringing
- ALL post-secondary institutions are participating in, and contributing to, opposition to the proposed \$45 FTE tariff, in different ways

All post-secondary institutions are incurring risks in their decisions:

- Whether or not Access Copyright withdraws the Tariff, the new contract bottom line contract to negotiate is \$10 FTE...
- If the Tariff proceeding continues,
 - And the Tariff is ordered at \$8 FTE, Access Copyright will have won, temporarily, over those institutions who have signed the \$27.50 and \$26 contracts or even \$10 ones – but the lower Tariff will influence the next round of license negotiation, if Access Copyright continues to leave the contract door open
 - If the Tariff is ordered at \$30 FTE, those institutions which did not enter into contracts will have lost, temporarily, but the lower priced contracts will not be re-offered to anyone anyway (even if Access Copyright keeps the contract option available)
- If a “bold” institution is successfully sued for infringement, it may have to pay damages – but will these damages outweigh the moneys saved by not paying the Tariff or a contract?

“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 three groups of post-secondary institutions are engaged in the exercise of “price discovery” and are 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.

Copyright in 2012 Workshop

1. The Courts – linking is probably not copying...
2. Parliament – Bill C-11
3. The Copyright Board and Access Copyright–
4 tariff proceedings now in play, at various stages, all affecting libraries
4. What are the choices facing Post-secondary Institutions?
To Contract or Not to Contract: that is the question!
5. **Library exceptions on the international stage**
IFLA has put us there!

Soon, WIPO may add the first international instrument to reflect exceptions to the rights of copyright holders...

On November 21-23, 2011, one of the most exciting things in the history of librarianship occurred in Geneva Switzerland: the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Association met to consider the question of creating an international instrument dealing with the rights of libraries and archives.

The prime mover behind this extraordinary event was the **International Federation of Library Associations (IFLA)** – of which our own Canadian Library Association (CLA) is a part. IFLA was an accredited non-governmental organization (NGO) at the meeting.

Extraordinary steps forward in November...

- **Only nation state members can participate directly in the meetings of WIPO; that is, only they can introduce text or propose actions or vote.**
- **Accredited NGOs can be invited to speak but otherwise are observers only. In addition to library and archives organizations accredited to this meeting, there were also publishers organizations and others representing groups of economic rights holders (e.g., there was an aspect of the meeting focussed on broadcast and so broadcaster NGOs were present).**
- **There is a process underway involving the blind (represented by the World Blind Union) which is also in process at WIPO and there were a number of NGOs related to that process accredited to the meeting.**

Your CLA at the forefront of the international stage:

The only national library association to be accredited to this meeting as an NGO was **CLA** (there was also a consortium representing the major American organizations which was accredited as well).

IFLA had laid extensive groundwork before the meeting: it had developed a draft treaty and had built a strong network of relationships with nation state members of WIPO over a number of years.

There were 3 Canadian librarians at this key meeting:

- ✎ Victoria Owen, Chair of your CLA Copyright Committee, Member of the OLA Copyright Users Committee, Member of the IFLA Executive and Chair of its Copyright and Other Legal Matters Committee
- ✎ Paul Whitney, a Past Chair of your CLA Copyright Committee and current member, also member of the IFLA Governing Board
- ✎ Margaret Ann Wilkinson, a member of your CLA Copyright Committee, Member of the OLA Copyright Users Committee and OLA's Copyright Advisor (successor to Bernard Katz in this role).

It may be recalled that WIPO, as an agency of the United Nations, does not create binding international standards...

Intellectual property law since 1995 has found itself involved two different spheres of international policy-making:

1. There is **international trade law** governing relationships amongst states with respect to intellectual property, including copyright. The most important of this law is the Trade-Related Aspects of Intellectual Property Agreement (**TRIPS**) which part of the World Trade Organization (**WTO**). This agreement deals exclusively with the provisions nation states must have in their law to protect the holders of economic rights in copyright. Any country can complain against the practices of another, through the WTO dispute resolution process, and, if successful, the offending country will suffer penalties which may be levied against a part of its economy other than the part over which the complaint was brought.
2. There is **public international law**, centred on the UN (and, specifically, WIPO, which has taken over the Victorian consensus-driven processes of the Berne Convention in copyright. There is no enforcement mechanism. The **Berne Convention** has addressed the rights of the holders of economic rights (and its text provides the basis for the more recent TRIPS text) – but has also addressed the rights of moral rights holders.

Neither of these bodies has ever before addressed the rights of users or the development of a consistent international approach to copyright exceptions.

The achievements:

- **There seemed to be a great deal of unanimity amongst all the nation states...**
 - ☞ about the important role of libraries and archives in all nation states;
 - ☞ about libraries and archives as trusted intermediaries;
 - ☞ about the need for exceptions to the economic rights of copyright holders in order to permit libraries to function
- **Through this subcommittee, WIPO has accepted the concept of an international treaty on exceptions as worthy of serious discussion...**
 - ☞ There is still no consensus evident across all states about whether the next step in this area should amount to an actual treaty or whether a less strong statement should be made – and, of course, until the process is further along, it is always possible that no document will finally be adopted by WIPO.
- **IFLA succeeded in having every element of its draft treaty [TLIB] introduced into the meeting through the efforts of various nation states...**
 - ☞ 3 documents were set out officially for the consideration of nation state members at future meetings (2 directly inspired through the textual efforts of IFLA – the text put forward by the African Group and the text put forward by Brazil, Ecuador and Uruguay; the 3rd document is a statement of principles put forward by the US which is compatible with, but different in scope from, the IFLA draft treaty text)

Thank you. Some resources:

1. Robert Tiessen (2012), "How copyright affects interlibrary loan and electronic resources in Canada" *Interlending & Document Supply*, Vol. 40 No.1, 49 - 54
2. Margaret Ann Wilkinson (2011), "**Access to Digital Information: Gift or Right?**," chapter 14 in Mark Perry and Brian Fitzgerald (eds) *Knowledge Policy for the 21st Century: A Legal Perspective* (Toronto: Irwin Law, 2011) , 313-340.
3. OLA's position and a **summary of Bill C-32 (now C-11) as it affects libraries** (prepared by Western Law students Justin Vessair, Dave Morrison and Dan Hynes) http://www.accessola.com/ola/bins/content_page.asp?cid=1-99-3377
4. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf
5. **Copyright Board of Canada** <http://www.cb-cda.gc.ca/>
6. Wilkinson, Margaret Ann (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.