

# Licenses, Tariffs, and Copyright in Canadian Libraries

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# Licenses, Tariffs, and Copyright in Canadian Libraries

## -- Agenda--



1. Describing the Canadian copyright “Playing Field”
2. The “New Game”
3. Lessons learned from School Libraries
4. The “New Game” expands
5. “Half-time commentary” on the game in progress for Post-Secondary Libraries
6. Coaches’ Corner

# Everything about copyright is created and contained in the Canadian Copyright Act -

## Three sets of rights enshrined:

**ECONOMIC RIGHTS** (from the beginning of copyright in the 18<sup>th</sup> century)

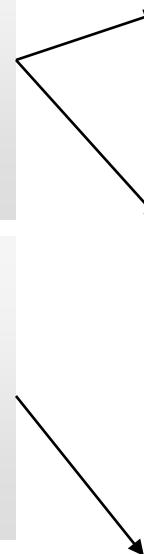
**MORAL RIGHTS** (Canada 1st common law country to introduce; fully articulated in 1988)

**USERS' RIGHTS** (clearly expressed by the Supreme Court in 2004)

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

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

Life of the author + 50 years on works; ALWAYS remain with the author – but can be waived



# The Copyright Act is entirely created by Parliament

## Bill C-32 The Copyright Modernization Act

- Introduced Tuesday, June 2, 2010 under the minority Conservative government... but fell with the government when the election was called...

## Now a Conservative majority has been returned...

- and the Globe & Mail last week was reporting that the new Conservative government plans to introduce substantially the same legislation as Bill C-32 was --- but the devil is in the details!

The provinces cannot legislate in the area of copyright or create legislation that interferes with the federal government's legislation in this area.

# Parliament's tightrope in legislating amendments to the Copyright Act:

## 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 Theberge 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...

# Copyright is a set of monopolies

- The statute attaches a set of monopolies to each work, or sound recording, broadcast, and performer's performance
- Only one entity at a time in Canada can own any given right to any give work or other subject matter in copyright.
- All activities that fall under the Copyright Act done in Canada fall under the Canadian Act – no matter where the author or rightsholder might be or where the work was created or published ...

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 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**].
- 
- Bill C-32 would have given moral rights to performers (as well as the economic rights they were given in the 1997 amendments) – what will happen under a new copyright bill in this Parliament?
  - Not transferable... licensing not an option.

## Economic rights in works

to produce, reproduce

to perform in public

to translate

to convert from one type of work to another

to make sound recordings or cinematographs

to communicate the work by telecommunication

to present art created after 1988 in public

to rent computer programs

*to authorize any of the above*

## Economic rights in “other subject matter”

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

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

to reproduce a fixed **performance**

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

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

to fix a **broadcast signal**

to retransmit a **signal**

*to authorize any of the above*

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

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

### Robertson v. Thomson 2006 Supreme Court

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

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

### SOCAN “Tariff 22” decision 2004 Supreme Court

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

### Robertson et al v. Proquest et al (settled May 2011)

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

### Canadian Wireless Telecommunications Association v. SOCAN (Federal Court of Appeal 2008 – leave to SCC denied same year)

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

# A continuum from insubstantial takings to taking the whole thing!

- While it may be possible to take insignificant amounts of a work or other subject matter without invoking the Copyright Act at all, as in the case of short quotations, what will amount to a “taking” that invokes the Copyright Act is a qualitative standard of **substantiality**, not a quantitative measure...
- Clearly, short quotes from texts are OK to use...Just as clearly, even very, very short passages of music can be infringement...
- And, without question, dealing the whole of a work or other subject matter does fall within the purview of the Copyright Act...
- While taking the whole work for study or review can (but does not necessarily under the Supreme Court’s 2004 tests) fall within **USERS’ RIGHTS**, using the whole work is much less likely to fall within the Educational Institution’s rights for projecting images because the owners of the images are more likely to have created opportunities for purchase of such rights (making them “commercially available”)...

# What is the difference between Copyright and Plagiarism?

**COPYRIGHT** is a legislated set of rights;

**PLAGIARISM** is a question of literary and cultural norms:

Using contract law, however, UWO has made plagiarism a wrong for which a person can be sanctioned. Plagiarism exists as an “academic offence”:

- Vis-à-vis students, it has been declared by Senate as an offence and enforce under the terms of the contract between the student and the university;
- Vis-à-vis faculty, it was negotiated as an academic norm by the faculty union, The University of Western Ontario Faculty Association (UWOFA), and the University and is defined in the Collective Agreement and enforced by the University against faculty members through the disciplinary process created in the Agreement.

Other than as enforced by the university, plagiarism that does not amount to copyright or moral rights infringement is not actionable in law in Canada.

# The greatest area of exemption for any institution's 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 have expanded 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)**

**What will a new Bill do?**

# From the “educational institutions” part of the Act:

29.4 (1) It is **not an infringement** of copyright for an educational institution or a person acting under its authority

(a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or

(b) **to make a copy of a work to be used to project an image** of that copy using an overhead projector or similar device

for the purposes of education or training on the premises of an educational institution.

**BUT** ...

**29.4 (3)** ... the exemption from copyright infringement provided by [the above] does **not** apply **if** the work or other subject-matter is **commercially available** in a medium that is appropriate for the purpose referred to [above]. (emphasis added)

# How do you get permissions from copyright holders?

- By buying the right(s) outright (assignment) - **possibly free but typically \$\$ -- or**
- Through permissions of the copyright holders given in advance (“open content licensing” or “creative commons”) (**FREE**) or
- Through permissions negotiated directly, from time to time, with copyright holders (**\$\$ or FREE –choice of copyright holder**)
- Through permissions negotiated with copyright collectives in blanket licenses (where the right(s) where the copyright holder of the work you are interested in is represented) (**\$\$**) or
- Where a collective takes a Tariff application to the Copyright Board of Canada, by paying the Tariff which the Board orders (**\$\$\$**) ...
- Depending upon whether and how the copyright holder makes the permissions available... **MUTUALLY EXCLUSIVE...**

# Licenses and Permissions

## It is the copyright holder's prerogative

- (a) to decide whether or not to grant permission (a license) to a requestor to make any particular use of a work (or other subject matter); and
- (b) if granting permission, to charge or not charge for that permission.

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

Licenses under the Copyright Act are required to be in **writing** (s.13(4)) and so it is best to get all permissions in writing.

If you use a work without obtaining permission – or without obtaining permission from the correct rightsholder – you are using the work **AT RISK** of a suit for copyright infringement.

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

# COPYRIGHT OFFICE

optional  
registration  
of copyrights and assignments

# COPYRIGHT BOARD OF CANADA

# STATUTORY COPYRIGHT OWNERS (authors & their employers)

LICENSE

# ASSIGNEES OF ORIGINAL COPYRIGHT HOLDERS (e.g. Publishers)

LICENSE

# COPYRIGHT COLLECTIVES (e.g. Access Copyright)

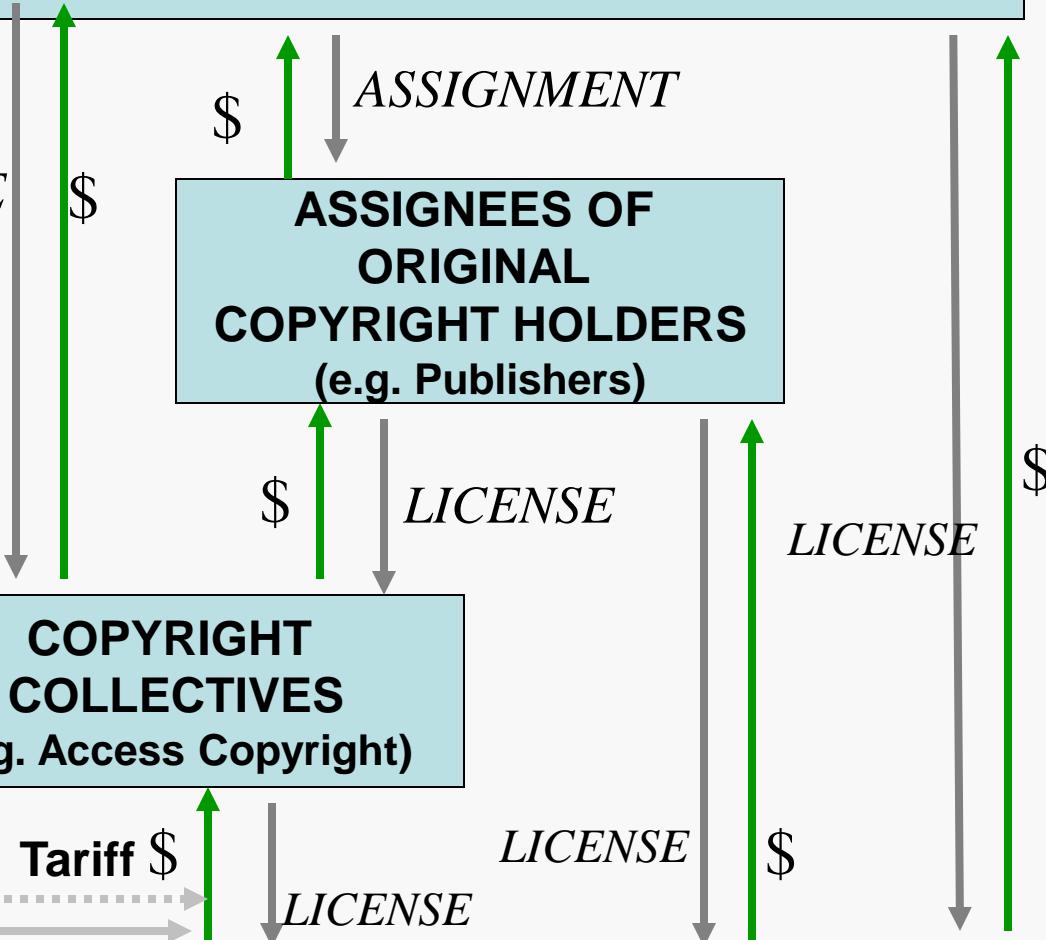
Tariff \$

LICENSE

LICENSE

\$

# COPYRIGHT USERS (Intermediaries & Users)



## 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**

# Collectives have long existed in the music industry --

**Canadian Performing  
Rights Society 1926**

**1935 – Copyright Appeal Board created for these rights**

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

**BMI Canada  
1940**

**1988 - Copyright Act amendments**

**PROCAN  
1978**

**SOCAN  
1990**

- In 1988, Parliament changed the Copyright Act to permit those who hold the monopolies on the various rights in works and other subject matters in Canada to create collectives and market their rights together...
- All the Canadian collectives represent those whose works are in copyright in Canada – no matter where the owners of those rights reside...
- The majority of the moneys collected for rightsholders by Canadian collectives flow to rightsholders located outside Canada...

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

s.3(1) Right	Associated Collective Society
Produce or Reproduce the Work	<b>Access Copyright (writing)</b> <b>AVLA (music: videos and audio)</b> <b>CARCC (visual arts)</b> <b>CMRAA (audio &amp; music)</b> <b>COPIBEC (writing)</b> <b>SODRAC (music)</b>
Perform the Work in Public	<b>ACF (films)</b> <b>Criterion Pictures (films)</b> <b>ERCC (tv and radio, education only)</b> <b>SOCAN (music)</b> <b>SoQAD (theatre, education only)</b>
Publish the Work	
(a) Translate the Work	
(b) Convert a dramatic work	
(c) Convert a non-dramatic work by performance	

s.3(1) Right	Associated Collective Society
(d) sound/cinematography film to mechanically reproduce a literary, dramatic or music work	
(e) Adapt a work as a cinematographic work	
(f) Communicate the work by Telecommunication	<b>CBRA (tv)</b> <b>CRC (tv and film)</b> <b>CRRA (tv)</b> <b>FWS (sports)</b> <b>MLB (sports, baseball)</b> <b>SACD (theatre, film, radio, audio)</b> <b>SOCAN (music)</b> <b>SOPROQ (audio and video)</b>
(g) Present an Artistic work at a Public Exhibition	
(h) Rent out a Computer Program	
(i) Rent out a Sound Recording	

# There is not always a collective that can represent a rightsholder's right:

- The collectives each represent only one or two rights, in respect of certain kinds of works. Some rights have no collective to represent them. Some works do not find themselves in collective repertoires...
  - The Copyright Board of Canada lists about 35 Canadian collectives on its website at:
    - <http://www.cb-cda.gc.ca/societies/index-e.html>
- National Film Board – represents its own repertoire (without being part of a collective)
- CBC – represents its own repertoire (without being part of a collective)

Films, for example, are generally commercially available: there is no users' right to show them in class or post them to websites – need permissions

- There are several collectives which represent films and many educational institutions have licenses with Criterion and Audio Cine Films which allow professors to show certain films in class.
- There is no collective from which an institution can get permissions to post films to WebCT sites
- Sometime those controlling the rights will give or sell permission to post a film to a website, especially a password-controlled website – case by case basis...

Without further licensing, five of the following eight films may be shown in class at UWO and only one, under certain conditions, can be posted (with thanks to law student Robert Galloway)

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

## The risk in CANADA -

- Section 27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.
- Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

# HOW IS A COPYRIGHT HOLDER ABLE TO ENFORCE RIGHTS?

Statutory enforcement is provided in 3 ways:

1. criminal sanctions
2. **provisions for copyright holders to sue for infringement (civil redress)**
  - And Copyright Holders can ALSO sue for contract violations where the terms of a license agreement are not being met by users...
3. administrative remedies – mandating Customs to seize infringing goods

In 1988 the criminal sanctions were dramatically beefed up –

- a demonstration to persuade
- In the summer of 2007, the Criminal Code was amended to prohibit the copying of movies by recording in movie theatres...new s.432

and certain streamlining of civil enforcement has occurred

- coercion through increasing the bargaining power of the copyright holder?

# Licenses, Tariffs, and Copyright in Canadian Libraries

## -- Agenda--



1. Describing the Canadian copyright  
“Playing Field”
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## The way we do business with English language works has been dramatically changed by a collective in the past decade...

- Access Copyright (formerly Cancopy) has represented rights to reproduce (including photocopying) English language works in Canada since the late '80s)
- Originally most institutions in the various library sectors had come to have a “blanket license” with Access Copyright (for each institution paid \$\$ each year) to allow members of the institutions to make copies of most English language works
- These licenses never permitted anyone to make digital copies of works – because apparently Access Copyright did not have those rights from the original copyright holders whom it represented – and these licenses did not include rights to public performance or posting

Access Copyright began its new approach with the schools across Canada (except in Quebec where it does not represent these rights – Copibec does)

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

- The tariff process is completely and fundamentally different from the process of negotiating licenses – even negotiating licenses with a collective...
- If you want to oppose a tariff before the Board that is directed at the class of copyright users of which you are a part, you have to become a party to the litigious process which is the proceedings before the Board (the class of users who are to be affected by the proposed tariff on one side and Access Copyright on the other)

# Council of Ministers of Education, Canada, Approach

- CMEC is the closest body that provincial/territorial government education departments/ministries have at the federal level
- We speak as one level of government to another level of government, and not as a interest group
- CMEC ministers created a CMEC Copyright Consortium Steering Committee, with one member from each province/territory (except Quebec) which makes recommendations on strategy and funding
- These members represent the Ministers of Education (and their public schools) across Canada, and for Ontario, the Ontario Catholic School Trustees' Association and the Ontario Public School Boards' Association.

# Tariffs do not give libraries what the blanket licenses did...

In the licenses negotiated by libraries with Access Copyright (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...

# Council of Ministers of Education, Canada, Approach

- For the 2005-2009 School Tariff, the Copyright Consortium created a Tariff Proceedings Subcommittee with four Consortium members (BC, NFLD, and two from Ontario)
- This Subcommittee managed, made decisions, and directed all of the activities related to Access Copyright, the Copyright Board of Canada, and the appeals

# Council of Ministers of Education, Canada, Approach

## Subcommittee Members:

- Gary Hatcher (Newfoundland & Labrador) is the chair
- Gail Hughes-Adams (BC)
- Cynthia Andrews (OPSBA)
- Paul Whitehead (OCSTA)

# Council of Ministers of Education, Canada, Approach

- CMEC Secretariat hired a team of individuals to address matters beyond the expertise and time of the Copyright Consortium members. The CMEC case as objectors to the AC proposed 2005-2009 school tariff was developed by:
  - Lead counsel (Wanda Noel)
  - Litigation counsel (Aidan O'Neill)
  - Statistician (Dr. Robert Andersen)
  - Economist (Dr. Steven Globerman)
  - Nordicity Group (Evaluation firm)
  - Administrator/Project Manager (Gerry Breau)
    - including interrogatories

# Council of Ministers of Education, Canada, Approach

- Based on the cost of conducting our business in this fashion, the CMEC had to address a 2-3 million dollar cost which was shared by the Consortium members (each province/territory pays a base cost, plus a cost for each K-12 student)
- No one province/territory could reasonably be expected to find millions to pursue adequately the case by itself

# Handling Interrogatories/Surveys/Gathering Evidence

- Copyright collectives have two avenues to follow to secure copyright license with the group it has chosen to be its audience: copyright contractual agreements and copyright tariffs
- Copyright agreements involved discussions, presentations, meetings, chit-chats, compromises, with the legal authority being contract law, etc., with Access Copyright
- Copyright tariffs are not unlike the previous agreements but these are determined through and by the Copyright Board of Canada where evidence is presented by the parties, per the authority of the Copyright Act

# Handling Interrogatories/Survey/Gathering Evidence

- Steve Wills, Manager of Legal Affairs, AUCC, has defined a tariff as  
**“a set of standardized terms and conditions drafted by a copyright collective to govern certain uses of copyright works with the collective’s repertoire”**
- This proposed tariff must be filed by the collective with the Copyright Board which begins a very long and expensive process
- If the party chooses not to respond to the proposed tariff via the Copyright Board, then the tariff becomes as stated in the proposed tariff
- What changes between contractual agreements and tariffs are the tariff cost and the repertoire being offered
- Once the tariff proceedings start, both parties (AC vs CMEC) are expected to provide evidence supporting their cases to the Copyright Board of Canada

# Handling Interrogatories/Surveys/Gathering Evidence

- Evidence for the Copyright Board is gathered by the parties through interrogatories and surveys
- Interrogatories (questions) are filed by both parties between both parties
- Access Copyright for 2005-2009 School Tariff filed 29 questions with the Objectors (CMEC)
- If the evidence exists you must provide it; you do not have to create evidence
- Both parties can file Objections to the questions and answers; if agreement cannot be reached, the Copyright Board rules

# Handling Interrogatories/Surveys/Gathering Evidence

- For example, the CMEC objected to AC's question 20: "wanted budgeted and actual expenditures on the purchase, rental, lease, maintenance and operation of copying devices used, following these categories: paper, toner/ink, etc. over the past five years"
- Copyright Board ruled that the question must be answered, including toner and paper used
- Both parties can also claim deficiencies in the answering of questions and, if the parties cannot reach an agreement, then the Copyright Board rules
- To indicate the magnitude of possible deficiencies, with the current proceedings in the Provincial/Territorial Government Tariffs, AC filed a 71 page deficiency report in the data provided by the Objectors

# Handling Interrogatories/Surveys/Gathering Evidence

- Survey is designed to gather volume evidence by AC and the Objectors of photocopying activity in schools, school boards, and Ministries/Departments of Education
- For the 2005-2009, neither party had any current evidence as to photocopying practices
- The survey was contentious; AC wanted to go directly to schools; the CMEC stated that AC strangers would never be permitted to enter schools and that the Copyright Board had no right to allow AC into schools
- The Copyright Board told both parties to work out how the survey could be conducted

# Handling Interrogatories/Surveys/Gathering Evidence

- AC chose the five star hotel approach; the CMEC wanted the two star economy approach to the survey
- The CMEC and AC jointly developed the survey during the summer of 2005, although the CMEC chose not to fund the five star survey approach
- Estimated that AC spent 3-4 million in developing and conducting the survey
- After the survey was conducted, the CMEC requested a copy of the data from AC which refused
- CMEC went to the Copyright Board which ordered the release of data to the CMEC

# Handling Interrogatories/Surveys/Gathering Evidence

- Conducting the survey during a two week period was not without problems
- AC chose to have monitors watch and record each photocopying activity in each school, school board, and Ministry/Department of Education to be surveyed
- In the Manitoba Department of Education, bilingual monitors could not reply in French
- Monitors ran out of forms, and the Manitoba Department of Education refused to allow AC to photocopy their forms using our machines
- One monitor arrived drunk in a site in Canada
- Monitors were suspicious of photocopying after 4:00; who, what, why?

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**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)**

# The Copyright Board's formula for setting tariffs between Access Copyright and the schools:

- 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 -

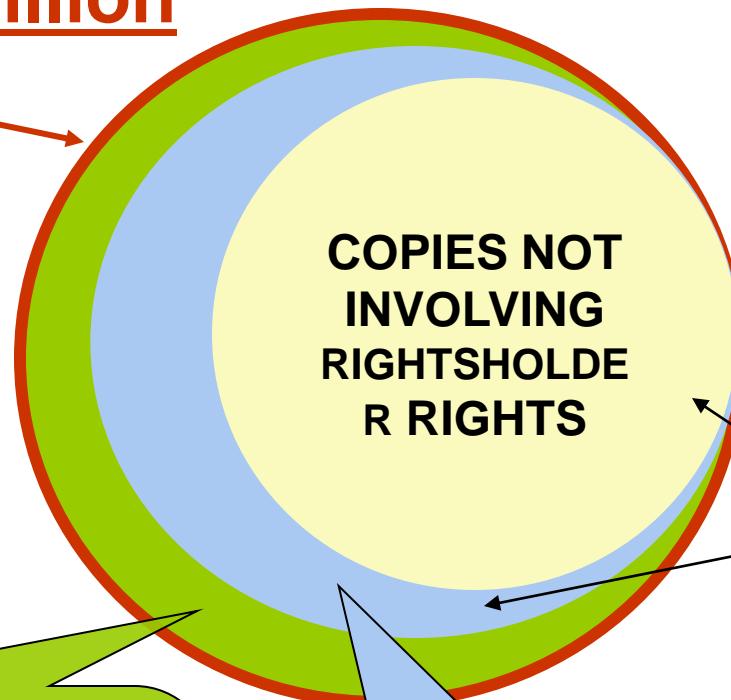
- the Act only protects substantial portions or the whole of original expressions -
  - **Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty**
- And the Act only protects works and other subject matter 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.

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

- 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)

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

**ALL COPIES MADE – 10.3 billion**



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

# Tariff Experiences: 2005-2009 School Tariff and Appeals

- Council of Ministers of Education, Canada, was displeased with several of the rulings of the Copyright Board, and made an Appeal to the Federal Court of Appeal (i.e. erred in law on tests and examinations; and on the meaning of fair dealing)
- Fair dealing was the most important issue
- Copyright Board ruled that if the student made photocopies of materials, that was fair dealing and, therefore, not compensable; however, if a teacher made copies of the same materials for the students, this was not fair dealing and, therefore, compensable
- Both the Canadian Association of University Teachers and Publishers' Associations also sought to intervene and both were permitted to do so by the Court of Appeal
- The Appeal was heard by the Federal Court of Appeal on June 8, 2010, with a decision released on July 23

# Tariff Experiences: 2005-2009 School Tariff and Appeals

## The Federal Court of Appeal decision:

- Confirmed the Copyright Board's decision on fair dealing
- Sent the Copyright Board's decision on tests and examinations back to the Copyright Board for reconsideration.

## Leave to Appeal to Supreme Court:

- Sought by CMEC
- Granted this month

# The Federal Court of Appeal

- CMEC appealed the Copyright Board's ruling to the Federal Court of Appeal.
- The Appeal Court ruled in favour of Access Copyright: “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 Supreme Court has now agreed to hear CMEC’s appeal of the FCA judgment.

# Judicial Review

Oct. 15, 2009

- The Applicants filed a Memorandum of Fact and Law.
  - What is the appropriate standard of review?  
Reasonableness, not correctness
  - Did the Board err in law in failing to give fair dealing a large and liberal interpretation as directed by the Supreme Court of Canada in the decision of CCH Canadian Ltd. v. Law Society of Upper Canada? NO
  - Did the Board err in law in interpreting fair dealing based on who “requests” the copy? NO

# Judicial Review

Oct. 15, 2009

- The Applicants filed a Memorandum of Fact and Law.
  - Did the Board err in law in interpreting fair dealing based on whether the student was instructed to read the material? NO
  - Did the Board err in law in finding that the absence of a copyright policy precluded a finding that dealings in kindergarten to grade 12 (“K to 12”) schools were fair? NO
  - Did the Board err in law by failing to give any meaning to the words “on the premises” in section 29.4(2)(a) and the words “in a medium that is appropriate for the purpose” in section 29.4(3) of the exception for tests and examinations? YES, to some extent...

# The Problem: Teacher Distribution to a class

- According to the Supreme Court in CCH: It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.
- According to the Federal Court of Appeal in the CMEC judicial review application, this would not be covered by fair dealing: When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.”

# Tests and Examinations

- Consortium's question to the Court
  - Did the Copyright Board err in law by failing to give any meaning to the words “on the premises” in section 29.4(2)(a) and the words “in a medium that is appropriate for the purpose” in section 29.4(3) of the exception for tests and examinations?

# Tests and Examinations

- The Federal Court of Appeal's Decision
- Almost all of the works consists of material in the Access repertoire.
- The material is commercially available.
- Therefore it does not qualify for the exemption.

# Tests and Examinations

- The Decision

But

- The Court directed the Copyright Board to review how it interpreted the exception, paying particular attention to the phrase; “in a medium that is appropriate for the purpose”.

# Tests and Examinations

## Next Steps

- The Copyright Board will reconsider its interpretation.
- The Copyright Board:
  - Could ask the parties to make a written submission presenting arguments.
  - Could ask the parties to make oral arguments.
  - Could make a decision without input from the parties

# Tests and Examinations

The Copyright Board has yet to advise the parties how it intends to proceed.

# Reasons the CMEC sought leave to appeal to the SCC

- The decision would result in jurisdictions paying approximately \$1.3 M per year more than would be required if making multiple copies for students was “fair dealing” under the exception.
  - The cost of an appeal to the Supreme Court (including the cost of seeking leave) was estimated to be \$300,000.
- Legislative changes rarely have retroactive effect, therefore an appeal is the only way to recover funds related to the 2005 – 2009 tariff

- The Supreme Court decided in the 2004 CCH case that exceptions are to be given “large and liberal interpretation”. Unless the Copyright Board’s ruling is appealed, the narrow interpretation of fair dealing will be the precedent for teachers and students.
- The Supreme Court as the author of the “large and liberal interpretation” decision is likely to take this more seriously than the Federal Court of Appeal.

# Licenses, Tariffs, and Copyright in Canadian Libraries

## -- Agenda--

1. Describing the Canadian copyright  
“Playing Field”
2. The “New Game”
3. Lessons learned from School Libraries
4. The “New Game” expands
5. “Half-time commentary” on the game in progress for Post-Secondary Libraries
6. Coaches’ Corner



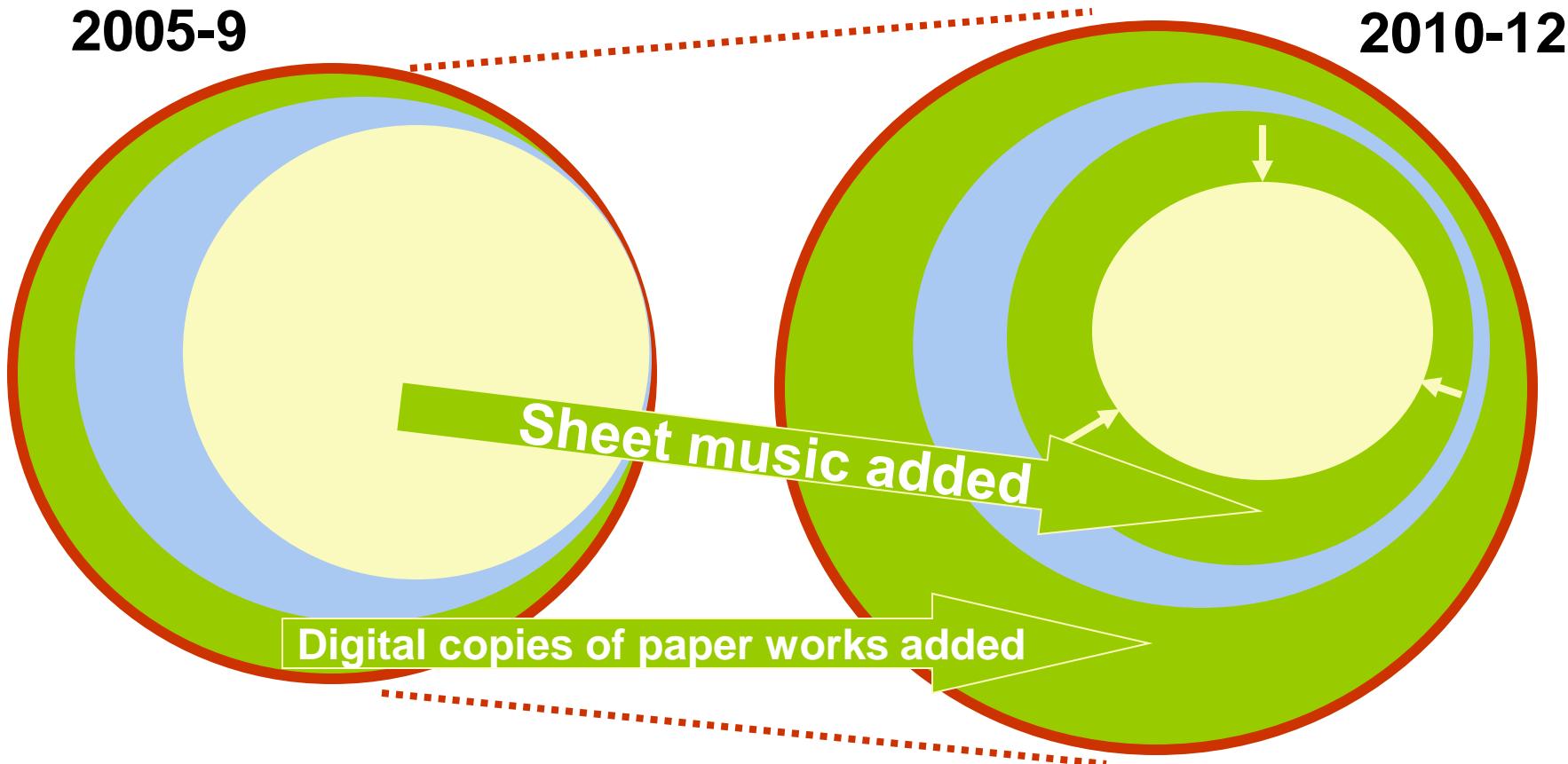
# Meanwhile Access Copyright continued its new approach...

- |   |  |
|---|--|
| <p>1. Schools – K-12 – 2005-2009 uses</p> | <p>1. \$5.16/student/year ordered by the Copyright Board* (from earlier negotiated license fee of \$2.56)</p> <ul style="list-style-type: none"><li>• appealed to the Federal Court of Canada – minor changes ordered</li><li>• Leave to Appeal sought by the schools – Granted just this month...</li></ul> |
| <p>2. Schools – K-12 – 2010-2012 uses</p> | <p>2. \$15/student/year sought by Access Copyright</p> <ul style="list-style-type: none"><li>• Some product added (sheet music, reproducibles + digital copies of paper)</li><li>• No hearing date before the Board yet</li></ul>  |

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

2005-9

2010-12



ALL COPIES MADE

No Rights

Compensable  
Copies

Users' Rights exempt  
for these uses

# **And then Access Copyright targeted another set of institutions with libraries ...**

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

**2. Schools – K-12 – 2010-2012 uses**

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

**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
- - Leave to Appeal sought by the schools – Granted just this month...

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

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

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

- Same product as offered to schools for 2010-2012
- Preliminary Application for crown immunity set for September 27th...
- Hearing on Tariff set for October 2<sup>nd</sup>...

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# What is happening between Access Copyright and Post-secondary Institutions?

- 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)

# Post Secondary Licence

- The Access Copyright Post Secondary licences expired on August 31, 2010. A four month extension was signed by most institutions through December 31
- Access Copyright applied for a tariff from the Copyright Board.
- The Copyright Board approved an interim tariff on December 23, 2010. The interim tariff is very similar to the old licence, except for Schedule G.
- Schedule G includes the worst parts of Access Copyright's tariff proposal. Institutions have to choose to join Schedule G.
- The post secondary tariff deals far more with digital rights than the initial K – 12 tariff

And Access Copyright moved further in its sweep of institutions with libraries...

**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
- - Leave to Appeal sought by the schools – Granted just this month...

**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**

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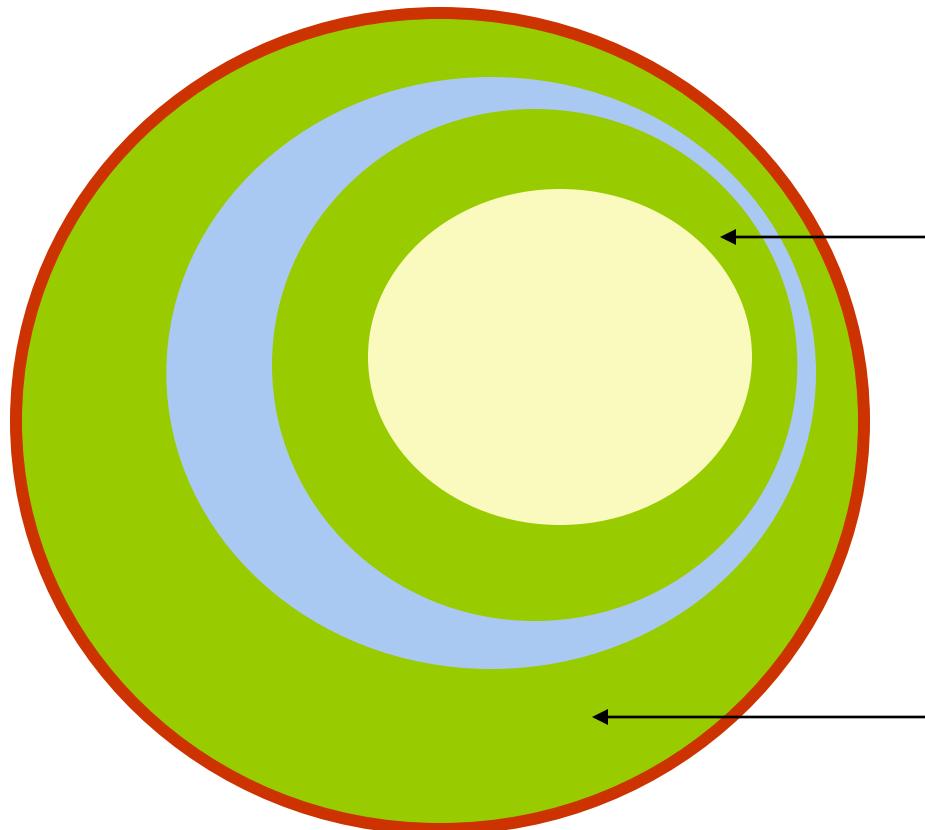
- Same product as offered to schools for 2010-2012

**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

# 2011-2013 Post- Secondary Tariff as Proposed for \$45/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

**ALL COPIES MADE**

No Rights

Compensable Copies

Users' Rights exempt for these uses

Canada's colleges and universities have chosen to combine resources and ask the Association of Colleges and Universities (AUCC) to represent them, collectively, before the Board –

Each university, in addition, will be deciding how to respond itself to the changing circumstances: if a university or college wants to not pay the eventual tariff that will be ordered, it can structure its activities so that it does not make the uses of materials for which the tariff will be ordered

For example, UWO has struck a committee to advise the President (and, ultimately, the Board of Governors) on these matters

In the meantime, all universities and colleges will be considering themselves at increased risk of lawsuits from rightsholders (since the Board process makes rightsholders and users adversaries) and will therefore be trying their utmost to litigation-proof themselves

# AUCC/ACCC

- AUCC and ACCC are representing their members in the hearings before the Copyright Board.
- The AUCC (Association of Universities and Colleges of Canada) and the ACCC (Association of Canadian Community Colleges) have established a fair dealing policy. Latest official version:  
[https://library.ucalgary.ca/sites/library.ucalgary.ca/files/Fair\\_dealing\\_policy\\_final\\_revised\\_March\\_2011-2.pdf](https://library.ucalgary.ca/sites/library.ucalgary.ca/files/Fair_dealing_policy_final_revised_March_2011-2.pdf)
- Several institutions are opting out of the tariff and planning to operate only under the Fair Dealing Policy.
- Other institutions are considering opt out of the interim tariff in August.
- Hearings will start in 2012?

- Association of Universities and Colleges of Canada (AUCC) Fair Dealing Guidelines – it appears that many universities can be expected to endorse this policy or tailor one for the institution modelled on this document
- Canadian Association of University Teachers (CAUT) Guidelines – not authoritative in any institution unless this, and not the AUCC model, is declared the institution's policy (<http://www.caut.ca/>)

# Digital Issues with the Tariff

- Access Copyright has had dropping revenue from the post secondary sector over several years
- Canadian university libraries on average are now spending more than 50% of their collections budgets on digital collections.
- For Universities, copyright royalties would go up 3.5 to 4 times the rate under the old licence.
- It looks like Access Copyright's business model may be failing and it is using the tariff process to force its way into the digital arena.

# Definitions Section – Schedule G

- 2(g) Projecting an image using a computer or other device. Educators are allowed to do this under S 29.4 of the Copyright Act.
- 2(h) Displaying a digital copy on a computer or other device. Educators are allowed to do this under S 29.4 of the Copyright Act.
- 2(i) posting a link or hyperlink to a digital copy. A link is not a copy under the Copyright Act.

The interim tariff doesn't recognize any instructor behaviour as being covered by fair dealing.

# Access Copyright Interrogatories

- AUCC and ACCC are working feverishly on the completing the interrogatories by early June.
- AUCC members have 134 questions to ask, ACCC members have only 132.
- The interrogatories will serve as evidence for the Copyright Board hearings.

# Interrogatories

- One concern is that the Access Copyright copy definitions might be (unfortunately) accepted as the final version
- AUCC should have objected and at worst case had the Board rule on the definitions.
- AUCC has objected to many of the questions.

# Some of the interrogatories

22. ...describe who at the institution makes copies of works and every way in which those copies are made with reference to ... the definition of copy.
50. Provide any all and all documentation, correspondence and notices relating to the use of published works, licenced databases, access, copyright, fair dealing, copying, privacy and academic freedom.
87. ...provide all licences, contracts and/or agreements with any platform providers or consortia such as ebrary, My iLibrary, Yankee Book Pedlar and CRKN...

# AUCC Fair Dealing Policy

- One understanding is that the policy is meant to be a safe harbour.
- Overall still too much attention paid to the interim tariff and not to things like the Supreme Court's six factors for fair dealings.
- When looking at interlibrary loan much more attention paid to Bills C-60, C-61 and C-32 than both the actual Copyright Act and CCH Para 49.

# AUCC Fair Dealing Policy and Inter-Library Loan (ILL)

- Section 12 (c) and 13 (c) have caused the following changes at U of Calgary (U of C):
- A check box on the interlibrary loan web form that indicates that the request is for fair dealing
- As of May 24 every U of C borrowing request will have a copyright compliance statement indicating that the request is a fair dealing.
- U of Calgary hasn't picked a date when it will stop accepting ILL requests from libraries without a copyright compliance statement

# AUCC FD Policy and Reserves

- More changes at the University of Calgary
- Faculty have to sign off that reserve readings are optional and a supplementary source of information for students and must be a small proportion (no more than 25 per cent) of the required readings.
- Online readings are limited to licensed works and links.

# What's next?

- The hearings for the post secondary tariff will probably take place in 2012.
- How will the appeal of the K – 12 Tariff affect the post secondary tariff?
- Will the AUCC be willing to appeal the post secondary tariff to the Federal Court of Appeal?

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# Conclusions based on the K – 12 Process

- It will take several years to finalize the Access Copyright Tariff for post-secondary institutions. And cost a lot for both AUCC and ACCC members.
- Much depends upon the what the Supreme Court does and that is out of the hands of the post secondary institutions.
- Neither the Copyright Board nor the Federal Court of Appeal are very sympathetic to teacher-distributed material being considered a fair dealing.

- There is no reason to suppose that public libraries could not become a target for which Access Copyright will seek a tariff
- If this comes to pass, public libraries, governed by boards in most provinces, will find themselves in a position similar to that facing the colleges and universities in Canada...

Of course, a tariff will have less impact if you build your collection through means which will not be affected by it:

## British Museum Website

[http://www.britishmuseum.org/research/search\\_the\\_collection\\_database.aspx](http://www.britishmuseum.org/research/search_the_collection_database.aspx)

- Publications and Electronic Journals licensed by the institution
  - Staff and Patrons have rights to certain content – depending on the journal or publication and the rights purchased by the institution

Certain Copyright holders have declared their materials to be intended for the “Public Domain” --

- Project Gutenberg ([http://www.gutenberg.org/wiki/Main\\_Page](http://www.gutenberg.org/wiki/Main_Page))
- Wikipedia Public Domain Resource Page  
([http://en.wikipedia.org/wiki/Wikipedia:Public\\_domain\\_resources](http://en.wikipedia.org/wiki/Wikipedia:Public_domain_resources))
  - The two websites listed above do not give either reproduction or public performance rights, but rather contain lists of works which are said to be in the public domain

# And more examples of tariff-free material...

- Creative Commons Canada – be sure you are looking at Creative Commons licenses for Canada and not Creative Commons licenses for other countries --
  - Wealth of material available for use for free, but subject to certain conditions (non-commercial use, acknowledgement of the author, etc...)
  - Contains a database of audio, video, image, and text material available under the Creative Commons license
  - Public performance rights are included in the license
  - Images from Flickr and videos from TED Talks included under this license
- Many copyright holders, including federal and provincial government (crown) departments and agencies, permit certain uses of content
  - Statistics Canada
    - Free statistical information from Statistics Canada can be reproduced for public non-commercial educational use
  - Statistics Canada Learning Resources (<http://www.statcan.gc.ca/edu/index-eng.htm>)
    - Anything in the learning resources section can be reproduced, photocopied, redistributed, or modified as long as it is used for educational purposes

## Meanwhile, CMEC continue to be the “flag-bearers” in litigation:

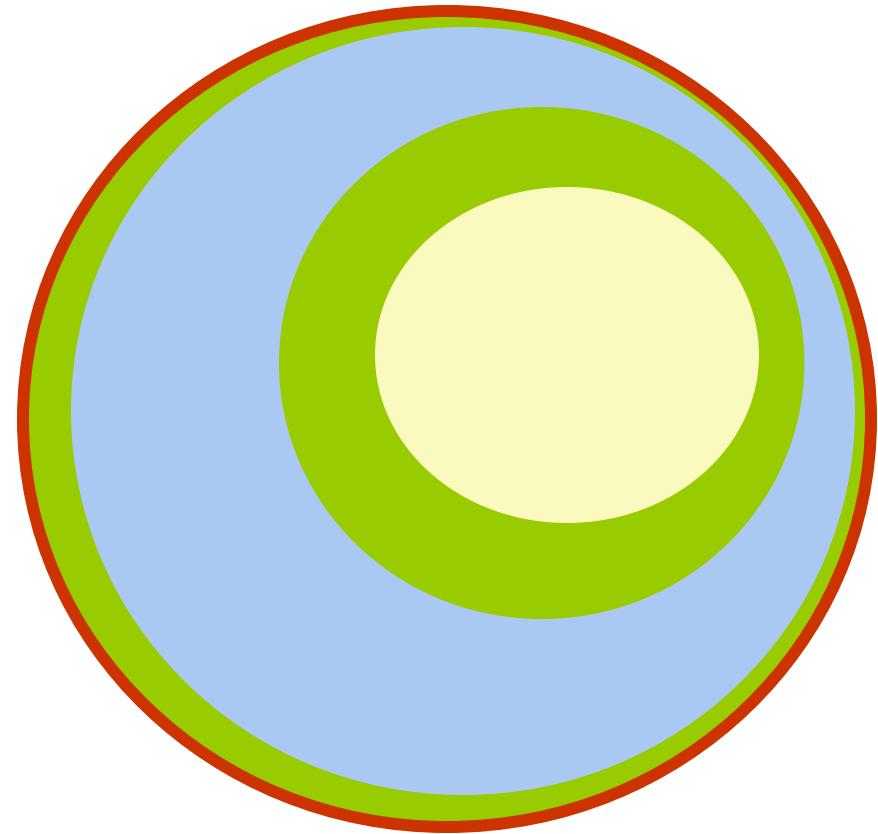
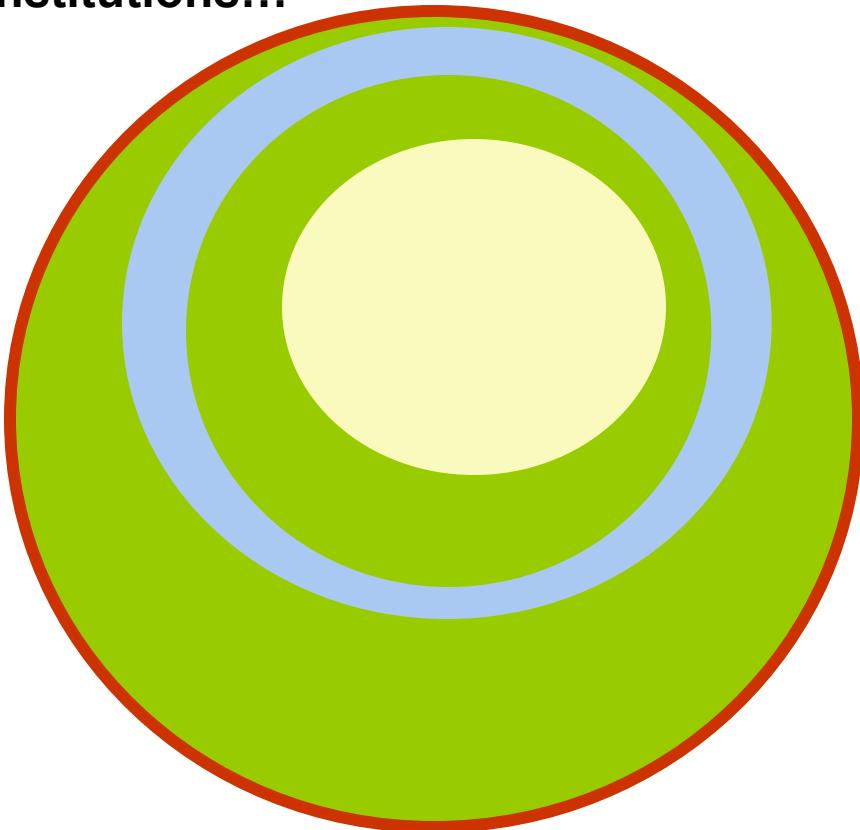
- Given the impact on public education, the K-12 tariff is evidently an issue of public importance in which the Supreme Court is interested.
- There is greater room to argue on public interest matters in the Supreme Court than in the Court of Appeal.

Like the CMEC, all library organizations need to continue to lobby for legislative change:

- Seek an amendment to the Copyright Act
- For the schools:
  - **Copying for distribution to students would not constitute fair dealing.**
  - **Even if the Supreme Court does not overturn the decision of the Court of Appeal, Parliament can amend the legislation.**

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

Again, what Access Copyright  
is asking from Post-Secondary  
Institutions...



... and how a new Bill might change  
the equation.

**ALL COPIES MADE**

No Rights

Compensable  
Copies

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for these uses

# Thank You

1. Copyright Board of Canada <http://www.cb-cda.gc.ca/>
2. Maskell, Catherine A., (2008) “**Consortia: anti-competitive or in the public good?**,” 26 (2) Library Hi-Tech 164-183.
3. Margaret Ann Wilkinson, “**Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries**” in a new collection edited by Michael Geist, From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010) <http://www.irwinlaw.com/store/product/666/from--radical-extremism--to--balanced-copyright-> [in the tradition of the earlier collection *In the Public Interest* (2005)]