

Copyright: New Legislation at International and Domestic Levels, Working With and Without Collectives

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Copyright in 2012 Workshop

1. **Library exceptions on the international stage**
IFLA has put us there!
2. **Fair Dealing and other Exceptions in Bill C-11**
3. **What are the choices facing Post-secondary Institutions?**
To Contract or Not to Contract: that is the question!

Saturday afternoon 1-2:30, session I-65, with John Tooth:
Copyright Bill C-11 and its Implementation

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)

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Bill C-11

How amending the Copyright Act affects Libraries

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

Changes to Fair Dealing

- Three new purposes added to Fair Dealing:
Education
Parody
Satire
- Existing purposes for Fair Dealing are research, private study, review, criticism and news reporting.
- A copy made for a fair dealing purpose does not infringe copyright.

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.*

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.

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.

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.

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.

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 Els: 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.

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.

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Access Copyright has 3 newer Tariffs pending:

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

4. Colleges and Universities – 2010-2012

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

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

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

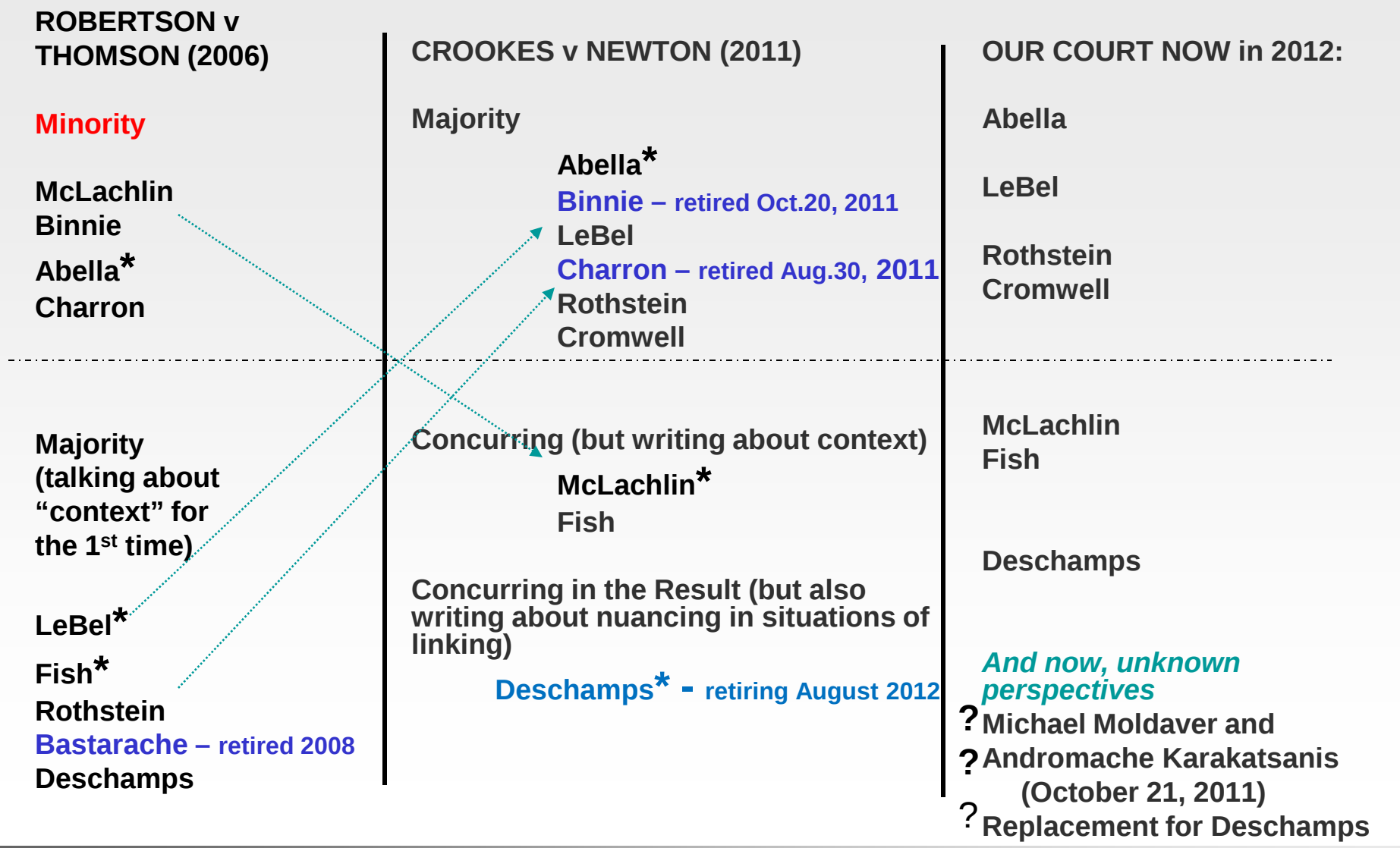
- Same product as offered to schools for 2010-2012

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

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

Our Supreme Court and Copyright “context”

[* means wrote judgment]



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

S 70.12 A collective society can choose to file for a tariff or negotiate a licence.

S68.12 (2) You have to pay the tariff if you are subject to it.

New S30.03

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)

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).

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

First, Rob Tiessen taking the position that institutions ought not to contract:
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“Price discovery” - 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.

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 motivates Access Copyright to undermine its own Tariff application by opening 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

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?

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.