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Copyright Update

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Copyright Update: The Courts, Parliament, the Copyright Board AND the World Intellectual Property Organization

1. **The Courts –**
   a) **last year we had 1 case to watch – a libel case which might have had implications for copyright: and the decision was released this past October – and it does have implications for copyright…**
   b) **last year we were watching to see whether 2 decisions rendered by the Federal Court of Appeal would be given leave by the Supreme Court – and, indeed, leave has been granted in both and now we need to watch the Supreme Court again…**

2. **Parliament –**
   last year we were watching Parliament deal with Bill C-32, the *Copyright Modernization Act*, which was then in committee –
   this year, we are watching Bill C-11, which is just Bill C-32 reintroduced – and it is now in committee--

3. **The Copyright Board –**
   last year we were watching the Copyright Board – with 4 tariff proceedings now in play, at various stages, all affecting libraries … still we watch the Board

But now we must also watch the international stage – and IFLA has put us there!

New Supreme Court decision we have been watching for…

Crookes v. Newton (2009 BCCA 392) **Leave to Appeal granted on April 1, 2010… heard December, 2010…released October 19, 2011**

- **defamation (libel) case, not copyright but about "publication"**

  We became interested because of the attitude of both the majority (Saunders JA, for herself and Bauman) and minority judge (Prowse, JA) of the British Columbia Court of Appeal, who all thought a website owner putting a hyperlink to another site might not automatically be considered "publication" of the material to which the link is made (and the majority in this particular case said there was no publication)…BUT the it *was* possible for the inclusion of a hyperlink to be publication. Factors tending toward a finding of publication "would include the prominence of the hyperlink, any words of invitation or recommendation to the reader associated with the hyperlink, the nature of the materials which it is suggested may be found at the hyperlink…, the apparent significance of the hyperlink in relation to the article as a whole, and a host of other factors dependant on the facts of a particular case." [Majority at para.61]

- **BUT, in the Supreme Court, only 2 of 9 judges (Chief Justice McLaughlin and Justice Fish) endorsed any of this "contextual" approach… though a 3rd judge, Justice Deschamps, also took a nuanced approach…**

Crookes v. Newton 2011 SCC 47

The majority, Abella, Binnie, LeBel, Charron, Rothstein and Cromwell, were clear that linking does not constitute publication:

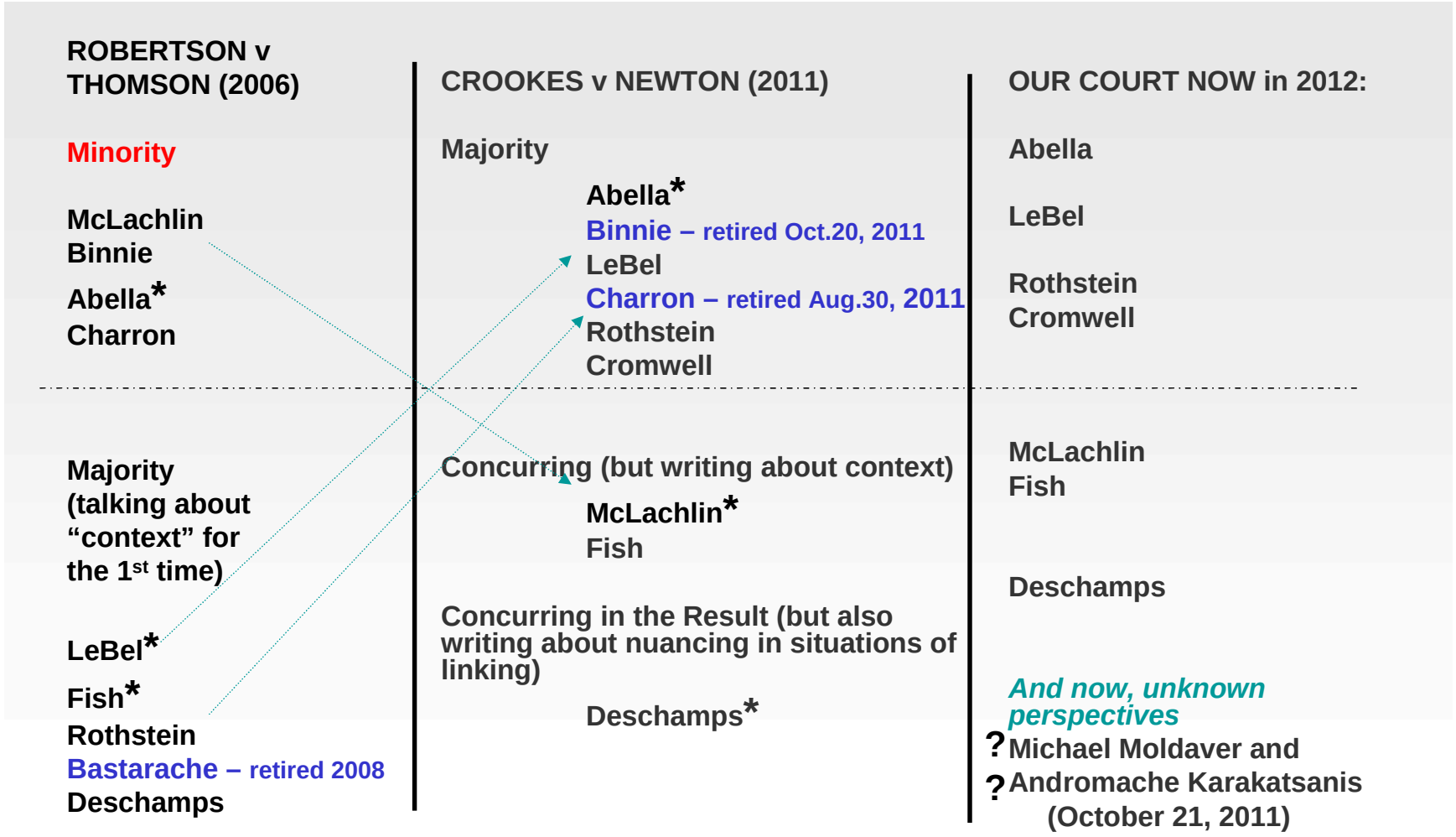
"Making reference to the existence and/or location of content by hyperlink… is not publication of that content." [para.42 (Abella)]

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]

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]



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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 --

Our old friend 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 --

You remember the litigation involving the first Access Copyright Tariff every issued?

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.**

Recall 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…**

- **Before proceedings to Parliament’s considerations involving “fair dealing,” let’s just complete our scan of Access Copyright’s activities in this past year …**

Recall that 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
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) • - appealled to the Federal Court of Canada – minor changes ordered; Supreme Court decision awaited
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	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

The provinces are fighting back…

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

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 –

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.

On January 5, 2012, the Board decided against the provinces – with reasons to follow

The hearing before the Board on the Tariff is now set to begin October 2, 2012…

There is much activity in the College and University sector:

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) • - appealled to the Federal Court of Canada – minor changes ordered • - Supreme Court decision awaited
2. Schools – K-12 – 2010-2012 uses In abeyance 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	3. $24/employee/year sought by Access Copyright • Same product as offered to schools for 2010-2012
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1. You will recall that Canada's colleges and universities had chosen to combine resources and ask the Association of Colleges and Universities (AUCC) to represent them, collectively, before the Board.

2. Each university and the governance in the college sector has also been deciding how to respond individually, as separate legal entities, to the changing circumstances. There are a number of options, including:

    a) 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 (eg Windsor), or

    b) a university can prepare to engage in the Tariff process but with an eye to eventually being governed by the Tariff, when set…

Meanwhile, all universities and colleges have probably considered themselves at increased risk of lawsuits from rightsholders (the Board process makes rightsholders and users adversaries) and therefore will have been trying their utmost to litigation-proof themselves…

In a surprise move, two universities have adopted a 3rd option, one which avoids all litigation, bothbefore the Board or for infringement:

This past Monday (January 30, 2012), it was announced that Access Copyright has entered into a contract with the University of Toronto and with Western University – a license at least to the end of 2013…

A signed and executed copy of the contract between U of T and AccessCopyright has made its way onto the web…

http://www.scribd.com/doc/80007524/Access-Copyright-U-of-T-Fully-Executed-License-Jan-30-2012

Although I am a professor at Western, I had no advance knowledge at all of these agreements and was alerted to them through librarians at other universities before the media announcement was released in my own institution: as far as I am aware, the text of the Western – AccessCopyright agreement has not been made public and, I have not seen any part of it…

AccessCopyright's tariff proposal is $45 per student per year: these agreements are for $27.50 per student per year. What have these 2 universities got for their money?

What have U of T and Western bought?

1. **INDEMNIFICATION. One problem with the Tariff process is that the Copyright Board does not have the power to include indemnification in its order. The problem is that , if a copyright holder who is not represented by Access Copyright sues an institution for infringement (an institution that is paying under a Tariff ordered by the Board), that institution must fight and, if found liable, pay $$ to the non-Collective entity suing: there would be no requirement for AccessCopyright to indemnify that institution and protect it from the $$ involved in that litigation… something that was required of Access Copyright in all the blanket licenses which preceded Access Copyright's move to the Board's Tariff process…**

   This is something that your Ontario Library Association first asked Parliament to correct when it made representations on Bill C-32 – now the Canadian Library Association has added its voice to this request in its representations to Parliament on Bill C-11…

   Now the University of Toronto and Western University have indemnification because they have left the Tariff process (which can't include indemnification given the current state of the Copyright Act) and have bargained successfully for indemnification in their new licenses with Access Copyright …

2. **CERTAINTY. Although the Board is unlikely to find the Tariff to be the $45 AccessCopyright is seeking, U of T and Western do not need to await the outcome of the process, they have their price. Of course, after the uncertainty, universities governed by the Tariff could find they will be paying less than U of T and Western under the Board's order of the value of the Tariff… SO…**

What have U of T and Western given up?

1. **$27.50 per student per year – until the license is terminated on 6 months notice by either side at any time after the end of 2013…**

2. **benefit from the possibility that the Board will order a lower tariff than $27.50…**

ON THE OTHER HAND, the 2 universities have continued to insist on recognition by Access Copyright of universities' rights to the benefits of the Copyright Act provisions for users (including fair dealing).

From the opening recitals in the U of T- Access Copyright license:

"The Licensee [U of T] wishes to obtain a license to legally reproduce copyright-protected works in ways that would be outside the scope of fair dealing, or any other applicable exceptions [LAMs, Educational Institutions, for instance], under the Copyright Act…"

"Nothing in this license agreement restricts the ability of the Licensee to use any [work] in any way that would be permitted by the Copyright Act, including by way of linking or hyperlinking…"

Now, what is happening to the Copyright Act (and, in particular, to users' rights therein)?

LET'S CHECK IN ON PARLIAMENT AGAIN…

Last year at this time, we were discussing Bill C-32 – which was then in Committee

What a difference a year makes!

This year we will be discussing Bill C-11 – which is identical to Bill C-32 – and is again in 2nd Reading in Committee (the last consideration of it was in December)…

Last year, I reported to you that

- **"CLA, OLA and other library organizations have made and are making representations to government on [Bill C-32]"**
- **This year I can report that your Copyright Committee at CLA is working through CLA to ensure that representations are being made on Bill C-11…**
- **What happened to Bill C-32? Just like its predecessors, Bills C-60 and C-61, when the Parliamentary session ended, it disappeared…**
- **As we know, the election has returned the Conservatives in a majority, rather than their previous minority, and they reintroduced the same legislation on September 29, 2011 as Bill C-11 of this sitting of Parliament (when passed, it is to be known as The Copyright Modernization – but all it will do is amend the Copyright Act so we will probably rarely refer to this statute by name, instead just referring, as usual, to the Copyright Act.**
- **While it was unlikely that Bill C-32 could have passed without amendments, because of the minority situation, the government has the majority now and can push Bill C-11 through…**
- **As always, unless and until Bill C-11 is passed in some form, the Copyright Act remains as it has been since last amended in 1997…**

Even with a majority, the Conservative government still walks a tightrope with Bill C-11, even if it passes Parliament, just as was the case with Bill C-32

If it broaden users' rights too much?

TRIPS and other agreements Canada has signed privilege copyright holders over users:

> Members [states] shall confine limitation or exceptions to exclusive rights
>
> > To certain special cases
> >
> > which do not conflict with a normal exploitation of the work
> >
> > And do not unreasonably prejudice the legitimate interests of the right holder

(the "3 step" test)

If it narrows users' rights too much?

The SCC, beginning some years ago in the 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…

Users' Rights expanded – especially FAIR DEALING

Bill C-11 would expand FAIR DEALING to add

- **Education**
- **Parody**
- **Satire**

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

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

And time-shifting (s.29.23)

And back-up copies (s.29.24)

But 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.**
- **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.**

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.

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.**
- **There were 3 Canadian librarians at this seminal meeting:**
  - **Victoria Owen, Chair of the CLA Copyright Committee, Member of your 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 the CLA Copyright Committee and current member, also member of the IFLA Governing Board**
  - **Your humble speaker today**

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. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf

2. Margaret Ann Wilkinson, **"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. Margaret Ann Wilkinson,"**Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries"** in Geist (ed), From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010) http://www.irwinlaw.com/store/product/666/from--radical-extremism--to--balanced-copyright- **-- still relevant because Bill C-32 is the same as the current Bill C-11.**

4. **OLA's position** and a **summary of Bill C-32 as it affects libraries** (prepared by Western Law students Justin Vessair, Dave Morrison and Dan Hynes) is at **http://www.accessola.com/ola/bins/content_page.asp?cid=1-99-3377 – still relevant because Bill C-32 is the same as the current Bill C-11.**

5. **Copyright Board of Canada** http://www.cb-cda.gc.ca/