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Copyright Update - Super Conference 2019: “What’s not ‘in the cards’”!

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Upcoming Super Conference OLA Copyright Committee Sessions:

- **Copyright Is *Not* a Choose Your Own Adventure**
Jason Bird (Sault College), Meaghan Shannon (Fanshawe College)
 - **When:** Thursday, Jan 31 | 2:00 pm - 2:40 pm
 - **Location:** [MTCC 206D](#)
- **The “Copyright Act Review”, Literally**
Joy Muller (Seneca College), Victoria Owen (University of Toronto), Mark Swartz (Queens University)
 - **When:** Friday, Feb 01 | 10:45 am - 12:00 pm
 - **Location:** [MTCC 206D](#)

Outline:

1. Litigation
2. Legislative Change
3. Into the Future
4. At the United Nations

1. Litigation

A. Toronto Real Estate Board v Commissioner of Competition

B. Copibec v Université Laval: SETTLED

***C. York University v the Canadian Copyright Licensing Agency
[Access Copyright]: POISED FOR HEARING before the
Federal Court of Appeal***

***D. Canadian Copyright Licensing Agency (Access Copyright) v
Canada***

A) *Toronto Real Estate Board v Commissioner of Competition*

- The Toronto Real Estate Board (TREB) had created a database of information about property listings in the GTA and made parts of it available to its members electronically but not otherwise: Canada's Commissioner of Competition found this to be anti-competitive and ordered that all the information should be made electronically to members.
- One thing to note from this case is the interrelationship of the *Copyright Act*, which creates monopolies, with Canada's *Competition Act*, which is designed to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy" (s. 1.1 "Purpose of the Act")
- But, s 79(5) of the *Competition Act* states that "an act engaged in only pursuant to the exercise of any right or enjoyment of any interest derived under the *Copyright Act* ... is not an anti-competitive act."

A) TREB (con't)

- One reason TREB argued it could control the distribution of the data in its database was that it held copyright in the data, as a “compilation” under s 2 of the *Copyright Act*:

“a work resulting from the selection or arrangement of data”

And having the monopoly protection for the data as a work in copyright would, in turn, allow TREB to choose whether and under what conditions to make the data available (recall the rights of the holder of a work in copyright set out in s 3 of the *Copyright Act*)

- The Federal Court of Appeal disagreed with TREB and upheld the decision of the Commissioner of Competition against it (2017 FCA 236) – and, on August 23, 2018, the Supreme Court dismissed TREB’s attempt to appeal (SCC, case no. 37932)

The Federal Court of Appeal found against TREB's argument grounded in copyright for two reasons:

1. Even where copyright is held, s 79(5) of the *Competition Act* only protects anti-competitive conduct by the holder of the copyright interest if the copyright “monopoly and exclusivity rights created are not exercised in an anti-competitive manner.” (para 179)
 - In terms of TREB's limited distribution of its data, the FCA confirmed the Commissioner's finding that the purpose and effect of the conditions TREB put upon distribution “was to insulate members from new entrants and new forms of competition... and not “only” to exercise a copyright interest” and was therefore anticompetitive contrary to the Competition Act (para 181)

The Federal Court of Appeal found against TREB's argument grounded in copyright for two reasons:

2. In this case, there was no copyright in the data in the database, so s79(5) could not apply to shelter TREB and therefore TREB's actions were anti-competitive.
 - “TREB's evidence did not speak to skill and judgment in compiling the database, but rather illustrated that it was a more mechanical exercise” (para 33);
 - One fact which struck the Federal Court of Appeal as detrimental to a finding of originality was that “the process of data entry and its ‘almost instantaneous’ appearance in the database” (para 1944)

The Federal Court of Appeal found the TREB database was not original and therefore did not meet the definition “compilation” under s 2 and therefore not protected by copyright (see paras 183-195)

...recently in the news:

- A coalition of more than 45 Canadian public library systems last week launched a **public campaign seeking better ebook and audiobook pricing for libraries**:
 - See <http://www.fairpricingforlibraries.org/> or hashtag [#eContentForLibraries](https://twitter.com/eContentForLibraries)

Example shown on the campaign website: Robert Galbraith's *Career of Evil*

- Sale price to **individual** (presumably of licence for audio recording): **\$16.99** Cdn
- Sale price to **library** (presumably of licence for audio recording): **\$117** Cdn

... might there be another “angle” for public libraries?

- Are audiobook publishers trying to “insulate” public libraries from participating in the new channels of book distribution, viewing libraries as a form of competition by satisfying reader demand for this new type of book?
- If so, one might think that they might want to consider carefully the finding of the Federal Court of Appeal in the *Toronto Real Estate Board v Commissioner of Competition* case just discussed:
 - the purpose and effect of the conditions TREB put upon distribution “was to insulate members from new entrants and new forms of competition... and not “only” to exercise a copyright interest” and was therefore anticompetitive contrary to the *Competition Act* (para 181)

B. *Copibec v Université Laval* 2017 CLASS ACTION settled June 19, 2018, before trial... but should not be forgotten!

Launched in the Quebec Superior Court by Copibec, “on behalf of authors and publishers from Quebec, the rest of Canada and other countries around the world” against Université Laval, the lawsuit might have rendered Laval liable for over \$ 10 million...

Under the terms of the settlement Laval agreed to do the following:

- suspend the use of its own copyright policies;
- contract *retroactively* with Copibec for 2014-18 and pays almost \$2mil for those years;
- join the “common licence” with Copibec with the other Quebec universities;
- pay various individual amounts to various authors and copyright holders listed in the Order, and
- take various other actions... [there were 21 specific terms in total]

Despite this settlement (ending the case) , the Sept 2017 judgment of the Quebec Court of Appeal making the case a class action cannot be ignored:

Gagnon, JA, wrote the unanimous decision of the Court of Appeal (35 pp)

The Quebec Court of Appeal noted (para 78) that the *Copyright Act* s 34.1 creates a presumption of copyright and its ownership

The Quebec Court of Appeal also said the “low amount attached to each of the author’s claim is in itself a valid reason for allowing the class action” (para 85)

Moreover, while the original Quebec judge who considered the matter had held (Feb. 2016) that since Laval was raising a “fair dealing” defence the matter was unsuitable for a class action, the Quebec Court of Appeal disagreed (para 50), holding “fair dealing” to be an “exception defence” (para 60) not relevant to the question of a class action but was only a defence and therefore could not be relied upon until trial (in either a class action or a non-class action).

The Quebec Court of Appeal's decision allowing the *Copibec v Laval* lawsuit to proceed as a class action however remains important for TWO REASONS:

1. The decision is a precedent establishing that rights holders (both Canadian and foreign) can definitely bring class actions in Quebec courts against “user” institutions... and would be support for the proposition that they can be brought in the courts of other provinces and territories...
 - The requirements for certification as a class action in Quebec might be found to be less rigorous than in other provinces, perhaps, because, as the Quebec Court of Appeal itself stated (para 50, quoting from a Supreme Court of Canada judgment about class actions):
 - “There is one common theme in the Quebec decisions[:].... the ... requirements for class actions are flexible... even where circumstances vary from one class member to another, a class action can be authorized if some of the questions are common.”

The Quebec Court of Appeal's decision allowing the *Copibec v Laval* lawsuit to proceed as a class action however remains important for TWO REASONS:

2. On the other hand, it is very interesting to note that Copibec brought its case against Laval not only on the grounds of copyright infringement but also on the grounds of moral rights infringement (whereas the current lawsuit by AccessCopyright against York University involves no claims about moral rights)
 - The Quebec Court of Appeal found that both types of rights (economic and moral) are suitable for class actions.
 - The Quebec Court of Appeal grouped “moral rights” with causes of action such as defamation, interference with inviolability and dignity [a civil law cause of action], discrimination and so on, and noting that all these other causes of action are amenable to class action proceedings, held that moral rights infringement actions, like these other rights, are also amenable to the class action approach (para 97-98)

C. Access Copyright v York University, 2017 FC 669

- In the summer of 2017, Justice Phelan decided for Access Copyright, against York *
- York is appealing Justice Phelan’s decision to the Federal Court of Appeal
 - Notice of Appeal filed September 22, 2017
 - The status of the appeal may be checked at any time on the Federal Court of Appeal’s website: this is case #A-259-17
 - On December 6, 2017, 5 volumes of appeal documents were filed with the Court!
 - **The Appeal will be heard in Ottawa this March 5 (2019)**

★(2017 Federal Court 669)

6 page description of Justice Phelan’s decision, released July 12, 2017, and its implications for libraries (by Margaret Ann Wilkinson for OLA, see

<http://www.accessola.org/web/Documents/Programs/Copyright/OLA%20-%20Access%20Copyright%20v%20York%20U.pdf>)

(also accessible also from the CFLA website, under “Copyright”)

It is still relatively rare to see Intervenors in the courts of appeal – though they are becoming more and more common in intellectual property litigation at the SCC...

- Under the Federal Court Rules, Rule 109(2)(b), the applicant seeking to intervene must “describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding”
- The courts have established criteria upon which they will accept an intervention, including that **the intervener**
 - **must be putting forward its position in the public interest and**
 - **be best placed to put its position before the court**
 - **and that the position is not one already being put forward by the parties.**

The Federal Court of Appeal has permitted intervenors for this appeal, although not all who applied were successful in gaining standing...

- Universities Canada – leave to intervene ([written submissions only](#)) sought– **GRANTED** (without a hearing) by Justice Webb April 20, 2018 – counsel David Kent (McMillan LLP)
- Canadian Association of University Teachers [CAUT] & Canadian Federation of Students [CFS] – leave to intervene in writing & orally – **GRANTED** by Justice Webb April 20, 2018 – counsel Andrew Bernstein (Torys LLP)
- **CARL** – leave to intervene – **DENIED** by Justice Webb April 20, 2018; application for reconsideration dismissed (without a hearing) by Justice Webb June 25, 2018 – Counsel Howard Knopf (Macera & Jarzyna LLP)
- “York Academic Intervenors”: York University Faculty Association, Osgoode Hall Faculty Association, Canadian Union 3903 – leave to intervene **DENIED** (without a hearing) by Justice Gauthier July 6, 2018 – Counsel Adam Jacobs (Hayes eLaw LLP)
- Copyright Consortium of the Council of Ministers of Education, Canada in writing & orally – **GRANTED** (without a hearing) by Justice Gauthier on July 6, 2018, subject to certain conditions, including written argument limited to 10 pages – Counsel Wanda Noel
- Colleges and Institutes Canada [CICan] –leave to intervene **DENIED** (without a hearing) by Justice Gauthier July 6, 2018 -- Counsel Aidan O’Neill (Faskens LLP)
- Canadian Publishers/Publishers’ Council/Writers Union coalition – leave to intervene **GRANTED** (without a hearing) by Justice Gauthier on July 6, 2018, subject to certain conditions, including written argument limited to 15 pages - Counsel Brendan Van Niejenhuis (Stockwoods LLP)

York is appealing on a number of grounds:

- Substantive:
 - that Justice Phelan erred in his treatment of fair dealing;
 - AND
 - that Justice Phelan erred in his findings respecting the Interim Tariff
- Procedural:
 - that the “bifurcation” (for which, it may be recalled, York had applied) did not proceed fairly and Justice Phelan’s judgment should be overturned on those grounds.

Whatever the outcome of this Federal Court of Appeal hearing, absent a settlement, the final outcome of the lawsuit is still years in the future...

- 1st, it seems inevitable that, whatever the outcome at the Federal Court of Appeal, there will be an appeal to the Supreme Court of Canada – and
- 2nd, Judge Phelan, whose July 12, 2017 judgment is under appeal in the Federal Court of Appeal, pointed out that that judgment relates only to “Phase I” of the York lawsuit!
 - Recall, again, that on July 30, 2014, Prothonotary Aalto, at York’s instigation, made an Order in the lawsuit, for “bifurcation” of the trial into two phases
 - In his July 12, 2017 judgment on “Phase I” (now under appeal) Judge Phelan held that **only in the future “Phase II” of the trial**, the “damages phase” (see para 219), **will York be able to raise fair dealing** (see para 220)...
 - This holding appears consistent with the subsequent Sept 20, 2017 finding of the Quebec Court of Appeal in *Copibec v Laval* that fair dealing is a defence which cannot be raised in an application to certify a class action but must wait until the trial of the action

Dealing with the ROLE and EFFECT of GUIDELINES going forward...

- In its Defence to the current lawsuit, para 4(c), York pled that it “implemented appropriate fair dealing guidelines consistent with those of the Association of Universities and Colleges of Canada [now called Universities Canada” (with further detail in para 16(c))
- The SCC held in 2004 that
“Persons or institutions relying on ... fair dealing... need only prove... **their own** practices and policies were research-based [for s.29] and fair” (para 63, emphasis added); in that case it was the Law Society that was relying on the fair dealing defence and the Court quoted in full, and approved, the Law Society’s Great Library’s Access Policy...
- Phelan J held that **York University’s “Fair Dealing Guidelines for York Faculty and Staff”, based on the AUCC model, do not have the same effect as the Great Library notice to patrons about the copying the Great Library would do for others – and the York Guidelines do not establish fair dealing ... because the York Guidelines are directed at copying the students and faculty will do themselves...**

D. Canadian Copyright Licensing Agency (Access Copyright) v Canada, 2018 FCA 58 (tariff for provincial & territorial governments):

- **Access Copyright has been unsuccessful in its application for judicial review** of the decision of the Copyright Board made May 22, 2015 arising from Access Copyright's proposed tariff for the years 2010-2014 in respect of uses made by Canadian provincial and territorial governments of material in copyright.
 - The long delay (2016-18) between the hearing of the application for judicial review by the Court of Appeal (June 20, 2016) and its decision was explained by Justice Stratas as the Court of Appeal awaiting the outcome of a relevant **administrative (not copyright)** law appeal before the Supreme Court of Canada (see para 72, citing to *Quebec (Attorney General) v Guérin*, 2017 SCC 42)
 - Justices Rennie & Near, Rennie writing their brief reasons (paras 174-181), concurred in the result with Justice Stratas (who wrote paras 1-173) and with his reasoning supporting his decision but disagreed with some of Justice Stratas' reasoning on tangential issues.
 - In its tariff order, **the Copyright Board removed the requirement proposed by Access Copyright that governments stop using digital copies they had made under the license provided by the tariff when the tariff expired and delete those copies** (the "Deletion Provision")(para 11): all three of the judges of the Federal Court of Appeal upheld the Copyright Board in removing it (para 181).

Outline

1. Litigation
- 2. Legislative Change**
3. Into the Future
4. At the United Nations

2. Legislative Change

Budget Implementation Act, 2018, No 2

a) Introduced

b) Changes to the Notice-and-Notice Provisions

c) Copyright Board Reform and the 2017 CFLA Submissions

a) *Budget Implementation Act, 2018, No 2*, Statutes of Canada 2018, c. 27

- Introduced into Parliament Monday Oct.29, 2018 (as Bill C-86)
- Received Royal Assent December 13, 2018: **will come into force on a day to be fixed by Cabinet**

<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-86/first-reading>

- 884 pages
- See Division 7 (Sub-sections A-H)
 - Patent Act, Trademarks Act reforms
 - **Copyright Board reforms**
 - New College of Patent and Trademark Agents

b) Changes to the 2012 Notice-and-Notice provisions (s 41.25 ff) (Subdivision C)

ISPs are defined as those organizations having

“the means, in the course of providing services related to the operation of the Internet, or another digital network, of telecommunications through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network” (s 41.25(1)).

- If a copyright holder or representative sends a notice to an ISP, claiming infringement by any user of the ISP’s system and posting claimed infringing content, the ISP must pass on the notice to the user (s41.26(1)).
- Failure to follow through on this responsibility can be expensive: a court can award between \$5,000 and \$10,000 in damages against the ISP (s 41.26(2)).
- The **Budget Implementation Act 2 (Bill C-86), Subdivision C “Copyright Act (notices of claimed infringement), s 243 – 246)** has made certain changes to ss 41.25, 41.26 (1), 41.27(3), 62(1)(c)

Section Affected	Change	New Wording
s 41.25	Add new wording after “(2)”	Prohibited content (2) A notice of claimed infringement shall not contain (a) an offer to settle the claimed infringement (b) a request or demand, made in relation to the claimed infringement, for payment or personal information; (c) a reference, including by way of hyperlink, to such an offer, request or demand; and (d) any other information that may be prescribed by regulation.
s 41.26(1)	Replace old language with new wording before “(a)”	A person described in para 41.25(1)(a) or (b) who receives a notice of infringement that complies with subs 41.25(2) and (3) shall, on being paid any fee that the person has lawfully charged for doing so,

Section Affected	Change	New Wording
s 41.27(3)	Replace old “(3)” with new wording	(3) If the provider receives a notice of claimed infringement, relating to a work or other subject-matter, that complies with subsections 41.25(2) and (3) after the work or other subject-matter has been removed from the electronic location set out in the notice, then subsection (1) applies, with respect to reproductions made from that electronic location, only to infringements that occurred before the day that is 30 days – or the period that may be prescribed by regulation – after the day on which the provider receives the notice.
s 61(1)(c)	Replace old “(c)” with new wording	(c) prescribing the form of notice of claimed infringement referred to in s 41.25 and prescribing the information that must be and that is not permitted to be in it;

c) Copyright Board reform (Subdivision H, ss 280 -298)

There are appear to be a number of important areas of reform:

1. Substantive criteria for the Board's decision-making
2. New timing for Board proceedings and case management
3. Voluntary access to the Board for resolution of disputes over the setting of royalties in non-tariff situations

(There are also other measures aimed specifically at music.)

For reference, from the Copyright Update 2018 slides:

CFLA Copyright Board Review Submission

http://cfla-fcab.ca/wp-content/uploads/2017/10/CFLA_FCAB_Copyright_Board_Submission_September_2017_Final-1.pdf

1. an explicit statutory mandate for the Copyright Board, focused on the public interest and fairness amongst multiple interests;
2. a statutory process for intervenors and a system to make funds available to them;
3. a statutory list of decision-making factors the Board must consider in decisions;
4. the previous tariff to remain in effect while a new one is before the Board AND the new one to apply only on a go-forward basis;
5. libraries to be able to choose whether to work with a collective through contract or, if one is initiated, through a tariff process;
6. the *Copyright Act* to continue to govern libraries under the current tariff system for them (s 70.1), separate from the system for music-related organizations (s 67) AND to allow collectives to remain non-exclusive representatives for the rights holders they represent;
7. it to be clear in the *Copyright Act* that in cases where a library is not involved with a process before the Copyright Board, that library will not be required to provide evidence of its operations in that Board proceeding.

1. Substantive criteria for the Board's decision-making

CFLA ASKS: an explicit statutory mandate for the Copyright Board, focused on the public interest and fairness amongst multiple interests **and** a statutory list of decision-making factors the Board must consider in decisions

- **The Board will now have criteria for establishing fair and equitable royalty rates (new s 66.501):**
 - Establishing “what would be agreed upon by a willing buyer and a willing seller acting in a competitive market will all relevant information, at arm’s length and free of external constraints;
 - Considering “the public interest”; and
 - Considering “any other factor the Board considers appropriate”
- **The Commissioner of Competition under the *Competition Act* to have a role in monitoring agreements made under the Copyright Act to ensure the “public interest” is served (see new s 76)**

2. New timing for Board proceedings and case management

- Proposed tariffs must cover at least 3 years (not 1, as now – new s 68.1(2))
- Proposed tariffs to be filed 14 months in advance (not 9, as now – new s 68)
- Filing tariff objections to be done within 30 days (new s 68.3(2) (present 60 days)
- Board will be able to make regulations to make the process timely (stakeholders given opportunity to comment before finalized) (new ss 66 (1.1) and s 66(2))
- Cabinet will be able to enact regulations to set deadlines within which the Board must complete matters before it (new s 66.91(2))
- Board will be required to conduct its hearings “as informally and expeditiously as the circumstances and considerations of fairness permit but, in any case, within any period or no later than any day provided for under this Act” (s 66.502)
- The Board may appoint a “case manager” to work with the parties to help move the tariff through the process – who could, when necessary, issue orders (s 66.504)

3. Voluntary access to the Board for resolution of the setting of royalties in non-tariff situations

- New s 71(1) – 71 (6)
- S 71(1) “If a collective society and a user are unable to agree on royalties to be paid with respect to rights under section 3, 15, 18, 19 or 21, other royalties [which are required to be established through the tariff process], or are unable to agree on any related terms and conditions, the collective society or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.”

CFLA ASK: libraries to be able to choose whether to work with a collective through contract or, if one is initiated, through a tariff process – **now** both options remain for libraries – as well as a new option for contract dispute resolution through the Board if a tariff is not in place.

More comparisons to CLFA 'ASKS':

CFLA ASK: that the mandatory tariff process in place for music-related organizations remain (s 67) remain separate from the optional one under s 70.1 for that affects libraries

- this remains the case.

CFLA ASK: that collectives be allowed to remain non-exclusive representatives for the rightsholders that they represent

- New s 67.1 – On application by a collective society, the Board may designate the collective society as the sole collective society authorized to collect as royalties referred to in para 19(2)(a) with respect to a **sound recording** of a musical work.
- No other such provision so no other kind of collective can do this: literary collectives cannot

CFLA ASK: the previous tariff remains in effect while a new one is before the Board and the new one will apply on a go-forward basis

- New s s 73 and 73.2 (a) and 73.2 (b)

Possible Future Responses to CFLA 'ASKS':

- Of the seven (7) submissions made by CFLA, five (5), as demonstrated in the previous slides, appear to have explicit responses in the legislated Copyright Board reforms.
- The remaining two do not have direct legislative responses but may be implemented either through the newly invigorated procedural mechanisms the Board can now employ or through regulations from Cabinet, should it choose to enact them:
 - **CFLA ASK:** a statutory process for intervenors and a system to make funds available to them
 - **CFLA ASK:** to be clear in the *Copyright Act* that in cases where a library is not involved with a process before the Copyright Board, that library will not be required to provide evidence of its operations in that Board proceeding

Outline

1. Litigation
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3. Into the Future

a) Trade Agreements

i. Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (2016)

- already in force in Canada through the *Canada-EU Comprehensive Economic and Trade Agreement Implementation Act, Statutes of Canada 2017, c 6* (brought into force on September 7, 2017) but, though it had impact on other areas of intellectual property law in Canada, it had **no effect on copyright**.

ii. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)

iii. United States Mexico Canada Agreement (USMCA)

b) Statutory Review of the *Copyright Act*

ii *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* (January 2018)

Agreed amongst 11 countries January 23, 2018: Australia, **Brunei**, **Canada**, **Chile**, Japan, **Malaysia**, Mexico, New Zealand, **Peru**, Singapore, Vietnam.

Signed by Canada March 8, 2018.

The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation Act*, Statutes of **Canada**, c.23, was given Royal Assent October 25, 2018. It makes no mention of copyright.

December 30, 2018, the CPTPP came into force for **Canada**, Australia, Japan, Mexico, New Zealand and Singapore – and, on January 14, 2019, for Vietnam.

- **Does NOT require change to Canada’s copyright**
- In particular, does not require any change to Canada’s longstanding copyright terms, including “life of the author plus 50 years”

iii. United States-Mexico-Canada Agreement (USMCA)

- Deal reached Sept. 30, 2018, signed Nov. 30, 2018, enacting legislation for Canada will have to follow
- Chapter 20 governs Intellectual Property, including copyright.
 - See text at:
https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20_Intellectual_Property_Rights.pdf
- The US steadfastly refused to agree to any statement that copyright represents a balance between authors and users!
- In Art 20.14 (in section B: Cooperation) the 3 countries establish a new “**Committee on Intellectual Property Rights**”, with membership from each country
 - It shall, among other things,
 - “2 (a) Exchange information ... such as
 - (iv) approaches for reducing ...infringement, as well as effective strategies for removing underlying incentive for infringement”

The biggest implication for Canada's copyright★:

- The US copyright term is already “life + 70” and Mexico’s is “life + 100”.
- Art 20.63 (in Section H: Copyright and Related Rights) requires Canada to move to “life + 70” –
 - “(a) [where there is] the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death; and
 - (b) on a basis other than the life of a natural person, the term shall be:
 - (i) not less than 75 years from the end of the calendar year of the first authorized publication [or fixation (see note 60)] of the work, performance or phonogram, or
 - (ii) failing such authorization performance within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.”

★ Canada has 2 ½ years to make this change (so, to **spring 2021**)

Other key provisions for Canadian law:

- It is confirmed (footnote 61 to the text of the USMCA) that Article 20.66 concerning “contractual transfers” does not affect the exercise of moral rights.
- With respect to TPMs and RMI, Canada can create exceptions from criminal procedures and penalties for those that are “a **non-profit library, archive** [including non-profit **museum**], **educational institution**”
 - See Art 20.67: Technological Protection Measures (TPMs) in section H
 - See Art 20.68 (1)(3) Rights Management Information (RMI) in Section H
- Annex 20-A to section J of chapter 20 (on Intellectual Property) makes it clear that Canada can keep its “notice-and-notice” regime.
- Art 20.89 (1)(b) requires all three countries to shelter ISPs from financial liability in situations where “copyright infringements that they do not control or initiate or direct” take place through their networks.

b. Statutory Review of the *Copyright Act*

The review is being conducted by the **House of Commons Standing Committee on Industry, Science and Technology (INDU)**.

- Began meeting: Feb 13, 2018
- 209 witnesses before it;
- 192 briefs filed
- 41 meetings held to Dec 12, 2018

Until the middle of this month the **Honourable David Lametti** was one of the 4 non-voting Parliamentary Secretaries on the Committee – and the one from Innovation, Science and Economic Development. The others are from (a) Small Business and Export Promotion, (b) Tourism, Official Languages and La Francophonie, and (c) Science & Sport as well as Public Services, Procurement and Accessibility.

In the latest Cabinet shuffle the **Honourable David Lametti** has become **Minister of Justice** and presumably will not continue as he has in the past on this Committee.

The committee met yesterday (Jan 29, 2019) and will meet tomorrow (Jan 31, 2019), when the Agenda calls for it to be “Drafting instructions for a Report”

(<https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>)

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1. Litigation
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 - a) *Marrakesh Treaty... For ... Blind, Visually Impaired or Otherwise Print Disabled* (Marrakesh VIP Treaty)
 - b) Efforts at WIPO's Subcommittee on Copyright and Related Rights toward a Treaty on Limitations for Libraries and Archives

a) Marrakesh VIP Treaty

https://www.wipo.int/marrakesh_treaty/en/

European Union joined in October 2018, which, through its member states brings the total of participating nations now to over 70.

Both **Mexico** and **Canada** are members but, though the **United States** supported the Marrakesh Treaty in 2013 and helped bring it into being, the United States has not ratified it and so is not a member. Note that the new **USMCA** has exceptions that are supportive of member states' Marrakesh Treaty obligations.

The Treaty creates the ABC Book Consortium which is reporting it has so far made 415,000 titles accessible – but this represents less than 10% of all published material.

b) WIPO's SCCR on Limitations for Libraries

- The prospect of a UN treaty dealing with limitations and exceptions to copyright for Libraries, Archives and Museums (TLAM) still seems a distant prospect (after more than a decade of effort) – but it remains an active part of the United Nation's agenda
- The 38th Sub-Committee on Copyright and Related Rights (SCCR) meeting is scheduled for April 1-5 this year and the topic of “Limitations for Libraries and Archives” is #7 on the Agenda
- There is now an “Action plan on libraries, archives and museums” in place in the SCCR and Dr. Kenneth Crewes is actively pursuing a project on creating a “typology of libraries” under it.
- It may also be noted that the USMCA Chapter 20 on copyright has left room for its 3 signatories to create limitations and exceptions for libraries, archives and museums, as mentioned on our earlier slide, even though there is no international treaty focused on those institutions yet ...

In Closing

Thank you ...

Any questions or comments?