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Copyright and Control

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Copyright and Control

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CLA Copyright Committee Peer-Reviewed *Felicitator*

columns (fully footnoted; I am General Editor) – accessible from

http://www.cla.ca/AM/Template.cfm?Section=Copyright_Information:

1. Jeannie Bail & Brent Roe, “**Copyright and the Trans-Pacific Partnership**,” 59(5) October 2013 at 15
2. Rob Tiessen, “**The Definition of ‘Commercially Available’**,” 59(6) December 2013 at 14
3. John Tooth, “**Copyright for Schools and School Libraries**,” 60(1) February 2014 at 6
4. Sam Cheng & Christina Winter, “**Copyright Skills in Academic Libraries**,” 60(2) April 2014 at 8
5. Margaret Ann Wilkinson, “**Copyright Users’ Rights in International Law**,” 60(3) June 2014 at 7
6. Robert Glushko, Rumi Graham, Ann Ludbrook & Heather Martin, “**Understanding ‘Large and Liberal’ in the Context of Higher Education**,” 60(4) August 2014 at 14
7. Victoria Owen, “**The Librarian’s Role in the Interpretation of Copyright Law: Acting in the Public Interest**,” 60(5) October 2014 at 8
8. Carolyn Soltau & Adam Farrell, “**Copyright and the Canadian For-Profit Library**,” 60(6) December 2014 at 8
9. Bobby Glushko & Rex Shoyama, “**Unpacking Open Access: A Theoretical Framework for Understanding Open Access Initiatives**,” 61(1) Spring 2015 at 8-11, 20.
10. John Tooth, Becky Smith, Jeannie Bail, “**Unravelling the Complexity of Music Copyright**,” 61(2) April 2015 *forthcoming*

Look forward to further columns on the Public Lending Right, on the rights of Interviewees & Oral Histories, on Photographs, etc.

Control and Balance

Legislative control in Canada over copyright was given in 1867 exclusively to the Federal government: Constitution Act s 91 (23)

- Note that the concept of “copyright” is neither defined nor elaborated upon (differs from US).

“In Canada, copyright is a creature of statute, and the rights and remedies provided by the Copyright Act are exhaustive.”

Binnie, “Tariff 22”, para 81 (see also s 89 of the Act)

But, the Copyright Act must align with the Charter:

- Freedom of expression (and “media of communication”) is guaranteed in Charter (s 2(b))
 - Since copyright involves a limited term monopoly over dissemination of expressions, it is evident that a **balance** must be achieved between ...

Federal government control over copyright
AND
Freedom of expression and media of
communication

International evidence of the necessity for balancing control:

Universal Declaration of Human Rights (1948) Art 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

International Covenant on Economic, Social and Cultural Rights (1966) Arti 15

(1) The States Parties to this present Covenant recognize the right of everyone:

- To take part in cultural life;
- To enjoy the benefits of scientific progress and its applications;
- To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture

“Balance” in Canadian Copyright



“Under the Copyright Act, the rights of the copyright holder and the limitations on those rights should be read together to give ‘the fair and **balanced reading** that befits remedial legislation”.

Justice Binnie (as he then was), for SCC majority (at para 89), with Justice LeBel (as he then was) concurring, in the 2004 “Tariff 22” decision (emphasis added), quoting from para 48, 2004 *CCH v LSUC* unanimous decision written by the Chief Justice

“**balance** between promoting the public interest in the encouragement and dissemination of works... and...[preventing] someone other than the creator from appropriating whatever benefits may be generated.”

Binnie, for the majority in 2002 *Théberge* (para 30), quoted with approval by Chief Justice in *CCH v LSUC* (para 10)

What balance?



Decision	1 st stated	2 nd stated
CCH v LSUC; “Tariff 22”	“rights of the copyright holder”	“limitation on ... rights [of copyright holder]”
Théberge	“promoting the public interest in ... work”	“preventing someone other than the creator from appropriating benefits”

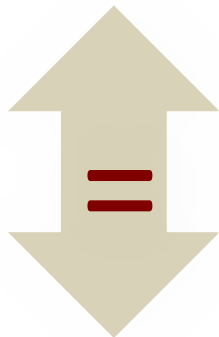
Balancing what?



Rights of the **copyright holder**
(CCH v LSUC; “Tariff 22”)



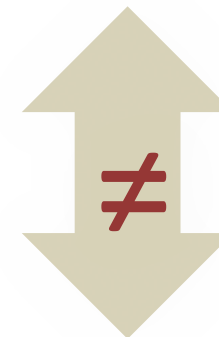
Limitations on ... rights [of
copyright holder]
(CCH v LSUC; “Tariff 22”)



Preventing someone other
than the **creator** from
appropriating benefits ...
(Théberge)



Promoting the public
interest in ... works
(Théberge)



Does “Balance” have to be Binary?

Historically, YES:

KEY FEATURE of copyright interest – transferability (“assignees or assigns” identified specifically in the legislation)

Statute of Anne, **1709**

The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times **to Authors** ... the exclusive Right to their respective Writings

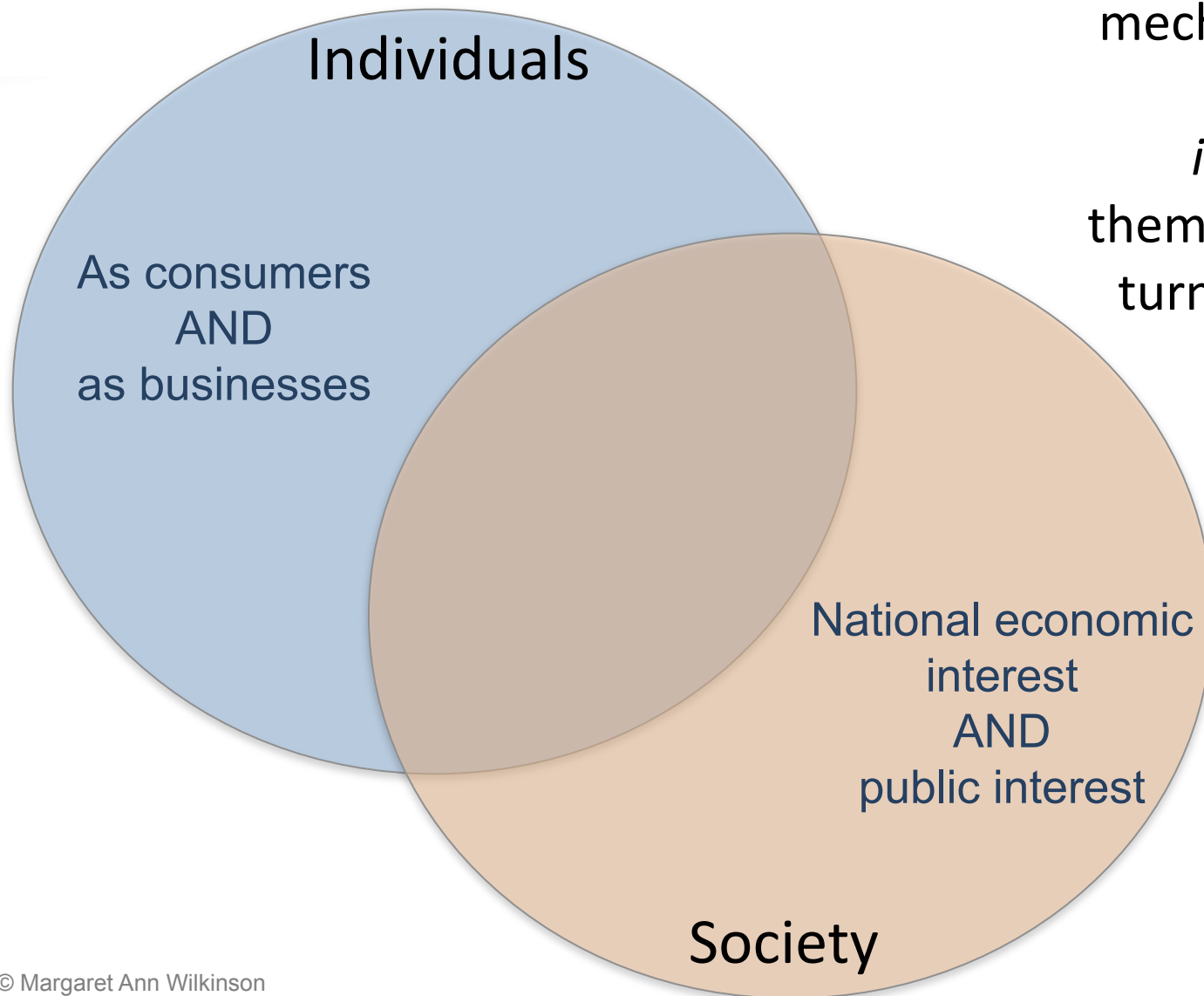
US Constitution Art 1 §8 cl 8 (**1787**)

The “classic balance”: **encouragement for dissemination of ideas**

in return for

contractually transferable limited term monopolies over expressions of those ideas

STAKEHOLDERS REPRESENTED IN THE CREATION OF COPYRIGHT



Copyright created as mechanism to provide incentives to *individuals* to spur them to creativity -- in turn producing public benefits through dissemination of information

But is more than a binary balance evidenced in the current Copyright Act?

YES

1. Original economic rights – works – s.3
-- “other subject matter” – ss 15, 18, 21
CORPORATE

2. Moral Rights – ss 14.1 and 17.1 and 28.2
INDIVIDUAL

3. Users’ Rights – ss 29 to 32.3
LIMITATIONS ON THE RIGHTS OF
ECONOMIC RIGHTSHOLDERS
(NO EFFECT ON MORAL RIGHTS)

[4. TPM and MRI – ss 41 to 41.27
-- whether or not it can be argued
TPM and MRI are not copyright —
but CORPORATE]

What is the CATALYST for the CHANGE in copyright from “classic” past to multi-faceted present?

TECHNOLOGY ?

NO...

KEY BUSINESS ENVIRONMENT CHANGE:

17th -18th C.

Mid-19th C.

Late 19th C. to Present

Patent

Copyright

Trademark

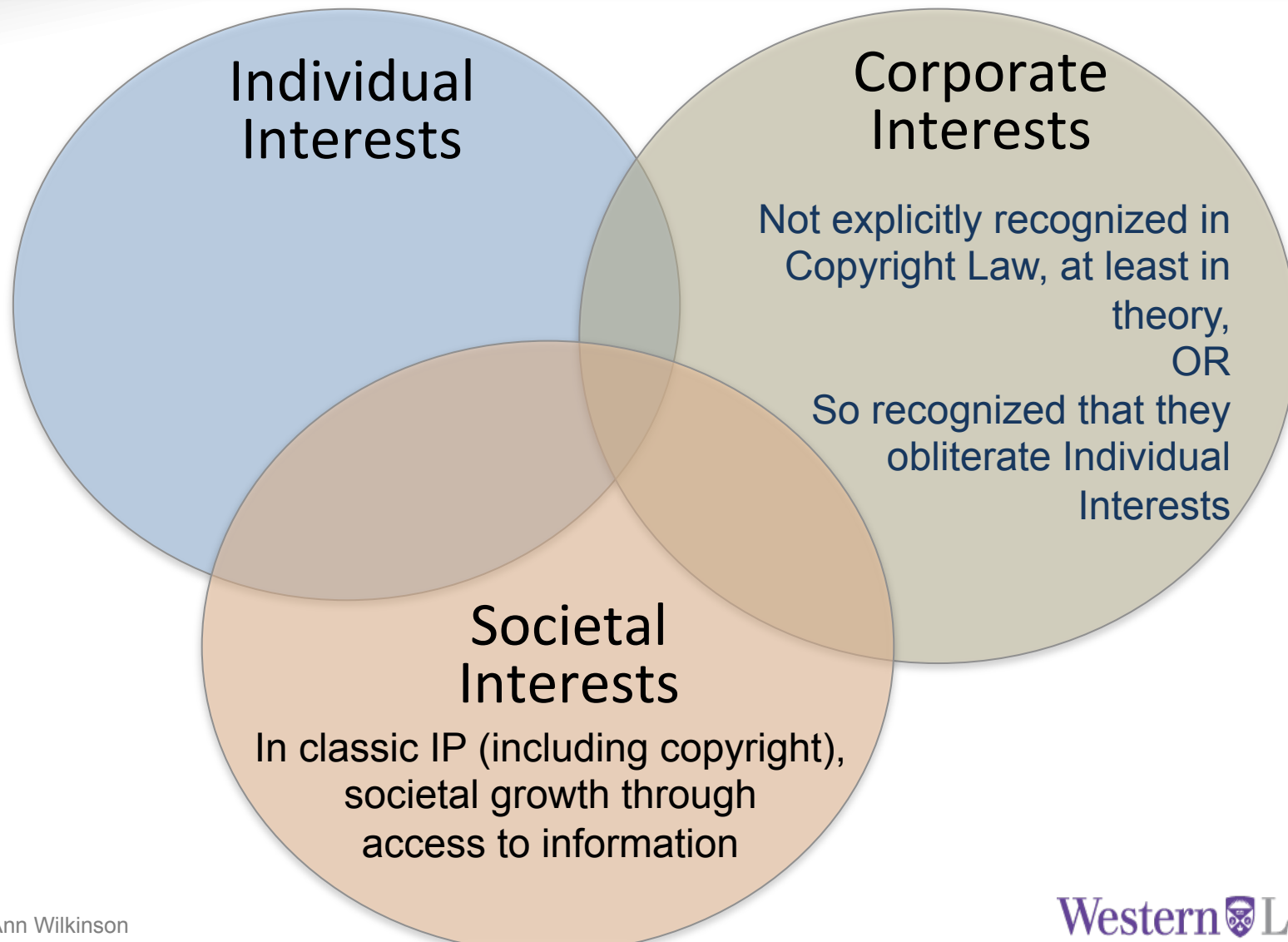
Separation of company from its individual owners

- e.g. *Joint Stock Companies Act*, UK1844

The corporation as a person in its own right.

- e.g. *Santa Clara Cty v Southern Pacific RR Co.* 1886 US
- e.g. *Salomon v A Salomon & Co Ltd* 1897 HL

Mid 19th C Rise of Corporation changes landscape



INHERENT © RESPONSE TO CORPORATE SEPARATION FROM INDIVIDUALS:

17th -18th C.

Mid-19th C.

Late 19th C. to Present

Copyright

MOVE TO INTRODUCE
"Moral Rights" -
non-transferable

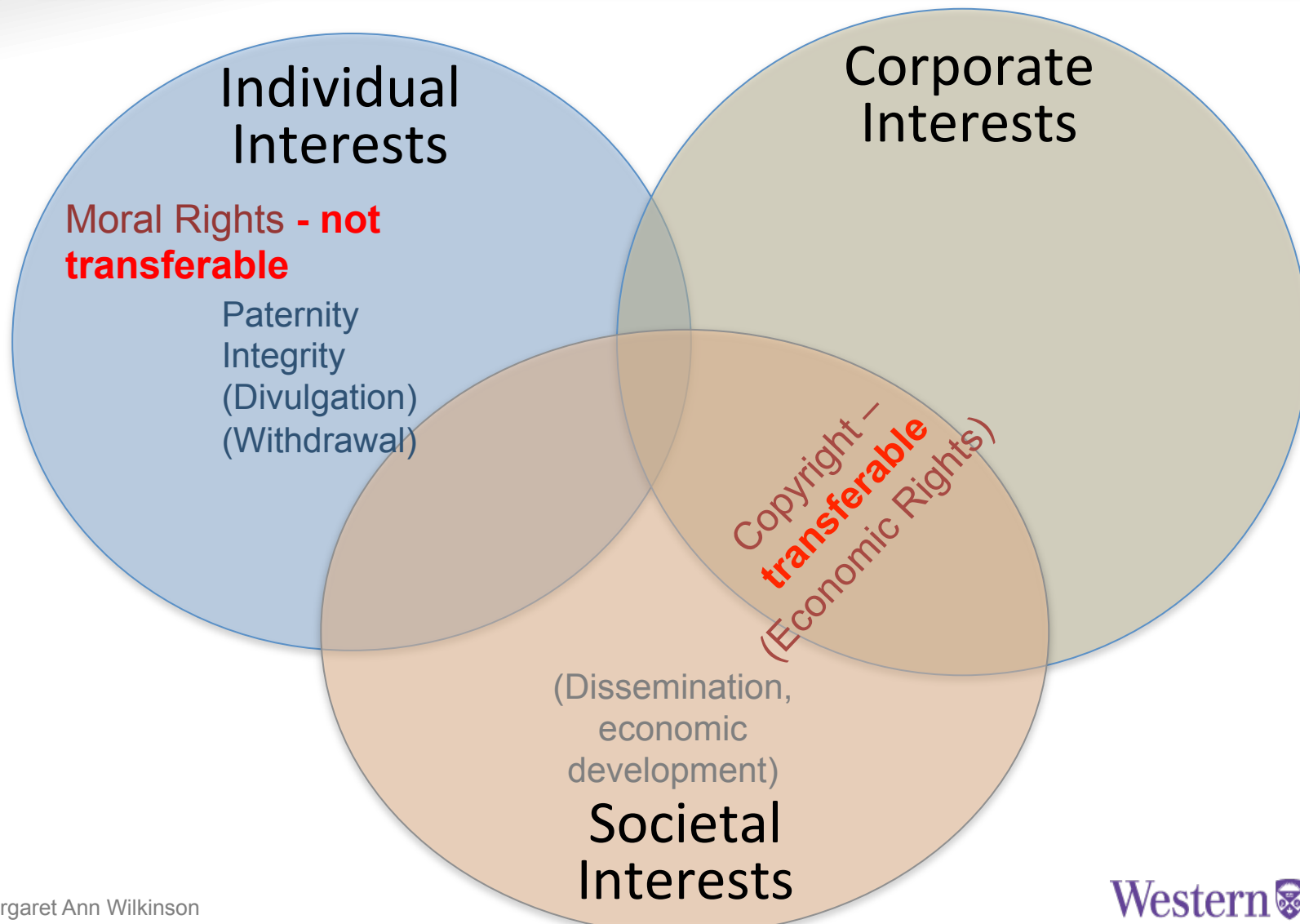
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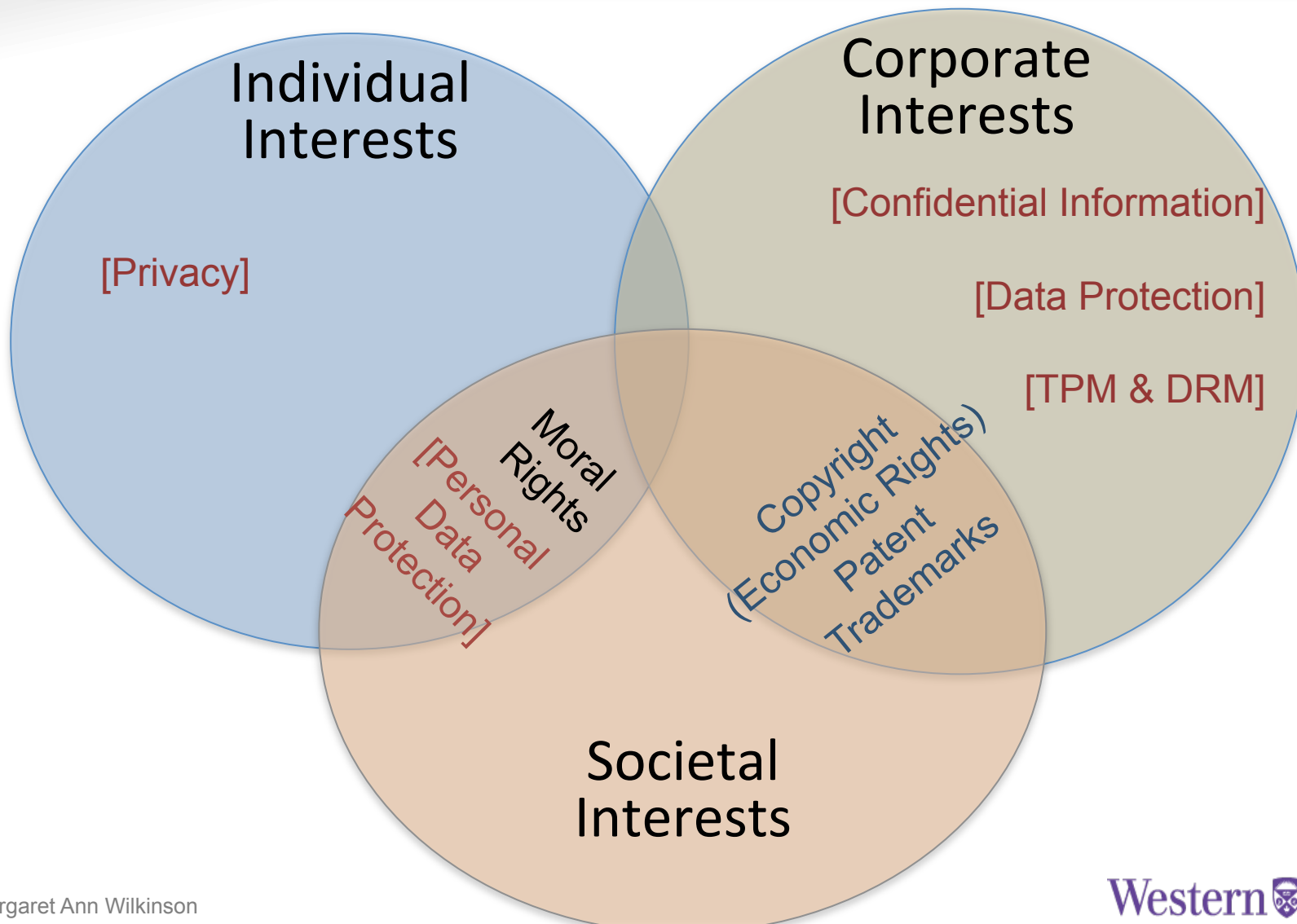
The corporation as a person in its own right.

- e.g. *Santa Clara Cty v Southern Pacific RR Co.* 1886 US
- e.g. *Salomon v A Salomon & Co Ltd* 1897 HL

20th C, as Moral Rights gain acceptance:



As Technology Advances, Tensions and Divisions Created by Separation of Individuals from Companies (after Creation of Original IP) intensifies:

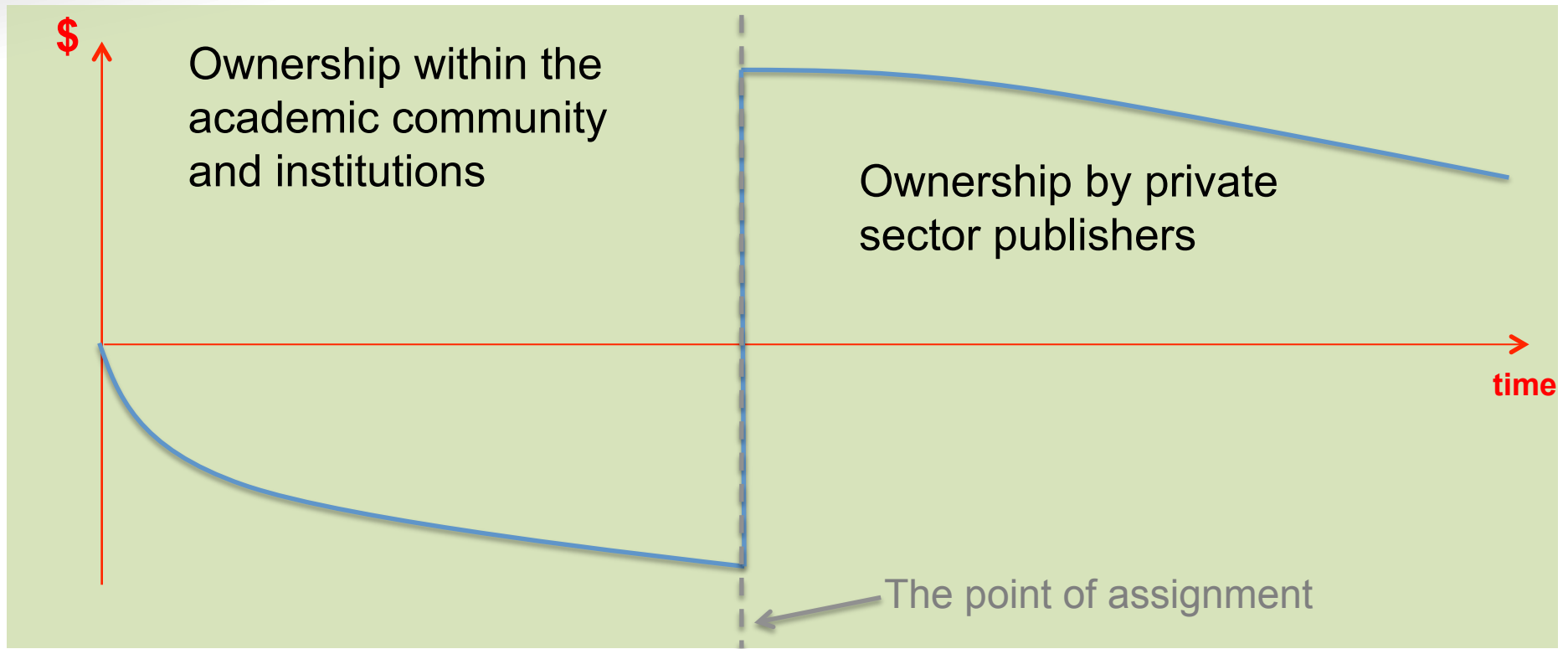


Information Needs and the Copyright Regime

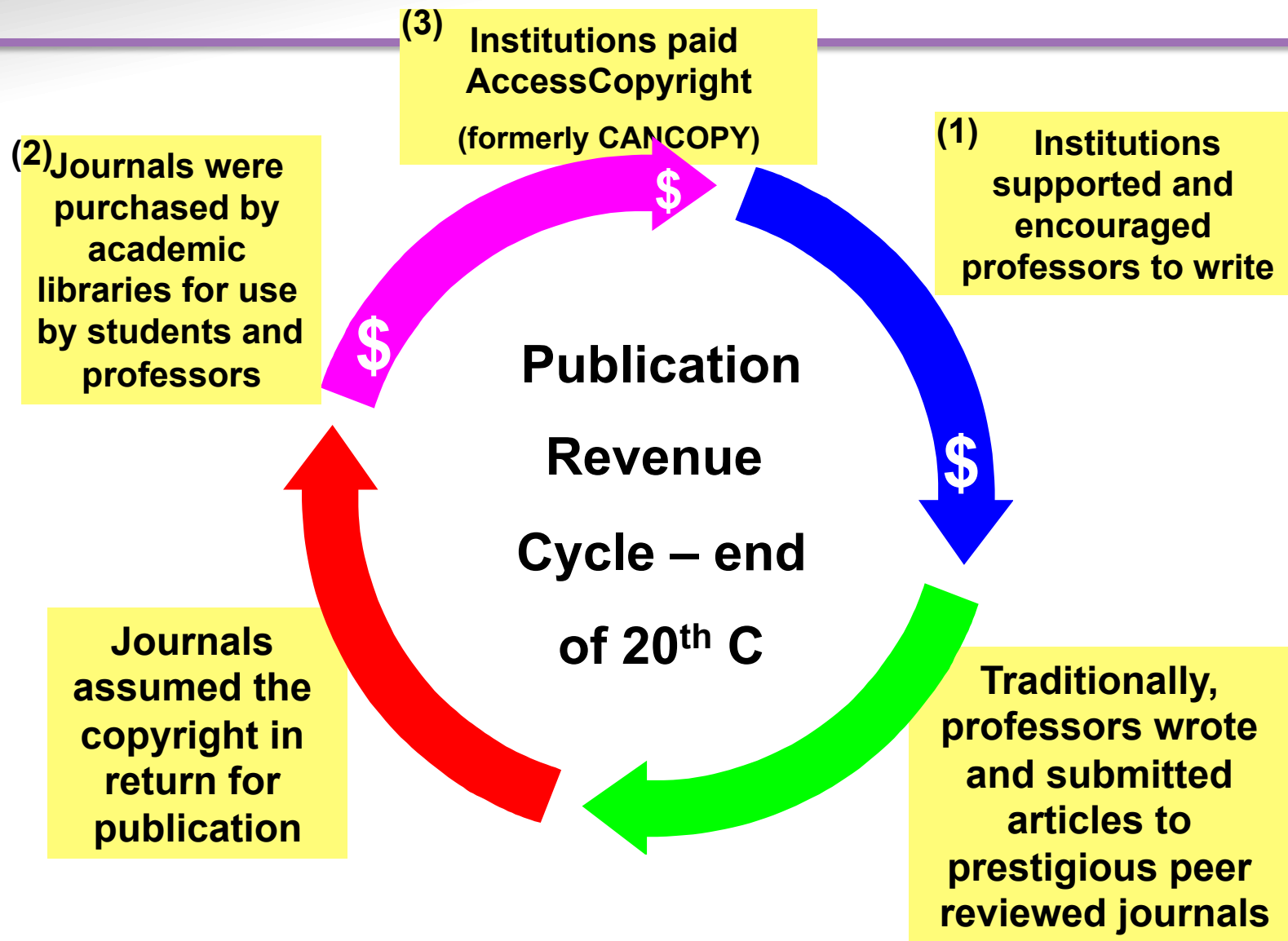
Users need (1) access to information and (2) indications of the authority of accessed information (both of work and author) in order to make decisions about using information:

- Economic rights in copyright act to enhance the user's ability to access information;
- Moral rights act to provide indicators of the reliability (integrity rights) and authority (paternity rights) of information
 - The functions of the moral rights are increasingly important as the “old” indicators of authority (eg, the reputations of established publishers) become vastly diminished as self-publication and “free” republication become norms.

Traditional Academic Publishing Cycle – Typical Economic Allocation of Literary Output



At the **end of the 20th Century**, when Academic Publishers, assigned rights by authors, joined Collectives to assert *their* assigned rights: Academic Institutions ended up Paying 3 Times for Written Product !



When Original Copyright Owners Make Economic Copyright Decisions, they are Key Intellectual Property Policy Makers

Assert economic copyright rights?

1. Assign to traditional publishers ?
 - » Control shifts to publishers, whether foreign or domestic.
2. Assign to alternative publishers (those who do not insist on full transfer of rights) ?
 - » Some control shifts to publishers, whether foreign or domestic, some rights remain with original copyright holder.
3. Grant certain permissions
4. Exercise rights collectively ?
 - » Individually authors have little control over collective enforcement (though Access Copyright only requires non-exclusive assignment and therefore individual infringement action still possible) – but there is possible remuneration according to collective's policies and possible control through governance of the collective...

OR

Renounce economic copyright rights?

If rights are renounced, the original owner ceases to be important as a policy-maker:

Consequences of renunciation of economic rights:

- No control of the work or other subject matter by the original copyright holder;
- No further potential for original copyright holder to exploit future economic value of that work or other subject matter;
- Works and “other subject matter” can be exploited (throughout the period of copyright protection) by other persons (individual or corporate)...

When Original Copyright Owners Make Copyright **& Moral Rights Decisions**, they are Key Intellectual Property Policy Makers

Assert copyright economic rights?

1. Assign to traditional publishers ?
 - » Control with publishers, whether foreign or domestic.
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3. Grant certain permissions
4. Exercise rights collectively ?
 - » Individually little control over collective enforcement (though Access Copyright only requires non-exclusive assignment and therefore individual infringement action still possible) – but possible remuneration according to collective's policies and possible control through governance of collective?

Retain moral rights – or waive them as part of agreements focused on economic rights?

Effect of moral rights waiver in Canada:

- Waiver of moral rights is a uniquely Canadian legislative concept (introduced in 1988)
- Once a waiver is given to someone, unless otherwise indicated, any subsequent users authorized by the person (individual or corporate) receiving the waiver can also rely on the waiver (ss 14.1 and 17.1)
- In the United States, moral rights have only been legislated in a very narrow sphere – one not affecting this discussion – so it is possible American academic publishers will not seek moral rights waivers from their creators; in this case, in Canada, these creators, publishing with Americans, will be able to exercise their full moral rights in Canada (because they have never waived them) whereas those publishing with Canadian publishers *will* have waived their rights and thus will typically not be able to assert their moral rights in Canada.

The effect of the “open access” movement:

Reasons for adopting (from Glushko & Shoyama (2015))

- Enlightened self-interest
- Enlightened group interest
- Neo-Marxist rationale
- Taxpayer rationale
- Social justice rationale

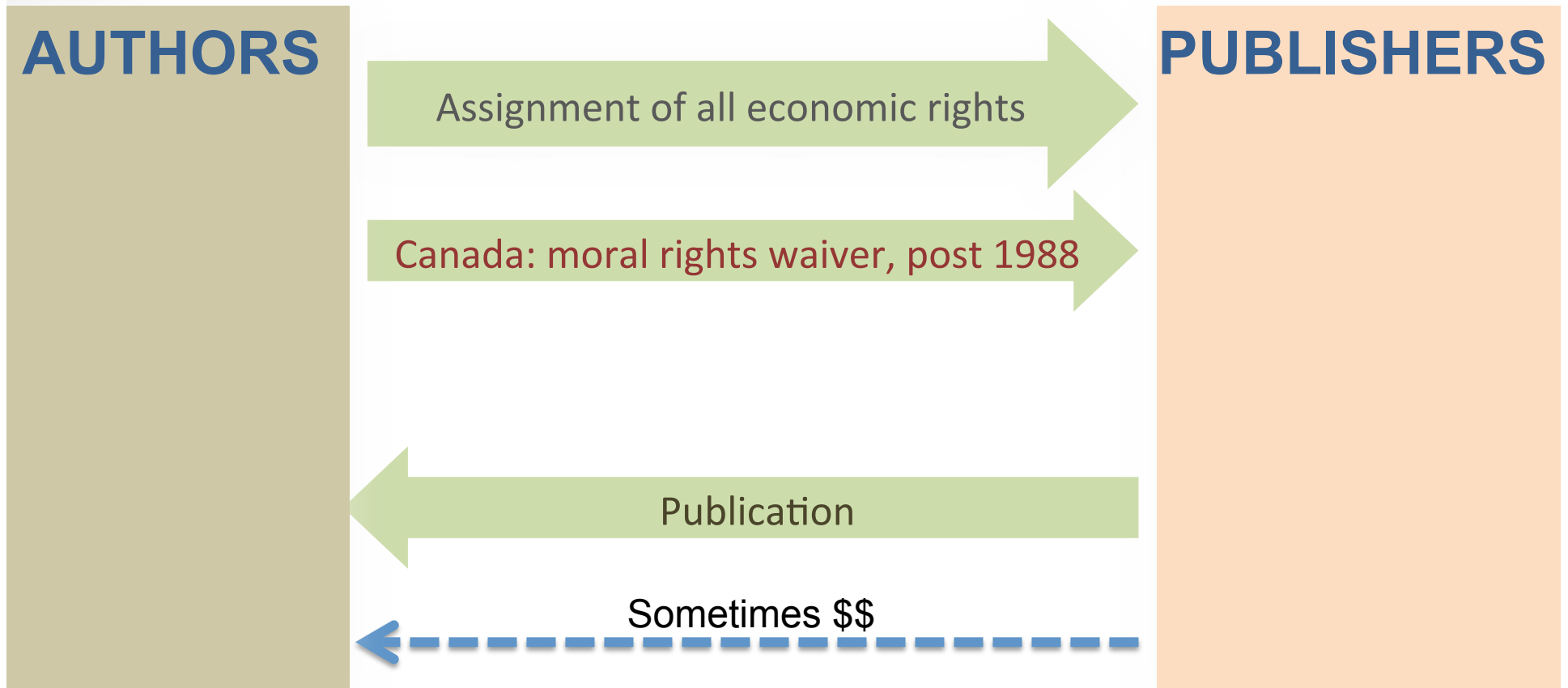
“while one can support open access for some or all of these reasons, these rationales do not always operate in concert, and supporting ... certain ... forms may advance ... some... without advancing the objectives of other”

What happens when a grass-roots movement becomes mandated?

- Tri-Agency Open Access Policy on Publications (effective from May 1, 2015)

“Grant recipients are required to ensure that any peer-reviewed journal publications arising from Agency-supported research are freely accessible within 12 months of publication ... [through] Online Repositories [or] Journals.”

Model of Typical “classic” contract:

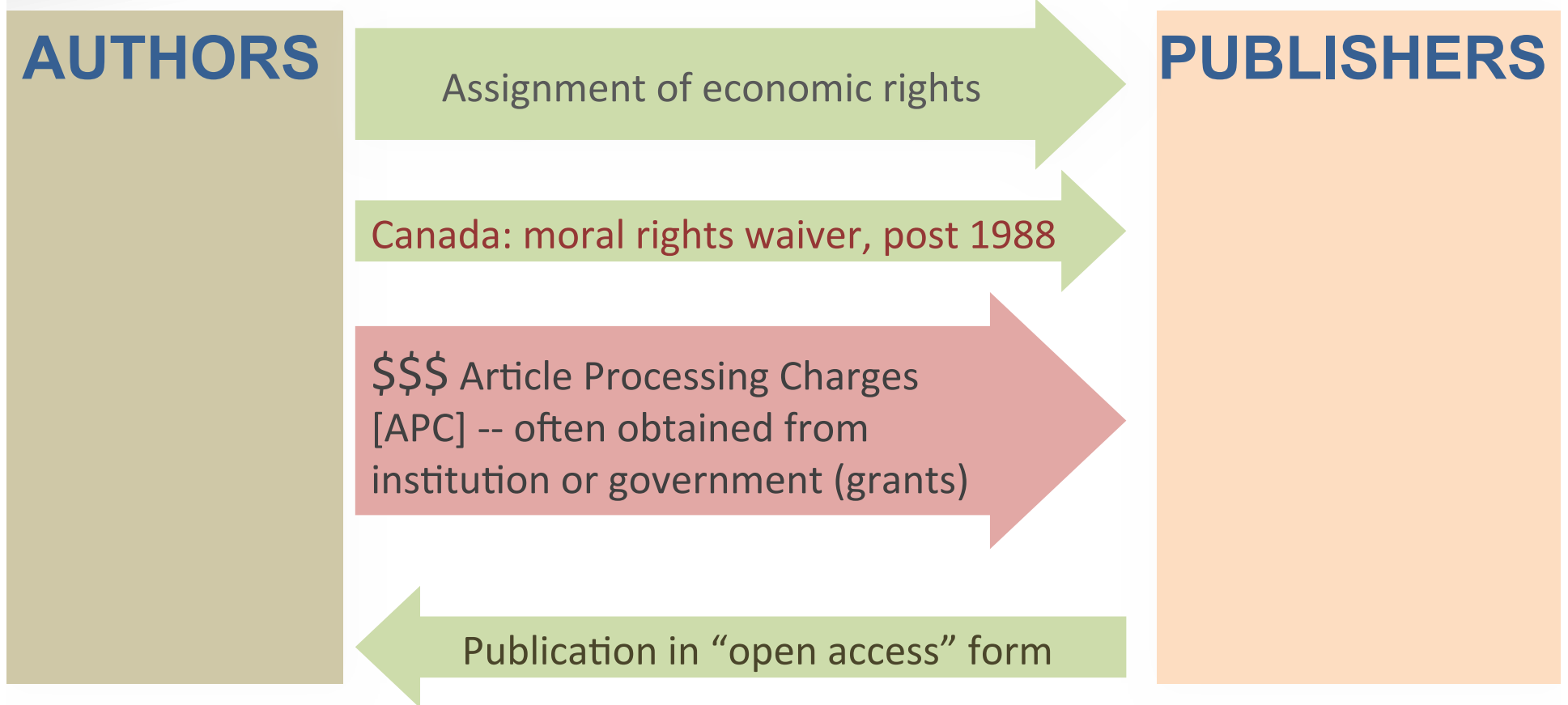


Not Contract but **Permission Model**:



Since no contractual exchange between author and publisher, neither can control economic uses once published – but nor can users be certain moral rights will not be claimed since legal status of waiver would not be certain (is general waiver for all public contemplated under s 14.1(2) given s 14.1(4) provision that others can claim through owner or licensee and here no licensee?)

Contract for Open Access in “hybrid” publication:



Under the Tri-Council-influenced model 2015, authors may PAY publishers to publish their works as dictated by Tri-Council influenced institutions and the Tri-Council itself: Academic institutions can end up Paying 4 Times for works and other subject matter!

(4) Universities pay Access Copyright for reproduction rights where not open access

(3) Hybrid journals are purchased by academic libraries (with both open access and non-open content), in order to preserve full publications for use by students and professors

(1) Academic institutions support and encourage professors to write

**Publication
Revenue
Cycle**

(2) Authors pay Article Processing Charges [APC] to publishers, using “public” funds, to release articles with “open access” permissions

Professors write and submit articles to prestigious peer-reviewed journals or venues

Open Access Movement may frustrate Legislation Against Circumvention of TPMs & MRI

- Open access may detract from the over-balance toward corporate power created by the recent imposition of legal protection of TPMs & MRI – because open access necessarily means TPMs will not be installed;
- Open access can enhance the power of authors who have NOT waived their moral rights because avoiding TPMs leaves authors able to see their own works and ensure their moral rights are respected
 - No legislated exception for moral rights holders to circumvent TPMs to ensure respect for moral rights
- Can more be done to enhance moral rights in order to preserve indications of reliability & authority of sources for users?

Once moral rights are waived, creators cease to be important as policy-makers contributing to the authority of information sources ...

Consequences of renunciation of economic and moral rights:

- No control of the work or other subject matter by the original copyright holder;
- No further potential for original copyright holder to exploit future economic value of that work or other subject matter;
- Works and “other subject matter” may be available to be exploited (throughout the period of copyright protection) by other persons (individual or corporate);
- The author or performer cannot control connecting her or his name or pseudonym to the work or performance or cannot enforce his or her choice of anonymity – and cannot stop the connection of another person (individual or corporate) being connected with the work as author or performer
- The author or performer cannot ensure that the work or performance remains as it was originally conceived and executed by the author or performer
- The public loses legal protection of the “authority” of the work or performer’s performance (neither the authenticity of the work or performance nor the real identity of its creator are guaranteed)

Contractual power of Colleges & Universities

- In recent years colleges and universities have had **significant impact** on copyright policy in Canada by **negotiating** licenses **for** online materials that mirror the Canadian “**fair dealing**” legislative provisions (rather signing contracts that contain the American “fair use” provisions, other users’ rights provisions or no users’ rights provisions)
- Can this success be replicated in respect of supporting authors’ moral rights?

I would urge you to consider a policy change in 3 steps that will empower creators, better address users' needs, preserve a multi-faceted balance in copyright and, thus, serve the public interest:

1. Use the influence of your position to **educate and encourage** authors and creators (including performers) to resist attempts to have them waive their moral rights as part of agreements involving their economic rights (open access or otherwise);
2. Use the influence of your position to **negotiate, as part of** licenses or purchases, for wording such that, even if vendors have asked creators to waive their moral rights, that the vendor will respect the rights legislated for authors and creators in ss 14.1, 17.1, 28.2 (referring the sections or setting out identical wording in the license (whether open access is involved or not));
3. Use your **influence in any relevant venue** to try to ensure that any type of “open access” that is supported leaves the moral rights of creators intact and in place.

Taking these three steps to re-invigorate authors' control over their works and performances in key public interest policy-making by

- Ensuring creators are given ongoing controls over their works and performances;
- Redressing the imbalance in copyright in the 19th century which occurred when corporations became businesses apart from individuals and copyright ceased to be a matter of binary balancing (requiring, instead, balancing amongst multiple stakeholders);
- Meeting key users' needs in the online, digital environment of distributed dissemination by preserving indications of the authority of available information (the integrity of the work and identification of authors as authors intend).

THANK YOU – for further background see:

- Wilkinson, “What is the Role of New Technologies in Tensions in Intellectual Property?,” in **Intellectual Property Perspectives on the Regulation of Technologies** [tentative title] ed by Tana Pistorius (Cheltenham UK: Edward Elgar) Forthcoming 2015 . See also Powerpoint presentation on my faculty website at http://law.uwo.ca/faculty_and_administration/PDFs/Wilkinson_ATRIP_Montpellier_2014.pdf
- Wilkinson, “Access to Digital Information: Gift or Right?,” Ch.14 in **Knowledge Policy for the 21st Century: A Legal Perspective**, ed by Mark Perry & Brian Fitzgerald (Toronto: Irwin Law, 2011), 313-340. http://www.irwinlaw.com/content_commons/knowledge_policy_for_the_21st_century.
- Wilkinson & Natasha Gerolami, “The Author as Agent of Information Policy: the Relationship between Economic and Moral Rights in Copyright,” (2009) 26 *Government Information Quarterly* 321-332.
- Wilkinson, “The Public Interest in Moral Rights Protection,” [2006] 1 *Michigan State Law Review* 193-234.
- Wilkinson, “Copyright in the Context of Intellectual Property: A Survey of Canadian University Policies,” (1999-2000) 14(2) *Intellectual Property Journal* 141-184.