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Copyright Update 2015

Margaret Ann Wilkinson
Western University, mawilk@uwo.ca

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Copyright Update

Dr. Margaret Ann Wilkinson,
Professor, Director of IPIT Area
(Graduate Supervisory Status in
LIS, Law & Health Information Science programs)
Western Law, Canada

With the assistance of Joan Dalton, Chair, OLA Copyright Users' Committee

Bi-monthly CLA *Feliciter* Copyright Columns

(Wilkinson, General editor; CLA Copyright Committee peer-review)

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) February 2015 *forthcoming*

OLA Superconference 2014 comprehensive ©-related program:

Wednesday -

- AODA & Copyright: Paper Cuts & Paper Trails (#501)

Thursday –

- Buy, Borrow or Stall? Access to Films (#801C)
- IP, Makerspaces & 3D Printers (#803D)
- [Our Copyright Update session together] (#908)
- Transparent Licenses: Making User Rights Clear (4 pm – #1116)

Friday -

- Wild West: Open Access Publishing (10 am – #1605)
- Course Readings Evolution @ Ryerson (2 pm – #1701B)
- Crediting your Storytime Sources in the Digital Age (2 pm – #1703D)

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1. Royal Society of Canada on Libraries

Expert Panel Report on

The Future Now: Canada's Libraries, Archives and the Public Memory (2014)

Patricia Demers, Chair (U Alta), Guylaine Beaudry (Concordia), Pam Bjornson (NRC), Michael Carroll (Amer U Wash College of Law), Carol Couture (U Montréal), Charlotte Gray (Carleton) Judith Hare (Halifax Public L) Ernie Ingles (U Alta), Eric Ketelaar (U Amsterdam), Gerald McMaster (AGO (ret'd)), Ken Roberts (Hamilton Public L)

Pp 173-184 M. Copyright and Canadian Libraries and Archives in the Digital Environment

63. ….make full use of users' rights of … fair dealing and the additional specific exceptions…

64. ..continue to participate in proceedings before the Copyright Board to ensure their positions are well represented.

65. library licensing practices for electronic resources be revised. …

66. in discussions of how to adapt to the digital environment, concerns about increasing access are balanced with concerns about ensuring that creators of literary and artistic works are adequately compensated for their contribution to Canada's cultural legacy.

63. ….make full use of their users' rights of fair dealing and the additional specific exceptions…

- Libraries … make full use of their users' rights of fair dealing and the additional specific exceptions and limitations to copyright to engage in productive initiatives such as digitization of collections in analogue media, providing private study copies to patrons, and otherwise using the flexibility provided by the law as appropriate.

65. library licensing practices for electronic resources be revised. …

- library licensing practices for electronic resources be revised. From a user's perspective, the Internet enables equal access to digital information wherever there is a connection. But, access to licensed electronic resources, including ebooks, varies greatly across Canada because licensing is still done at the local, or sometimes at the consortial, level. Greater institutional cooperation on licensing and hosting should be given high priority to equalize access to the resources by using cloud services or other shared Internet infrastructure.

Text to the recommendations -

- Is interesting and well-written.
- Is, unfortunately, already a touch out-of-date …
- Does not explicitly explain or connect to each of the four recommendations made.
- Does NOT ever mention the moral rights.

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2. Following up on *Copyright Act* changes

Key change:

- The **Notice-and-Notice** provisions of the Act are now in effect .
- These apply to Internet Service Providers (ISPs) and many libraries will fall within the definition of ISP.
- There will be no regulations in this respect.

The new law:

- SI/2014-58 (2 July 2014) *Copyright Modernization Act: Order Fixing the Day that is Six Months after the Day on which this Order is published as the Day on which Certain Provisions of the Copyright Act Come into Force*
- The Explanatory Note says that the government decided, after consultation, "the regime will function without regulations, as the elements of the legislation are sufficient."
- CLA was the only users' group to make submissions during the consultation.

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 the ISP library, claiming infringement by any user of the library's system and posting claimed infringing content, the library must pass on the notice to the user (s 41.26(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 library (s 41.26(2)).

Status of pending amendments to the *Copyright Act*:

- Sections of the *Copyright Act* (as amended by the *Copyright Modernization Act*) still not in force (largely to do with the *WIPO Phonograms and Performances Treaty*)

- But *Combatting Counterfeit Products Act* (aka *Act to Amend the Copyright Act and the Trade-marks Act*) introduced last year on March 1 – discussed at our last Update –passed into law this past December, 2014.
  - The provisions amending the Criminal Offence provisions of the *Copyright Act* are in force.

As indicated last year, Secondary Infringement has been expanded (in terms of exportation) by the *Combatting Counterfeit Products Act* --

- **3. Section 27 of the** [Copyright] **Act is amended by adding the following after subsection (2.1):**
- Secondary infringement — exportation
- (2.11) It is an infringement of copyright for any person, for the purpose of doing anything referred to in paragraphs (2)(*a*) to (*c*), to export or attempt to export a copy — of a work, sound recording or fixation of a performer's performance or of a communication signal — that the person knows or should have known was made without the consent of the owner of the copyright in the country where the copy was made.
- Exception
- (2.12) Subsection (2.11) **does <u>not</u> apply with respect to a copy that was made under a limitation or exception under this Act or, if it was made outside Canada, that would have been made under such a limitation or exception had it been made in Canada** (emphasis added).

As predicted last year, import & export have been given greater enforcement by the new provisions:

44.01 (1) Copies of a work or other subject-matter in which copyright subsists shall not be imported or exported if(*a*) they were made without the consent of the owner of the copyright in the country where they were made; and(*b*) they infringe copyright or, if they were not made in Canada, they would infringe copyright had they been made in Canada by the person who made them.

Exception

(2) Subsection (1) does not apply to(*a*) copies that are imported or exported by an individual in their possession or baggage if the circumstances, including the number of copies, indicate that the copies are intended only for their personal use; or …

But recall that the following exception continues to exist:

- **45.** (1) Notwithstanding anything in this Act, it is lawful for a person
- (*a*) to import for their own use not more than two copies of a work or other subject-matter made with the consent of the owner of the copyright in the country where it was made;…
- (*c*) at any time before copies of a work or other subject-matter are made in Canada, to import any copies, except copies of a book, made with the consent of the owner of the copyright in the country where the copies were made, that are required for the use of a library, archive, museum or educational institution;
- (*d*) to import, for the use of a library, archive, museum or educational institution, not more than one copy of a book that is made with the consent of the owner of the copyright in the country where the book was made; and
- (*e*) to import copies, made with the consent of the owner of the copyright in the country where they were made, of any used books, except textbooks of a scientific, technical or scholarly nature for use within an educational institution in a course of instruction.

Some ambiguity amongst commentators about the period of protection for photographs:

- Copyright Act s 10 (special periods of copyright in photos) now repealed, leaving general s 6 to govern (life of the photographer + 50 years).
  - This brings Canada into line with our international obligations
- But, Transitional Provisions about photos in the *Copyright Modernization Act*, 2012, provisions that do not appear in the *Copyright Act* but are still law, seem to have been misinterpreted by some commentators (ss 59, 60);
- These provisions do not now create some sort of sliding scale of periods of protection in photos depending upon how old the photo is – they clarify that, where a photo was owned by a corporation *ab initio* under the pre-2012 law (now removed from the *Copyright Act*), the period of protection going forward now from 2012 is still going to be the same "life of the photographer + 50 years" that a photo owned by a photographer *ab initio* had before 2012 and still has.

copying based on where your institution sits

Opt-Out

1. Materials licensed from creators or others will not be affected by the decision to opt-out of any relationship with Access Copyright;

2.Proceed to copy under the "Users' Rights" exceptions in the Copyright Act, including

i. Fair Dealing
ii. Educational Institutions
iii. LAMs

3.Can use all materials, all formats, as permitted in these sections;

4. Guidelines may help your institution provide evidence of its compliance with the requirements of "Fair Dealing" under the Act

5.If Users' Rights exceptions don't apply, seek permission or do not use the material.

Tariff

1.Materials licensed from others not affected by this Tariff;

2.Proceed to copy under terms of the Tariff;

3. Can use only Access Copyright repertoire of materials under Tariff: no audio-visual, musical materials;

4. Guidelines may help your community understand how to comply with the terms of the Tariff;

5."Fair Dealing" NOT in here directly but will factor into the Board's valuation formula for setting the Tariff.

Access Copyright License

1.Materials licensed from others not affected by this License;

2.Proceed to copy under terms of the license agreement;

3. Can use only Access Copyright repertoire of materials under this License: no audio-visual, musical materials;

4. Guidelines may help your community understand how to comply with the terms of the license agreement;

5."Fair Dealing" IS recognized under the current AC license and its extent may factor into renegotiation of the price of the license when the current license expires.

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3. The Copyright Board

Last year we were watching tariffs filed by Access Copyright that affected libraries in three sectors:

i. Provincial and Territorial Governments,

ii. Public K-12 Schools except in Quebec ,and

iii. Post-secondary Institutions except in Quebec.

i. Provincial and Territorial Governments

- Copyright Board of Canada, as of January 19, 2015, listed, among others, the following Tariffs as "Decisions Under Advisement:" Governments Tariffs (2005-2009 and 2010-2014) http://www.cb-cda.gc.ca/home-accueil-e.html.

- There is also a further application for a tariff 2015-2018 filed, see [10 May 2014] *Canada Gazette*.

ii. Public K-12 Schools except in Quebec

- It will be recalled that schools in Quebec deal with Copibec, rather than Access Copyright.
- All other schools were included in Access Copyright's application to the Copyright Board for a Tariff 2013-2015 filed (published in the Canada Gazette) June 16, 2012 …
  - Subject of an Interim Tariff ordered by the Board May 29, 2013
  - This Interim Tariff being in place, Access Copyright can sue public school boards or other public school entities for photocopying without a license.
- The Copyright Board currently lists this Tariff for 2010-2015 as "Under Advisement"

Nevertheless…

CMEC believes public schools and Access Copyright currently have no connection…

- "education" now part of "fair dealing" and legislated "educational institution" exceptions exist
- CMEC believes Canadian public schools (and their libraries) are doing nothing that requires permission from Access Copyright (neither through licensing nor tariff) [see John Tooth *Feliciter* column, above)…
- CMEC has widely distributed in school systems the following booklet: Wanda Noel & Jordan Snell, *Copyright Matters! Some Key Questions & Answers for Schools*, 3rd ed (CMEC, 2012) available at http://cmec.ca

One issue arising now for school libraries:

Is a sign required over photocopiers – and, if so, what sign will suffice?

Under the LAMS Regulations since 1997:

- WARNING!
- Works protected by copyright may be photocopied on this photocopier only if authorized by:
- the *Copyright Act* for the purposes of fair dealing or under specific exemptions set out in that Act;
- the copyright owner; or
- a license agreement between this institution and a collective society or a tariff, if any.
- For details of authorized copying, please consult the license agreement or applicable tariff, if any, and other relevant information available from a staff member.
- The *Copyright Act* provides for civil and criminal remedies for infringement of copyright.

As many of you will know, I have taken the position the position for years that this sign, created under the LAMS (and Educational Institution [EI]) provisions of the Act, is not necessary because there is a simpler one approved by the Supreme Court – but John Tooth points out (in his column noted above) that this notice is now not required of school libraries because they are no longer in a tariff relationship with Access Copyright.

Approved by the Supreme Court in the Law Society case:

- The copyright law of Canada governs
- the making of photocopies or other
- reproductions of copyright material.
- Certain copying may be an
- infringement of the copyright law.
- This library is not responsible for
- infringing copies made by the users
- of these machines.

However, John Tooth advocates for a sign CMEC's fair dealing guidelines "can" and "cannot" list beside photocopiers, whereas I continue to believe that the best sign to post is the sign the Suprem Court has approved…

Adopting and Posting **Institutional** Policy

- Why not adopt a national or provincial or sectoral policy approach?
  - This is not negligence law: in negligence, a branch of tort law, evidence that you have met the standard of a competent professional, which means you have not been negligent, can mean pointing to the standard of similar professionals - and national or sectoral or regional policies to which you adhere can help provide this evidence.
  - This is copyright: the Great Library's policy in ***CCH v LSUC*** assisted the Law Society to establish evidence of ***its institutional*** general practice instead of having "to adduce evidence that every patron uses the material provided for in a fair dealing manner" (para 63)
- "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)

iii. Post Secondary Institutions

- Other than the proposed Tariff appearing on the Copyright Board's website, there is no indication of any other activity with respect to this tariff.
- As research currently underway by my colleague Rob Tiessen at University of Calgary Library and me continues to demonstrate, post-secondary institutions outside Quebec are now in one of two groups: (a) those who hold blanket licenses with Access Copyright and (b) those who are operating without a relationship with Access Copyright

However…

Copibec has decided to include seeking tariffs from the Copyright Board in its quiver:

First Target is Post-Secondary Institutions in Quebec:

- "Statement of Proposed Royalties to Be Collected by Quebec Reproduction Rights Collective Administration Society (COPIBEC) for the Reproduction and Authorization to Reproduce, in Canada, for the Years 2015-2019, the Works in its Repertoire by Universities and Persons Acting Under Their Authority," [June 28, 2014] *Supplement Canada Gazette*, Pt.1.

- Now in the Copyright Board process.

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4. The litigation situation

Copibec v Université Laval

Launched in the Quebec Superior Court by Société québéquoise de gestion collective des droits de reproduction, operating as Copibec, and framed as an application for a **class action lawsuit** to be brought against Laval "on behalf of authors and publishers from Quebec, the rest of Canada and other countries around the world."

- See "Copibec: $4 Million Class Action Lawsuit Against Université Laval for Copyright Infringement," (November 10, 2014)

University of Toronto v Canadian Copyright Licensing Agency (Access Copyright)

- 2014 ONSC 646 – released February 4, 2014
- U of T was in a license agreement with Access Copyright, not participating in Access Copyright's Tariff process involving Colleges & Universities;
- Clause provided "U of T should not be required to … provide information [to] the proposed tariff proceeding."
- U of T did participate in joint process under the contract to provide survey data to Access Copyright
- Motion for interlocutory injunction by U of T against Access Copyright to stop use of survey data in Tariff proceeding dismissed by Maranger, J.
  - The reality was that what was sought would be a final order and the law would need to be "clearly right and almost certain to be successful at trial" but the judge thought the contract interpretation favoured by U of T was not that certain, though valid.
  - U of T needed to show **it[not the rest of the Canadian university community then before the Copyright Board]** would suffer irreparable harm – and could not.
  - The balance of convenience test indicated Access Copyright would suffer more without using the information before the Board than U of T would suffer by their using it.

Access Copyright v York University

- Following up on last year's discussion of this case - Federal Court T-578-13
  - This litigation continues to be very active
  - Eventually, on April 1, 2014, the CMEC was told that it could not now become an Intervener in this case but could apply again later to become one (they had applied, as we noted last year, on January 21, 2014).
  - Eventually, on July 30, 2014, Prothonotary Aalto decided to **GRANT** York's application (we discussed last year) for the case to be split in two (bifurcated)
  - At present the parties anticipate a Case Management Conference February 19, 2015.

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Marrakesh Treaty *to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*

- Adopted by the World Intellectual Property Organization (WIPO) – an agency of the United Nations – June 27, 2013 – over 80 signatories (not Canada)
- To come into force as soon as 20 nations have ratified it (see Article 18) – to date, 6 ratifications or accessions –
  - **India (June 24, '14)**
  - **El Salvador (Oct.1, '14)**
  - **United Arab Emirates (Oct.15, '14)**
  - **Uruguay (Dec.1, '14)**
  - **Mali (June 24, '14)**
  - **Paraguay (Jan.20, '15)**

WIPO Limitations & Exceptions for Libraries & Archives

- Proposed treaty on "Limitations and Exceptions for Libraries and Archives" being shepherded among NGOs by IFLA
  - Still at committee stage (Standing Committee on Copyright and Related Rights (SCCR)) at WIPO in Geneva
  - Next session, the 30th, to be held June 29-July 3, 2015

- There is controversy amongst nations about the nature of the international instrument that is suitable for Libraries and Archives – with some resisting the creation of a treaty and wanting something much less strong.

SCCR Session	Outcome	Topics	End Status
26th Dec 16-18 2013	Committee Conclusions	Broadcasting	Toward treaty
		Libraries & Archives	Text-based toward legal instrument
		Educational & Research Institutions & Persons with other disabilities	Text-based work
27th Apr 27-May 2 2014	Chair's Conclusions	Broadcasting	Toward treaty
		Libraries & Archives	Toward legal instrument- no agreement on basis of work
		Ed & Res & other dis'd	No agreement on basis of work
28th Jun 30-Jul 4 2014	Chair's Conclusions	Broadcasting	Toward treaty
		Libraries & Archives	Just maintained on agenda
		Ed & Res & other dis'd	Not mentioned for agenda, connected to WIPO's Development Agenda
29th Dec 8-12 2014	Chair's Summary	Broadcasting	Maintained on agenda
		Libraries & Archives	Work done on texts, maintained on agenda
		Ed & Res & other dis'd	Maintained on agenda

Thank you. Some resources:

1. Information about WIPO SCCR meetings, including documents from them: http://www.wipo.int/meetings/en/topic.jsp?group_id=62

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

3. CLA Copyright Information http://www.cla.ca/AM/Template.cfm?Section=Copyright_Information

4. Margaret Ann Wilkinson (May 2014) "Recent Developments in Canadian Law Affecting Genealogists," Families 3-15 (Updating my 2010 book *Genealogy and the Law in Canada*)

5. Margaret Ann Wilkinson (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.

6. *Feliciter* Copyright Columns listed at the outset of this presentation – and coming up this year.