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Copyright Users' Rights in International Law

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The Challenge

In 2004 Chief Justice Beverley McLachlin, speaking for all nine judges of the Supreme Court, declared that "[t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right."¹ This declaration was a welcome tonic for Canadian librarians who had become concerned about developments in international circles that pointed to increasing power for copyright holders.

Although the *Free Trade Agreement* negotiated between Canada and the United States in 1989 did not deal with intellectual property such as copyright,² its successor, the *North American Free Trade Agreement* (NAFTA),³ negotiated by Canada, the United States, and Mexico, did. And, at the same time, though the post-WWII multilateral *General Agreement on Trade and Tariffs* (GATT) had been silent on intellectual property,⁴ its replacement, the global multilateral *World Trade Organization* (WTO) *Agreement*,⁵ included agreement on international standards for intellectual property (including copyright) in the *Trade-Related Aspects of Intellectual Property* (TRIPS).⁶

While it is true that Canada had long been party to international agreements about intellectual property, NAFTA and TRIPS were entirely different kinds of agreements than Canada's previous international commitments to intellectual property.⁷ Whereas Canada's previous commitments had been matters of public international law, where there are effectively no sanctions if a nation-state does not domestically implement that to which it has internationally agreed,⁸ NAFTA and TRIPS are matters of international trade law and, as

such, if Canada does not implement that to which it has agreed, it may face trade sanctions from another member (or members) of the agreement.⁹

As trade agreements, NAFTA and TRIPS are focused on those aspects of intellectual property that are "tradable"—that is, in terms of copyright, the rights of copyright rights-holders.¹⁰ Under NAFTA, while Canada, the United States, or Mexico "may implement in its domestic law more extensive protection of intellectual property rights than is required,"¹¹ each country "shall confine limitations or exceptions to the rights provided for [in copyright] to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."¹² Canada is similarly bound under TRIPS.¹³ The approach in these trade agreements allows countries to add to the rights of rights-holders but, on the other hand, requires countries to satisfy a "three step test"¹⁴ in order to justify creating limitations or exceptions to the rights-holders' rights. This approach has led to librarians' particular concern that there is "a growing imbalance in intellectual property laws between owners and users."¹⁵

Particularly in light of the new focus of international attention on copyright as part of international trade regimes, it was reassuring in Canada to hear from our highest court in 2004 that, in Canada, "[i]n order to maintain the proper balance between the rights of a copyright owner and users' interests, [a users' right, in this case "fair dealing"] must not be interpreted restrictively."¹⁶

However, even for Canadians, despite the continuing support of users' rights evidenced by Canadian courts, in light of the international developments involving copyright holders' rights it seems very important to ensure that the rights of users are clearly internationally enshrined as well.¹⁷ If they are not, it is possible that future Canadian governments will be pressured by future international trade possibilities to use legislative power to derogate from the level of users' rights protection that is currently in place in Canadian law. Moreover, virtually every other country in the world has less clearly enshrined users' rights than has Canadian law: no one else's courts (or legislators) explicitly express the exceptions to the rights of rights-holders to be users' rights. Most countries actually have far fewer exceptions made explicit in their copyright legislation.¹⁸

Why WIPO as the International Forum for a Copyright Treaty for Libraries?

The *Berne Convention* on copyright is one of the earliest multilateral treaties of the modern era, and much of its text has been included as foundational in the international trade agreements that have now included copyright (i.e., NAFTA and TRIPS). The language of *Berne* is therefore critical to the interpretation of the rights enshrined in the international trade environment.

Although neither *Berne* nor its "companion" treaty, the *Paris Convention* governing patents and trademark and other "industrial property," were then administered under UN auspices, the UN's 1948 *Universal Declaration of Human Rights* (UDHR) addressed their subject matter:

Article 27(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.

It is abundantly clear that, since 1948, international law, both public and trade, has continued to ensure that the goals of Article 27(2) have global legal expression in the emerging information age. However, in 1948, there were two other relevant declarations made:

Article 19 Everyone has the right to freedom of opinion and expression; this includes freedom . . . to seek [and] receive . . . information and ideas through any media and regardless of frontiers.

And

Article 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.

The instantiation of these latter two declared areas of human rights into international law has lagged far behind the international legal instruments instantiating the "material interests" of holders of copyright and related rights.

Upwards of a dozen international legal instruments have been adopted in international public and trade law (including revisions and amendments to *Berne*) to protect the rights-holders' rights to "material interests" in the sixty-four years since 1948, but, until 2013, not one international intellectual property instrument focused on the rights guaranteed by Articles 19 and 27(1).¹⁹

Because the rights guaranteed in Articles 19 and 27(1) are not assignable and therefore cannot be sold, they will never be directly protected through international trade agreements. It therefore falls to WIPO, exclusively, to create the necessary protections, through public international law, for these rights that the UDHR has declared.

IFLA's Approach

The International Federation of Library Associations and Institutions (IFLA) is celebrating its seventy-fifth anniversary this year.²⁰ It has long had a Committee on Copyright and other Legal Matters (CLM).²¹ Among other things, "CLM keeps a watching brief on the activities of the World Intellectual Property Organization (WIPO), and represents IFLA at key WIPO-meetings."²² While CLM itself acknowledged that, coincident with the rising involvement of international trade regimes in copyright, it had rather overlooked WIPO between 1996 and 2003,²³ by 2009, IFLA, through its CLM, was presenting a *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* to the Standing Committee on Copyright and Related Rights (SCCR) of WIPO.²⁴ Although only nation-states have standing to participate in the deliberations of this subcommittee of WIPO, it is possible to be given status as a non-governmental organization (NGO) and thus be able to attend the meetings of the SCCR—and IFLA has done this regularly throughout this century.²⁵

It has become a tradition at the SCCR for NGOs to be invited to speak at least once during any given session (typically a week long) for about ten minutes. In his short oral address presenting the *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* to the SCCR, then-CLM Chair Winston Tabb emphasized four of its principles: preservation; general free use exceptions applicable to libraries, including reproduction for research or private purposes; copyright term; and barriers to lawful uses. In its full document, IFLA also addressed legal deposit, interlibrary loan and document supply, education and classroom teaching, provisions for persons with disabilities, orphan works, contracts and statutory exceptions, and limitations on liability.²⁶

By 2011, IFLA, joined by other like-minded organizations, had developed a document that took the form of “treaty-language” that it hoped eventually could form the basis for consideration by the nation-state members of SCCR for inclusion in a draft treaty—which, in turn, SCCR would then recommend to its parent organization, WIPO, for international adoption.²⁷ That document is titled “Draft Treaty on Exceptions and Limitations for Libraries and Archives” (TLIB) and has been through a number of iterations to the present.²⁸ In 2011, a meeting was convened at Columbia University between a sub-committee of CLM and a group of international copyright scholars who had each been asked to independently and confidentially consider the TLIB document.²⁹ Two points upon which the four scholars were unanimous were that, in order to have any chance at all of being considered at WIPO, (1) any text for treaty provisions proposed by the NGOs to representatives of the member states of SCCR for consideration needed to be demonstrably consistent with the “three step test,” and (2) only provisions that directly addressed the needs of libraries or archives (and not provisions, for example, that addressed the needs of their users) should be proposed. Following upon advice from these scholars and input from the subcommittee of CLM, TLIB was redrafted and tightened up before being circulated as widely as possible amongst national library organizations and others after the end of November 2011.

The WIPO Process

SCCR23 lasted for an unusually long two weeks (November 21 to December 2, 2011) and proved to be a watershed moment in the history of libraries. For the first time, unique consideration was given, by nation-states at the international level, to possible

treaty text for copyright limitations and exceptions for libraries and archives.³⁰ Members of the African Group of States presented possible language, as did Brazil, Ecuador, and Uruguay. In many ways these proposals echoed principles and language also present in the TLIB document. The United States, on the other hand, presented a set of Principles for discussion—an approach more distant from that advocated by IFLA and its NGO allies.

Another initiative that was progressing at SCCR23 was the possibility of a treaty for copyright exceptions for the visually impaired. It turned out that this initiative moved forward at SCCR ahead of the initiative involving libraries and archives and, ultimately, at a 2013 Informal Session and Special Session of the Standing Committee on Copyright and Related Rights,³¹ a text was agreed upon by SCCR. This was then proposed to WIPO at the Diplomatic Conference to Consider a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities held in June 2013 in Marrakesh.³² The resulting *Marrakesh Treaty* was adopted by the General Assembly of WIPO on June 27, 2013 but has not yet come into force. Despite having been signed by fifty-one nations in Marrakesh and having sixty-four signatures with France, Greece, India, and the European Union signing on May 1, 2014, during SCCR27 (Canada has not signed), the treaty still needs twenty eligible parties (i.e., states) to accede or ratify the treaty in order for it to come into force (Article 18).³³

The *Marrakesh Treaty* becomes the first international treaty focused on copyright exceptions and limitations. It is interesting to note, in light of previously described concern of the legal experts consulted by IFLA (that, realistically, any text suggested for a proposed treaty for exceptions for libraries and archives must respect the “three step test”), that the *Marrakesh Treaty* includes the following article:

Article 11 - General Obligations on Limitations and Exceptions

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, including their interpretative agreements so that:

(a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;

(b) in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a Contracting Party shall confine limitations 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 rightholder;

(c) in accordance with Article 10(1) of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;

(d) in accordance with Article 10(2) of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any limitations of or exceptions to rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Going Forward

One might have thought that the success of the *Marrakesh Treaty* would ease the progress of a treaty for libraries and archives. Its adoption certainly dispels any argument that a treaty on copyright exceptions and limitations is not possible in international copyright law.³⁴ In addition, when, in 2012, the United Nations Educational, Scientific and Cultural Organization (UNESCO), a “sister” special agency of the UN to WIPO, held its first ever conference in Canada,³⁵ the resulting Declaration included the following recommendation to

urge the UNESCO Secretariat to:

. . . b. support the work of the international archival, library and museum community to secure an international legal framework of copyright exceptions and limitations to ensure preservation of and access to cultural heritage in digital format, and acquisition of and access to that heritage in a culturally appropriate manner.³⁶

However, with every swing of a pendulum there is some swing back, and progress appeared slow toward an international instrument focused on libraries and archives during SCCR26, held December 16 to 20, 2013.³⁷ Despite an appearance at SCCR26 by UNESCO and a statement in support of securing a legal framework for copyright exceptions and limitations as set out in the Vancouver Declaration, certain of the formal Conclusions to the meeting give a flavour of the SCCR26 debates between member states on this topic:

14. The Committee was reminded that the terms of the work program adopted by the 2012 General Assembly recommended that the SCCR continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), with the target to submit recommendations on limitations and exceptions for libraries and archives to the General Assembly by the 28th session of the SCCR.


15. Different points of view were expressed with regard to the nature of the appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms) referred to in the 2012 General Assembly mandate to the SCCR for text-based work. With regard to fulfilling that mandate, some Member States expressed interest in discussing national laws, capacity building, technical assistance, the development of studies, and the exchange of national experiences, while other Member States did not agree.

17. The Secretariat was requested to arrange for the update of the Study on Copyright Limitations and Exceptions for Libraries and Archives (document SCCR/17/2) prepared by Kenneth Crews. The Secretariat was also asked to arrange for a separate study on limitations and exceptions for museums. It is understood that the preparation of these studies would not delay discussion on the limitations and

exceptions agenda item on libraries and archives. These studies will serve as information resources for the Committee.³⁸

SCCR27 was held in Geneva from April 28 to May 2, 2014, and IFLA attended, as did CLA.³⁹ IFLA prepared by internationally distributing a survey seeking library examples of cross-border or international information exchange in order to provide the nation-state members of SCCR with actual examples of the need for an *international* instrument. Citing from data gathered in the study, as well as distributing examples of publicly available licenses for digital materials that involve libraries in the laws of countries other than their own, IFLA and the other library and archive NGOs participated throughout the second substantive agenda item for SCCR27, limitations and exceptions for libraries and archives.⁴⁰ However, for what is apparently only the third time in the history of SCCR since it was established by WIPO in 1998-9, at the end of SCCR27, the member states failed to agree on Conclusions from the meeting; this negated all the progress made on every agenda item, including progress on the first substantive agenda item, protection of broadcasting organizations. This will mean that SCCR28, to be held June 30 to July 4, 2014, will begin from the conclusions of SCCR26 of December 2013. The failure of SCCR27 to reach formal conclusions occurred when the European Union, which has declared that it does not favour an international legally binding instrument in this area, would not agree to continued use of the term “text-based” in connection with ongoing work by the committee on libraries and archives, and when Brazil and Kenya, with the support of other countries who have declared support for a treaty in this area, would not permit this change in approach.

As demonstrated by the *Marrakesh Treaty*, it is possible to gain international agreement for a set of limitations and exceptions to copyright through the WIPO public international law process—and, if such a treaty can be attained for libraries and archives, member states will be less concerned that their national efforts to create rights for libraries and archives to serve the needs of their users will run afoul of their trade obligations not to create legislation that violates the “three step test” that forms part of their international trade obligations. Moreover, such a treaty for libraries and archives will tend to lead nation-states to create a common minimum platform of rights for libraries and archives internationally, one upon which libraries can rely no matter what borders are crossed in serving

users. Moreover, while the *Marrakesh Treaty* is a giant step forward in international intellectual property law, since it only deals with the rights of the visually impaired, by definition, it does not address most of the world’s population whose rights to information are set out in the UDHR. Therefore, the largest number of the world’s citizens still have no international legal instantiation of their users’ rights as guaranteed to them by the UN in the UDHR. Libraries are institutions that exist to serve the public throughout all the nations of the world and are globally recognized as trusted information intermediaries.⁴¹ They are well positioned to exploit the advantages of the new global telecommunications and digital technologies in order to serve all the populations of the world without barriers of jurisdiction—if international law can create a minimum legally protected environment for them in providing this service. 

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Notes

1. *CCH Canadian Ltd. v Law Society of Upper Canada (CCH v LSUC)* 2004 SCC 13, [2004] 1 SCR 339, para 48.
2. *Canada-United States Free Trade Agreement*, Dec.12, 1987, 27 I.L.M.281 (1988).
3. Signed 17 December 1992, Can.T.S.1994, No.2, 32 I.L.M. 289 (entered into force 1 January 1994).
4. Concluded 30 October 1947, 61 Stat. A-II, 4 GATT B.I.S.D.I (1969).
5. *Marrakesh Agreement Establishing the World Trade Organization*, (1994) 33 I.L.M.1125.
6. *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 U.N.T.S. 299, WTO.
7. Most notably in copyright the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention), 9 September 1886, 828 U.N.T.S. 221, Can.T.S. 1998 No.18 (last revised 24 July 1971 and amended on 28 September 1978). This treaty is still governed by members of the Berne Union, which now forms part of the World Intellectual Property Organization (WIPO), which is itself now a special agency of the United Nations (UN). Canada, as one of the United Kingdom’s colonies for international treaty purposes (though independent since 1867 for domestic matters) was part of the Convention at its inception, and has remained a party ever since.

8. As J. H. Reichman puts it, under the *Berne* and *Paris Conventions*, “state practice treated the adoption into domestic law of a statute that more or less embodied an international minimum standard as sufficient to discharge a given state’s international responsibility, even if the domestic law in question were laxly or loosely enforced. What mattered was the member states strictly observed national treatment in the application of such laws, and not that the laws themselves, as implemented, fulfilled the spirit of the Conventions.” See “Enforcing the Enforcement Procedures of the TRIPS Agreement,” (1997) 37 *Virginia J. of International Law* 335 at 338 (footnotes omitted).
9. As Reichman describes it (*supra* at 339, footnotes omitted), “[u]nder the TRIPS Agreement . . . adopting legislation that complies with the international minimum standards becomes the starting point. States must further apply these laws in ways that will stand up to external scrutiny . . . [Those who do not] may eventually trigger the WTO’s dispute-settlement machinery.”
10. In the Canadian *Copyright Act*, s.13(4) makes it very clear that copyright right interests can be bought and sold. On the other hand, “moral rights,” also set out clearly in the Act, cannot be bought and sold: see s. 14.1(2).
11. NAFTA, Article 1702.
12. NAFTA, Article 1705 (5).
13. See TRIPS, Articles 1 and 13.
14. The three steps require a country defending a provision in its own copyright legislation to show that the exception or limitation is (1) a special case, (2) a case which does not conflict with the rights holders’ normal exploitation of the work, and (3) a case which does not unreasonably prejudice the legitimate interests of the rights holders. If the country being challenged cannot successfully defend its copyright provision in the relevant international trade tribunals, it will need to remove the provision from its law or face trade sanctions (sanctions that may be taken with respect to sectors other than copyright-related industries) from other states belonging to the relevant trade agreement.
15. IFLA CLM Annual Report 2004.
16. *CCH v LSUC* para 48.
17. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [*SOCAN v Bell*] 2012 SCC 36, [2012] 2 SCR 326; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [*Alberta v Access Copyright*] 2012 SCC 37, [2012] 2 SCR 345.
18. Kenneth Crews, now at Columbia University, was commissioned in 2007 by the WIPO Secretariat to prepare a report on the state of copyright exceptions for libraries and archives in the legislation of the countries of the world. His “Study on Copyright Limitations and Exceptions for Libraries and Archives” was released by WIPO as part of SCCR17, Geneva, November 3 to 7, 2008, and is available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf. There is a helpful “Presentation” made at that SCCR meeting by Kenneth Crews himself available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_www_111493.pdf. The maps at pp. 17-19 of the Presentation are particularly illustrative.
19. See discussion of the *Marrakesh Treaty* below.
20. See http://www.ifla.org/files/assets/hq/history/-1929_statutes.pdf.
21. From 1997 to 2003, the Chair of CLM was Canada’s own then-National Librarian, Marianne Scott. For the next decade the Chair was Winston Tabb, Sheridan Dean of University Libraries and Museums at Johns Hopkins University. Now, again, beginning in 2013, a Canadian, Victoria Owen (Chief Librarian, University of Toronto Scarborough and past chair of the CLA’s Copyright Advisory Committee) is Chair.
22. <http://www.ifla.org/clm>.
23. CLM Annual Report, 2003 (www.ifla.org/node/444).
24. See www.ifla.org/publications/statement-of-principles-on-copyright-exceptions-and-limitations-for-libraries-and#full.
25. CLA has also frequently sought and received status as an attending NGO at the SCCR meetings.
26. Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives by Electronic Information for Libraries, International Federation of Libraries Associations and Institutions, and Library Copyright Alliance – WIPO Standing Committee on Copyright and Related Rights, Eighteenth Session, Geneva, May 25-29, 2009: www.ifla.org/files/assets/clm/statements/statement--of-principles-sccr20.pdf.
27. The other organizations joining IFLA were EIFL, International Council on Archives, and Innovarte.
28. The July 2012 version, for example, may be seen at http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/TLIB_v4.3_050712.pdf.
29. The scholars external to the committee and its resource persons were Daniel Gervais, FedEx Research Professor of Law, Co-Director Technology and Entertainment Law Program, Vanderbilt

- University; Ruth Okediji, William L. Prosser Professor of Law and Solly Robins Distinguished Research Professor, University of Minnesota; Conrad Visser, Head of Centre for Business Law and Professor in Intellectual Property Law, Department of Mercantile Law, University of South Africa; and Margaret Ann Wilkinson, Professor of Law, Director of Intellectual Property, Information and Technology Law Concentration, Western University.
30. This author, together with Victoria Owen and Paul Whitney, represented CLA at this meeting, acting in concert with the IFLA delegation.
 31. SCCR/SS/GE/2/13.
 32. See http://www.wipo.int/meetings/en/details.jsp?meeting_id=28722.
 33. See http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843.
 34. An argument put forward by Professor Jane Ginsburg from Columbia University School of Law in a piece posted by the Media Institute: "Do Treaties Imposing Mandatory Exceptions to Copyright Violate International Copyright Norms?" February 28, 2012, <http://www.mediainstitute.org/IPI/2012/022712.php>.
 35. Vancouver, September 26-28, 2012, on "The Memory of the World in the Digital Age: Digitization and Preservation."
 36. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/mow/unesco_ubc_vancouver_declaration_en.pdf.
 37. A meeting that the author was privileged to attend as Legal Advisor to IFLA.
 38. The "Conclusions" document is a formal element of the record of an SCCR meeting, and its contents have to be agreed upon by all the state representatives; see http://www.wipo.int/edocs/mdocs/copyright/en/sccr_26/sccr_26_conclusions.pdf.
 39. The author was again privileged to attend as Legal Advisor to the IFLA delegation and also presented the CLA intervention, which concerned Technological Protection Measures.
 40. It is agenda item 6, following "protection of broadcasting organizations." The first four items are routine procedural matters. Item 7 concerns the possibility of "limitations and exceptions for educational and research institutions and for persons with other disabilities." Another matter, "Stakeholders Platform Report," will round out the five-day session, which will close with the creation of the Conclusions for SCCR27. See http://www.wipo.int/meetings/en/details.jsp?meeting_id=32086.
 41. Virtually every nation-state made an opening statement of the value of libraries to the nation at the start of discussions of the topic of limitations and exceptions for libraries and archives at SCCR23.