

Collective Rights Management of Copyright in Canada

Margaret Ann Wilkinson

Professor, Faculty of Law, The University of Western Ontario

Joan Dalton

Associate University Librarian, University of Windsor

Victoria Owen

Head Librarian, University of Toronto Scarborough Library

Why is this question of collectives pressing to librarians right now?

All school libraries in Canada except those in Quebec have been part of the tariff process since before 2006...

All government libraries in the provinces and territories have become part of the tariff process during 2010...

All college and university libraries in Canada have also become part of the tariff process during 2010...

Public libraries may be brought into it soon...

The tariff process is completely and fundamentally different from the process of negotiating licenses – even negotiating licenses with a collective...

Collectives have long existed in the music industry --

**Canadian Performing
Rights Society
1926**

1935 – Copyright Appeal Board created for these rights

**Composers Authors & Publishers
Association of Canada
CAPAC 1946**

**BMI Canada
1940**

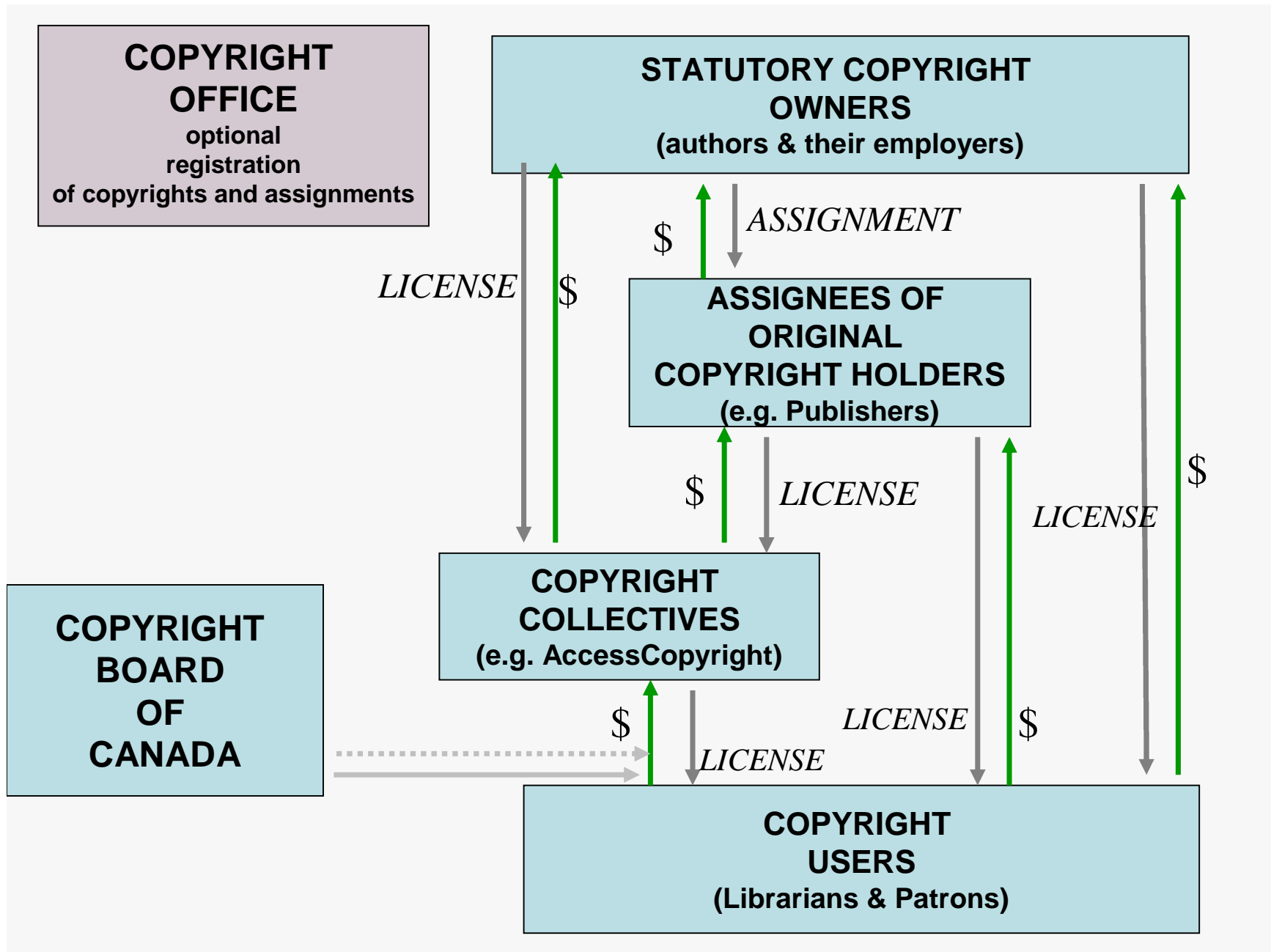
**PROCAN
1978**

1988 - Copyright Act amendments

**SOCAN
1990**

In 1988, Parliament changed the Copyright Act and encouraged more collectives to become active -

- “Collectives” represent copyright holders.
- If the Copyright Act in 1988 did not exempt copyright holders from the Canadian Competition Act, “cartels” of copyright “sellers” would be illegal as anti-competitive in Canada
- It is only after 1988 that collectives in Canada were formed that directly impacted upon the lives of librarians...
- “Consortia” represent libraries who are copyright users
- In 1988, Parliament only exempted copyright holders from the rigours of the Competition Act: forming collectives is specifically allowed and encouraged by the Copyright Act
- copyright users are not exempt from the Competition Act and thus it might be thought that the legal position of library consortia, vis a vis copyright, was problematic
- See **Catherine A. Maskell**, “Consortia: anti-competitive or in the public good?,” (2008) 26(2) *Library Hi-Tech* 164-183 for the answers to this question...



Collectives and the Copyright Board of Canada

- Librarians have had experience with Cancopy (now AccessCopyright) and other collectives since 1988 – but have not experienced the Copyright Board until recently...
- Why do many libraries find themselves involved with the Copyright Board now?

s. 70.12 of the Copyright Act (Part VII)

A collective society may, for the purpose of setting out by license the royalties and terms and conditions relating to classes of uses,
(a) file a proposed tariff with the Board; or
(b) enter into agreements with users.

s. 70.2(1) of the Copyright Act (Part VII)

Where a collective society and any person [or organization]... are unable to agree on the royalties to be paid for the right to the act... **either may**, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

Who are the Copyright Board of Canada?

- **Chairman: Mr. Justice William Vancise**
 - Part time
 - 2009 reappointment for a 2nd 5 year term
 - Supernumary Judge of the Saskatchewan Court of Appeal
- **Vice Chairman and Chief Executive Officer: Mr. Claude Majeau**
 - Full time
 - Newly created position, 2009 for a 5 year term
 - Long time civil servant; with the Copyright Board since 1993
- **Mrs. Jacinthe Théberge**
 - Full time – 2007 appointment for 5 year term
 - Quebec lawyer: longtime with Outaouais Community Legal Aid Centre, formerly on the Canadian Human Rights Tribunal, latterly strategic planning work in communication technologies
- **Mr. Nelson Landry**
 - Part time
 - Retired in 2002 from IP litigation practice with Ogilvy Renault in Quebec
 - 2010 appointment for 5 years
- **One Vacancy on the Board –**
 - no necessary qualifications in the legislation for the Board except for the requirement that the Chair be a sitting or retired judge...
 - One previous member was from the real estate industry

From the website of the Board: indication of the volume of business it does --

DECISIONS

[Arbitration](#)

[Educational Rights](#)

[Media Monitoring](#)

[Private Copying](#)

[Public Performance of Music](#)

[Reproduction of Musical Works](#)

[Reproduction of Sound Recordings and of Performers' Performances](#)

[Reprographic Reproduction](#)

[Retransmission of Distant Radio and Television Signals](#)

[Unlocatable Copyright Owners](#)

Notes:

The Board's decisions from 1990 to 1994 have been published by Carswell (Copyright Board Reports 1990-1994). These decisions are reproduced in this site and respect the page numbering of the publication.

A compilation of the Copyright Appeal Board's decisions (1935-1989) is being prepared for publication.

There is not always a collective that can represent a rightsholder's right:

The collectives each represent only one or two rights, in respect of certain kinds of works. Some rights have no collective to represent them. Some works do not find themselves in collective repertoires...

The Copyright Board of Canada lists about 35 Canadian collectives on its website:

at <http://www.cb-cda.gc.ca/societies/index-e.html>

National Film Board – represents its own repertoire (without being part of a collective)

CBC – represents its own repertoire (without being part of a collective)

The Copyright Board website lists more than 30 collectives --

The following are involved in rights management associated with “works” under s.3:

1. Access Copyright
2. ACF – Audio Cine Films
3. AVLA – Audio-Video Licensing Agency
4. CARCC – Canadian Artists’ Representation Copyright Collective
5. CBRA – Canadian Broadcasters Rights Agency
6. CMRRA – Canadian Musical Reproduction Rights Agency
7. Criterion Pictures
8. COPIBEC – Societe quebecoise de gestion collective des droits de reproduction
9. CRC – Canadian Retransmission Collective
10. CRRRA – Canadian Retransmission Right Association
11. ERCC – Education Rights Collective of Canada
12. FWS – FWS Join Sports Claimants
13. MLB – Major League Baseball Collective of Canada
14. PGC – Playwrights Guild of Canada
15. SOCAN – Society of Composers, Authors and Music Publishers of Canada
16. SACD – Societe des auteurs et compositeurs dramatiques
17. SODRAC – Society for Reproduction Rights of Authors, Composers and Publishers in Canada
18. SOPROQ – Societe de gestion collective des droits des producteurs de phonogrammes et videogrammes du Quebec
19. SoQAD – Societe quebecoise des auteurs dramatiques

| s.3(1) Right | Associated Collective Society |
|---|---|
| Produce or Reproduce the Work | Access Copyright (writing) AVLA (music: videos and audio) CARCC (visual arts) CMRAA (audio & music) COPIBEC (writing) SODRAC (music) |
| Perform the Work in Public | ACF (films) Criterion Pictures (films) ERCC (tv and radio, education only) SOCAN (music) SoQAD (theatre, education only) |
| Publish the Work | |
| (a) Translate the Work | |
| (b) Convert a dramatic work | |
| (c) Convert a non-dramatic work by performance | |

| s.3(1) Right | Associated Collective Society |
|---|---|
| (d) sound/cinematography film to mechanically reproduce a literary, dramatic or music work | |
| (e) Adapt a work as a cinematographic work | |
| (f) Communicate the work by Telecommunication | CBRA (tv) CRC (tv and film) CRRRA (tv) FWS (sports) MLB (sports, baseball) SACD (theatre, film, radio, audio) SOCAN (music) SOPROQ (audio and video) |
| (g) Present an Artistic work at a Public Exhibition | |
| (h) Rent out a Computer Program | |
| (i) Rent out a Sound Recording | |

The right (for owners or authors) – and risk (for users)

Section 27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

BUT there are also **USERS** (and intermediaries') **RIGHTS** in the Copyright Act...

HOW DOES A COPYRIGHTHOLDER ENFORCE RIGHTS?

Statutory enforcement is provided in 3 ways:

1. criminal sanctions
2. **provisions for copyright holders to sue for infringement (civil redress)**
 - **And Copyright Holders can ALSO sue for contract violations where the terms of a license agreement are not being met by users...**
3. administrative remedies – mandating Customs to seize infringing goods

In 1988 the criminal sanctions were dramatically beefed up –

- a demonstration to persuade
- In the summer of 2007, the **Criminal Code** was amended to prohibit the copying of movies by recording in movie theatres...new s.432

and certain streamlining of civil enforcement has occurred

- coercion through increasing the bargaining power of the copyright holder?

What are the choices that users of works or other subject matter can make?

1. They can rely on "**user rights**," to make "exempt" uses, or they can rely on the philanthropy of rightsholders.

free for users - no \$ value for rightsholders

2. Where user rights are not extensive enough and permissions are not available (at all, or, in their eyes, affordably), users can **curtail uses** of copyright material.

less use for users - no \$ value for rightsholders

3. They can use material without permission and **risk** enforcement.

risk assessment for users - costs of enforcement for rightsholders

4. Users can buy **permissions** for uses of materials.

costly, temporary for users - \$ value for rightsholders

What are the choices that users of works or other subject matter can make?

1. They can rely on "user rights," to make "exempt" uses, or they can rely on the philanthropy of rightsholders.

free for users - no \$ value for rightsholders

2. Where user rights are not extensive enough and permissions are not available (at all, or, in their eyes, affordably), users can curtail uses of copyright material. less use for users - no \$ value for rightsholders

3. They can use material without permission and risk enforcement.
risk assessment for users - costs of enforcement for rightsholders

4. Users can buy permissions for uses of materials.

costly, temporary for users - \$ value for rightsholders

How do users get permissions?

1. Through permissions given in advance (“open content licensing” or “creative commons”) (**FREE**) or
2. Through permissions negotiated with copyright collectives in blanket licenses (if there is a copyright collective that represents the rights in works that the user is seeking and where rightsholders have agreed to have the collective represent them) (**\$\$ TARIFF – Board’s decision**) or
3. Through permissions negotiated directly, from time to time, with rightsholders (assuming they have not given a collective the exclusive right to represent them with respect to the rights the user wants) (**\$\$ ROYALTY or FREE – rightsholder’s choice**).

The value of choice #2 for rightsholders: the Copyright Board's formula for setting tariffs:

- Take all copying done within the institution
 - (determined by actual surveying, using statistically robust sampling)
- Subtract all copies for which the rightsholders should not be compensated
 - (a) because the materials in question were not “works” or works in which the rightsholders in the collective have rights (eg materials created by schools for themselves, in which they hold copyright)

AND

- (b) because although the materials in question are *prima facie* materials in which the collectives' members have rights, there are users' rights (exceptions) which mean the rightsholders are not exercise their rights for these uses (fair dealing, rights for “Educational Institutions” or “LAMs”)

SUB- TOTAL: NUMBER OF COMPENSABLE COPIES

x the value of each copy as determined on economic evidence by the Copyright Board

EQUALS THE AMOUNT OF THE TARIFF EACH INSTITUTION IS TO PAY TO THE COLLECTIVE

The situation of the K-12 Tariff for 2005-2009

The Ministers of Education (the users) , and Access Copyright (the copyright holders)

The **Copyright Board** rendered its decision in the tariff proceeding June 26, 2009

The **Federal Court of Appeal** rendered its decision in the application for judicial review (not appeal) from the decision of the Copyright Board on July 23, 2010 (Mr. Justice Trudel writing for himself and Chief Justice Blais and Justice Noël) – only slight variance to Copyright Board's decision.

The Ministers of Education are seeking leave from the **Supreme Court** to appeal (File No.33888)

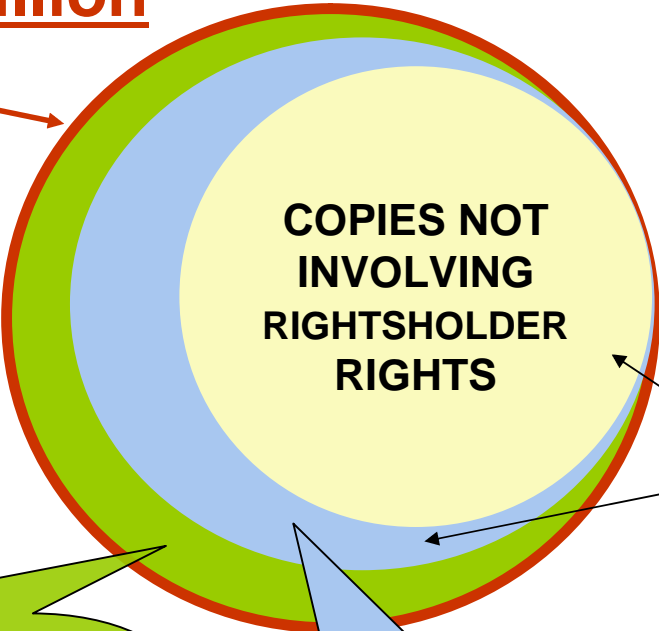
Setting the amount schools needed to pay the owners of copyright in print materials for photocopying during the years 2005-2009 everywhere in Canada except in Quebec

This replaced the Pan Canadian Schools/Cancopy License Agreement agreed between the Ministers of Education and Cancopy (without going to the Board) that lasted from 1999 until 2009...

See: <http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>

K-12 2005-2009 findings of the Copyright Board -

ALL COPIES MADE -10.3 billion

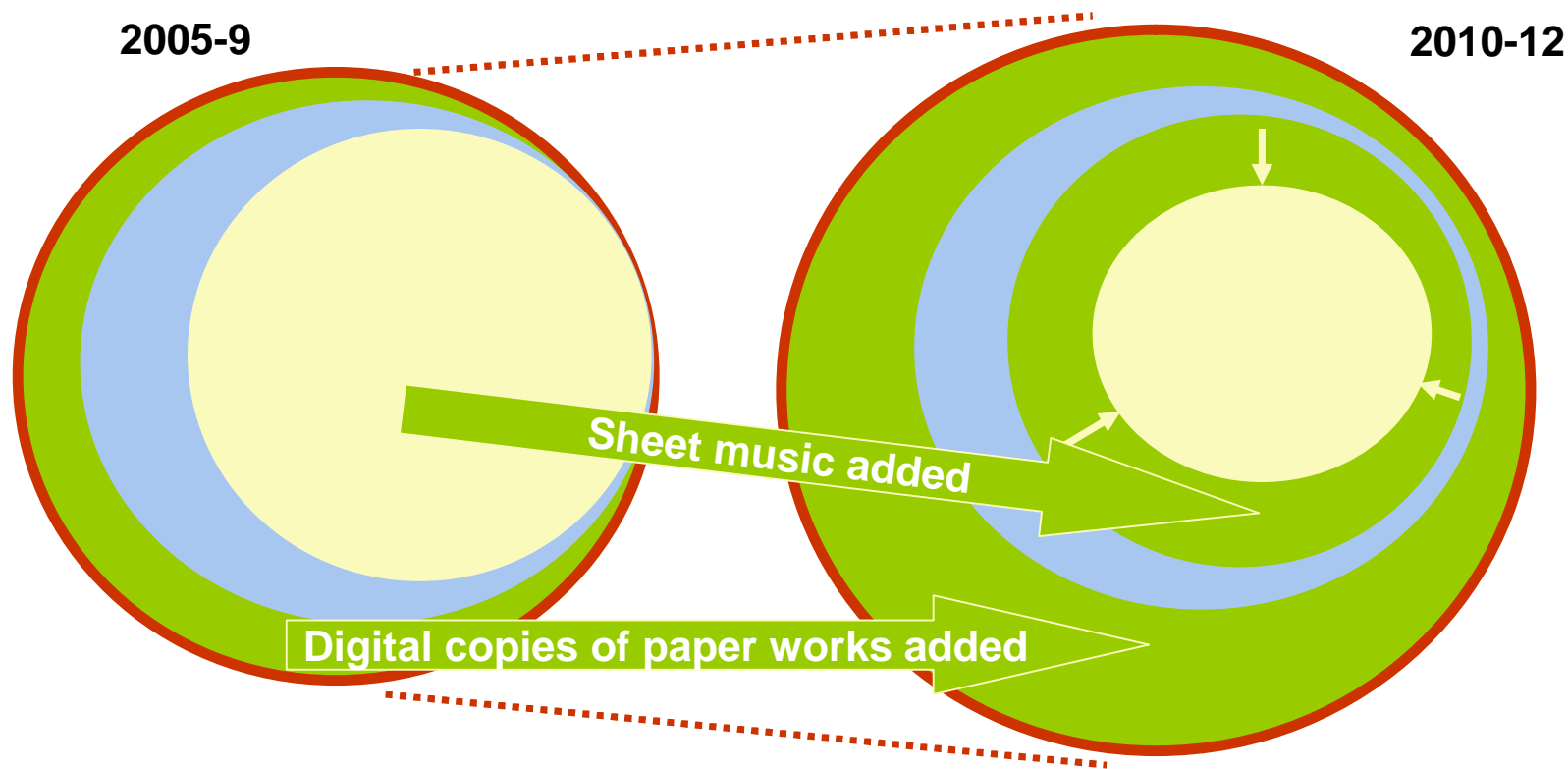


**COMPENSABLE COPIES (2%)—
250 million**
X value per copy
= total tariff of \$5.16/student

(previous agreement negotiated without the Board – \$2.56/student)

COPIES INVOLVING RIGHTSHOLDERS' RIGHTS BUT WHERE USERS' RIGHTS EXEMPT THESE USES

K-12 **new** 2010-2012 tariff before the Copyright Board



ALL COPIES MADE

No Rights

**Compensable
Copies**

**Users' Rights exempt
for these uses**

Access Copyright's K-12 proposal for 2010-2012

Tariff fee proposed is \$15.00/FTE student– up from the \$5.16/FTE student appealed to the Federal Court of Canada and to be adjusted slightly by remission back to the Board on the question of whether exam copying was actually not available in a medium that is appropriate for the purpose and thus not compensable (which would reduce the tariff now payable of \$5.16 a bit

(but note enlarged scope of “product” AccessCopyright is offering in the 2010-2012 tariff for schools)

Canadian Ministers of Education (CMEC) has indicated its intention to oppose...

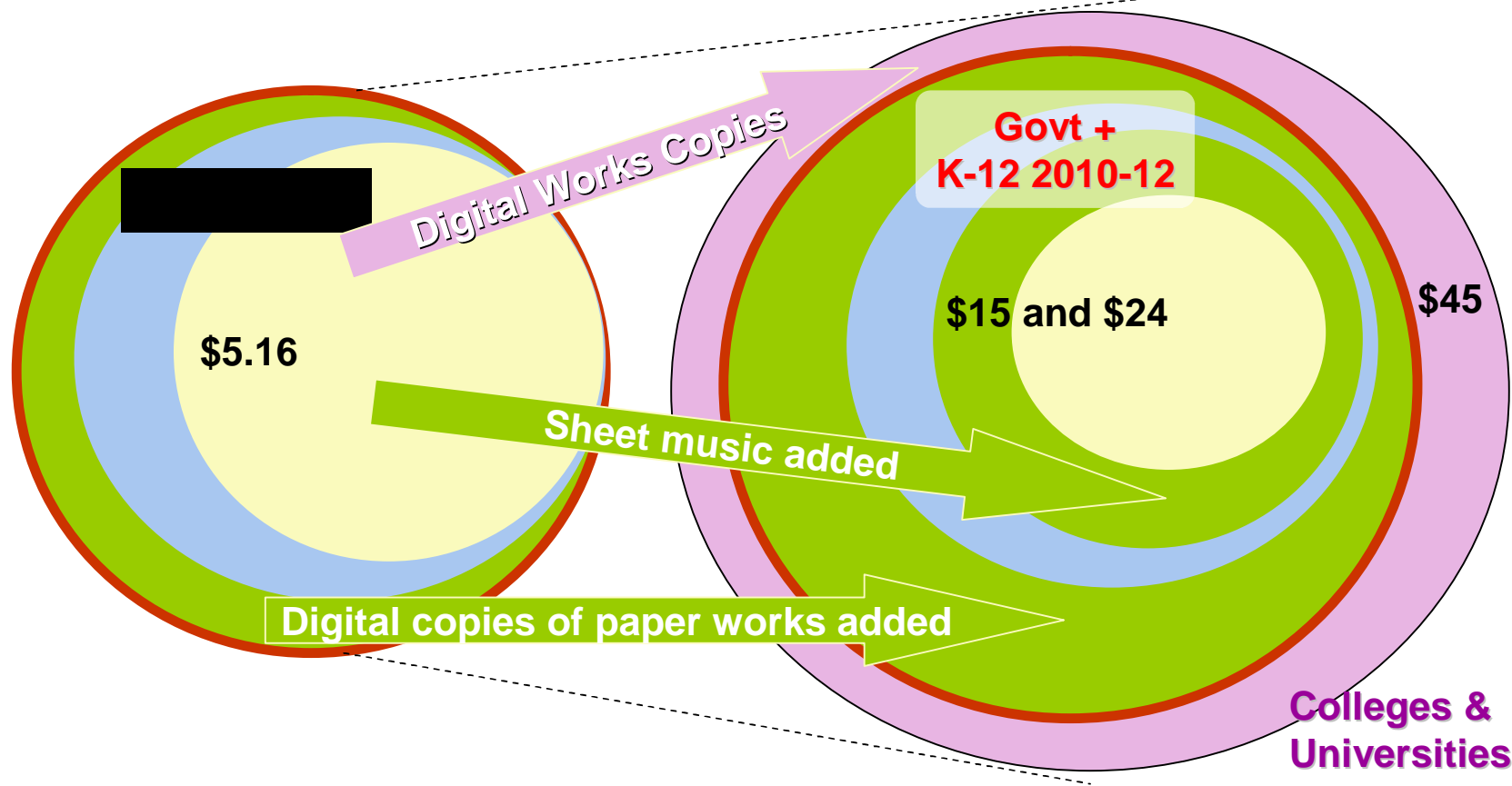
Access Copyright has not sought a hearing date with the Copyright Board to pursue this new tariff

Access Copyright's proposed 2005-2009 and 2010-2014 **Provincial and Territorial Government** Tariffs

- **Proposed fee is \$24.00/FTE civil servant**
- **Coverage of the proposed Tariff is similar to Schools Tariff**

Presumably AccessCopyright expects less government copying to be identified as non-compensable because of the users' rights in the Act (the difference between seeking \$15/student and \$24/civil servant)

Colleges & Universities 2011-2012 Tariff before the Board



ALL COPIES MADE

No Rights

**Compensable
Copies**

**Users' Rights exempt
for these uses**

Colleges & Universities License ← → Proposed Tariff

| In the License / Omitted from Proposed Tariff | Not in the License / Added to Proposed Tariff |
|---|--|
| Fair Dealing statement | digital works; activities around digital works; conditions required for digital works; |
| Indemnity | Anti-circumvention clause |
| | Increased record-keeping & reporting |
| | Access to secure networks by AC for surveys |
| | Fee increase: \$45/FTE |

Can Bill C-32 affect this process? Only INDIRECTLY

Research

Private study

Criticism *

Review *

News reporting *

* if source and attribution mentioned

The Supreme Court has said:

“It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the Copyright Act to prove that it qualified for the library exception.” **(LSUC case)**

**Bill C-32 would expand FAIR DEALING to add
Education
Parody
Satire**

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

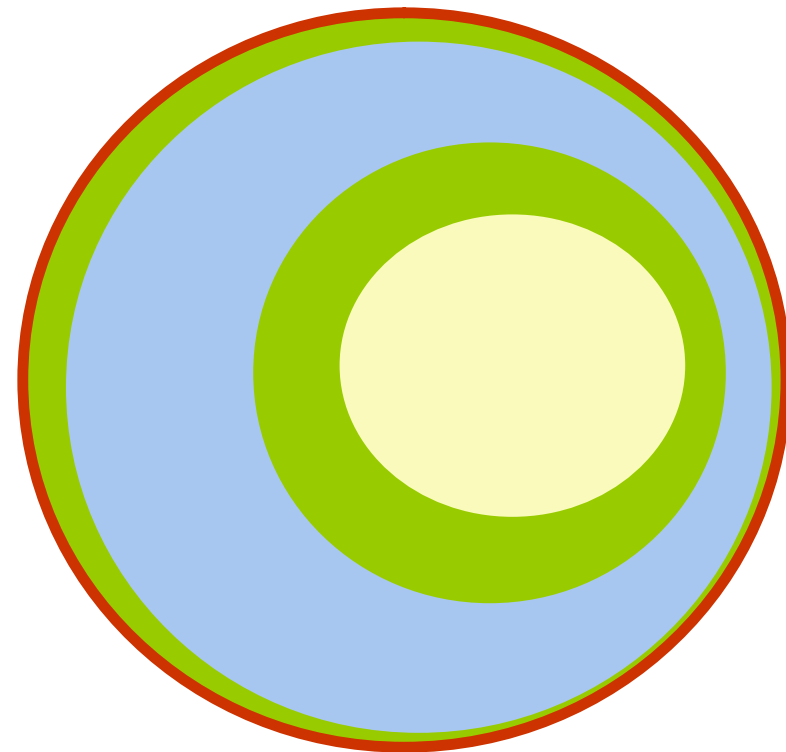
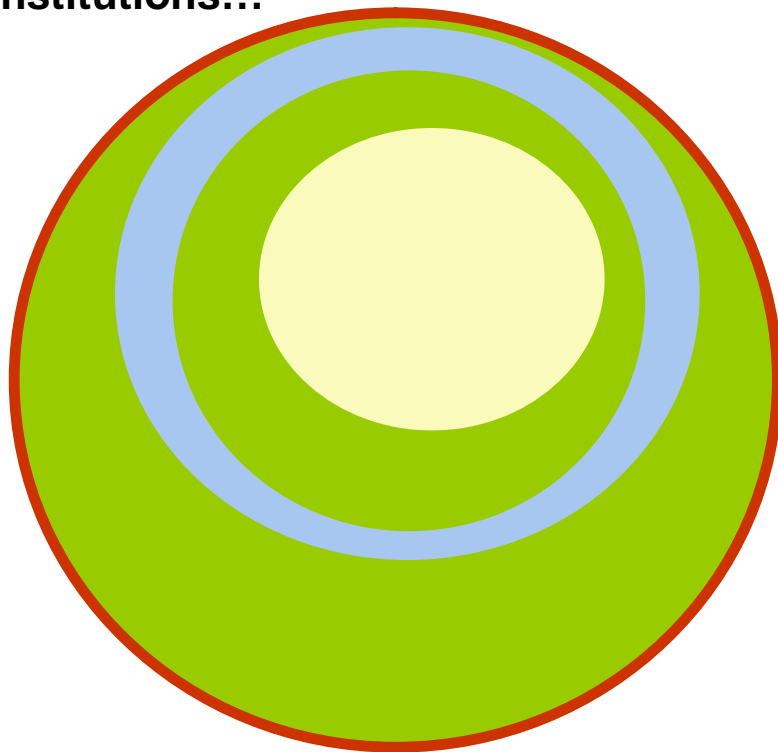
And reproduction for private purposes – without circumventing Technological Protection Measures (s.29.22)

And time-shifting (s.29.23)

And back-up copies (s.29.24)

If Fair Dealing Users' Rights are enlarged and if Educational and LAMs Exceptions are expanded?

Again, what AccessCopyright is asking from Post-Secondary Institutions...



... and how Bill C-32 might change the equation – **but** only within the range of what is compensable...

ALL COPIES MADE

No Rights

Compensable
Copies

Users' Rights exempt
for these uses

Bill C-32 is silent on collectives...

To give colleges and universities the protection under tariffs that they had negotiated under the earlier licenses, the Copyright Act would have to be changed

1. To say that contracts cannot override fair dealing rights

And

2. Where a collective exists, it represents that class of rightsholders on a worldwide basis unless the rightsholder specifically opts out (the extended repertoire or extended licensing system)

Bill C-32 proposed neither of these changes to the Copyright Act...

December 23, 2010: Board Interim Order in Post-secondary Tariff Proceedings (not all institutions need comply with it – only those wanting to do business with Access Copyright under Tariff)

| What AC asked for in the Interim Tariff | What CB approved in Interim Decision |
|---|---|
| The imposition of an interim tariff on PSE institutions for the duration of the Gap Period. | Interim Tariff approved, but not imposed. PSE institutions can elect not to operate under the tariff. |
| Extension of same payment obligations as under the license; subject to adjustments once the final Tariff is certified. | Granted |
| Extension of authorization for reprographic activities under the license (with the explicit exclusion of “sheet music”) | Granted |
| Inclusion of ‘array of activities ‘introduced in the Proposed Tariff around digital content, without additional payment on an interim basis | The tariff gives institutions the option to licence digital copies if it so wishes |
| Extension of same reporting obligations that existed in the license. | Granted |
| Extension of indemnity, as it existed in the license. | Granted |

Thank you. Some resources:

1. **Copyright Act, RSC 1985 as amended, Part VII Copyright Board and Collective Administration of Copyright (ss.66 – 78)**
2. **Copyright Board of Canada** <http://www.cb-cda.gc.ca/>
3. **OLA's position and a summary of Bill C-32 as it affects libraries** (prepared by Western Law students Justin Vessair, Dave Morrison and Dan Hynes) is at http://www.accessola.com/ola/bins/content_page.asp?cid=1-99-3377
4. Margaret Ann Wilkinson, "**Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries**" in Geist (ed), From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010) <http://www.irwinlaw.com/store/product/666/from--radical-extremism--to--balanced-copyright->
5. Margaret Ann Wilkinson, "**Open Access and Fair Dealing: Philanthropy or Rights?**" in Mark Perry and Brian Fitzgerald (eds) Digital Copyright in a User-Generated World.— Irwin Law, forthcoming.