

## Copyright Update

Dr. Margaret Ann Wilkinson\*

Professor Emerita & Adjunct Full Professor

Faculty of Law, Western University

*Copyright Advisor\*\* to OLA*

\* **Western Law LL M student Matthew Robertazzi provided research assistance in the preparation of this presentation.**

\*\* This is a historically titled position at OLA: although called to the Ontario Bar and in good standing, Professor Wilkinson is retired and does not currently practice law.

# Outline:

- A. Copyright and International Trade**
- B. Consequences of Term Extension
- C. Where are we on statutory reform of the *Copyright Act*?
- D. Copyright Litigation Update
- E. Copyright at the United Nations

## A. Copyright and International Trade – Two 2020 Updates

Trade Agreements (in addition to 1994 TRIPS Agreement) now affecting Canada:

- i. **Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (2016)** – in force in Canada through the *Canada-EU Comprehensive Economic and Trade Agreement Implementation Act, Statutes of Canada 2017, c 6* -- **UK not a party; NO change required to Canada's copyright law.**
- ii. **Canada – United Kingdom (NEW)**
- iii. **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)** – in force in Canada through the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation Act, Statutes of Canada 2018, c.23* -- **US not a party; NO change required to Canada's copyright law.**
- iv. **Canada-United States-Mexico Agreement (CUSMA) (December 10, 2019);**  
**Required CHANGE to Canadian law.**

## ii. Canada – United Kingdom

- Last year's Copyright Update occurred the day before the UK confirmed its departure from the EU (January 31, 2020): the break is now complete and the UK has been on its own beginning January 1, 2021
- December 9, 2020 Canada and the UK signed the **UK-Canada Trade Continuity Agreement** 'rolling over' their current trade arrangement (i.e., adopting the text of the CETA Agreement) but contemplating the negotiation of a new, tailor-made Canada – UK agreement in 2021

<https://www.gov.uk/government/collections/uk-Canada-trade-continuity-agreement>

- As last year's Copyright Update noted, the UK will not implement EU copyright changes created post-Brexit, including changes required of EU member states by June 7, 2021 that make it more difficult to upload copyrighted works to "online content sharing services" – see Cox Dec 21, 2020, "The Changing EU Landscape for Online Content Regulation"

<https://www.lexology.com/library/detail.aspx?g=e0062c4e-f399-4210-b3ba-2abad3eda1dc>

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## iv. CUSMA 2019 replaced 1994 NAFTA

### Four official names for the treaty:

- **T-MEC** - Tratado entre Mexico, Estados Unidos y Canada (in Mexico)
- **USMCA** - United States Mexico Canada Agreement (in the United States)
- **CUSMA** - Canada United States Mexico Agreement (in Canada, in English)
- **ACEUM** - Accord Canada -- Etats-Unis – Mexique (in Canada, in French)

We noted last year, in our 2020 Copyright Update on January 30, 2020, that on December 10, 2019 the final agreement to replace the 1994 NAFTA was agreed between Canada, Mexico and the US... but Canada had not then completed its process of ratification of the agreement (nor had the US):

- Canada's Bill C-4 was tabled in Parliament the day before our 2020 session

On March 13, 2020, Bill C-4 received Royal Assent and became the **Canada-United States-Mexico Agreement [CUSMA] Implementation Act**, SC 2020, ch.1.

- This statute is the only statute to have amended the *Copyright Act* since our last Copyright Update in 2020. These amendments to the *Copyright Act* came into effect July 1, 2020.

# CUSMA Chapter 20 governs Intellectual Property, including, in Section H: Copyright and Related Rights ...

- Footnote 61 states Article 20.65 concerning “contractual transfers” does not affect the exercise of **moral rights**.
- Annex 20-B to section J of Chapter 20 makes it clear that Canada can keep its “**notice-and-notice**” regime.
- With respect to both Technological Protection Measures (**TPM**) and Rights Management Information (**RMI**), Canada can create exceptions from criminal procedures and penalties for those that are “a **non-profit library, archive** [including non-profit **museum**], **educational institution**” (see, on TPMs, Article 20.66(4)(g) and, on RMI, Article 20.67 (3)).

## HOWEVER --

- Art 20.88 (1)(b) requires all three countries to shelter **ISPs** from financial liability in situations where “copyright infringements that they do not control or initiate or direct” take place through their networks.

# One CUSMA-related change has been to the Copyright Act, about TPMs and RMI, and affects libraries different ways:

- CUSMA, as noted above, says, with respect to both **TPM** and **RMI**, Canada **can** create exceptions from criminal procedures and penalties for those that are “a **non-profit library, archive** [including non-profit **museum**], **educational institution**” (see, on TPMs, Article 20.66(4)(g) and, on RMI, Article 20.67 (3)).
  - For **TPMs**, **before CUSMA**, such exceptions already existed in the Copyright Act, see s 42(3.1).
- **Now the [CUSMA] Implementation Act**, SC 2020, ch.1, s 30, has added s 42(3.2) of the Copyright Act to create an infringement action related to **rights management information [RMI]** “**except [for] a person who is acting on behalf of a library, archive or museum**”.
- Recall that a “library, archive or museum” is defined in s 2 of the Copyright Act – as one “not established or conducted for profit” – so only not-for-profit libraries benefit from the new RMI exception.



## CUSMA Art 20.62 Section H: Copyright and Related Rights requires Canada to move longer periods of copyright protection...

The period of protection for “works” must generally become “life + 70” -- but, where there is no “life” (including situations where an author chooses to remain anonymous), the protection period must be at least:

- 75 years from the end of the year of authorized publication or fixation or,
- if there is no fixation within 25 years, not less than 70 years from the end of the year of creation of the work, performance or phonogram...

Canada has:

- **recently changed** the period for **anonymous works, cinematographic works, performances and sound recordings**, to comply with CUSMA

(through the Canada-United States-Mexico Agreement [CUSMA] Implementation Act, SC 2020, ch.1, see next slide...)

- **not yet changed** the period of protection for **works** in general (s 6 of the Copyright Act).
  - Canada must make this change by **January 1, 2023** -- 2 ½ years after CUSMA came into force on July 1, 2020; see CUSMA Art.20.89(4(c)).

# The new s 6.1 in the Copyright Act, for sole anonymous or pseudonymous authorship, reads:

(1) Except as provided in s 6.2 and in ss (2), where the identity of the author of a work is unknown, copyright in the work shall subsist until the end of 75 years following the calendar year in which the work is made. However, if the work is published before the copyright expires, the copyright continues until the earlier of the end of 75 years following the end of the calendar year in which the first publication occurs and 100 years following the end of the calendar year in which the work was made.

(2) Where, during any term referred to in ss (1), the author's identity becomes commonly known, the term provided in s 6 applies.

(The Copyright Act's **new s. 6.2** makes virtually identical provisions for anonymous and pseudonymous works of *joint* authorship ...)

(s 11.1 makes the same changes for cinematographic works.)

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## **B. Consequences of Term Extension:** When copyright protection is extended, is copyright “recapture” possible?

For anonymous works, cinematographic works, performances and sound recordings, the [CUSMA] Implementation Act, SC 2020, ch.1, has clearly told us:

s.34 (No revival of copyright):

Sections 6.1, 6.2 and 11.1, paras 23(1)(a) and (b) and ss 23(1.1) of the Copyright Act, as enacted by ss 24, 26 and 29 [of this Act], respectively, do not have the effect of reviving the copyright or a right to remuneration in any work, performer’s performance fixed in a sound recording or sound recording in which the copyright or the right to remuneration had expired on the coming into force of those provisions in that Act [i.e., before July 1, 2020].

**For works in general**, currently only in copyright for “life + 50 years”, but required to be given longer protection ...

Parliament could pass legislation implementing the CUSMA requirement for “life + 70 years” copyright in “works” that mirrors provision for no revival of copyright for anonymous works, sound recordings, etc.

OR, probably less likely,

Parliament could be silent on the question of revival, leaving the courts to interpret the rights of creators regarding recapture

In this case, you may wish to consult

- Margaret Ann Wilkinson, Carolyn Soltau and Tierney GB Deluzio, “Copyright in Photographs in Canada since 2012,” (December 1, 2015) *Open Shelf*  
<https://www.open-shelf.ca/wp-content/uploads/2015/12/Copyright-in-Photographs.pdf>
- Margaret Ann Wilkinson and Tierney GB Deluzio, “The Term of Copyright Protection in Photographs,” (December 2015) 31 *Canadian Intellectual Property Review* 95-109.

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## C. Where are we on statutory reform of the *Copyright Act*?

- In discussing “Copyright and International Trade” we have noted statutory reform to the Copyright Act being made in order to comply with Canada’s trade commitments...
- Last year, however, we devoted much time to discussing various domestic Canadian ideas for reform of the Copyright Act:
  - No ideas generated through the process of the mandatory review of the Copyright Act (under s 92), completed in mid-2019, have moved forward to proposed legislation – except ideas with respect to reform of the Copyright Board (see last year’s Copyright Update (2020), especially slide 44)

<http://www.accessola2.com/superconference2020/Sessions/2ThursJan30/OLA%20Copyright%20Update%202020%20%20Post%20Edit%20Final.pptx>

# Reforms at the Copyright Board since April 1, 2019

- For those who are interested in the Copyright Board, I highly recommend looking at the Copyright Board, Canada, Annual Report 2019-2020, the first annual report issued since the Copyright Board was legislatively reformed through amendments to Part VII of the Copyright Act -

<https://cb-cda.gc.ca/sites/default/files/inline-files/40-092-CopyrightBoard-AnnualReport-EN-Accessible.pdf>

## Among much other relevant information,

- there is a graphic history of the Board on p 10;
- there is a list of 8 “unlocatable copyright owners” licenses granted by the Board under s 77 of the Copyright Board during the Board’s fiscal year 2019-20 (see pp. 19-20);
- the Board is anticipating government promulgation of a new set of regulations governing its operation (see p 15) but, though its website anticipates publication of them, they have not as yet appeared, see <https://cb-cda.gc.ca/en/copyright-information/regulations/copyright-board>



# Library Advocacy in 2020 –

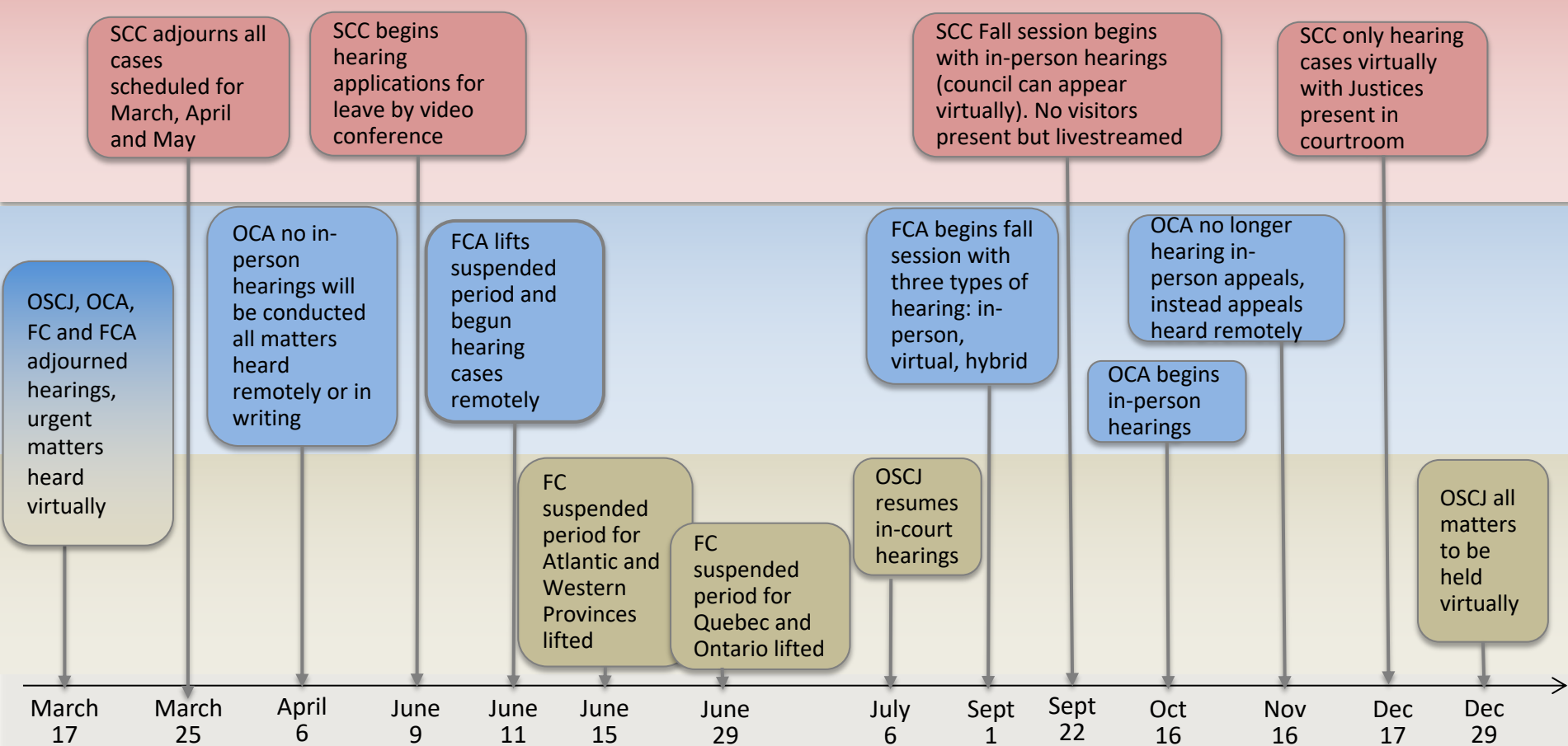
- On September 16, 2020, the Canadian Federation of Library Associations (CFLA) and the Canadian Association of Research Libraries (CARL) wrote to the federal government advocating for “Unfettered Access to Government Publications in [the] Face of COVID-19”.
- It was noted that a Creative Commons licence (in most cases the Creative Commons Attribution license (CC BY)) made available by government with respect to publicly available government publications “would help alleviate copyright-related legal barriers that prevent preservation, reproduction, and redistribution of these important reports and parliamentary proceedings”.

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# Canadian Courts and the Response to COVID-19

SCC- Supreme Court of Canada  
OCA- Ontario Court of Appeal    OSCJ- Ontario Superior Court of Justice  
FCA- Federal Court of Appeal    FC- Federal Court



## D. Copyright Litigation Update

1. ***York University v Access Copyright***, 2020 FCA 77 – now on appeal to the Supreme Court of Canada
2. Different ‘Fair Dealing’ Outcomes in 2 cases in 2020
3. *Thomson v Afterlife Network Inc*, 2019 FC 545
4. *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432
5. *Province of Alberta et al v Access Copyright*, FC # T-326-18 - ongoing

1. *York University v Access Copyright* 2020 FCA (Federal Court of Appeal) 77 (April 22, 2020)- unanimous decision: Justice Pelletier writing for himself, De Montigny & Woods)

- Prior to the original trial, Prothonotary Aalto, at York's instigation, ordered "bifurcation" of the trial into two phases (July 30, 2014).
  - Justice Phelan, later, in 2017, noted his judgment related only to "Phase I" of the York lawsuit and that **only in the future "Phase II" of the trial**, the "damages phase" (see para 219), **will York be able to raise fair dealing** (see para 220);
- The FCA decision (on York's appeal from Justice Phelan's 2017 decision) had three aspects important for libraries:
  - 1) **The justices disapproved of York University's Fair Dealing Guidelines;**
  - 2) **The justices held York's behaviour UNFAIR in respect of 5 of 6 Fair Dealing factors;**
  - 3) **The justices recognized "opt-out" institutions as legitimate.**

See "The decision of the Federal Court of Appeal in *York University v Access Copyright*" 9 pp prepared May 13, 2020 by Margaret Ann Wilkinson

<http://m.accessola.org/web/Documents/OLA/issues/York%20v%20Access%20FCA%20OLA%20Comment%20FINAL%20FINAL13May2020.pdf>

As noted at our 2020 Copyright Update, absent a settlement, finality in this lawsuit is still years away... both parties are appealing to the **Supreme Court**...

- **York University** applied June 19, 2020 for leave to appeal the FCA's upholding of Justice Phelan's dismissal of York's counterclaim for a declaration of fair dealing; **Access Copyright** applied June 22, 2020 for leave to appeal the decision of the FCA that (1) allowed York's appeal of Justice Phelan's decision in the main action and (2) dismissed Access Copyright's claim based on its Interim Tariff.
  - Supreme Court of Canada file # is **39222**...
- The **Supreme Court granted both applications for leave** (October 15, 2020).
- York and Access Copyright each filed a Notice of Appeal November 16, 2020.
- Neither party has yet filed its factum and therefore no applications by parties seeking to intervene have yet been filed
  - see Rules of the Supreme Court, SOR/2002-156, s 56(b)

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## 2. Different ‘Fair Dealing’ Outcomes in 2 Cases in 2020:

- In *Wiseau Studio et al v Harper et al*, 2020 Ontario Superior Court 2505 (J. Schabas, June 2020), use in a film by Harper et al of Wiseau Studio’s film clips **was fair** under s 29.1 criticism and s 29.2 news reporting:
  - Wiseau and Wiseau Studio released 2003 feature film ‘The Room’; Harper and others made 2016 documentary ‘Room Full of Spoons’ about it, including 69 clips, totalling 7 minutes, from 109 minute ‘The Room’ (para 188). Wiseau’s legal actions against the documentary meant it was never released before the 2020 trial – for this reason Harper et al (including Room Full of Spoons Inc) had counterclaimed against Wiseau Studio et al .
  - ‘Room Full of Spoons’ was found to **reproduce a substantial part** of ‘The Room’ (para 164) **BUT**, after discussing fair dealing (paras 172-197), Justice Schabas found **the dealing fair** (para 198). In light of the finding against the defendants, and because of their egregious conduct, the **counterclaimant** (and corporate defendant), Room Full of Spoons Inc, was awarded **\$550,000** for not being able to release its film + **\$200,000** in punitive damages.
- In *Alexander Stross v Trend Hunter*, 2020 Federal Court 201 (Prothonotary Angela Furlanetto, February 2020), reproduction of Stross’ photos for 9 months on Trend Hunter market research company website **was not fair**:
  - Though the use was not found to be for the purpose of s 29.2 “newsreporting” (para 31), it was found to be s 29 “research” (para 31) but the research use was found to be not fair (para 65; analysis of the test for fair dealing paras 37-64).
  - As recounted at para 54, neither Trend Hunter user nor Trend Hunter followed its “Copyright Policy” (described at paras 50, 51) or practices, so Trend Hunter liable (para 66). The photos were posted for nine months (Jan 11-Oct 27, 2017, para 4) and were taken down when Trend Hunter was notified of Harper’s claim (para 54) ,
  - **Trend Hunter had to pay copyright holder Stross \$3,983.40** (para 75) for copyright infringement.
- No appeal in either case.



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### 3. *Thomson v Afterlife Network Inc*, 2019 FC 545

(no appeal was taken from the judgment)

- Dawn Thomson represented herself and others in a class action against Afterlife Network, suing for copyright (Copyright Act s 27) and moral rights infringement (s 28.1): without any permission Afterlife had posted obituaries and photographs created by Ms Thomson and others on Afterlife's website.
- Madam Justice Kane held:
  - The obituaries and photographs are original works protected by copyright;
  - Afterlife infringed the copyright of the authors (Ms Thomson and others like her);
  - Because Ms Thomson did not provide objective evidence of damage to her (or others') honour or reputation, even though subjective evidence of damage was provided, no moral rights infringement by Afterlife was established.
- An injunction stopping Afterlife from posting the photos and obits issued and \$20,000 damages (for Ms Thomson and others) was to be paid by Afterlife.

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**Recall** that libraries often are (or are part of) Internet Service Providers under the Copyright Act:

The Copyright Act defines ISPs as those 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” (see 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 (see 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 (see s 41.26(2)).

(From Copyright Update 2015, slide 13)

## 4. *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, Justice Gleeson

(no appeal was taken from the order)

1. Courts can issue orders requiring an **ISP** (in the case, **Teksavvy**) to block users' access to a website even before a trial is completed...
2. Such an order will be made if to do so is “just and equitable in all of the circumstances” – through “a determination of which of the parties will suffer the greater harm from the granting or refusal of the injunction” (para 51)
3. In this case, © infringement had been alleged -- and a strong *prima facie* case of substantial or complete copying was demonstrated – and the plaintiff **Bell Media** established irreparable harm would occur if the copying continued, so the Federal Court ordered **Teksavvy** to block users' access to **GoldTV.Biz**...

The same type of order, in similar circumstances, could be made against a library... or the institution or organization of which a library is a part...

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## 5. *Province of Alberta et al v Access Copyright*,

Federal Court # T-326-18 - ongoing

- Entirely separate from both the *York University v Access Copyright* matter just discussed and older *Alberta (Education) v Access Copyright* 2012 SCC 37 proceeding
- The School Boards of Ontario and Ministries of Education for all Canadian Provinces (except BC and Quebec) claim they overpaid Access Copyright, for the years 2010-2012, by **\$25 million**, payments ostensibly made for access to copyrighted materials but made for actual copying that should have been free.
- Access Copyright is both defending itself and maintaining a counterclaim against the plaintiffs for **\$50 million** in royalties it alleges were not paid to it by the education entities between 2013 and 2019 (amounts it claims are increasing by **\$8 million** per year going forward)
- **This lawsuit appears, as it did last year, to be very far from going to trial...** Just today (Feb 5, 2021) there is a case conference scheduled for the parties to continue “to confer regarding the outstanding discovery issues” [Order of Prothonotary Mandy Aylen, Jan 5, 2021]

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# a) Marrakesh VIP Treaty

[https://www.wipo.int/marrakesh\\_treaty/en/](https://www.wipo.int/marrakesh_treaty/en/)

- 116 countries have signed *Marrakesh* (Canada ✓), it is only **in force in 76** of them (Canada ✓)  
[https://wipolex.wipo.int/en/treaties/ShowResults?start\\_year=ANY&end\\_year=ANY&search\\_what=C&code=ALL&treaty\\_id=843](https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=843)
- We noted that the **United Kingdom (UK)** was leaving the **EU** the day after our Copyright Update last year (ie, on January 31, 2019, reducing the number of countries covered by *Marrakesh* by one (88) BUT the **UK** signed *Marrakesh* on its own on June 28, 2013 and, indeed, ratified it, on its on, on September 30, 2020. *Marrakesh* came into force in the **UK** on December 31, 2020 and thus, as we predicted last year, the number of active *Marrakesh* participants is up to 89 again!
- Associated with *Marrakesh* is the ABC Accessible Books Consortium (**ABC**), a public private partnership organization led by WIPO (the UN's World Intellectual Property Organization) that is facilitating the exchange of accessible materials between countries.  
<https://www.accessiblebooksconsortium.org/portal/en/index.html>
- As we reported last year, the increase in titles made accessible through **ABC** between 2019 and 2020 represented a **30%** increase over the year before: this year, in a year mostly preoccupied with pandemic, **ABC** still reports an **18%** increase over last year – to **635,000** titles now made available in **over 80 languages...**

## b) WIPO's SCCR on Limitations for Libraries

- As we have discussed many times over the years, prospects for a United Nations Treaty dealing with limitations and exceptions to copyright for **L**ibraries, **A**rchives and **M**useums (“**TLAM**”), through sustained effort, remain live...
  - Last year we reported that the 40<sup>th</sup> meeting of the World Intellectual Property Organization (**WIPO**) Sub-Committee on **C**opyright and **R**elated Rights (**SCCR**) would be held in Geneva June 29-July 3, 2020... and a 2<sup>nd</sup> meeting was expected in 2020...
  - In fact, the only 2020 SCCR meeting, the **40<sup>th</sup>**, occurred, virtually, November 16-20.
- While little progress has been made in the formal process of treaty-making...
  - The “Summary by the Chair” of the 40<sup>th</sup> session, Item 6 “Limitations and Exceptions for Libraries and Archives,” shows activity and continuing international interest...
  - The focus of the advocacy by the International Federation of Libraries and Associations (**IFLA**) at this session was on digital reproduction and online distribution of information.

See: [sccr40 - iflas\\_statement\\_el - short\\_version\\_sccr40.pdf](#)

*Thank you...*