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Copyright

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The context of the ownership of copyrighted works:

Copyright is a form of intellectual property. Other forms of are

- Patents
- Trademarks

Other property rights exist in the physical manifestations of copyrighted works

- Books are owned by those who purchase them, even though the copyrights are not sold to the book purchasers

Under the Public Hospitals Act in Ontario, medical records are “owned” by the hospital: this is the personal property ownership, just as one owns a book, not the copyright ownership

So what is it that we are dealing with when we deal with copyright holder? What do they **own**?

Where does copyright fit in?

The Copyright Act creates an exception to the rights of the copyright holder for an institution required by personal data protection legislation or access legislation to make a copy of a copyrighted work which is also a record under the personal data protection or access legislation so that the institution can give a requestor entitled to the record one copy of the record.

This does not entitle the requestor who receives the record to make any further copies without the permission of the copyright holder.

Health institutions must simultaneously comply with:

**Ordinary
property rights
in records**

AND

**Intellectual
property rights
in records: ie
copyright**

AND

**Rights of individuals
for personal data
protection in records**

Users, and librarians, in a copyright world, potentially have access to materials in a number of different ways:

1. They can use materials that are not works covered by copyright;
2. They can make use of materials in ways not forming part of the copyright holders' rights bundle;
3. They can use materials in ways that do form part of the copyright holders' rights bundle but are excepted by governments from the purview of the copyright holders' exercise of their rights;
4. They can use materials in ways that do form part of the copyright holders' rights bundle but for which they have been given permission by the copyright holders –
 - **Through permissions of the copyright holders given in advance (“open content licensing” or “creative commons”) or**
 - **Through the copyright holders' collectives or**
 - **Through permissions negotiated directly, from time to time, with copyright holders.**

Today's topics:

WHAT RIGHTS ARE HELD BY COPYRIGHT HOLDERS?

1. Conversely, what materials are not works covered by copyright and are therefore freely available for librarians use?
2. Conversely, what uses of materials are not part of the copyright holders' rights bundle and therefore are uses librarians can freely make?

The Internet and Cyberspace

Copyright ownership

The rights of copyright owners

Liability for copyright infringement

HOW CAN LIBRARIANS WORK WITH COPYRIGHT?

3. What exceptions have been made from the purview of the copyright holders' exercise of their rights that librarians can rely on to make free use of materials?
4. How can librarians obtain permissions from the copyright holders?

Users' and librarians' rights

Buying rights

FIRST:

WHAT RIGHTS ARE HELD BY COPYRIGHT HOLDERS?

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One law for all materials dealt with in Canada:

Copyright Act,
Revised Statutes of Canada 1985, c.C-42, as amended

Because of the international principle of “national treatment” in international copyright agreements, all materials in Canada, for all practical purposes, are governed by Canadian law

When Canada became independent in international treaty making from Britain, it adopted its own, independent, copyright scheme, in compliance with the *Berne Convention* as it then stood (the 1908 version) in 1921 [in effect 1924].

BERNE

1886

1896 Paris

1908 Berlin

1914 Berne

1928 Rome

1948 Brussels

1967 Stockholm

1971 Paris, 1979

CANADA

1921 Act, in force 1924

1928 amendments -

adopted by Canada

Canada signs Paris 1998

Current International Trade Environment for Copyright

Trade-Related Aspects of Intellectual Property Rights

[Free Trade Agreement] *No IP*

1989

North American Free Trade Agreement

1994 *INCLUDED IP*

Since 1970 Berne administered by
World Intellectual Property Organization

WIPO Copyright
Treaty (WCT) 2004

WIPO Performances
and Phonograms
Treaty (WPPT) 2004

*Refer
to
Berne*

Berne Convention

19th century, *revised repeatedly*

World Trade Organization

1995

*Administered
through*

General Agreement on Trade and Tariffs

1948 - *included Canada*

TRIPS:

Article 13:

[Member states] 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
right holder.

And the internet is governed by copyright!

The Supreme Court of Canada made clear in the “Tariff 22” case concerning music that:

- Posting a work on the net is authorizing its communication – and communication occurs when the item is retrieved by an end user, and
- When a content provider intends the public to have access, that is a communication by telecommunication to the public...

Both rights only the copyright holder has.

laws, countries and “cyberspace”

In any area of law, where situations of dispute involve more than one jurisdiction, courts in several jurisdictions may be asked by disputants to get involved.

Questions of conflict of laws or private international law occur regularly.

Since the 19th century, international agreement in copyright has minimized the situations in which courts of various countries get involved in the same copyright disputes (the Berne Convention)...

But, new circumstances bring new questions and issues are again arising.

When a court is asked to resolve a dispute between parties, it asks itself a series of questions:

(1) does this court have jurisdiction?

- courts answer this various ways – they ask questions like:
 - ❖ does either party have a connection with this jurisdiction?
 - ❖ did the facts of the dispute arise within our borders?
- Depending upon the answer, the court will decide whether to hear the case
- Courts in two different jurisdictions can independently decide to hear the same case, since the courts in one jurisdiction cannot tell the courts in another jurisdiction what to do

(2) If the court decides to hear the case, what law should it apply?

- a Canadian court can apply the law of another country if it deems that appropriate...
- a foreign court can apply Canadian law, if it deems it appropriate...
- parties to a contract often try to signal the courts what law to apply by stating the chosen jurisdiction in the contract...

ICraveTV - Canadian company, downloading television signals in Canada, to be distributed over the internet originating in Canada

- a Pennsylvania court took jurisdiction and applied American law

The value of copyright ownership

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.

Copyright Act only protects original expressions

- **EXPRESSIONS** are protected in copyright-- **IDEAS** are not
- In 2002, the Ontario Court of Appeal decided a case, Delrina v. Triolet Systems, which demonstrates that not all works are ORIGINAL works which have copyright protection.
- Leave to appeal this decision to the Supreme Court of Canada was sought from the Supreme Court of Canada and the Court denied leave.
- Duncombe was employed by Delrina to improve a performance monitoring computer system. After leaving Delrina, Duncombe began to develop a similar system at Triolet, to compete. Delrina sued.
- But the court found that features similar to both programs are not capable of copyright protection -- Merger: if idea can only be expressed in one (or very limited) ways – then expression merges with idea – NO COPYRIGHT

But the Act also only protects original expressions:

“every original literary, dramatic, musical and artistic work” [OLDMAW] includes

- every original production in the literary, scientific or artistic domain,
- whatever may be the mode or form of its expression,
- such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

Canadian Supreme Court on Copyright

(majority & minority)

THÉBERGE 2002 (7 sitting)	CCH v LSUC March 2004 UNANIMOUS	SOCAN June 2004 ALL CONCUR	ROBERTSON v. THOMSON Heard December 14, 2005. Decision expected... BUT	ROBERTSON v. THOMSON "rehearing" held April 18, 2006. Released October 10, 2006.
McLachlin, CJ	McLachlin, CJ *	McLachlin, CJ	McLachlin, CJ	McLachlin, CJ
Major	Major	Major	Major – retiring –	ROTHSTEIN
Binnie *	Binnie	Binnie *	Binnie	Binnie
	Arbour	Arbour	ABELLA	ABELLA*
Iacobucci	Iacobucci	Iacobucci	CHARRON	CHARRON
	Bastarache	Bastarache	Bastarache	Bastarache
LeBel	LeBel	LeBel (*concur)	LeBel	LeBel**
L'Heureux-Dubé	FISH	Fish	Fish	Fish**
Gonthier *	DESCHAMPS	Deschamps	Deschamps	Deschamps

What was the Supreme Court's attitude in *Robertson v. Thomson* ?

The issue **did not involve users' rights** directly, although the public ultimately consumes the newspapers and online products that were at issue: the *lis* was between contributors to the newspaper and the newspaper publisher

This is a **new court**: the united court from the CCH (Law Society) and SOCAN (Tariff 22) cases has split: LeBel and Fish write for the majority, with Rothstein, Bastarache and Deschamps joining – Abella writes for the minority, joined by Chief Justice McLachlin, and Binnie and Charron.

Majority affirms **technological neutrality** of the Act... "if an act is an infringement in the "real world", it is an infringement if it occurs in the electronic environment."... the minority criticizes the majority's application of technological neutrality and says the "context" approach is not media neutral –Robertson won: the newspaper is a "collected work" and a "compilation" – but court focussed on compilation not collective work in its analysis...

The majority says that the "process" is not important to the decision – just the **"context"** of the presentation of the articles in the different products...- *distinguishes the Supreme Court's approach in Tariff 22*...the minority in *Robertson v. Thomson* says the "process" approach, emphasizing originality should have been used...

Thomson had permission for CD-ROM presentation, because retrieval preserved newspaper context... (minority agrees in the result, but not with the reasoning)

Thomson had no permission for InfoGlobe database because retrieval was of underlying article (Robertson's work) since retrieval did not preserve context of the compiled work (the newspaper) – here minority completely disagrees with analytic tack of majority – would have found permission for Thomson...

Majority in line with US *Tasini* case... (except for CD-ROM element...)

And the Act only protects substantial portions or the whole of original expressions -

- In Canada, copyright holders have only the rights to produce, reproduce, publish or perform in public substantial portions or the whole of works:
 - If you are producing, reproducing, publishing or performing in public only insubstantial portions of copyrighted works, then you are not violating copyright
 - Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty ahead of time...

In general, copyright is a temporary, “artificial” interest...

...at the end of the copyright period, the work becomes freely available to anyone.

Economic rights

in works

life of the creator + 50 years
automatic reversion interest to the
author's estate 25 years after
death

Moral rights

in works only

same period as the economic rights
*(no reversion interest since rights could
never have been assigned!)*

in “other subject matter” – 50 yrs

sound recordings
communication signals (broadcast)
performer's performance



SECOND:

WHAT RIGHTS ARE HELD BY COPYRIGHT HOLDERS?

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Economic rights in works

to produce, reproduce
to perform in public
to translate
to convert from one type of
work to another
to make sound recordings
or cinematographs
to communicate the work
by telecommunication
to present art created after
1988 in public
to rent computer programs

*to authorize any of the
above*

Economic rights in “other subject matter”

to communicate a **performer’s
performance** by
telecommunication
to “fix” a **performer’s
performance**
to reproduce a fixed **performance**
to rent out a sound recording of
the **performance**

to publish, reproduce or rent a
sound recording

to fix a **broadcast signal**
to retransmit a **signal**

to authorize any of the above

...what are “Moral Rights”?

Another class of rights created under the Canadian Copyright Act:

In Canada, the author of a work has a right :

- to the **integrity** of the work (i.e. to prevent the work from being distorted, mutilated or otherwise modified *to the prejudice of the honour or reputation of the author*)
- where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym (as well as the right to remain anonymous) [often referred to as the right to **paternity**]
- to prevent the work from being used in association with a product, service, cause or institution *to the prejudice of the honour or reputation of the author* [commonly referred to as the right of **association**].

So, who owns the copyright interests in ...

Materials found in your collection?

Materials found in your institution?

Materials found online?

So, who owns the copyright interests in ...

- Materials found in your collection?
- Materials found in your institution?
- Materials found online?

It turns out that where the work or other subject matter is found now does not determine who owns the copyright interests – wherever the material is found...

The individual authors, who were not employees at the time of creation of the works, if they have not assigned those rights, own the rights in works – and, even if they were employees or assigned their economic rights, unless they have waived them, they continue to hold moral rights.

Employers who employed authors who created works will own the copyrights, but not the moral rights, in those works, unless they have assigned them.

Sound recording rights and rights in performances by performers will be owned by the makers and performers, respectively (unless assigned to others), even though the sound recordings or recorded performance may also carry other copyright interests, for example in musical works or film, that are owned, at least originally, by others.

And there is no “copyright” in a work or other subject matter, but rather a BUNDLE of rights and the ownership of the bundle may be diverse...

Registration of Copyright

Registration is NOT required for the copyright to be effective

But there are advantages to registration:

- Provides good evidence of the facts

- Prevents defendant from claiming innocent infringement

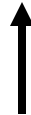
Most copyright interests are not registered– unless administered by collectives

Copyright rights

Economic rights

in works and in “other subject matter”

may be assigned
usually end up NOT in the author’s hands
may be licensed



ROYALTIES MAY BE CHARGED BY THE COPYRIGHT HOLDERS FOR THESE

Moral rights

only in works and NOT in “other subject matter”

always remain with the author
can only be waived

So, what is this about “assignment” and how do we find these copyright owners?

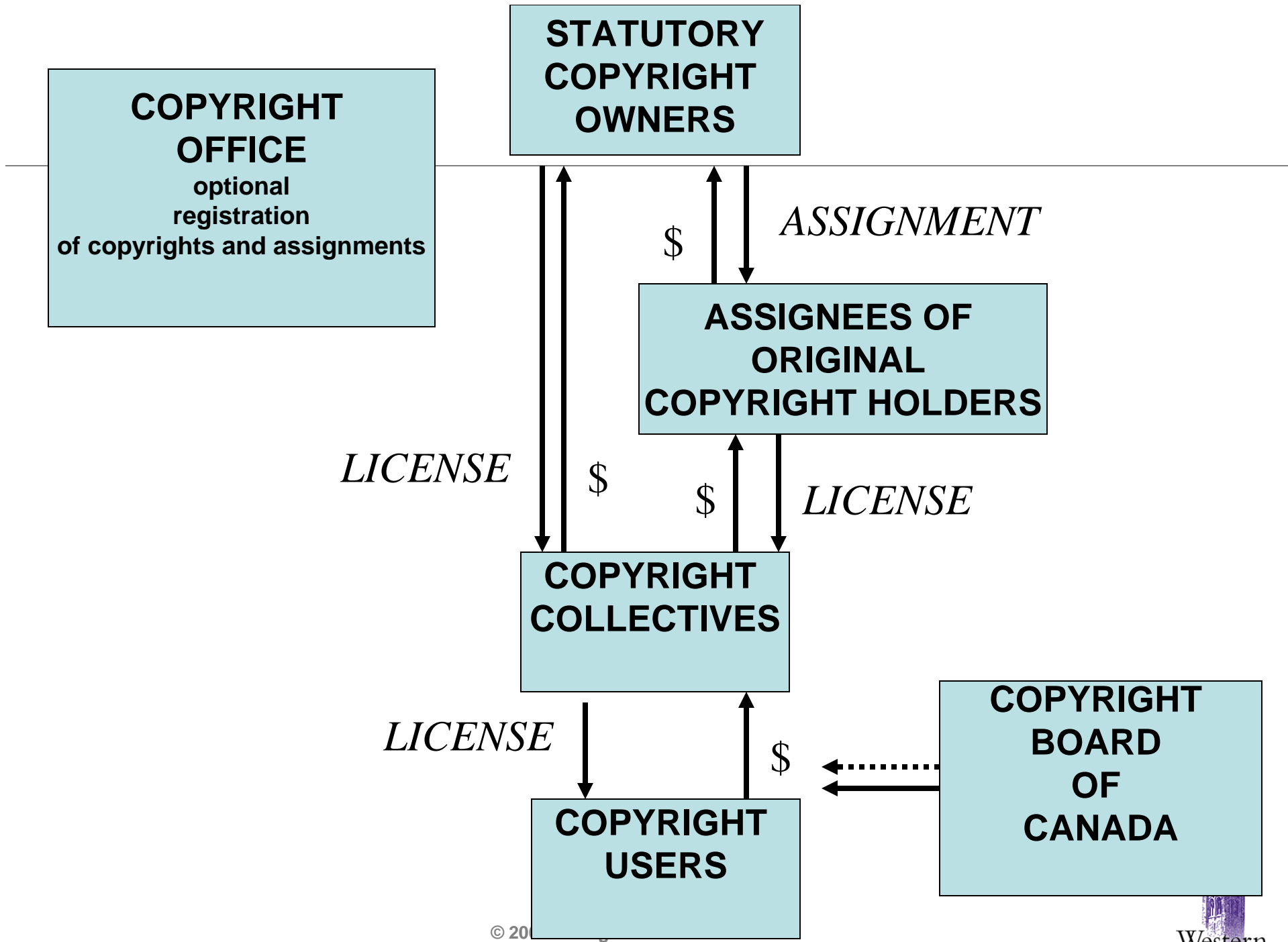
Contracts

If the original owner of the copyright has sold certain rights in a work to someone else, then original author or author’s employer cannot give permissions to use the work in ways covered by the sale.

Collectives

Geography

Copyrights interests can be divided up and sold according to geographic territory and this is the traditional basis of the publishing industry— if a Canadian publisher or distributor holds the rights for Canada, then someone wishing to use the work in Canada cannot get permission to do so from someone in another jurisdiction (for example, the American distributor)



Copyright Office

established under **s. 46**
administered under Canadian
Intellectual Property Office
(CIPO) within Industry
Canada
keeps registry of copyrights
and assignments (optional
process in copyright)

Copyright Board

established under **s. 66**
administrative tribunal
must approve all **tariffs** and fees
charged by collectives
can also set individual royalties
when requested
also can grant non-exclusive
licenses for use of works of
unlocatable owners

**Not, of course, forgetting the role, in determining rights
created under the Act, of**

- the provincial courts and
- the Federal Court
 - *in adjudicating infringement actions under the Act,*
- and the Federal Court also
 - *in adjudicating disputes under the Act involving registration, and*
 - *sitting in review of these administrative tribunals.*

Collective Societies:

“Collective society” or “collective” is not defined in the Copyright Act

Generally, a voluntary organization that represents the *holders of a particular economic copyright* in terms of the administration and enforcement of selected rights associated with that copyright.

“voluntary” but the Act is increasingly being amended to encourage copyright holders to associate in collectives

“organization” : private sector, not governmental - set up as the founders wish: e.g. AccessCopyright (formerly CANCOPY) is a non-profit, federally incorporated company – its revenue flows through to the copyright holders it represents (it does not make money for its own sake)

Collectives rarely represent actual authors or creators, since actual authors rarely begin or remain as the owners of the rights.

In a net information importing country such as Canada, collectives can, and most often do, remit most of their revenues to foreign rightsholders.

Do collectives give users rights?

Since 1988, collectives of copyright holders have been exempted from the rigours of Canada's ant-trust legislation: the Competition Act.

Since then, Canadian copyright holders have proceeded further in collectivizing than in other countries.

And, these collectives have been very successful at negotiating agreements with large sectors of users:

It may be that the development of this vast network of licenses is beginning to obscure the public's perspective on the actual exceptions and rights which have been legislated by Parliament

Why respect copyright interests? : Liability issues

Implementation of a legal regime inevitably involves:

- enforcement and/or
- coercion and/or
- persuasion

Statutory enforcement is provided in 3 ways:

- criminal sanctions
- provisions for copyright holders to sue for infringement (civil redress)
- administrative remedies – mandating Customs to seize infringing goods

In 1988 the criminal sanctions were dramatically beefed up –

- a demonstration to persuade

and certain streamlining of civil enforcement occurred

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

Copyright Infringement

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.

. . . Potential criminal penalties of fines, imprisonment

... Rights holders coming together in collectives to pursue civil remedies (“enforcement officers”)

BREAK

THIRD:

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The value of copyright ownership:

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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.

Users' and librarians' rights under the Act:

New since 1997: **s. 30.7 Incidental inclusion defence**

This may, in certain circumstance, be useful to librarians...

“Private copying,” on the other hand, is not a useful exemption for librarians --

The “private copying” exemption (Part VIII of the Copyright Act, ss. 79 ff.)

- only applies to sound recordings of musical works
- only applies to private uses
- it specifically does **not** apply if the recording is
 - distributed (whether or not it is sold)
 - communicated to the public by telecommunication
 - performed in public

Managing in a copyright environment:

In the LAW:

Decisions in the courts

LSUC directly involves a
library

SCC interested and active
in copyright

Copyright Act constantly
being clarified

In LIBRARY practice:

Should a library rely on the law
alone to provide "exempt"
services?

free

Should a library buy permissions?

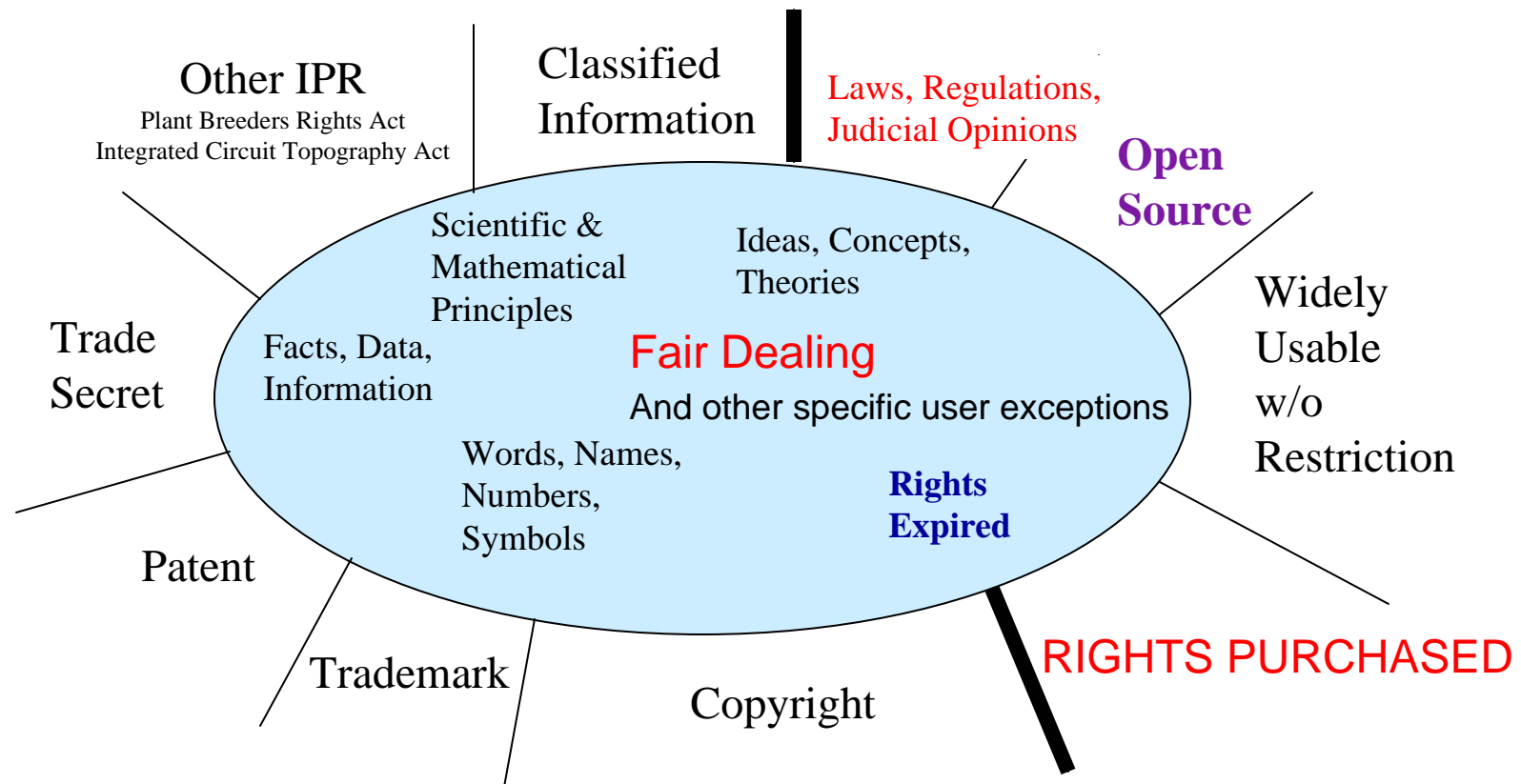
costly

temporary

Where permissions are not
available (at all or affordably) and
the law seems uncertain, should a
library curtail services to users?

each library must decide
for itself...

How users and librarians can legally make uses of materials:



... a map of the Canadian "Public Domain"
 Adapted from P.Samuelsn's American
 map, described in M.A. Wilkinson, "National
 Treatment,..." (2003-4)1 & 2 *University of
 Ottawa Law and Technology Journal* 23-48.

Why can it be said that libraries do not need the “Libraries, Archives and Museums” [LAM] exceptions?

It all started in 1993 when Canadian legal publishers got cross with the Great Library

Janine Miller, Director of Libraries for the Law Society of Upper Canada

The “LAMs” exceptions had not yet been passed.

The Great Library, Osgoode Hall

The legal publishers had not yet joined AccessCopyright (then CANCOPY)

Custom photocopy service

CCH et al v. Law Society of Upper Canada **[2004] SCR 339**

The SCC was interpreting the “fair dealing” provisions of the Copyright Act in the Law Society case:

The Canadian statute provides for fair dealing in five categories:

Research

Private study

Criticism *

Review *

News reporting *

*** if source and attribution mentioned**

The SCC specifically said:

“a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the Copyright Act. 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.”

(para.49)

How are libraries involved in research?

“research is not limited to non-commercial or private contexts.” (para.51)

“Persons or institutions relying on the s.29 fair dealing exception need only provide that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practice and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

When the Great Library staff makes copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process.”

(From para.63 and 64)

What did the Supreme Court of Canada declare about libraries?

all libraries can act as agents for their patrons (no need for the s.30.2 exceptions)

no liability for photocopiers if you post signs such as that posted by the Great Hall Library at Osgoode Hall, the library of the Law Society of Upper Canada involved in the case

if libraries make copies for research is OK and making whole copies is OK, then...

No need for s.30.2 and its specific regulations

No need for s.30.3 and its conditions and the regulations that have been enacted under it.

Arguably no need for s.30.1 and its conditions

And ss.30.4 and 30.5 become redundant also!

Under the Regulations since 1997:

Approved by the SCC in 2004:

WARNING!

Works protected by copyright may be photocopied on this photocopier only if authorized by:

- (a) the *Copyright Act* for the purposes of fair dealing or under specific exemptions set out in that Act;
- (b) the copyright owner; or
- (c) 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.

Unnecessarily verbose

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.

The Supreme Court of Canada in *CCH v. LSUC* did list a set of factors, first proposed in the Federal Court of Appeal, that judges should consider as a “useful analytic framework” in interpreting “fair dealing”

- **purpose of the dealing:**
 - must be an allowable purpose, one mentioned in the act
- **character of the dealing:**
 - how was the infringing work dealt with?
- **amount of the dealing:**
 - what was the amount and substantiality of portion used in relation to the whole work?
- **alternatives to the dealing:**
 - defense more likely allowed where no alternative available
- **nature of the work:**
 - i.e., strong public interest in access to legal resources
- **economic impact on owner:**
 - how is market for work impacted by fair-dealing in question?

Given the factors, how did the SCC find libraries deal fairly with works?

It may be possible to deal fairly with the whole work... for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. (from para.56)

Faxing works to patrons is not “communications to the public” – the SCC agreed with the trial judge that such communications “emanated from a single point and were each intended to be received at a single point” (para.77, quoting from the trial judgment) (although a series to the same patron might be a problem)

“...patrons ... cannot reasonably be expected to always conduct their research on-site at the Great Library... it would be burdensome to expect them to travel ... each time they wanted to track down a specific source” (para.60)

Can the principles of the case extend to ILL?

The case specifically addressed delivering materials to patrons by fax..

It can be argued that electronic ILL occurs on the same principles as was the case with the faxes in the Law Society case...

The SCC said there was no violation of copyright by the Great Library because, in faxing the materials, they were “emanating from a single point and each intended to be received at a single point” (para.77)

Moreover, if one librarian can act as agent for its patron, as the SCC has said, it would seem to necessarily follow that that librarian can engage the services of another librarian to act as his or her agent, and, therefore, also as agent to the patron, and, therefore, both librarians, the one in the first institution and the one providing the inter-library loan resource, would be able to act under the fair dealing rights of the patron.

In the Law Society case, the SCC has said that Canada's *Copyright Act*:

(1) requires “originality” and therefore information in records where there is not a demonstration of skill and judgment does not lie within “expression” which attracts copyright and therefore is not controlled by a copyright holder: mere copying of information does not create an original work;

(2) permits librarians to act as agents for their users who are exercising fair dealing rights – quite independent of the specific exceptions in the *Copyright Act* for not for profit “libraries, archives and museums”;

(3) requires interpretation of research, private study, criticism, news reporting, review (the “fair dealing” provisions), and other provisions limiting the rights of rightsholders, as representing a body of rights for users;

(4) recognizes alternative means of compensating rightsholders through such mechanisms as a levy on blank tapes and the related private copying exemption.

The Policy Makers

Government

Legislature

In Canada, the federal government, NO provincial interest

Judiciary- since 2002 steadily confirming a large “public domain”

In Canada, Parliament has tried to limit the role of the courts: s. 89 Copyright Act
The Canadian Charter of Rights and Freedoms has never yet been applied directly to an intellectual property law situation (but the Supreme Court in the *Harvard Mouse* case in patent, *for example*, has indicated a willingness to apply it)

How will “users’ rights” be expressed and preserved in the future?

International Treaties

Are Perceived, once entered into, as limiting Domestic National Policy Options

19th Century **Co-ordination** (e.g. Berne, Paris)

1990’s World Trade Agenda **Coercion** (e.g. NAFTA, TRIPS)

Are irrelevant to Charter concerns, are not binding on Canadian legislatures;
non-compliance runs the risk of sanctions in the trade context

Intellectual Property Owners, Themselves

Governments -- As Crown Copyright Holders

Copyright holders working together through Canadian Collectives

Other individual copyright holders – both domestic and foreign

Can Parliament “claw back” libraries’ rights as articulated by the SCC in 2004 in the Law Society case?

Why would Parliament try to narrow?

TRIPS and other agreements Canada has signed privilege copyright holders over users:

Members [states] shall confine limitation 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 right holder

(the “3 step” test)

How would the SCC interpretation withstand any such attempt by Parliament?

The SCC, beginning some years ago in the Theberge case, and continuing forward to the 2004 decision in the Law Society case, has spoken of users’ rights needing to be respected as well as those rights created under the copyright regime for copyright holders.

Rights language such as this may be interpreted as invoking the protection of the Charter value of freedom of expression (s.2(b)) – and Parliament’s attempt to extend the rights of copyright holders might be found to be unconstitutional.

A system of constitutionally protected users' rights?

- “Canada’s *Copyright Act* sets out the **rights** and obligations of both copyright owners and users.” (Law Society case, para.11)
- “exceptions to copyright infringement, perhaps more properly understood as **users’ rights**, ... set out in ss. 29 and 30 [the fair dealing provisions] of the Act.” (para.12)
- ““Research” must be given a large and liberal interpretation in order to ensure that **users’ rights** are not unduly constrained.” (para.51)
- “The language [of s.29] is general. “Dealing” connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to **ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works.**” (para.63)

Will Canada's Constitution mean that the Supreme Court's "Users' Rights" will triumph, despite TRIPS?

United States Constitution

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

Eldred v. Ashcroft (2003, USSC)

Canadian Constitution Act, 1867, s.91

"...the exclusive Legislative Authority of the Parliament of Canada extends to ...
(23) Copyrights

In a comparable Canadian case, support for the Supreme Court's concept of "users' rights"?

s. 2(b) Canadian Charter of Rights and Freedoms (1982): freedom of expression

ALTHOUGH

s.1 "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"

Are librarians free to do anything they like with materials?

Despite the support for users' rights, and librarians' roles in acting as agents for users, given by the SCC, librarians are not free to do as they like entirely with works: the rights to make some uses of works still must be negotiated from rightsholders...

NO

What rights need to be negotiated ? – and from whom?

FINAL TOPIC:

WHAT RIGHTS ARE HELD BY COPYRIGHT HOLDERS?

1. Conversely, what materials are not works covered by copyright and are therefore freely available for librarians use?
2. Conversely, what uses of materials are not part of the copyright holders' rights bundle and therefore are uses librarians can freely make?

The Internet and Cyberspace

Copyright ownership

The rights of copyright owners

Liability for copyright infringement

HOW CAN LIBRARIANS WORK WITH COPYRIGHT?

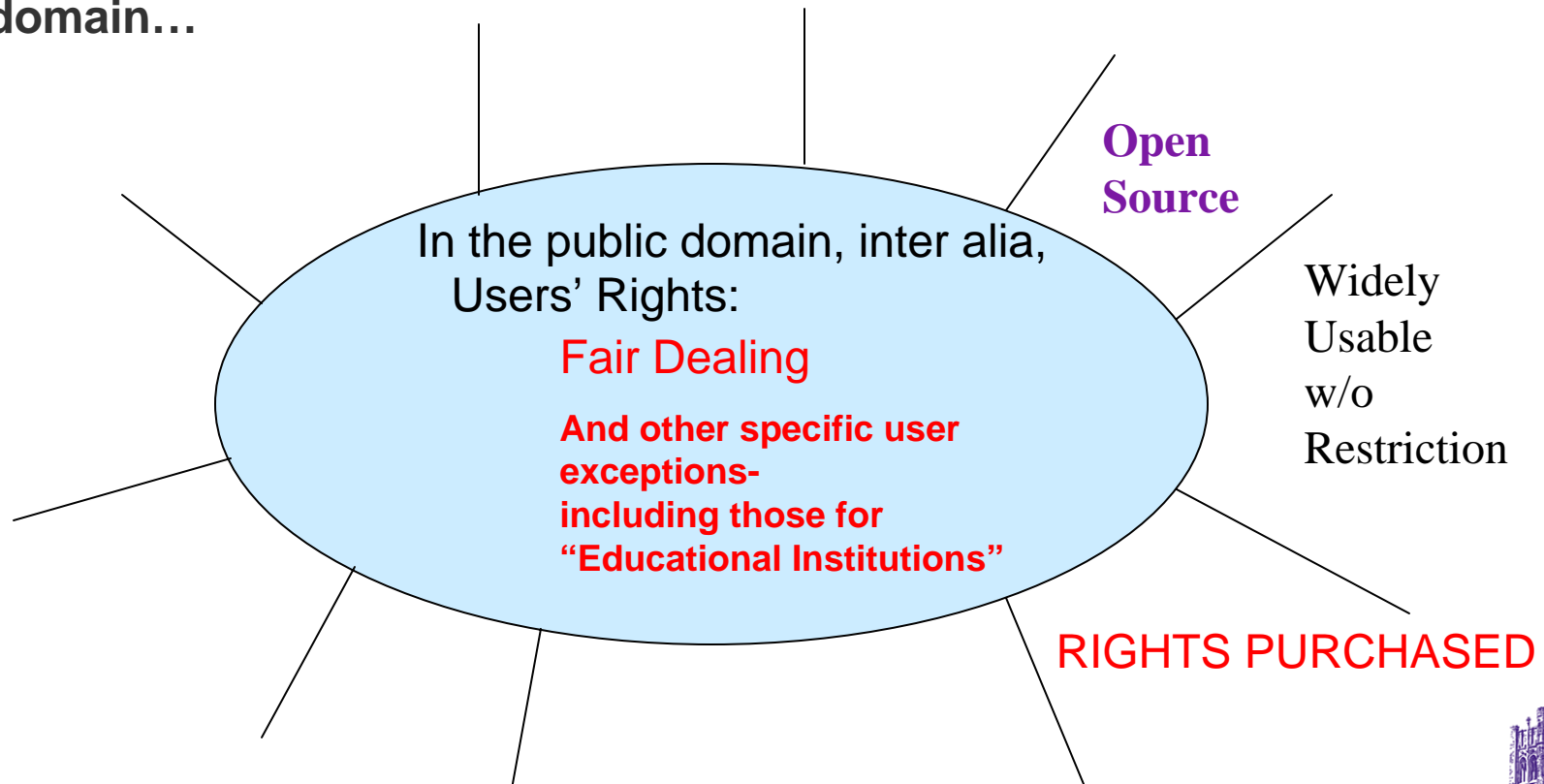
3. What exceptions have been made from the purview of the copyright holders' exercise of their rights that librarians can rely on to make free use of materials?

4. How can librarians obtain permissions from the copyright holders?

- Through permissions of the copyright holders given in advance (“open content licensing” or “creative commons”), or,
- Through the copyright holders' collectives, or,
- Through permissions negotiated directly, from time to time, with copyright holders.

Philanthropy vs. Entitlement

The philanthropy of copyright holders giving permissions or giving up the exercise of their copyrights (“open access, creative commons”) is more palatable from the point of view of the trade regimes...but it is contributing to the public interest, as is the exercise by government of Crown Copyright, rather than enlarging the public domain...



Can philanthropy be rendered unnecessary?

COPYRIGHT HOLDERS' PHILANTHROPY

Only necessary where “users’ rights” or the limitations of copyright itself (limited term, limited rights to copyright holders, the doctrine of merger, etc.) do not give users the access they desire

If Canada is operating under an extended repertoire or extended license regime, the existence of the collective license with an appropriate collective will protect institutions from liability for infringement even from a non-member and will render redundant the efforts of copyright holders to individually license uses administered by the recognized collectives.

If Canada is not operating under an extended repertoire regime, then institutions with collective licenses can breathe more easily about those rightsholders not represented by the collective if those rightsholder have publicly “donated” their rights.

In either case, if enough rightsholders decide to be philanthropic, it could affect the Canadian collective licensing environment in either or both of two ways:

- (1) there could be a new collective formed of like-minded rightsholders which could be recognized under the Act (since more than one organization can, and is now, able to be recognized in a particular market – although the Copyright Board actively discourages this); and/or
- (2) the existence of rights available at no cost to educational institution users should have an effect upon the Copyright Board’s determinations of the “fair price” for a tariff in a particular sector.

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USERS' ENTITLEMENT

“Users’ rights” through the enacted “exceptions to copyright holders’ rights” in the Copyright Act...

Licensed rights – from the appropriate rights collectives, by educational institutions, for tariffs approved by the Copyright Board of Canada

If we want, can we get “blanket licenses” to do what we want to do in libraries?

We only require licenses in libraries for activities that we undertake that fall outside the ambit of fair dealing as defined by the SCC in the Law Society case or where otherwise permitted by law or copyright holders.

Do we need the licenses we have?

Probably not

Can we buy the licenses we want?

Probably not

Managing in a copyright environment:

In LIBRARY practice:

Should a library rely on the law alone to provide
"exempt" services?

free

Should a library buy permissions?

costly

temporary

Where permissions are not available (at all or
affordably) and the law seems uncertain, should a
library curtail services to users?

each library must decide for itself...

Can we buy blanket licenses from a collective for electronic rights? Do we need to?

Can we post materials to websites? Recall the **Tariff 22** case indicates, if the materials are a work within copyright, we cannot without permission – the **Law Society** case does not help us here...

We could perhaps defend posting materials electronically to a controlled access site for our users on the grounds that such an act is not a posting to the public and that therefore, as librarians, pursuant to the Law Society case, we are merely facilitating our users' right to fair dealing for the purposes of research or private study to which they are entitled under the Act...

- Blanket licenses are not available for purchase for posting materials to the internet ...
 - Existing licenses between AccessCopyright and institutions do not provide for this use
 - AccessCopyright can provide some specific licenses for such uses, where it has obtained the right to do so from the rightsholder – but it has not chosen to offer blanket licenses for this use

AccessCopyright and UWO

Contract

Only available to the parties

AccessCopyright has reciprocal agreements with COPIBEC in Quebec and other international organizations – it offers UWO protection from the claims of those who are affiliated with it, either directly or indirectly

It offers an indemnity clause to cover the costs involved if others sue

Only available for the rights contracted

reproduction rights for **literary** works (photocopy and electronic) available for sale

Only available for the price negotiated

UWO has only bought photocopy rights to date – there is no agreement in place for electronic rights

Only available for the term negotiated

No **moral rights** covered (attribution, integrity, association)

Would AccessCopyright ever be able ever to meet all our needs?

SOCAN – performance and online distribution of musical works

SODRAC – distribution of visual art works

Audio Cine Films – films from certain commercial studios

Criterion Pictures – certain educational films and certain other commercial studios

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 of Canada lists about 35 Canadian collectives on its website: at <http://www.cb-cda.gc.ca/societies/index-e.html>

If we have to buy, what can we do about the prices charged by collectives?

You cannot “buy” rights from American sources, if the rightsholder is represented by a Canadian collective.

Support consortia activity (see recent work by Cathy Maskell, Associate Director of Libraries, University of Windsor, Ph.D. thesis, UWO, 2006 – winner Emerald Dissertation Award)

Librarians need to get active before the Copyright Board:

The Board is an economic regulatory body empowered [under the Copyright Act] to establish, either mandatorily [because the Copyright Act says so for certain collectives] or at the request of an interested party [like a library?], the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective administration society (from the Board’s website)

Where do we go from here?

- Watch for the actions of this minority government...
- **Exercise the fair dealing rights** confirmed as ours by the Supreme Court of Canada:
 - Don't pay for uses of material by contract in agreements with collectives or individual owners or vendors that we already possess by virtue of fair dealing...
 - Be prepared to challenge any attempts to limit our rights that are introduced in attempts to amend the Copyright Act
- **Buy Canadian!** Libraries in Canada can only be protected from the claims of rightsholders in Canada if we have bought or received free permissions for uses in Canada from the people or organizations that had the rights for Canada: American vendors are unlikely to hold the Canadian rights...
- Watch that “open source” and “Creative Commons” licenses cover Canada and are from the appropriate rightsholders...
- Where we have to buy rights, **haggle** over price – either with the copyright owners or before the Copyright Board...