

# OLA Superconference,

Toronto, January 31, 2018

## **Copyright Update**

**Dr. Margaret Ann Wilkinson,**

**Professor and Director of the Area of Concentration  
in Intellectual Property, Information and Technology Law,  
Faculty of Law, Western**

**(with Graduate Supervisory Status in  
LIS, Law, & Health Information Science programs);**

**Copyright Advisor\* to OLA**

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

# AGENDA: COPYRIGHT UPDATE 2018

## ***Within our library organizations:***

- CFLA
- OLA Copyright Users' Committee
- CFLA's submission to the Copyright Board Review

## ***Internationally:***

- *At the UN*
- *In international trade*

## ***In Canada:***

- *The Litigation Situation*
  - *Copibec v Laval*
  - *Access Copyright v York*
- *The Copyright Act mandated 5 year review*

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# The current membership of your OLA Copyright Users' Committee is:

Jason Bird (Chair)\*

Victoria Owen

Mark Schwartz

Joy Muller

Meaghan Shannon\*\*

Shelagh Paterson (Ex Officio)

\* Jason Bird became Chair, succeeding Sam Cheng, early in 2017.

\*\* Meaghan Shannon replaces Margaret Ann Wilkinson who resigned in December 2017, but continues as OLA Copyright Advisor.

# CFLA has 24 member organizations:

1. Assoc des Bibliothèques Publiques du Québec
2. ABQLA (L'Assoc des bibliothécaires de Qué/Que Library Assoc)
3. APLA
4. Assoc of British Columbia Public Library Directors
5. BCLA
6. BCLTA
7. CALL-ABCD
8. CAPAL-ACBAP
9. CARL/ABRC
10. Cdn Council of Archives
11. CHLA/ABSC
12. CSL: Cdn School Libraries
13. Cdn Urban Library Council/ Conseil des Bibliothèques Urbaines du Canada
14. Ex Libris Assoc
15. Fedn of Ontario Public Libraries
16. Library Assoc of Alberta
17. Manitoba Library Assoc
18. Manitoba Library Trustees Assoc
19. Northwest Territories Library Assoc
20. Nfld & Labrador Library Assoc
21. Nova Scotia Library Assoc
22. Ontario Library Assoc
23. Saskatchewan Library Assoc
24. Yukon Library Assoc

The **CFLA Copyright Committee** currently comprised of the following individuals (each person serves because nominated by one of the 24 member organizations):

- Jeannie Bail
- Jason Bird\*
- Donna Bourne-Tyson
- Camille Callison
- Christina de Castell
  - (rep to SCCR at WIPO)
- Raphaella Dixon
- Patrick Gamsby
- Susan Haigh
- Alexandra Kohn
- Nancy Marelli
- Kim Nayyer
- Ebony Novakowski
- Victoria Owen
  - CHAIR
- Ann Smith
- Paul Takala
- Donald Taylor
- Rob Tiessen
- John Tooth
- Martha Whitehead
- Christina Winter
- Katherine McColgan
  - EX OFFICIO (Ex Dir CFLA since Aug 8)

\* From its inception until the end of 2017, Margaret Ann Wilkinson served on the committee. OLA has replaced her with Jason Bird.

# On June 29, 2017 , CFLA's Copyright Committee presented a ½ day facilitated Advocacy Session in conjunction with the ABC Copyright Conference held in Kingston

- The facilitator throughout the day was Queens University professor Erik Lokhart;
- The concept was to discuss ideas and then prioritize their importance for libraries...
- The second ½ of this session focused on substantive concepts connected with copyright ---
  - Both concepts that fall within the current *Copyright Act*:
    - Fair Dealing
    - Technological Protection Measures
    - Orphan Works
  - And concepts that are not currently dealt with in the *Copyright Act*
    - Contract Override
    - Traditional Knowledge
    - Ancillary Copyright
- Presenters, from the CFLA Copyright Committee, included Camille Callison, Jeanie Bail, Christina Winter, Alex Cohn and Susan Haigh.

## The earlier ½ session focused on the Copyright Board:

- The CFLA’s Copyright Board Sub-committee (Don Taylor (chair), Rob Tiessen, Victoria Owen, Ann Smith and Margaret Ann Wilkinson) prepared new materials that supported this ½ session\*, including:
  - A double-sided sheet dealing with “Recommendations for Intervenors at the Copyright Board” and
  - An 8 page handout that described 6 different models of ways the regulation of Collectives currently contained in Part VII of the Copyright Act might be changed – and describing the pros & cons of each
- The session was well-attended. As Rob Tiessen was unable to be in Kingston, the oral presentation of these materials was handled by the other 4 members of this subcommittee.

\*The Subcommittee was assisted in this preparation first by 6 law students working for OLA January-April in a course project at Western Law, under the guidance of Shelagh Paterson, supervised by Margaret Ann Wilkinson. In Kingston, student support to the sub-committee was provided by Western Law Student Research Assistant Colin Hyslop.



At roughly the same time, *Policy Options* invited a series of short articles on the future of the Copyright Board ... including:

- “Libraries and the copyright (balancing) act” by Victoria Owen [June 14, 2017] See

<http://policyoptions.irpp.org/magazines/june-2017/libraries-and-the-copyright-balancing-act/>

- “A Copyright Board for Canada at 150” by Margaret Ann Wilkinson [June 26, 2017]

See

<http://policyoptions.irpp.org/magazines/june-2017/copyright-board-canada-150/>

# On August 9 the federal government opened “A Consultation on Options for Reform to the Copyright Board of Canada” – closing September 20!

- Submissions were specifically not to deal with issues of :
  - Funding;
  - Collective management generally;
  - The system for granting licences in respect of copyright belonging to owners who cannot be located (ie, orphan works).
- On the other hand, submissions *were* sought about the “appropriate enacting instrument for each proposal”
  - ie whether the reforms should be enacted “through amendments to the Act or the creation of new regulations pursuant to the Act,” use of a “Model Directive” approach was also specifically mentioned as an approach to consider when thinking about “appropriate enacting instrument[s]”

(see part 3 at the end of the Consultation announcement)

# CFLA met this giant challenge:

- A six page Submission was created through the Copyright Board subcommittee and meticulously considered, corrected, adjusted, and adopted by the full Committee a full week before the submission deadline;
- The CFLA Board then acted expeditiously and CFLA made its 1<sup>st</sup> government submission.
- The submission is not only internally historic but also VERY important to this Copyright Board consultation:  
-- data gathered by Joy Muller of the OLA Copyright Users' Committee leads to the following table:

# Analysis of Copyright Board Reform Submissions:

Focus of Submitting Organization*	Rights holders-focused	User-focused	Total
Collectives	12		12
Industry Players including unions (Publishing / Entertainment)	28		28
Education		7	7
Other than Education		3 (including CFLA)	3
<b>Total</b>	<b>40</b>	<b>10</b>	<b>50</b>

\* 9 submissions were from individuals (no in chart) for a total on 59 submissions

# CFLA Copyright Board Review Submission

<http://cfla-fcab.ca/wp-content/uploads/2017/10/>

[CFLA FCAB Copyright Board Submission September 2017 Final-1.pdf](#)

## CFLA wants...

1. an explicit statutory mandate for the Copyright Board, focused on the public interest and fairness amongst multiple interests;
2. a statutory process for intervenors and a system to make funds available to them;
3. a statutory list of decision-making factors the Board must consider in decisions;
4. the previous tariff to remain in effect while a new one is before the Board AND the new one to apply only on a go-forward basis;
5. libraries to be able to choose whether to work with a collective through contract or, if one is initiated, through a tariff process;
6. the *Copyright Act* to continue to govern libraries under the current tariff system for them (s 70.1), separate from the system for music-related organizations (s 67) AND to allow collectives to remain non-exclusive representatives for the rights holders they represent;
7. it to be clear in the *Copyright Act* that in cases where a library is not involved with a process before the Copyright Board, that library will not be required to provide evidence of its operations in that Board proceeding.

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# International Copyright Environment

## Public Int'n'l Law (cooperative)

## Int'n'l Trade Law (coercive)

### UNITED NATIONS (World Intellectual Property Organization)

- *Berne Convention* (1886)
- *WIPO Copyright Treaty* (1996)
- *WPPT [WIPO Performances & Phonograms Treaty]* (1996)
- ***Marrakesh Treaty* (2016)**

### World Trade Organization

- *Trade-Related Aspects of Intellectual Property Rights [TRIPS]* (1995)

international

regional

*North American Free Trade Agreement [NAFTA]* (1994)

*Canada-European Union Comprehensive Economic and Trade Agreement [CETA]* (2016)

*Comprehensive and Progressive Agreement for Trans-Pacific Partnership [TPP]* (January 2018)

Western Law

# *Marrakesh is now in force, since June 2016*

- ***Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled***
  - See [www.wipo.int/edocs/mdocs/diplconf/en/vip\\_dc/vip\\_dc\\_8.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8.pdf)
- Designed to be acceptable under, and compatible with, existing copyright treaties in force at WIPO, at the World Trade Organization [WTO], and elsewhere (see paragraph 10 of the Preamble);
- adopted by WIPO – June 27, 2013 -- **it is the first international treaty or agreement dealing with users' rights...**
- SC 2016, c 4 amended our *Copyright Act* to comply with our *Marrakesh* obligations: see current “perceptual disability” definition in s 2 & s 32
- It is the provisions for the perceptually disabled in our Canadian *Copyright Act* (not the *Marrakesh Treaty* directly) that govern the activities of libraries in Canada
- Recall that, whether your province has passed accessibility legislation or not, in matters of copyright, the library must comply with the *Copyright Act* (the federal government has sole jurisdiction over copyright)...



# *Marrakesh*, though “in force” internationally, is only very gradually having a global effect:

- This past summer, 2017, **Victoria Owen**, OLA Copyright Users’ Committee member, CFLA Copyright Committee Chair and Board Member of IFLA, in summer 2017 was appointed to 3 year term on the Board of **WIPO’s Accessible Book Consortium [ABC]**.
- WIPO’s ABC runs ABC Global Book Consortium, involving organizations in 22 countries

- Implementation of Marrakesh is proceeding slowly:
  - those ratifying or acceding now number 33 –
  - [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843)
  - but many countries which have ratified or acceded to it have not yet implemented it through their domestic laws.

# ABC Global Book Service

<http://www.accessiblebooksconsortium.org/globalbooks/en/>

Supports *Marrakesh* goals at a practical level...

Not all ABC members come from countries which are *Marrakesh* member states

eg, the National Library Service for the Blind and Physically Handicapped (NLS) belongs even though the United States has not ratified *Marrakesh*.

- Canadian
- American
- Australian
- Bangladeshi
- Brazilian
- British
- Danish
- Dutch
- Finnish
- French
- Icelandic
- Irish
- Israeli
- Korean
- Nepalese
- New Zealand
- Norwegian
- Polish
- Portuguese
- South African
- Swedish
- Swiss

# CFLA continues the important work of CLA at the WIPO Subcommittee on Copyright and Related Rights (SCCR):

<http://www.wipo.int/policy/en/sccr/>

- International Federation of Libraries and Library Institutions (IFLA) continues as chief NGO spearheading this initiative;
- CFLA had to pursue and achieve accreditation to the SCCR in its own right when it was created: the CLA accreditation to SCCR was lost when CLA ceased to exist;
- CFLA's presence and participation at SCCR are critical as the rights holders' NGOs active in this space FAR outnumber the users' rights-focused NGOs

- 34<sup>th</sup> Session
  - May 1-May 5, 2017
- 35<sup>th</sup> Session
  - Nov 17-Nov 17, 2017
  - (CFLA Copyright Committee member Christina de Castel attended the FALL session and occupied CFLA's NGO "seat")

Both sessions achieved moderate success:

- Texts drawn from IFLA's draft *Treaty for Libraries and Archives* ("TLIB") continue to be dealt with as specific formal proposals presented officially before the committee by nation states...
- There is enough consensus in the committee that the states are accepting Chair Reports to sum up progress made each session...

There will be a 36<sup>th</sup> session this year (2018 -- dates to be announced) and, virtually inevitably, a 37<sup>th</sup>.

# International and Regional Trade Law

Recall regional and bilateral agreements among and between countries that are also members of the WTO cannot derogate from the minimum standards they agreed to in the WTO's TRIPS...

The “**three step test**,” which is a part of TRIPS (and number of other treaties, including *Marrakesh*), requires that countries

confine limitations or exceptions to the economic rights holders rights provided

- ① To certain special cases
- ② That do not conflict with a normal exploitation of the work
- ③ And do not unreasonably prejudice the legitimate interests of the right holder.

# Multilateral Regional Trade Agreements involving Copyright:

## IN PLACE

### **CETA** (Canada, EU) 2016

- In force in Canada through the Canada-EU Comprehensive Economic and Trade Agreement Implementation Act, SC 2017, c 6) on Sept 7, 2017...
- **IMMEDIATE IMPACT on other IP, but NO IMPACT ON COPYRIGHT**

### **TPP** (11 countries: Canada, Mexico, Japan, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam) 2018

- **Text not publicly available**

## UNDER RE-NEGOTIATION

### **NAFTA** (Canada, Mexico, US) 1994

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	ESA 2012	Rogers 2012	Bell 2012	Alberta (Education) 2012	Re:Sound 2012	re: Broadcasting Act 2012	Robinson 2013	National Gallery [status of the artist] 2014	CBC v SODRAC 2015	Current Court
McLachlin	✓	✓	✓	✓	✓	✓	M	✓	✓	McLachlin GONE (last justice from 2004 LSUC decision!) <b>Martin</b>
Rothstein	D	M	✓	D	✓	M	✓	M	M	<b>Brown</b>
Karakatsanis	✓	✓	✓	✓	✓	✓	N/A	N/A	D	<b>Karakatsanis</b>
Moldaver	M	✓	✓	✓	✓	✓	✓	✓	✓	<b>Moldaver</b>
Cromwell	✗	✓	✓	✗	✓	D	✓	✓	✓	<b>Rowe</b>
Deschamps	✓	✓	✓	✗	✓	✓	Wagner N/A	✓	✓	<b>Wagner New Chief Justice</b>
LeBel	✗	✓	✓	✓	M	✓	✓	✓	✓	<b>Côté</b> <b>Côté</b>
Abella	M	C	C	M	✓	D	✓	✓	D	<b>Abella</b>
Fish	✗	✓	✓	✗	✓	✓	✓		✓	<b>Gascon</b> <b>Gascon</b>

# *Copibec v Université Laval* CLASS ACTION

Launched in the Quebec Superior Court by Copibec, “on behalf of authors and publishers from Quebec, the rest of Canada and other countries around the world” against Université Laval

- Certification as a class action first denied (Feb 2016, Que Superior Ct);
  - Copibec began appeal proceedings - to get class action certification –
  - Quebec procedure permitted a motion by Université Laval to reject appeal: June 6, 2016 Que Court of Appeal rejected Laval’s motion;
  - On Nov 23, 2016 Que Court of Appeal [QCA] heard Copibec’s appeal:
  - February 8, 2017, **QCA allowed the action to proceed as a class action (unanimous decision, written by Justice Gagnon (34pp))**
- The trial is now proceeding under Quebec’s rules for class actions:
  - On September 7, 2017 Copibec gave public notice of its class action lawsuit;
  - All those presumed plaintiffs who did not want to be part of the class suing were required to have given notice by October 17, 2017.



In support of its decision that the matter can be dealt with as a class action the QCA pointed to factors including:

- The facts that “Copibec acknowledged at the appeal hearing, if the Université demonstrates its Policy to be valid, its By-laws sound and the way they are implemented on a daily basis, the class action is likely [not to succeed]” (para 90) and, relying on the [*CCH v LSUC*] Supreme Court decision, Laval would not need to prove fair dealing in every instance but needs only to prove that its ‘own practices and policies were research-based and fair’” (para 92, quoting from para 63 of the 2004 *CCH v LSUC* SCC judgment)
- Grouping “moral rights” with causes of action such as defamation, interference with inviolability and dignity [a civil law cause of action], discrimination and so on, and noting that all these other causes of action are amenable to class action proceedings, moral rights infringement actions, like these other rights, are also amenable to the class action approach (para 97-98)

# This dispute must still go to trial...

- As the QCA stated (para 50, quoting from a Supreme Court of Canada judgment):
  - “There is one common theme in the Quebec decisions... the ... requirements for class actions are flexible... even where circumstances vary from one class member to another, a class action can be authorized if some of the questions are common.”
- The earlier judge who denied certification as a class action relied on the question of fair dealing as making the lawsuit unsuitable to be a class action... the QCA decided the question of fair dealing is an “exception defence relied on by the Université” [para 69] and could not be considered at this stage of certifying the class action.
  - The QCA pointed out (para 71) that McLachlin, CJ, in para 70 the 2004 *CCH v LSUC* decision, said “a defendant must prove [fair dealing]”
  - Also the QCA noted (para 78) that the *Copyright Act* s 34.1 creates a presumption of copyright and its ownership
  - The QCA said the “low amount attached to each of the author’s claim is in itself a valid reason for allowing the class action” (para 85)

The QCA, in paragraph 8 of the judgment, recites its order that

**The classes are:**

- A. All [individuals] who are authors of literary, dramatic or artistic works in Canada
- B. All [individuals or corporations] that are publishers of literary or dramatic works or that are entitled to represent one or more copyright owners in Canada
- C. All [individuals or corporations] part of the described class and domiciled outside of Canada, including the collective societies of foreign reproduction rights authorized to represent owners of copyright in their respective country.

Given these classes, it has been noted that the lawsuit could render Laval liable for over \$ 10 million...

<https://www.copibec.ca/en/nouvelle/127/copibec-v-universite-laval-class-action-publication-of-the-notice-to-members>

In para 9, the QCA recites its order that the two questions of law and of fact to be tried are:

- I. Did Université Laval and its personnel, its mandataries [persons with a mandate from Laval] and subcontractors, in their teaching and research activities, breach the class members' patrimonial [civil law conception of these statutory] rights, under **section 3** of the *Copyright Act*
  - a) by reproducing,
  - b) and by telecommunication,
  - c) Including making available to the public by telecommunicationcopyrighted literary, dramatic and artistic works without the authorization of the copyright owners or of their representatives?
  
- II. Did Université Laval and its personnel, its mandataries and subcontractors, in their teaching and research activities, breach the **moral rights** of the class members' who are authors, under s 14.1 of the *Copyright Act*,
  - a) by reproducing,
  - b) and by telecommunication,
  - c) Including making available to the public by telecommunicationshort passages of copyrighted literary, dramatic, artistic and musical works without the authorization of the authors or of their representatives?

***Copibec v Laval*** is a very important case to be watching, but much of its importance at the moment lies in its procedural value, as it sets a precedent establishing that rights holders (both Canadian and foreign) can bring class actions, at least in Quebec courts, against “user” institutions...

on the other hand, ***Access Copyright v York*** is a lawsuit that is determining not *how* rights can be enforced but ***what*** rights the rights holders and users have – and it is also continuing to proceed through the courts

# *Access Copyright v York University, 2017 FC 669*

- Justice Phelan decided for Access Copyright, against York
  - 6 page description of **Justice Phelan**'s decision, released **July 12, 2017**, and its implications for libraries (by Margaret Ann Wilkinson for OLA, see <http://www.accessola.org/web/Documents/Programs/Copyright/OLA%20-%20Access%20Copyright%20v%20York%20U.pdf>)
    - accessible also from the CFLA website, under “Copyright”
- **York is appealing to the Federal Court of Appeal**
  - Notice of Appeal filed September 22, 2017
  - The status of the appeal may be checked at any time on the Federal Court of Appeal's website: this is **case #A-259-17**
  - On December 6, 2017, 5 volumes of appeal documents were filed with the Court!
- There are no orders evident in the file with regard to addition of any parties having yet sought standing to intervene in the appeal...

# The FCA does not seem to have accepted any interventions to this point:

- The Canadian Association of University Teachers [CAUT] announced early on (in September 2017) that both it and the Canadian Federation of Students would seek to intervene in York's appeal
  - (see <https://www.caut.ca/bulletin/2017/09/news-caut-challenges-copyright-ruling-against-york>)
- Under the Federal Court Rules, Rule 109(2)(b), the applicant seeking to intervene must “describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding”
- The courts have established criteria upon which they will accept an intervention, including that **the intervener**
  - **must be putting forward its position in the public interest and**
  - **be best placed to put its position before the court**
  - **and that the position is not one already being put forward by the parties.**



In last year's 2017 Copyright Update we speculated that "the tariff aspect of the trial decision will likely be governed by 2015 Supreme Court legal interpretation". The idea was accompanied by this text:

- Even though Access Copyright sued York in 2013, the question involving Access Copyright's tariff processes for universities may be found to be governed by the Supreme Court decision in *SODRAC v CBC*, released Nov 26, 2015 ...
  - Access Copyright argues that York University was bound by – and required to make payments to Access Copyright under -- an Interim Tariff ordered by the Copyright Board of Canada for uses of materials by universities;
  - York argues that it had chosen to become an "Opt Out" university, "stepping away from Access Copyright's Tariff proceedings before the Copyright Board and making arrangements not to make copies which would bring it within the provisions of the Interim Tariff ordered by the Board...
- In *SODRAC*, Rothstein, writing for the majority [para 113], said:

"licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline."



Phelan, J, however, held that SODRAC did not govern the questions before him involving York:

- He held that the relevant *Copyright Act* provisions in the **SODRAC** decision involved **licensing** (ss 70.1-70.191) and the **York** lawsuit involved a **tariff** (s 70.2 & s 70.4) (see para 12);
- He held that while “opting out” might be relevant to a licence situation, it is *not* relevant to a tariff situation (see para 214);
- He pointed out his judgment relates only to “Phase I” of the York lawsuit (recall the order for “bifurcation” we have referred to in previous years): he held that only in the future “Phase II,” the damages phase (see para 219), will York be able to raise fair dealing (see para 220)...

# Supreme Court in SODRAC and now...

## SODRAC COURT

### MAJORITY:

ROTHSTEIN (writing)  
McLachlin, CJ  
Cromwell  
Wagner  
Moldaver  
Gascon  
Cote

### DISSENTING JUDGMENTS:

Abella  
Karatkansanis

## CURRENT COURT

Wagner, CJ  
Moldaver  
Gascon  
Cote  
Abella  
Karakatsanis  
Brown  
Rowe  
Martin

} **Appointed  
Since SODRAC**

Only 4 of the SODRAC majority are still on the Court – and the 2 dissenters: if the York lawsuit eventually comes before it and the Supreme Court sits as a full 9-member bench, the 3 new judges could determine a new direction in the law.

# ABOUT the part of the judgment dealing with the ROLE and EFFECT of GUIDELINES:

- In its Defence para 4(c) York pled that it “implemented appropriate fair dealing guidelines consistent with those of the Association of Universities and Colleges of Canada [now called Universities Canada” (with further detail in para 16(c))
- The SCC held in 2004 that  
“Persons or institutions relying on ... fair dealing... need only prove... their own practices and policies were research-based [for s.29] and fair” (para 63, emphasis added); in that case it was the Law Society that was relying on the fair dealing defence and the Court quoted in full, and approved, the Law Society’s Great Library’s Access Policy...
- Phelan J held that **York University’s “Fair Dealing Guidelines for York Faculty and Staff”, based on the AUCC model, do not have the same effect as the Great Library notice to patrons about the copying the Great Library would do for others – and the York Guidelines do not establish fair dealing ... because the York Guidelines are directed at copying the students and faculty will do themselves...**
- This part of the *Access Copyright v York* judgment will be **important right across Canada** – and, especially, perhaps, will be important in Quebec where the class action against Laval, which was using similar Guidelines, is moving forward...

## On the part of the judgment dealing with the effect of the Interim Tariff:

- Justice Phalen decided that York had **no option to “opt out” of the Interim Tariff** ordered by the Copyright Board and was therefore bound by its terms from September 1, 2011 to December 31, 2013 (paras 7-13)
- This part of the *Access Copyright v York* judgment **will not directly affect institutions in Quebec** because Copibec has not had an interim tariff in place ... **but it does directly affect all post-secondary institutions in other parts of Canada.**

## On the relationship of York university to its professors:

- Justice Phelan held that the **professors who copied material subject to the Tariff “triggered obligations [for York] under the Interim Tariff”** (para 241):
  - the actions of these professors “were so closely connected to the professors’ authorized employment activities as to render York vicariously responsible” (para 243)

# On the matter of Fair Dealing: Justice Phelan held that York clearly met only the 1<sup>st</sup> of the 6 factors and therefore was not dealing fairly ...

1. **PURPOSE OF THE DEALING** -- York's photocopying was **done for an allowable purpose**: education (paras 16, 256, 267)...
2. **CHARACTER OF THE DEALING** - York's copying included "mass copying of portions of [works]" and "multiple copyright of ... materials into coursepacks or digital forms" (para 261): the **character of the dealing was unfair**;
3. **AMOUNT OF THE DEALING** - York's copying was **not quantitatively fair** (paras 291-295) **or qualitatively fair** (paras 296-317): York's Guidelines limiting copying to 10% or a single article, for example, were fixed and arbitrary -- lacking explanation of their fairness (paras 20-22, 295, 306)

4. **ALTERNATIVES TO THE DEALING** - Though Justice Phelan wrote “this [4<sup>th</sup>] factor favours York but not as strongly as it has argued” (para 331), he actually found York’s coursepacks and LMSs [learning management systems] stood **in place of course textbooks** (para 324) whereas in the 2012 *Alberta (Education)* case (where the Supreme Court found fair dealing did apply to schools’ uses) the materials involved were **in addition to textbooks**: “the justification of cheaper access cannot be a determinative factor” (para 24, see also paras 319-331) “**There are alternatives... just no free alternatives** to copying.” [para 330, emphasis in original]
  
5. **NATURE OF THE WORK** – Justice Phelan found this factor non-determinative (see paras 332-338) but “**tend[ed] toward the negative end of the fairness spectrum**” (para 338)

**6. EFFECT OF THE DEALING ON THE MARKET** – This is the factor where the burden of proof lies upon the copyright owners rather than the users – and it has been a problem for copyright users to establish sufficient evidence to convince courts that there has been a detrimental effect upon markets – but Justice Phelan found that **Access had sufficiently proven “that the market for the works ... has decreased** because of the [York] Guidelines, along with other factors” (para 26, see also paras 339-355) and though “much of Access’s evidence of impacts on the market was general [nonetheless] it establishes that the likelihood of impacts from York’s own Guidelines will be similar. This is sensible given the massive amounts of copying at issue, the history of payments to Access prior to York opting out of the Interim Tariff, and the size of York as the second largest university in Ontario” (para 352)



# York is appealing on a number of grounds:

## Procedural:

- Those of you who have come to past Copyright Updates may recall that we have been monitoring this case over a number of years, and that it was under “case management” for a number of years before coming to trial.
- For instance, we noted in 2016 that the 2014 order to “bifurcate” the case (effectively splitting it into 2 parts, with different evidence being directed to each) was ordered amended...
- The 3<sup>rd</sup> ground of appeal by York is that this “**bifurcation**” **did not proceed fairly** and this judgment should be overturned on those grounds.

## Substantive:

- York appeals on the grounds that Justice Phelan erred in his assessment of **fair dealing**; AND
- York appeals on the grounds that Justice Phelan erred in his findings respecting the **Interim Tariff**

# AGENDA:

# COPYRIGHT UPDATE 2018

## ***Within our library organizations:***

- *CFLA*
- *OLA Copyright Users' Committee*

## ***Internationally:***

- *At the UN*
- *In international trade*

## ***In Canada:***

- ***Copibec v Laval***
- *Access Copyright v York*
- ***Copyright Act review***



As we noted last year, there is a pending Review of the Act:

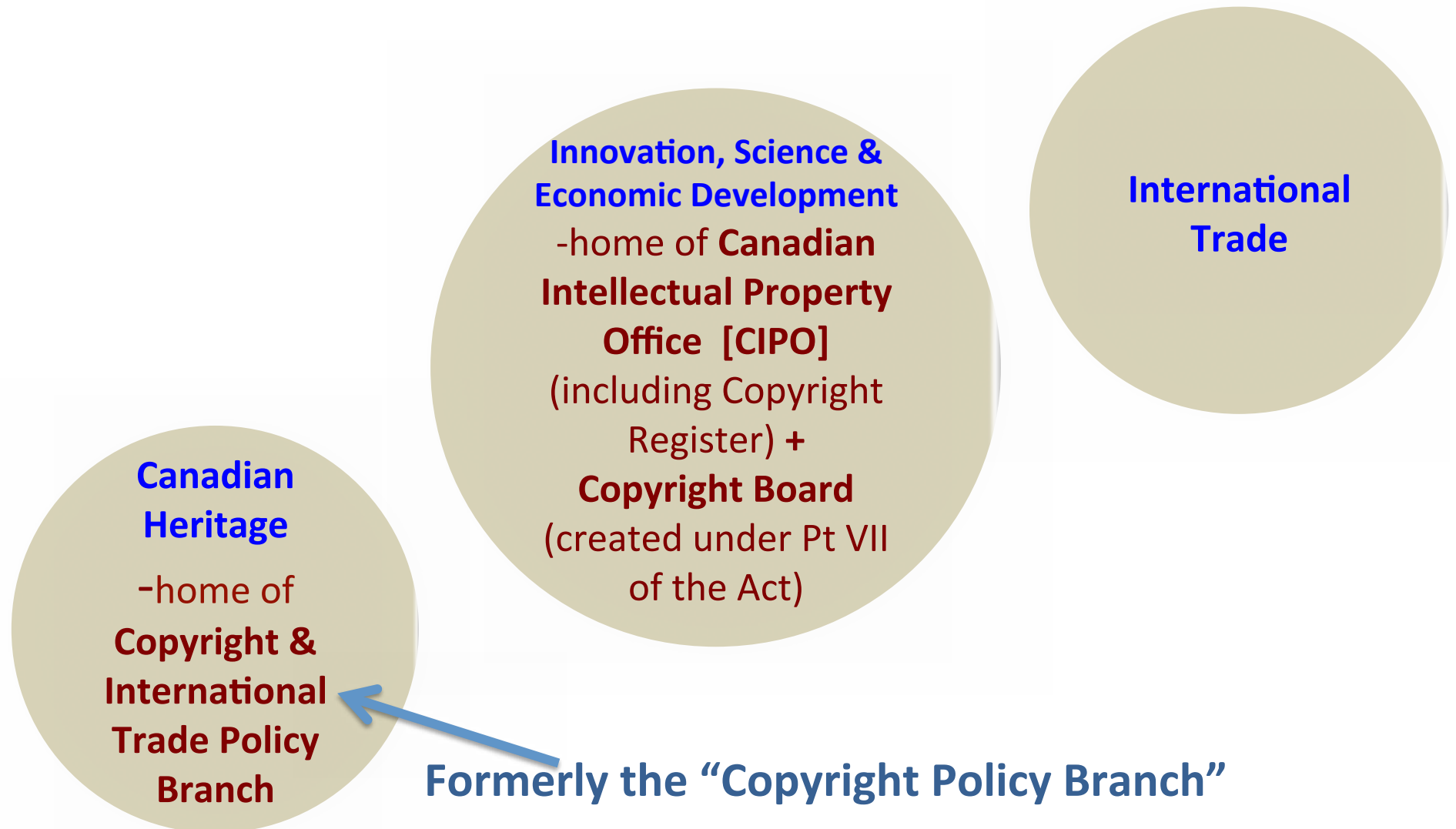
Copyright Act, s 92:

“Five years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee of the **Senate** [or], of the **House of Commons** or of **both Houses** of Parliament is to be designated or established for the purpose of reviewing this Act.”

(SC 2012, c 20, s57)]

- So the **“review committee”** was to be set up after **November 7, 2017** (as the *Copyright Modernization Act* (and therefore this version of this provision of the *Copyright Act*) came into force on November 7, 2012).

And as we noted last year, there are “3 federal departments involved in copyright”:



Of the 3 possible forms of review, the government has chosen:

Copyright Act, s 92:

“Five years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee of the Senate, of the **House of Commons** or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act.”

(SC 2012, c 20, s57)]

On December 13, 2017 the Government mandated the review to be conducted by:

## **The Standing Committee on Industry, Science and Technology**

### **Motion (c) of the House of Commons:**

“the Standing Committee on Industry, Science and Technology be the committee designated for the purposes of section 92 of the *Copyright Act*”

*[Journals of the House of Commons]*

# Standing Committee on Industry, Science & Technology:

## Chair + Vice-Chairs

Dan Ruimy, **CHAIR** (Lib)  
(Hon) Maxime Bernier, **V-Ch** (Con)  
Brian Masse, **V-Ch** (NDP)

## NON-VOTING MEMBERS:

David Lametti (Lib)  
*Parl Sec to Min of Innovation, Science & Economic Devmt*

Alaina Lockhart (Lib)  
*Parl Sec to Min of Small Business & Tourism*

Kate Young (Lib)  
*Parl Sec for Science*

## VOTING MEMBERS:

Frank Baylis (Lib)  
Jim Eglinski (Con)  
Matt Jeneroux (Con)  
Majid Jowhari (Lib)  
Lloyd Longfield (Lib)  
Mary Ng (Lib)  
Terry Sheehan (Lib)

Plus 146 **ASSOCIATE MEMBERS:**  
91 Conservatives, 47 Liberals  
(where David Lametti is again listed), and 8 NDPs

<http://www.ourcommons.ca/Committees/en/CIIT/Members>

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The two Ministers of **Canadian Heritage AND Innovation, Science & Economic Development** wrote immediately (Dec 13) to the Committee:

[http://www.ourcommons.ca/content/Committee/421/INDU/WebDoc/WD9341854/421\\_INDU\\_reldoc\\_PDF/INDU\\_DeptIndustryDeptCanadianHeritage\\_CopyrightAct-e.pdf](http://www.ourcommons.ca/content/Committee/421/INDU/WebDoc/WD9341854/421_INDU_reldoc_PDF/INDU_DeptIndustryDeptCanadianHeritage_CopyrightAct-e.pdf)





# Joint December Letter of the Ministers:

## Suggests the following 3 questions guide the review:

1. “How can we ensure that the *Copyright Act* **functions effectively to foster a marketplace** that is transparent, promotes innovation and access for users, and supports creators in getting fair market value for their copyrighted content?”
2. “How can we ensure that the copyright framework continues to function in an **environment of constant change in technology and business** possibilities?”
3. “Finally, how can our domestic regime position Canadian creators, **users**, and innovators to **compete on** and harness the full potential of **the global stage**?”

Also includes the following language about users' rights:

- “copyright framework should contribute to a marketplace and environment where users have access to world-class content and services”
- “framework where creators receive fair and transparent remuneration and that users benefit from a public domain”
- “desirable marketplace for all types of creators and users”

Letter speaks of limiting the scope of review:

**Not putting everything into the *Copyright Act*:**

“issues like the integrity of content metadata, better tracking and information of copyright activity, simpler licensing systems, and the importance of transparency for all players in the system, may reach beyond the scope of the legislation itself.”

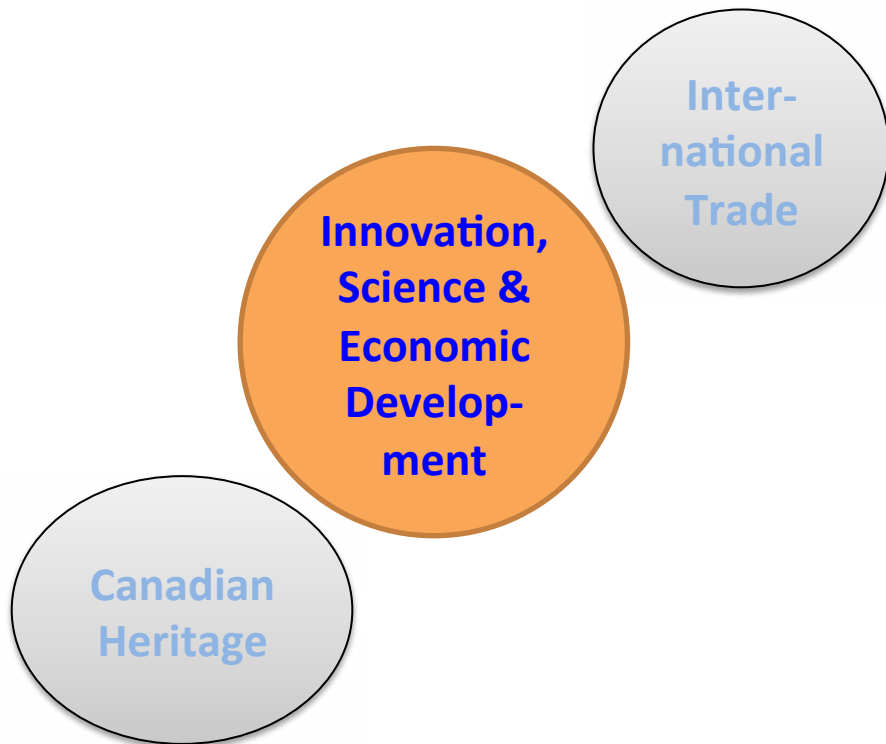
**Reform of Copyright Board within the next year:**

“We intend to bring forward measures for reform... to enable a more efficient decision-making process and timely decisions from the Board, to create a more predictable environment that allows creators to get paid properly and on time, encourage innovation, and invite investments from businesses that rely on a robust copyright ecosystem.”

Western Law

# 2018 will be a huge year for Canadian libraries & copyright!

## THE GOVERNMENT



## THE COURTS

- **CLASS ACTION LAWSUIT:**  
*Copibec v Laval University*
- **FEDERAL COURT OF APPEAL:**  
*York University v Access Copyright*

# Thank You