

CRKN-RCDR AGM
Halifax Oct 20 2016

Copyright:
**Considering the upcoming
statutory review**

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Agenda

- What triggers the review? Is this process new to our sector?
- Where should efforts to affect outcomes of the review be directed?
- What outcomes might be expected from the review?
 - Process
 - Substance

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The upcoming review is, in one sense, routine:

Copyright Act, s 92:

Review of the Act

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)

- So the **“review committee” is 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).

s 92, as just shown, was enacted through the *Copyright Modernization Act* (2012) and replaced the first 5 year review provisions – enacted by SC 1997, c 24, s 50 – below:

Review of Act

92 (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to this Act.

Reference to parliamentary committee (2) The report stands referred to the committee of the House of Commons, or of both Houses of Parliament, that is designated or established for that purpose, which shall

(a) as soon as possible thereafter, review the report and undertake a comprehensive review of the provisions and operation of this Act; and
(b) report to the House of Commons, or to both Houses of Parliament, within one year after the laying of the report of the Minister or any further time that the House of Commons, or both Houses of Parliament, may authorize.

We should be experiencing our 3rd 5 yr review:

Original statutory review:

Passed 1997

1. ... 2002 projected review
2. ... 2007 projected review

Revised version:

Passed 2012

3. ... 2017 projected review

The **2002** review duly occurred:

- “green paper,” A Framework for Copyright Reform, issued 2001;
- national consultation meetings March/April 2002; and, eventually,
- October 3, 2002: Section 92 Report “Supporting Culture & Innovation: Report on the Provisions & Operation of the Copyright Act”
- Government Status Report on Copyright Reform (2004) & Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage (2004)
- Bill C-60 resulted (introduced in 2005 by Paul Martin’s Liberals, died on the Order Paper when the government fell)...

Reports about and attempts at statutory reform continued (**right past projected 2007 statutory review date**)...

- 2008 Conservative Bill C-61 (dies on Order Paper when election called)
- 2009 public consultations on copyright
- 2011 Conservative Bill C-32 (dies on Order Paper when election called)
- Bill C-32 reintroduced as Bill C-11 of new Conservative government and passes **as Copyright Modernization Act, 2012 – review process amended; first review under new structure to be at least mid-2017**

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Copyright responsibility has come to currently involve at least 3 departments:

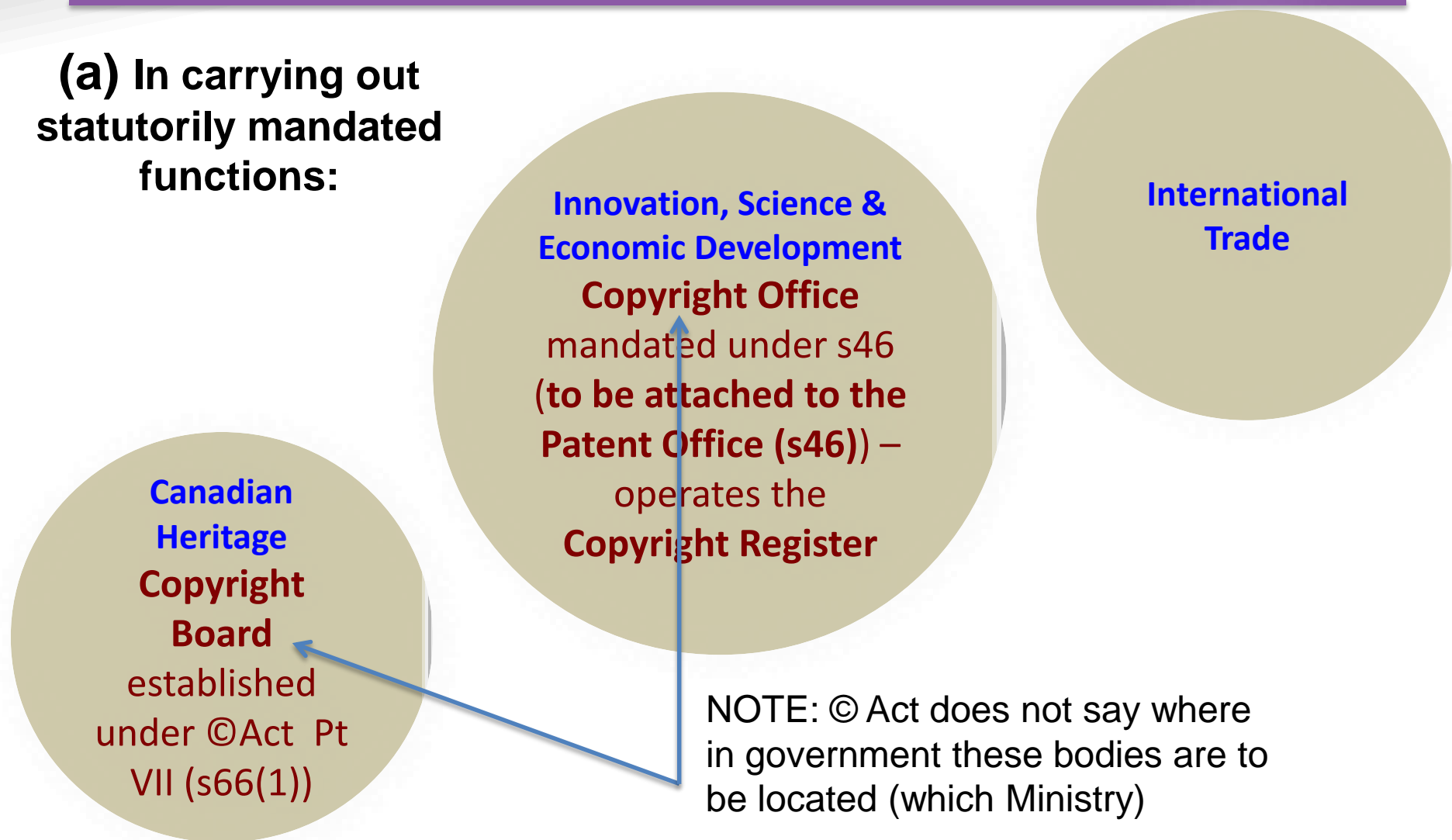
**Canadian
Heritage**

**Innovation,
Science &
Economic
Development**
(formerly Industry)

**International
Trade**
(formerly **one
part** of Foreign
Affairs &
International
Trade)

How are the 3 departments involved in copyright?

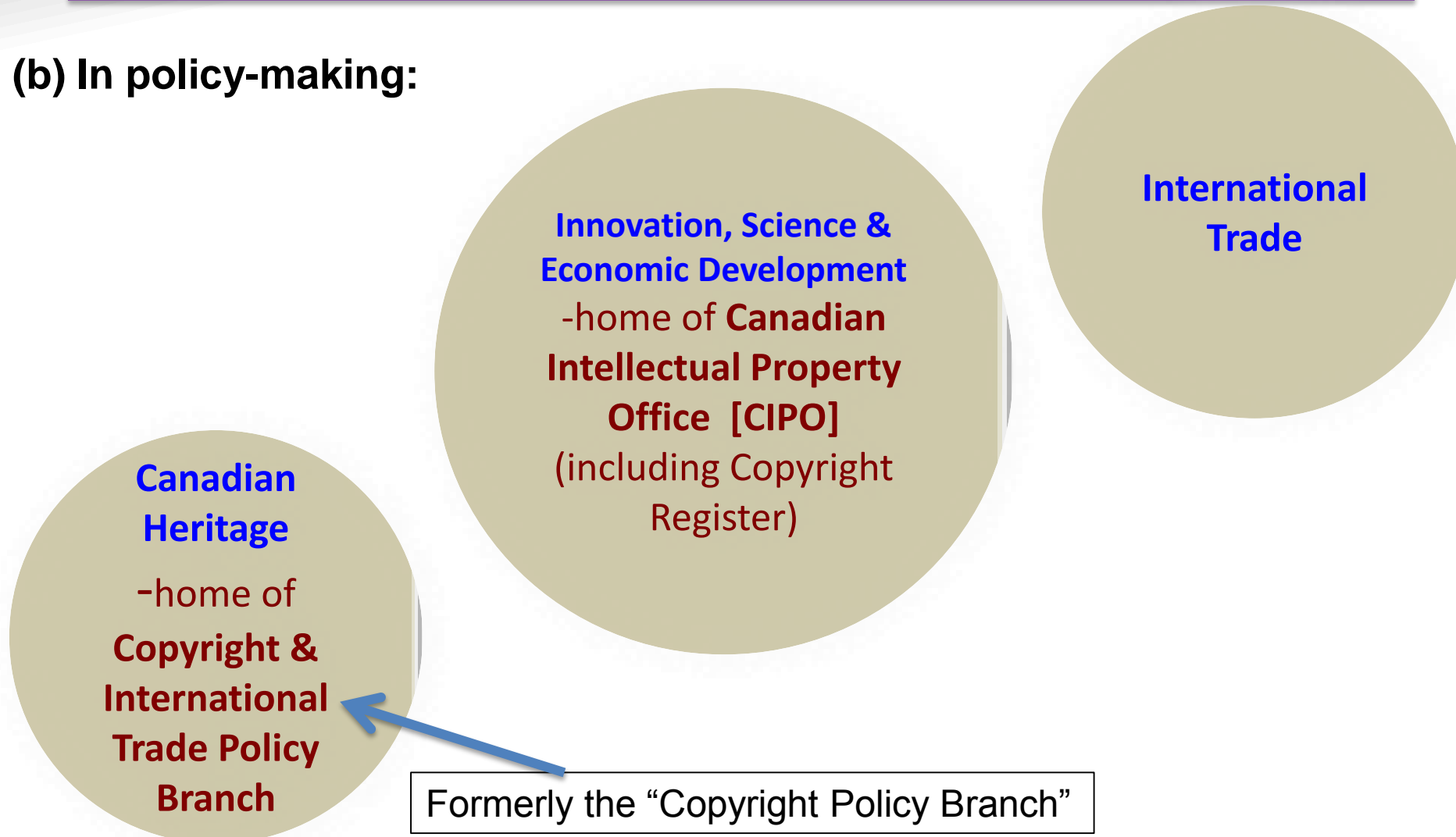
**(a) In carrying out
statutorily mandated
functions:**



NOTE: © Act does not say where in government these bodies are to be located (which Ministry)

How are the 3 departments involved in copyright?

(b) In policy-making:



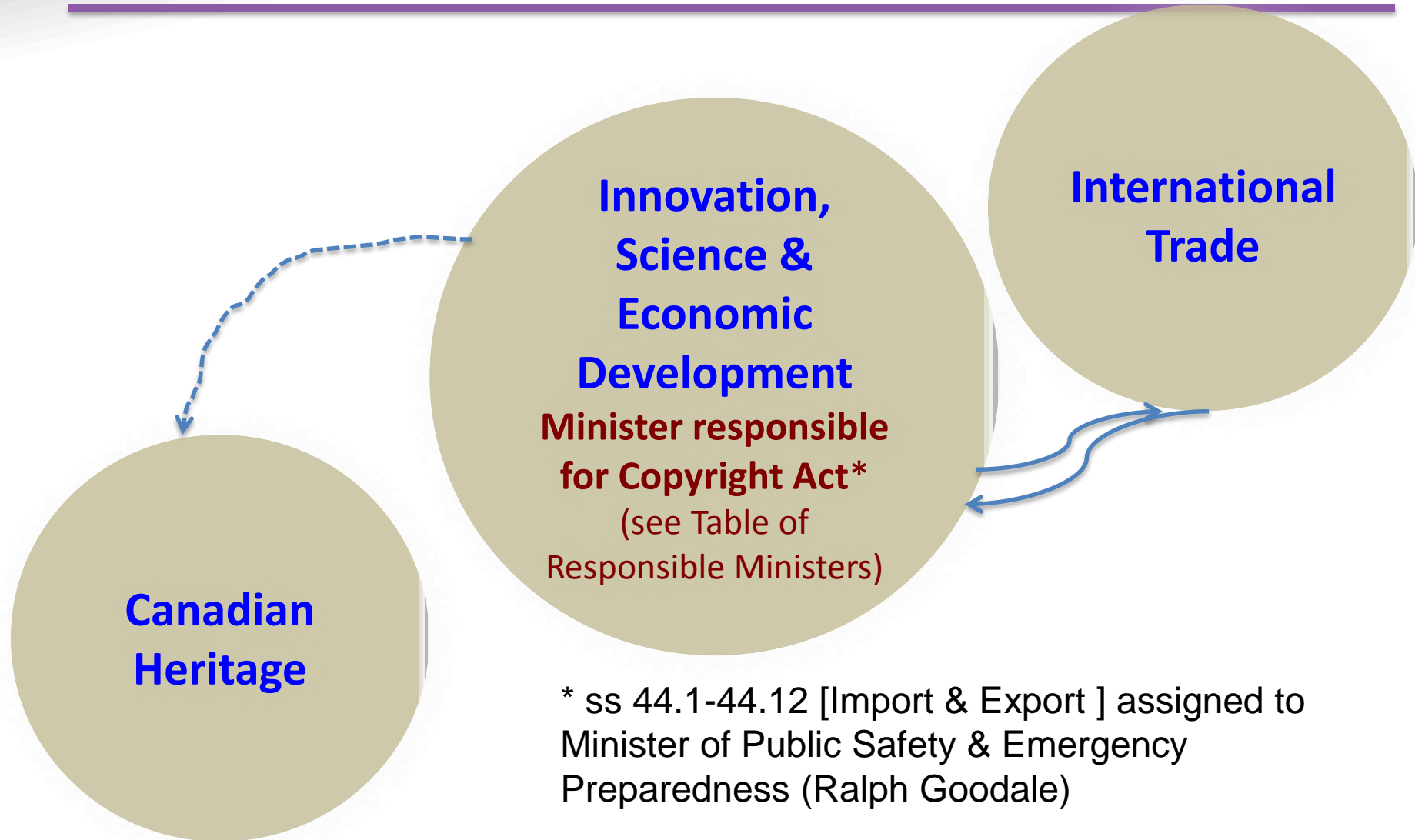
International trade change is delayed worldwide ...

- ... and with that stall, there is a stall in momentum for any fundamental copyright change – or even any trade-driven copyright change –
 - US Presidential election
 - Brexit
- As well, though Canada has brought the *Marrakesh Treaty* into effect on the public international law side,...
 - ... there is now a stalemate at WIPO continuing between proponent states supportive of a new agreement for broadcasters and proponent states supportive of a new agreement for exceptions for libraries and archives (IFLA's proposed “Treaty for Libraries and Archives” [TLIB])

Evidence from the PM's Mandate Letters that copyright is not a priority for this government:

- Minister of Canadian Heritage Mandate Letter:
 - 13 bulleted priorities for Minister Joly – **not one of them mentions copyright**
<http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter>
- Minister of Innovation, Science & Economic Development:
 - 12 bulleted priorities for Minister Bains – **not copyright** (though, inter alia, telecom)
 - mentions specifically Minister of International Trade (Minister Freeland)
<http://pm.gc.ca/eng/minister-innovation-science-and-economic-development-mandate-letter>
- Minister of International Trade
 - Mentions specifically working with Minister of Innovation, Science & Economic Development
 - Mentions Minister of Canadian Heritage but only “to restore the Trade Routes and PromArt international cultural promotion programs”
 - **not copyright**
<http://pm.gc.ca/eng/minister-international-trade-mandate-letter>

Evidence of ministerial influence on copyright:



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- **What outcomes might be expected from the review?**
 - Perhaps not “**Substance**” directly, given recent big amendments (2012), worldwide trade conditions, and the indications of the current government; but
 - Perhaps in “**Process**” – which can in turn bring about substantial benefits for the library sector...

What outcomes might be expected from the review?

- There have been those who believe the library sector should direct its energy toward preserving “**fair dealing**” as now instantiated in *the* Copyright Act
 - The current wording supports continued application of strong Supreme Court interpretations of “users’ rights” (see, for instance, library-friendly 2004 CCH v Law Society of Upper Canada, 2012 Alberta [Ministers of Education] case)
- It is true that changes to the wording of the Act would alter our Canadian rights and render existing Supreme Court cases less directly relevant and perhaps even irrelevant...
 - But is this an area likely to be opened up by Parliament?
 - And, if it is, is this an area in which libraries are able to provide strong evidence of the rightness of the current language?

Is fair dealing an area likely to be opened up by Parliament? UNLIKELY, see above.

And, if it is opened up, should lead? Is it an area in which libraries can provide strong evidence of the rightness of the current language? NO

Australian legislation:

- “fair dealing”
- includes, in its Copyright Act 1968 (currently in force), specific proportions as “fair”:
 - 10% of various works,
 - whole chapter of a book, etc.
- See also new Copyright Amendment (Online Enforcement) Act 2015 currently coming into force...

Canadian legislation

- “fair dealing” but legislated without any quantitative boundaries...

Canadian libraries:

- Currently almost universally practicing under voluntary “guidelines” closer to the Australian legislation than the Canadian...
- No evidence in practice of actual support or reliance on current Canadian “fair dealing”
- very weak position to take-supporting current Canadian law – evidence is libraries avoid current law and use Australian-like yardsticks (thus sometimes frustrating existing rights of Canadian users to, in appropriate cases, take the whole of a work (see 2004 CCH v LSUC)...

Licensing allows the parties to choose the law they wish to have govern the deal – and virtually all electronic resources are licensed... BUT tariffs **are** governed under Canadian Act

- Part VII of the Act governs the Copyright Board (ss 66-78) – inserted in virtually its current form in 1988, based on historical experience of the music industry in Canada;
- Libraries’ experiences from moment of Access Copyright’s first decision to abandon previous policy of blanket licensing and take schools before the Board, pre-2006, have been painful...
- Currently those systems acting as “opt out” or in blanket licenses are avoiding that pain...
- But should libraries forget that pain at this time?

Experience would suggest it may NOT continue to be possible to choose to ignore the Board:

1. In Europe all users are bound to the tariffs taken out by information providers (whether or not they would choose to be): **at the very least, libraries currently enjoying “opt out” status or blanket licenses should be ensuring the European position is not adopted in Canada** (which would put all libraries under the Board and subject to tariffs...)
2. Currently the Copyright Act has not been interpreted to make library consortia, as cartels of intermediaries serving users, subject to the Tariff process or any other process under the Competition Act (see See **Catherine A. Maskell**, “Consortia: anti-competitive or in the public good?”, (2008) 26(2) *Library Hi-Tech* 164 and her PhD dissertation completed at Western which lies behind the article: **at the very least, libraries and library consortia should be ensuring that this status continues...**

Self interest for the future may suggest NOT ignoring the Board:

1. ***Copibec v Université Laval***, launched in Quebec Superior Court by Société québécoise de gestion collective des droits de reproduction, operating as Copibec; framed as an application for a **class action lawsuit** to be brought against Laval “on behalf of authors and publishers from Quebec, the rest of Canada and other countries around the world.” Currently lower court decision not to certify as a class action still under appeal: if libraries and their institutions were regulated under the Board, such class actions would be avoided.
2. **If** libraries and their institutions were regulated by the Board, then attempts to impose “foreign” licencing terms and prices would be frustrated since the Canadian tariff would govern in Canada...
3. **It** should be easier and cheaper to prosecute the rights of libraries in a well-ordered, competent, quasi-judicial Copyright Board than in court actions... ***Access Copyright v York U***, Federal Court T-578-13, decision of 1st trial (of the two parts of the bifurcated action) pending...

The Copyright Board itself is looking for reform

(the spur for this is framed as concern over “delays in rendering decisions... and ... level of funding”):

“The Board is sometimes referred to as a ‘polycentric’ administrative tribunal, meaning that its mandate and responsibilities involve **more than simply resolving a dispute between the individual parties before it**; it involves **public policy considerations** and the weighing of a large number of conflicting and overlapping factors that affect the industry and the **public interest** as a whole.”

Claude Majeau, Vice Chair & CEO, Copyright Board.

Presentation to the Parliamentary Standing Committee on Industry, Science & Technology, May 5, 2016

www.cb-cda.gc.ca/about_apropos/speeches-discours/20160505-en.pdf

Becoming part of the “Board solution” would seem to be a strategic opportunity:

In 2004 and succeeding years, there have been 8 copyright decisions rendered by the Supreme Court: all but 1 (*Cinar Corporation v Robinson* 2013 SCC 17 (about creativity in cartoons)) has originated from a decision of the Copyright Board:

1. What about **ensuring that the Board process ensures that evidence gathered pursuant to a contract (license) not before the Board is not admissible by the Board on a tariff** hearing to which that licensee library or library institution is not party?
 - Overturning by statutory amendment the decision made against the U of T in *University of Toronto v Canadian Copyright Licensing Agency* (Access Copyright) 2014 ONSC 646
2. What about ensuring that there is opportunity for library associations (as NGOs) to intervene in Board processes, acting as **intervenors** to represent the public interest?
 - Currently there is no such process – see Victoria Owen, “Who Safeguards the Public Interest in Copyright in Canada?,” (2012) 59(4) *Journal of the Copyright Society of the USA*, 803-842 (CLA Blackburn Distinguished Paper Award 2013).

Board is looking for “a consensus prior to the five-year Parliamentary review”

- Vancise, J (Former Chair of Copyright Board), “The Copyright Board of Canada: Which Way Ahead?” May 25, 2016 www.cb-cda.gc.ca/about_apropos/speeches-discours/30052016-en.pdf

The Board is already active:

- Board has created a Working Committee looking into its operations, processes and procedures;
- House of Commons Standing Committee on Canadian Heritage reported on the music industry in 2014 and recommended Board delays be examined even before the 2017 review;
- The primary departments (Canadian Heritage & Innovation...) commissioned two studies about the Board:

(1) Ottawa Law Professor Jeremy deBeer. See <http://jeremydebeer.ca/wp-content/uploads/2015/04/Copyright-Tariff-Setting-Study-2015-04-16.pdf>

(2) Montreal Law Professor Paul Daly. See www.cb-cda.gc.ca/about_a propos/speeches-discours/5052016-ed.pdf

Returning, finally, to our Agenda:

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Perhaps consider focusing on PART VII of the Act: The Copyright Board...

THANK YOU –

And, for further consideration & information:

Ontario Library Association Copyright Users' Committee activities upcoming:

- **Copyright Users' Workshop**, full day, December 5, 2016, Hart House, University of Toronto –
 - working toward consensus-building in advance of the 5 year review
- At **Superconference** in Toronto, Feb 1-3, 2017,
 - An introductory session on “Things you should know about copyright “
 - (Wednesday, February 1, 9 – 10:15 am)
 - A session on the Marrakesh Treaty and its Canadian implications
 - (Thursday, February 2, 3:45 – 5 pm)
 - “Copyright Update” session
 - (Friday, February 3, 9 – 10:15 am)