

Submission To: Industry Canada and the Department of Canadian Heritage
On: 2009 Copyright Consultation
From: Council of Canadian Archives (CCA)
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Introduction

The Canadian Archival Community welcomes the opportunity to participate in this consultation.

The mission of the Canadian Council of Archives (CCA) is to lead, coordinate and sustain the nationwide efforts of over 800 archival organizations that share a common purpose – to save and promote Canada's rich documentary history. Canadian archives acquire and preserve records of government, industry and individuals, and make these records accessible to all Canadians. Working cooperatively since 1985 through the CCA, Canadian archives have developed standards that are recognized internationally.

What archives do

Canadian archives strive to protect the memory of the Canadian nation for the benefit of present and future generations. They safeguard for present and future generations the documentary history of Canada, the essence of who Canadians are and what they have done. Our preoccupation is with the very long term rather than the immediacy of the current marketplace. Archives house the diaries of Mackenzie King and those of a Prairie housewife during the Depression, photographs by Karsh and photos taken by young YMCA campers, as well as the records of town councils, community groups and individuals who have contributed to the social, political and artistic life of our nation. Our holdings have high research and historical value, but the commercial value will vary between high to little or nothing.

Copyright reform objectives

Archivists' key objective in copyright reform is to ensure that archives are able to meet the expanding information needs of present and future users while respecting the rights of creators. To achieve this key objective requires the addition of a new provision to the existing *Copyright Act* permitting archives to make their holdings accessible to the public using digital technology and the Internet. There are several additional matters of a more technical nature that concern archivists: the term and ownership of copyright in photographs, technological measures, tools and devices, remedies, rights management information, ISP liability and Crown copyright.

There are a number of copyright reform issues that negatively affect archival researchers, as opposed to the institutions that hold archival material. Although archivists are concerned about these issues, this submission will focus on matters of direct concern to archival institutions.

Bringing archival material to Canadians

Archivists have one clear goal in copyright reform: a Canadian copyright law that allows archives to use current technology to make our holdings accessible to Canadians without requiring our users to visit our institutions in person.

Traditionally, researchers have had to travel to the particular archive that holds the research material that is of interest. In the digital environment, with an appropriate copyright law in place, this should no longer be necessary. Archivists would be better able to serve the public if we were not required to limit our services to those who come into our reading rooms but could reach out to let all Canadians share the rich documentary resources that are in our care. The role of the archivist is active rather than a passive as we strive to meet the expanding information needs of our users.

Canadian archives are full of valuable historical material that is preserved in large part at public expense: genealogical records, diaries, letters, documentary films, photographs, home movies, census data, immigration records, drawings, e-mails, to name just a few examples. This archival material is very important because it tells the stories of Canadians and of Canada. Archivists are not concerned with the commercial value of what is entrusted to us but rather with the long-term historical and research value of archival materials.

The existing copyright law must be changed if archives are to be able to bring the contents of our archives to Canadians. To do that effectively, archivists are asking for a provision in the *Copyright Act* that would permit us to make our holdings accessible to the public using all the possibilities of the digital environment. We seek a commitment from government to deal with the millions of works that are hidden in archives because they cannot be reproduced for researchers in another city or province, or posted on archival websites for research because of copyright restrictions.

In the digital environment, for the first time in history, archives can truly come to the public—it is no longer necessary for the public to come to the archives. The technology exists to provide the same access to archival material for a researcher in Vancouver or Thunder Bay or Nunavut as for a researcher living a bus ride away from an archive in a large Canadian city. Copyright restrictions tie the hands of archivists whose mandate it is to reach out with all the digital resources at our disposal to bring our content to Canadians and to the world at large. Archivists believe it is a matter of good public policy to not let the holdings in archival institutions languish in darkness because the public has no way of knowing they are available, or they have no way of traveling to the archives to use them on site. The *Copyright Act* must be changed so researchers can access these materials on web sites and through the other means now available because of digital technology.

For many years archivists have been asking for amendments to the *Copyright Act* to permit the use of technology to better fulfill our mandate. As long ago as 1985 a parliamentary committee made the following recommendation:

An exception should be provided to permit an archival institution to make a copy of a work for another archival institution where the latter has requested a copy of a work from an individual researcher for the purpose of private research.¹

Since 1985 technological advances have created greatly improved ways to meet the needs of archival researchers. In 2009 the Internet, websites, email and personal computers provide the means for archival users to conduct their research without ever entering an archival institution. The copyright law needs to be changed so the full potential of digital technology can be harnessed to provide access to the vast and rich holdings of Canadian archives for research purposes.

The technology has changed dramatically since 1985, but the objective identified in 1985 has not. Researchers should have access to material in archives. The technology to achieve this goal in 1985 was to make a copy for the researcher. The technology that now exists to achieve this goal was not even imagined in 1985 – only the need to achieve it. In 2009 the Internet, websites, email and personal computers provide even more efficient ways to achieve the goal. Archivists have remained constant in our request to government in copyright reform initiatives going back at least 24 years. It is long overdue that the *Copyright Act* includes a technologically neutral access right to archival holdings for research purposes.

Recommendation

1. The Copyright Act should be amended to include a technologically neutral access right to archival holdings, permitting archives to make their holdings accessible to the public using digital technology, including the Internet.

This remainder of this submission describes amendments to the *Copyright Act* archivists believe are necessary in order to harness the potential of digital technology in our institutions.

¹ *A Charter of Rights For Creators*, Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, October 1985, page 70.

Photographs

(i) Term of Copyright in Photographs

Under the current copyright law photographs have a different term of copyright protection depending on who is the author of the photograph. If the author is a corporation, the term is 50 years from creation. If the author is the photographer (a “natural person” under the Act) the term is the life of the photographer plus 50 years. Unless an archivist or researcher knows who the photographer is, which in many cases is not known, it is impossible to determine the copyright term.

Archivists prefer a fixed term of copyright protection for photographs. The term of fifty years from creation that was used in the copyright law previously is preferable from an archival perspective. A fixed term makes it much easier to determine the term of protection because the only information needed to make the determination is the date the photograph was created. As already stated, it is impossible to determine the creator for many of the photographs held in archives. Unlike literary, artistic or musical works, photographs often do not contain information that permits a user to identify the photographer, whether that author is still alive, or the date he or she died. This is particularly true of photographs not taken by a professional photographer, which comprise a large proportion of the photographs in Canadian archival institutions.

Unfortunately for archivists and users of archives, if Canada is to ratify the World Intellectual Property Organization’s (WIPO) *Copyright Treaty*, its copyright law must provide a term of copyright protection for photographs that is the life of the author plus fifty years. Since it is unlikely that the needs of archivists and their researchers will provide sufficient reason for Canada to decide not to ratify the WIPO *Copyright Treaty*, the CCA most reluctantly accepts the repeal of section 10 in the existing *Copyright Act*. However, this acceptance is conditional upon the *Copyright Act* being amended to include recommendation 1 above which will permit archives to provide access to our users for research purposes.

Recommendation

2. Archivists agree that the term of copyright for photographs be changed to the life of the author plus fifty years provided that the amendment in recommendation 1 above is enacted coincidentally.

(ii) Ownership of Copyright in Commissioned Photographs

Under the existing copyright law the commissioner owns the copyright in a commissioned photograph. If this is changed to make the photographer the first owner of the copyright, a number of policy consequences follow.

First, copyright in photographs will become more difficult to administer in archival institutions because textual documentation such as contractual arrangements does not always accompany photographs when they are deposited into archives, often many years after the photographs were created.

Second, if the person commissioning the photograph does not own the copyright, the commissioner will not be able to negotiate the use of the photograph within an archival institution in a donor agreement.

Third, most people who commission photographs are not familiar with copyright law. Most commissioners will assume that they own the copyright in personal photographs such as baby pictures, wedding photographs and so on. When these photographs are donated to archives many years later, it may well be impossible to identify the copyright owner or calculate the term of copyright protection.

Recommendation

3. If the photographer is to be the first owner of copyright in commissioned photographs then recommendation 1 above is necessary to address the problems associated with changing the first owner of copyright from the commissioner to the photographer.

(iii) Personal Use of Commissioned Photographs

If the first owner of copyright in a commissioned photograph is changed from the commissioner to the photographer, commissioners of photographs will no longer be the owner of the copyright in the photographs they commission. Permission from the copyright owner (the photographer) would be required for the commissioner to use commissioned photographs. So that commissioners do not need to ask for permission, it has been suggested that commissioners may use the photographs they commission for private or non-commercial purposes. The idea is to protect the interests of consumers in the use of photographs commissioned for domestic purposes.

Such consumer issues are not within the mandate of CCA. What is within an archivists mandate is a copyright law permitting the use of photographs donated to archives by consumers or their estates, once the consumer dies. These photographs often have no information about who took the photograph, thereby making identification of the copyright owner and the calculation of the term of copyright protection impossible. Archivists therefore seek the amendment described in recommendation 1 above to permit archival use of commissioned photographs in their holdings for research purposes.

Recommendation

4. Archivists agree that the owner of a commissioned photograph be changed from the commissioner to the photographer provided that the amendment in recommendation 1 above is enacted coincidentally.

(iv) Transitional Provision: Term for Photographs

The *Copyright Act* currently treats photographers differently from other creators regarding the length of copyright protection. Photographers want to harmonize the term of copyright for photographs with that of literary, dramatic, musical and artistic works. Since the existing term rules are different it will be necessary to provide for transitional rules. Archivists recommend that any change in this regard not result in the copyright in public domain photographs being revived.

Recommendation

5. Changes in the term of copyright for photographs should not revive copyright in photographs that are in the public domain.

(v) Transitional Provision: Term For Corporate Authors

The World Intellectual Property Organization's *Copyright Treaty* (WCT) requires countries joining that treaty to provide a term of protection of life plus 50 years on a retroactive basis. (WCT Article 9 and Articles 7(1) and 7(4) of the Berne Convention.) Under the existing Canadian copyright law photographs created in the last 50 years (since 1958) whose authors are corporations do not meet the WCT requirement because the term provided is 50 years from creation.² Moreover, corporations do not have a "life" that can be used to measure term. To meet the WCT requirement, it will be necessary to provide that where a corporation is deemed to be the author of a photograph that is protected by copyright law immediately before the Act is changed, the life of the photographer should be deemed to be the basis for the calculation of the term. The ownership

² Under the current law, the term for photographs taken is either: (1) the life of the individual who owned the original negative or plate (who may or may not be the photographer) plus fifty years; or (2) where the negative or plate was owned by a corporation, for fifty years from the time the photo was taken. The one exception is where the corporation which owned the negative or plate had as its majority shareholder the actual photographer in which case the term will be the life of that person plus fifty years.

of the copyright however, should not change. The corporation should continue to be the copyright owner.

Recommendation

6. Where a corporation is deemed to be the author of a photograph that is protected by copyright law under the existing *Copyright Act*, the life of the photographer should be used as the basis for the calculation of the term. The ownership of the copyright however, should not change. The corporation should continue to be the copyright owner.

(vi) Transitional Provision: Term For Individual Authors

In the case of photographs where the author is an individual, there is a “life” that can be used to measure term. Where an individual is deemed to be the author under the existing *Copyright Act*, then that individual should continue to be the author of that photograph.

Recommendation

7. Where an individual is deemed to be the author under the existing *Copyright Act*, then that individual should continue to be the author of that photograph.

(vii) Transitional Provision: Ownership of Commissioned Photographs

Under the existing *Copyright Act*, where an engraving, portrait or photograph is commissioned, the first owner of copyright is the commissioner. Other conditions apply: the work must be made for valuable consideration, the consideration must be paid and there must be no agreement to the contrary. As noted above, the change in the term of protection for photographs makes an already difficult situation even worse. A special provision addressing archival uses of photographs is necessary to deal with archival use of commissioned photographs.

Recommendation

8. Archivists agree that ownership of copyright in commissioned photographs be changed to the photographer provided that the amendment in recommendation 1 above is enacted coincidentally. with the change in the ownership of copyright in photographs.

Technical measures, tools and devices

The current *Copyright Act* provides a number of rights that permit uses of copyright material for specific purposes without permission or payment of royalties. Fair dealing for research, private study, criticism and review, in section 29, 29.1 and 29.2 and copying works deposited in an archive in section 30.21 are examples of users' rights. Another example is the existing right of archives to reproduce a work in their holdings for preservation purposes. Enacting laws prohibiting circumvention, or possession of devices for the purposes of circumvention, would prevent archives and our researchers from exercising existing rights provided under the *Copyright Act* by successive Parliaments over many decades. These users' rights have major significance for archives as they directly affect the ability to carry out preservation functions, functions that have become even more complex and urgent in the digital environment where obsolescence is both rapid and disastrous for long-term access to digital materials of all kinds.

Prohibiting circumvention for legal purposes such as preservation activities by archivists to protect the documentary heritage of Canada is not acceptable to archivists. Archivists believe that circumvention of technological measures should only be prohibited when the circumvention is for the purpose of infringing copyright. Similarly, circumvention tools and services should be available for non-infringing uses.

Recommendation

9. Circumvention of technical measures should only be prohibited when the circumvention is for the purpose of infringing copyright.

Recommendation

10. Circumvention tools and services should be available for non-infringing uses.

Remedies

Archivists believe that the only remedy that can be awarded against an archive that engages in a prohibited act of circumventing a technical measure should be an injunction, if a court is satisfied that the defendant was not aware, and had no reasonable grounds to believe, that the defendant's circumvention was prohibited. Archivists believe that this section should be extended to include activities related to preservation, management and maintenance of archival holdings. Adding these activities would prevent permanent loss of historically significant material. Archives should be able to harness the benefits of digital technology to fulfill our preservation mandate. If this requires circumvention of a

technical measure then the interests of archival preservation for the public good should take precedence.

Recommendation

11. Only an injunction should be available against an archive that circumvents a technical measure and has reasonable grounds to believe that their circumvention was not prohibited.

Rights management information

Archivists have a number of recommendations regarding the implementation of the obligations in the *WIPO Copyright Treaty* and the *WIPO Performance and Phonograms Treaty* dealing with rights management information. These treaties require countries ratifying them to enact remedies against the removal or alteration of “rights management information” attached to works or other subject matter, and against the distribution of works or other subject matter in the knowledge that such information has been removed or altered.

Recommendation

12. The removal or alteration of rights management information should not be subject to remedies where the information interferes unreasonably with an authorized display or reproduction.

Recommendation

13. The fact that rights management information may not be legally binding in Canada should be recognized in the *Copyright Act*. Protecting rights management information should not be construed as confirming the legal validity of the information.

Recommendation

14. The definition of rights management information should include only information provided by the copyright owner or the holder of any right under copyright.

Recommendation

15. The copyright owner or the holder of any right under copyright should be made subject to the same remedies (injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law) for knowingly making false or misleading statements in electronic form.

Internet service provider (ISP) liability

Archivists believe that an ISP should be under no obligation to monitor content provided by, and stored at, the request of a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity. Many archives provide Internet connections to their researchers. It is impossible, in practice, to monitor or screen the activities of researchers using these network services. On that basis, archives acting as service providers need legal protection similar to that already given under the law to “common carriers,” such as telephone companies, for infringements committed by their subscribers.

Archivists support the introduction of a “notice and notice” regime in the *Copyright Act* requiring ISPs to forward any notice they receive from a copyright owner to a subscriber who is alleged to be engaged in infringing activities on-line. Under the regime envisaged by archivists, ISPs would be required to keep records that would allow the subscriber to be identified in any court proceeding that may ensue. The rationale for agreeing to these recordkeeping obligations is that ISPs are often the only parties that can identify and warn subscribers when they are accused of copyright infringement. If ISPs do not keep the required records, or fail to forward notices under the envisaged regime, they should be liable for civil damages.

Recommendation

16. An ISP should be under no obligation to monitor content provided by, and stored at, the request of a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity.

Recommendation

17. An ISP should be required to participate in a “notice and notice” regime that includes obligations to:

- (i) forward to their subscribers a notice from a copyright owner alleging copyright infringement by the subscriber; and**
- (ii) keep records that would allow the subscriber to be identified in a subsequent court proceeding.**

Crown copyright

Canadian archival holdings include many records that are currently covered by Crown copyright. There are two issues of concern to archivists regarding Crown copyright: whether Crown material should continue to be protected by copyright and whether the existing perpetual copyright in unpublished Crown copyright material should be eliminated.

With regard to the first issue, section 12 of the *Copyright Act* provides that the Crown holds copyright in any work it prepares or publishes. These provisions follow a Commonwealth tradition that vests copyright in the Crown as a creator of works under the same rules that protect the creators of all other kinds of works. However, in the United States there is no copyright in government works. The United Kingdom and Australia have reviewed the continued existence of Crown copyright in their respective jurisdictions. Whether Crown copyright should continue to exist in Canada requires a similar review.

Recommendation

18. The federal government should undertake a thorough review of the continued existence of Crown copyright in Canada.

With regard to whether the existing perpetual copyright in unpublished Crown copyright material should be eliminated, section 12 of the *Copyright Act* provides that any work which is prepared or published by the Crown is protected until it is published and for an additional 50 years after publication. The result is that Crown works that are never published are protected by copyright in perpetuity. In 1997 a similar rule for non-Crown unpublished works was repealed. The rule was replaced by a new rule that provides the same term of copyright protection whether a work is published or not. Unpublished works protected by Crown copyright are the only works that remain protected by copyright in perpetuity unless they are published. Archivists believe that there is no justification for perpetual copyright protection for unpublished Crown copyright material.

Recommendation

19. The *Copyright Act* should be amended to eliminate perpetual copyright in unpublished works protected by Crown copyright.

Conclusion

The *Copyright Act* is a complex and synergistic whole that defines a delicate balance between the rights of creators and users. Archivists are uniquely placed in the balance sought in copyright reform. Our clientele includes the creators who deposit material, as well as the users who need to access that material, often for the creation of new works as part of the ongoing economic and cultural process. It is essential that the balance

between the rights of creators and fair and reasonable access to original work be maintained. Archivists, whose holdings are an integral part of the heritage and culture of Canadian society, believe it is important to ensure that issues which affect culture and heritage are addressed in the reform of the copyright law.