

The Canadian Archivist and Copyright Legislation

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The purpose of this paper is to explain the nature of copyright protection in relation to the concerns and needs of professional archivists. The paper will first describe the copyright system since it is necessary to understand this system in order to appreciate the interaction between it and archival activities. New technological developments have put a tremendous strain on the existing Canadian *Copyright Act* which dates from 1924. These new technologies have also affected the role and function of archives and put further strains on the constraints imposed on them by copyright. After addressing the needs of archivists in relation to copyright, the paper will suggest ways to solve these concerns while attempting to respect the principles of the copyright system.

I THE NATURE OF COPYRIGHT PROTECTION

Copyright protection is limited to certain types of literary, dramatic, musical, and artistic works. The economic rationale for copyright protection is to increase and to improve the rate of creation and dissemination of intellectual works. In the absence of such protection, it is argued that production would be inadequate since creative works are easily appropriable. Take away the limited monopoly conferred by copyright, and any third party could simply obtain a copy of the work, reproduce it, and sell it to the public. Since the initial costs involved in creating the work need not be incurred by the copyist, he can market it at a lower price than the original creator. Consequently, the creator would have no economic incentive to produce and the output of intellectual works (or property) would fall. Copyright protection is an attempt to rectify this market failure.

In addition to economic or pecuniary rights, authors have interests which relate to their integrity or personality. These interests are referred to as moral rights and are incorporated in section 12(7) of the present *Copyright Act*. These rights generally include the right to claim attribution of authorship and to restrain any distortion, mutilation, or similar modification of the work.

The scope of the monopoly protection granted under copyright is restricted. The scope of protection regarding reproduction only extends against copying the form of

* The analysis and conclusions of this study do not necessarily reflect the views of the Department of Consumer and Corporate Affairs Canada.

the work. In other words, copyright protection does not extend to cover the ideas or information contained in a work, but merely the form of expression of the ideas.

In order to qualify for protection, a work must be original. This requirement of originality appears only to imply that the work must be the product of some minimum amount of intellectual labour. It does not imply that the work must be original in a qualitative sense, but only that the work has not been copied. Copyright does not protect against similarity or duplication arising from independent creation.

A further criterion of protection is that of fixation. This criterion is not stated in the act but is a concept developed by case law. Essentially, this requires that copyright works must be fixed in a material form of some permanence. From an evidentiary standpoint, this is a useful concept since it is difficult to prove the existence of unfixed works.

The general term of protection for copyrighted works is the life of the author plus a period of fifty years after death. There are exceptions to this rule, however, one of which will be discussed later in the paper. The author or creator of the work is generally the first owner of copyright. The main exception is the employment situation where the employer is the first owner.

Registration of copyright is optional in Canada. There is no statutory sanction or penalty for not registering a work; one does not forego copyright by neglecting to register a claim in it. Copyright protection arises automatically with creation in all published and unpublished works and no formalities or procedures are required to obtain protection.

While copyright protection is the central device relied upon to stimulate the production and dissemination of creative works, the inherent restrictive nature of it may conflict with other important values in society. Thus, it is necessary in developing copyright legislation to try to strike a balance between potential competing interests. As a result, specific exemptions from the private rights of copyright owners may be required to promote the interest of educational, charitable, or religious endeavours.

In addition to specific exemptions, there is a fair dealing or fair use section which is intended to draw the line between what is and what is not within the scope of copyright protection. Perhaps the best insight between the purpose of fair use provisions and exemptions has been provided by Leon Seltzer, who made the following observation:

With fair use we were concerned with drawing the line between protected uses and a use that the copyright scheme itself contemplates as not within the appropriately expected economic reward of the scheme. With exemptions we are concerned with what is on the protected side of that line ... uses which are fully and properly within the copyright scheme but which should for reasons of public policy be declared exempt from the copyright control of the author.¹

1 Leon Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tension in the 1976 Copyright Act* (Cambridge, Mass., 1977), p. 49.

The present fair dealing provisions of the Canadian *Copyright Act* are contained in section 17(2)(a).

As indicated, the *Copyright Act* came into force in 1924. The act has only been amended in a few limited instances since that time. It was developed at a time when the major copyright industry was publishing. Technological developments such as photocopying machines, computers, cable television, communications satellites, earth receiving stations, and home audio and video recorders were obviously not envisaged by the founders of the existing legislation. Clear delineations of the rights of copyright owners with respect to these new technological uses are sometimes lacking. Technological developments have created difficulties for the courts in construing and interpreting the act in relation to problems which it was not designed to solve. Further, with private uses such as home recording, the problem for copyright owners lies in attempting to detect and to enforce potential infringements. Thus, a revision of the act is required to ensure that established principles of copyright protection are not unduly altered and that the law be specific enough to provide guidance to all who must interpret it. These requirements for revision to the *Copyright Act* apply as well to the situation faced by archivists in attempting to comply with copyright provisions since technological change has also had a major impact upon the role and function of the archivist.

The *Public Archives Act* was passed in 1912 and was concerned primarily with archival material of a textual nature such as private manuscripts and maps. Unlike the situation in 1912, information is now accessible to archivists in many new media forms including audio and video recordings, computer tapes, and so on. The broad mandate of most archives to collect and preserve historical material of every kind makes it necessary for archives to develop the capability to preserve, reproduce, and disseminate archival information in these new media. Questions are raised, however, as to the copyright implications of reproducing and disseminating to the public these newer forms of copyright protected material.

II PROBLEMS OF ARCHIVISTS IN RELATION TO COPYRIGHT

The central issue for the archival profession is that the *Copyright Act* should not be so restrictive as to prevent archivists from fulfilling their responsibilities as well and efficiently as possible. The primary responsibility of archivists is to acquire and preserve archival material and to make it available to the public.

In order to preserve unique historical material, archivists often need to make copies of such material for conservation purposes. This is required since the originals may be in an imminent state of deterioration. Moreover, it is argued that archivists should have the right to make copies for the purpose of preservation before the original material begins to deteriorate.² Once deterioration has begun the original record is permanently damaged.³ Moreover, with the opportunities that the new

2 Public Archives of Canada, "Comments and Recommendations in Response to the Working Paper on Copyright," brief submitted to Consumer and Corporate Affairs Canada, November 1977, p. 17. (Hereafter cited as PAC Brief.)

3 Association of Canadian Archivists, Copyright Committee, "Response to the Working Paper on Copyright," brief submitted to Consumer and Corporate Affairs Canada, January 1976, p. 10. (Hereafter cited as ACA Brief.)

technologies offer, it is possible to preserve the intellectual content of many works, so that the originals may be conserved in appropriate conditions or in cases where the original form need not be kept, the originals may be otherwise disposed. Thus, it is often seen as being most appropriate to make a copy at the moment the material is acquired so that the original will not be damaged at all by use.

In addition, there is the desire to provide copies to other archives and libraries to add to their collections. Because most archival material is unique and not available on loan, researchers must normally travel to the archives that hold the material in order to use it. The ability to make copies for other archives or libraries, or for an interlibrary loan arrangement for microfilm copies, would enable archives to make the material in their collections more accessible to the public.

Archives in Canada have for some time been acquiring audio and audio-visual material as part of their current mandate. Copyright restraints have in some cases delayed or blocked acquisitions. If a copyright owner of a film, for instance, is not resident in Canada and if the Canadian distributor or exhibitor does not have the right to reproduce the work, then permission to make a copy for deposit in an archives could be difficult to obtain. Archivists would also like to have the right to make, with impunity, copies of broadcast programmes where the broadcaster does not intend to retain a copy. A film or television archives might also wish to give public performances of the material in their collection as part of their mandate of making their material accessible to the public.

It is further argued that much of the material in archives, such as personal correspondence, was produced in the pursuit of objectives other than monetary gain. Thus, copyright restrictions on access to this type of material are undesirable because they deny the public the benefit of access to the works while not providing any positive inducement to the owners of copyright in the material.

Archives do not feel that contractual arrangements with the donors are a completely adequate solution to copyright problems since the donor rarely holds copyright on the entire collection being deposited in the archives.⁴ Collections of personal papers, for instance, normally consist of incoming correspondence, copies of replies, plus other writings. It is impossible in many situations to seek out every copyright holder represented in a collection. Even if collectives representing copyright owners are formed for the purpose of facilitating copyright permissions, it is unlikely that authors of unpublished material such as letters and manuscripts would belong to a collective and the problem of the use of this material would remain.

Under the current *Copyright Act* (section 6), protection for unpublished works is perpetual. Often these works are in the form of letters, diaries, and manuscripts. Archivists argue that it would be of assistance to biographers and historians to be able to publish letters and other manuscripts without being obliged to seek out and settle with the owners of copyright in such unpublished works of authors long dead.⁵

In order to assist archives and users to obtain the information required for copyright verification, Canadian archivists have argued for compulsory registration

4 PAC Brief, pp. 3-4; ACA Brief, p. 9.

5 PAC Brief, pp. 3-5.

accompanied by deposit of the work or facsimile.⁶ It is argued that such compulsory registration can provide a rich source of heritage material.

A further troubling aspect of the treatment of unpublished works for archivists is that there is doubt as to whether the reproduction and use of unpublished material falls within the scope of fair dealing.⁷ If such works do not, then the making of copies of such works would be an infringement of copyright even if done for the purposes of private study or research.

Another problem with the current fair dealing provisions of the *Copyright Act*, section 17(2)(a), is that it may not be clear to what extent an entire work may be reproduced.⁸ Archivists have argued that especially for works such as photographs and maps a partial reproduction of a work is virtually useless.⁹

III PRESENT CANADIAN AND FOREIGN LEGISLATION

The present Canadian *Copyright Act* is silent on the specific issue of the reproduction and use of material for archival purposes. It is possible that many such uses could fall within the fair dealing provision of section 17(2)(a) if they were undertaken for the purposes of private study or research. However, as noted above, the fair dealing provisions may not be sufficiently broad to cover many situations.

The recent American copyright legislation has a number of provisions which promote the archival preservation and dissemination of deposited material. These include the requirement of deposit of two copies of works in order to acquire registration.¹⁰ The legislation also permits the development of rules with respect to making copies of broadcasts or diffusions for archival purposes.¹¹ Non-profit libraries or archives are further able to reproduce unpublished works for the purposes of preservation or security¹² and for the reproduction of published works to replace a lost or stolen copy if an unused replacement cannot be reasonably obtained.¹³

The copyright legislation of the United Kingdom provides that where a manuscript or copy of an unpublished work is kept in a library, museum, or other similar institution and more than fifty years have elapsed since the author died or more than one hundred years have elapsed from the making of the work, then the work may be reproduced for the purposes of private study or research.¹⁴

The Australian copyright legislation has a similar provision with respect to use after the death of the author or seventy-five years after the work was made.¹⁵ A new

6 *Ibid.*, p. 18.

7 See *British Oxygen v. Liquid Air Co.*, (1925) 1 Ch. 383.

8 See *Zamacois v. Douville et al.*, 3 Fox Pat. c. 44; C.P.R. 170: (1943) 2 D.L.R. 257.

9 PAC Brief, p. 14; ACA Brief, pp. 6-7.

10 17 U.S.C., s. 408.

11 *Ibid.*, s. 407(e).

12 *Ibid.*, s. 108(b).

13 *Ibid.*, s. 108(c); D. Magnusson and W. Nabhan, *Exemptions under the Copyright Act* (Ottawa, Consumer and Corporate Affairs Canada, 1982) contains a concise review of the provisions of the American legislation dealing with provisions for archival use of copyright material.

14 *Copyright Act*, 1956, 4-5 Elizabeth II, c. 34, ss. 7(6)-(9).

15 *Copyright Act*, 1968-1976 (Cth), (No. 63 of 1968 as amended), ss. 51-53.

provision also allows for the copying of deteriorating, lost, or stolen works if the library or archives is unable to find a replacement within a reasonable time.¹⁶

IV RECOMMENDED APPROACH TO NEEDS OF ARCHIVISTS

In this section a variety of amendments to the *Copyright Act* are suggested in order to balance the needs of archives with those of copyright owners of the material being used.

Exemptions: The most direct method of adequately dealing with the needs of archivists to carry out their responsibilities to make information available to the public is by the provision of an express exemption within the *Copyright Act*.¹⁷ Such an exemption should be framed so as not to interfere with the intended economic incentive functions of copyright legislation (that is, the commercial exploitation of published works). The exemption should not be so all encompassing, however, as to override the non-commercial interests of an author such as his right not to make a work public or his moral rights.

It is suggested that a specific exemption could be introduced into the Canadian copyright legislation to allow non-profit archives and libraries to copy material deposited in them for the purpose of preserving the original material. This exemption should properly be limited to unpublished, out-of-print, or otherwise unavailable material. In constructing this exemption, it would seem reasonable to allow copies of the material to be loaned or deposited in another library or archives, but for research purposes only. Such an exemption would legitimize practices such as the loaning or duplication of microfilm copies of archival collections through interlibrary loan for use in other archives or libraries. Further reproductions of such works should not be permitted under this exemption.

It should also be noted that contractual restrictions on copying could be imposed by donors even with an exemption. Contractual arrangements would always take precedence over copyright provisions.

Collective Enforcement of Copyright: Archivists are often requested by users to provide them with copies of selected material in their custody. It was suggested above that an archival exemption should not extend to the further copying of material by researchers or other members of the public. The reason why a specific exemption is not recommended for such uses is that it is unlikely that a definitive exemption could be introduced to meet the needs of all researchers without potentially interfering with the exclusive rights of copyright owners to publish or to reprint protected material.

In order to address the desires of archives and libraries to better meet the needs of their clientele, it is suggested that copyright owners such as authors and publishers

16 *Copyright Amendment Act*, 1980 (Cth), (No. 154 of 1980).

17 A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, (Ottawa, Consumer and Corporate Affairs Canada, 1977), p. 175, recommended a very limited exemption to allow for the making of a copy of deposited material for the sole purpose of preserving the material which is deteriorating or damaged.

should be permitted to form associations (collectives) which would represent them in issuing general licences to user groups for the reproduction or other use of works under their control. In return, these collectives could charge a sum of money which they would then distribute among their members.¹⁸

This option of negotiating with collectives representing copyright owners may not, however, prove fully satisfactory for most archives for the majority of their collections. Any single archival collection may contain thousands of unpublished letters or manuscripts from individuals in all walks of private life all over the world. Such individuals will generally not be represented in copyright collectives and thus collective agreements will not cover the copying of their works.

Fair Use: Problems will still remain for archivists even if the exemption and the collective action suggested above come into force. As noted, it may be that under the current Canadian *Copyright Act*, the defence of fair dealing is not applicable with respect to unpublished material. Thus the reproduction of unpublished material, even if done for the purpose of research, may be an infringement. It is suggested that revised legislation should include a general fair use exemption applying to all works whether or not published. Reproductions of unpublished material used only for research purposes do not in any way deprive the owner of the copyright of any expected economic reward and thus should not interfere with the incentive function of the system. There appears to be no compelling reason not to allow fair use considerations to apply to such unpublished material.

It is further suggested that copying of an entire work should not be a *prima facie* infringement of copyright, but should be considered in relation to the same factors as any other reproduction (for example, the economic impact of the taking) in determining whether or not it is a fair use.¹⁹ This latter recommendation is important in relation to archival material since much of it must be reproduced in its entirety to be of use.

Term of Protection: Earlier it was explained that the term of protection for literary, dramatic, or musical works unpublished at the time of the author's death might be perpetual, provided the work is never published. This measure would appear to be an attempt to protect the privacy of the authors and their heirs. It is not clear, however, why the need to protect heirs is any greater when the author's work is unpublished than when it is published during his lifetime. Further, the complications caused to researchers in trying to track down heirs of an author dead for generations would appear to far outweigh any benefit from such protection.

In the absence of an overriding rationale to provide such extended protection, it is suggested that the term of copyright in unpublished works should be the same as the general term of copyright protection, that is, for the life of the author plus fifty years after his death. If the protection of privacy is important, this can often be arranged at the time of deposit by specifying access restrictions.

18 For a comprehensive review of the many complex implications of allowing for the expanded use of copyright collectives, see D. Smith, *Collective Agencies for the Administration of Copyright* (Ottawa, Consumer and Corporate Affairs Canada, 1983).

19 For an insightful discussion of the fair dealing doctrine, see B. Torno, *Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision* (Ottawa, Consumer and Corporate Affairs Canada, 1981).

Registration: Archivists in Canada have called for the establishment of a compulsory registration system in order to give users an effective and efficient means of verifying the copyright status of a work. The present registration system in Canada is permissive, the examination of applications for registration is merely cursory, and there are no deposit requirements. These defects cause registration to be inconclusive, incomplete, and thus unreliable. Because of obligations arising out of its membership in the Berne Convention (Rome Text, 1928)²⁰ and in particular the "no formalities" Article of the Convention, Canada cannot introduce a compulsory registration or deposit system. The only certain method of ensuring complete and accurate information is through obligatory registration combined with deposit requirements. In consequence of these factors, it is suggested that the copyright registration system in Canada is not particularly valuable as a source of verifying the copyright status of a work.

The *National Library Act* requires publishers of books published in Canada to send two copies to the National Librarian. If it is felt to be in the national interest to require deposit of other types of works such as sound recordings, films, video cassettes, and so on with the Public Archives or some other institution, then this requirement should be incorporated in legislation other than the *Copyright Act* because of the international convention obligations discussed above. The acquisition of copyright protection should not be dependent upon fulfilling a deposit obligation. An amendment in the form of an exemption could be provided in the *Copyright Act* to meet the requirements of other legislation and ensure that the party providing the copy to the Archives was granted immunity from any potential copyright infringement action.

V CONCLUSIONS

The examination presented in this paper of the nature of the copyright system and the problems of archivists in relation to that system does not indicate that such problems are intractable. The interaction of a limited exemption for archival use in conjunction with the collective exercise of copyright and a broadly defined fair use provision should neither unduly restrict legitimate archival activities nor interfere with the incentive function of the copyright system. Consequential amendments to the term of protection for unpublished works and the provision of compulsory deposit of material in legislation outside the *Copyright Act* should further reduce remaining handicaps to historical research and other archival activity in Canada.

20 The Rome Text (1928) of the Berne Convention is reproduced as Schedule III of the *Copyright Act*, RSC (1970), C.C. 30.