



Revision of the Copyright Act

Submission of the Canadian Museums Association
to the Standing Committee on Industry, Science
and Technology

July 24, 2018

Introduction

There are more than 2,700 museums in Canada, ranging from art galleries, science centers to large multi-purpose museums. They are all non-profit and charitable institutions, some small ones run by volunteers with little if any understanding of copyright issues. As repositories of history, they have an attendance of more than 75 million visitors per year and are trusted for the educational information and accuracy they provide.

The Canadian Museums Association (CMA) is pleased to respond on their behalf to the consultation launched by the government as part of an evaluation of the current Copyright Act (the Act), in keeping with Article 92 of the Copyright Modernization Act (2012).

In this brief, we will focus essentially on three issues of direct interest to the museum community:

- The digitization of collections for internet access;
- Technical protections measures versus fair dealing;
- The special case of Orphan Works.

We will also make some comments and a suggestion concerning an issue we believe calls for further reflection, namely so-called “Resale Rights”.

1. Digitization of collections for internet access

Museums must adapt to a rapidly changing digital environment if they are to remain current and relevant, and respond adequately to the needs of educational institutions, researchers, visitors and the general public. In the digital environment, museums are expected to ensure broad accessibility to their collections by making available online substantial information, including images. This represents a special challenge when it comes to museum holdings still under copyright protection.

For museums, a publicly available online database is a reference tool and guide to its collections. These databases are provided for research and documentation and they should not be considered as marketing or promotion to increase the visibility of, and the attendance to a special exhibition.

The licencing process and the financial impact of royalties may constitute a major obstacle to the discoverability of museum collections, and the way the current Act is written, financial and administrative impediments are depriving Canadians from access to copyrighted museum collection pieces online, and particularly to Canadian contemporary art.

In a spirit of promoting education, information and research relating to art, and particularly Canadian art, museums want a clear authorization to make available online the contents of their collections, including images, without having to obtain prior consent of the right holders or being subjected to royalties for this specific use of copyrighted material.

The CMA is engaging with the emerging international declaration on digital recording, documenting and re-creation of works of art ReACH¹ (Reproduction of Art and Cultural Heritage) and is committed to agreeing and producing set of standards on compatible digital systems for museums in Canada.

Recommendation

Museums request an exception in the Copyright Act allowing not-for-profit museums to make a low resolution digital image of a work of art protected by copyright, unless specifically prohibited by the copyright owner, and to make it available on line for reference to its collections, the works they include and the artists who are represented therein.

More specifically, such an exception would allow the distribution (communication by telecommunication) of a database or electronic catalogue accessible to the public, which would contain all pertinent information on the artists and copyrighted pieces in the museum's collection, including low definition images of those works of art.

For greater clarity, such distribution would be subject to specific conditions concerning image quality, the sole objective being to allow the public to see and understand the information related to a piece of art.

2. Technical Protection Measures

In 2012, the amendments to the Canadian Copyright Act introduced strict measures to bring Canada's laws into compliance with WIPO's 1996 Copyright Treaties. Included within the amendments was the introduction of a provision that made it an infringement to reverse engineer technological protection measure technology (TPM) created to specifically prohibit downloading, reproduction or electronic distribution of works protected by copyright.

With regards to digital works of art, the current wording of the Act concerning TPMs voids the exceptions granted for legal purposes in other parts of the Act. As the Act stands, digital locks cannot be removed – even for legal purposes, such as fair

¹ Launched at UNESCO in May 2017, see <https://www.vam.ac.uk/research/projects/reach-reproduction-of-art-and-cultural-heritage>

dealing. The interdiction to break digital locks also runs counter to the exception allowing museums to make copies of documents and copyrighted collection pieces for preservation purposes. Museums must be able to circumvent digital locks applied to certain works in order to exercise their statutory rights, including preserving works in a collection, and maintaining and managing a collection.

Recommendation

Museums request an exception from the TPM provisions, as long as they pursue legitimate and legal ends, in a manner consistent with the current exceptions framework found in the statute, and so long as the work has been obtained legally.

3. Orphan Works

Significant portions of Canadian museum holdings fall under the category of Orphan Works—copyright protected works and other subject matter for which the copyright owner is either unknown or impossible to locate.

Without access to the copyright holder of unpublished work, it is impossible to gain permission to use these Orphan Works where such permission is necessary. Furthermore, in cases of unknown copyright creators, since it is impossible to determine the creator's date of death, the term of copyright protection has no known expiry date.

By authority of the Canadian Copyright Act, the Copyright Board of Canada rules on applications for non-exclusive licences, for use in Canada, of **published** works, **fixed** performances, **published** sound recordings and **fixed** communications signals, when the copyright owner cannot be located. The applicants must demonstrate they have exercised due diligence in their search to locate the copyright owner.

However the vast majority of Orphan Works in Canadian museums do not fall into the categories under the jurisdiction of the Copyright Board since such licences are not available for **unpublished** works and sound recordings.

Museums expend scarce resources to acquire, preserve and make their collections accessible, but under the current legal framework, they cannot use modern electronic communications means such as their web sites and the Internet to make the Orphan Works in their holdings known and available to researchers and to the Canadian public.

The problem of Orphan Works is global² and is of growing concern with the increasing

² Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board, describes many of the complexities of orphan works. It is available at: <http://www.cb-cda.gc.ca/about-afpropos/2010-11-19-newstudy.pdf>

prevalence of modern technological means of communication. It is an important issue for both creators and users. Creators are concerned that all protections remain in place to ensure they receive compensation for their creations. Users are concerned about material falling into a black hole, when there is no possibility to secure permission from an unknown or “unlocatable” copyright owner.

A variety of solutions are being examined and implemented in many jurisdictions internationally and orphan works regimes have been introduced in the United States, the European Union, Korea, etc. We submit respectfully that the Canadian “solution” is not a model.

Recommendation

The CMA recommends that a special study be conducted with all stakeholders on the various solutions adopted in different jurisdictions concerning Orphan Works, and to make recommendations for the best possible practice.

4. Artist’s Resale Right

The Artist’s Resale Right (ARR), *is not a copyright per se*. Artists organizations argue ARR is a copyright royalty, but most stakeholders would argue that it is not an intellectual property issue but a taxation issue not unlike the Capital Gains tax.

Some nations³, mainly in the EU, have implemented this new royalty within their copyright acts, but more other countries around the world have not. And where nations have introduced this royalty, it has been in separate legislation.

According to ARR proponents, it has not affected the market place. However, dealers and collectors have rallied against it as yet another impediment to collecting art. They argue that most buyers will be bewildered by another tax since this is so obscure and may refrain from completing the purchase. But in countries where this form of benefit has been introduced, there is no firm evidence of impact in the marketplace.

How does this issue concern museums? Museums do buy works of art, but mostly depend on donations from collectors. Museums rarely sell pieces from their collections. As such, the impact of the tax will not be that significant to museums, but it may have an impact on the art market, which museums support by their very nature. And such a measure is unlikely to help the starving artist: those most likely to gain from this tax will be successful artists (and most significantly their estates) whose work has accumulated in value due as a result of having been displayed and promoted in museums and galleries, and received some other form of exposure.

³ According to a 2014 study, 74 countries had adopted some form of legislation pertaining to ARR. See https://www.raav.org/sites/default/files/pdf/Grandsdossiers/cisac_droit_de_suite_2014-05-15_fr.pdf

Furthermore, museums are already required to pay exhibition rights to the artist, reproduction rights and various professional fees. While sympathetic to the cause put forward by artists' collectives, the CMA questions the value of this, other than, as we just said, to benefit artists who are already successful, as well as their estates. This does not seem to be the objective of the proposal put forward by the proponents of ARR.

We believe that in this instance, adding an element of taxation to copyright law is neither the only nor the best way to provide for artist revenue. A recent study by New York University⁴ suggests for example that this objective would be better met if, when an artist sells one of his/her creations, the creator kept by contract a partial "share" of ownership in the work: if the piece is sold for a better price, the artist would get a portion of the selling price proportional to the percentage kept in the initial transaction.

In conclusion, we believe that this is a complex issue which requires further study, particularly on the impact of ARR on the art markets where such legislation has been adopted, as well as a look at alternative solutions to the problem at hand, fair compensation for artists and creators.

However, if the Committee were to recommend that ARR be added to the Copyright Act, the CMA requests the possibility to comment on any language which could be proposed.

RECOMMENDATIONS

Recommendation 1: *Museums request an exception in the Copyright Act allowing not-for-profit museums to make a low resolution digital image of a work of art protected by copyright, unless specifically prohibited by the copyright owner, and to make it available on line for reference to its collections, the works they include and the artists who are represented herein.*

Recommendation 2: *Museums request an exception from the TPM provisions, as long as they pursue legitimate and legal ends, in a manner consistent with the current exceptions framework found in the statute, and so long as the work has been obtained legally.*

Recommendation 3: *The CMA recommends that a special study be conducted with all stakeholders on the various solutions adopted in different jurisdictions concerning Orphan Works, and to make recommendations for the best possible practice.*

⁴ See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3100389

Finally, the CMA considers that further consideration of ARR with all stakeholders is necessary. But if the Committee were to recommend that ARR be added to the Copyright Act, the CMA requests the possibility to comment on any language which could be proposed.

Established in 1947, the Canadian Museums Association (CMA) has been active in copyright policy and education on behalf of our sector. CMA also regularly participates in the World Intellectual Property Organization's consideration of special exceptions for libraries, archives and museums.

For more information:

John G. McAvity, C.M.
Executive Director & CEO
Canadian Museums Association
280 Metcalfe Street, Suite 400
Ottawa, ON K2P 1R7
jmcauity@museums.ca
(613) 567-0099