

Brief to the Standing Committee on Industry Science and Technology in its Statutory Review of the *Copyright Act*
Submitted by the Canadian Council of Archives/Conseil canadien des archives
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Technological Protection Measures - TPMs

The 2012 amendments to the *Copyright Act* introduced a new restriction on access to works in digital formats. It is now prohibited to circumvent any technological protection measure (TPM) that guards a copyright-protected work with a technical device that controls access to the work, or that prevents certain uses of a work. The very limited exceptions include allowing Libraries, Archives and Museums (LAMs) to circumvent a TPM in order to provide alternate copies for users with perceptual disabilities, but otherwise, this restriction supersedes other user rights that are available to LAMs and that are included in the *Copyright Act*. Circumventing a TPM is not permitted even in order to carry out non-infringing essential activities such as making a copy for preservation or collection management purposes. This draconian measure has serious, and we believe unintended, consequences for our documentary heritage. It means that archivists cannot carry out the essential activities required to ensure the long-term preservation of, and access to, important parts of our documentary heritage that are constrained by digital locks. Non-infringing activities, such as reformatting documents, photographs or maps that are in an obsolete format, or a format that is in danger of becoming obsolete, have long been recognized in the *Copyright Act* as being both necessary and allowable for LAMs. The 2012 blanket circumvention prohibition makes these activities illegal – and prevents archivists from preserving significant parts of our documentary heritage.

Archivists believe that circumvention of TPMs by LAMs should be permitted for any activity that is otherwise allowable under the *Copyright Act*.

Crown Copyright

Crown works are works that have been prepared or published by or under the direction or control of Her Majesty, or any federal, provincial, or territorial government department. Crown works are protected for 50 years from their first publication, unless the work is never published. In that case, the copyright will never expire. Canadian archives hold millions of unpublished Crown works that are subject to perpetual copyright. From an archival perspective, perpetual copyright protection is very problematic—and it is the last place in the Act where perpetual copyright is possible. However, the problems with Crown copyright extend far beyond the term. Successive studies of Crown copyright note its confusing nature, including the precise meaning of royal prerogative, the jurisdictions to which Crown copyright applies, and which

government entities are covered. Crown copyright is a holdover from former days and it is long overdue for a comprehensive overhaul.

At a minimum, we recommend that the Act be amended immediately to establish that copyright in Crown works lasts for 50 years from date of creation, regardless of whether or not they are published. We further recommend that the federal government commission a comprehensive study that will identify the ways that Crown copyright is currently addressed by various levels of government, identify the many problematic issues, explore the solutions adopted by other countries, consult with stakeholders, and recommend appropriate measures that will transform this outdated provision into a measure that serves the public interest in the digital age.

Reversion

When acquiring historical materials from donors, archival repositories often request that the donor assign to the archives the copyright in the acquired materials (to the extent that the donor is the rights holder). Many donors assign their copyrights to the archives so they need not deal with requests for permission for reproduction and use. However, Section 14(1) provides that where an author has assigned the copyright in her papers to another party such as an archival repository (other than by will), the ownership of the copyright will revert back to the author's estate 25 years after her death, and the estate will own the copyright for the remaining 25 years of the copyright term. This provision cannot be overridden by additional contract terms. Section 14(1) is an outdated relic inherited from the 1911 British Act. In addition to being undue interference in the freedom of an author to enter into a contract, this little-known provision is an administrative nightmare for archival institutions and donors' estates to manage.

We recommend that section 14(1) be repealed. Alternatively, we recommend that section 14(1) be amended to permit the author to assign the reversionary interests along with the copyrights.

Indigenous Knowledge

There is a growing belief in Canada and internationally that copyright laws should be amended to address copyright protection for Indigenous knowledge. Archivists are particularly concerned with the category of Indigenous knowledge commonly referred to as Traditional Cultural Expressions (TCEs) – including stories, songs, names, dances, performances, stories. . . , many of which are currently housed in Canadian archives.

While the Copyright Act currently protects TCEs just as it does other types of expression, the copyright system represented in the Act is based on the idea that copyright is owned

by an author, and that the duration of copyright is based on that author's life. This system does not reflect an Indigenous approach that is based on community ownership of stories, songs, dances, names, and other creations, and the principle that such ownership is perpetual.

There are no specific provisions in the Canadian *Copyright Act* protecting Indigenous knowledge. Canada has recently signed onto the *UN Declaration on the Rights of Indigenous Peoples*, in which Article 31 states that "in conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of ..." Indigenous heritage, traditional knowledge and traditional cultural expressions. It's time for change!

We urge the federal government to engage without delay in a respectful, and transparent collaboration with Canada's Indigenous Peoples to amend the Copyright Act in ways that recognize a community-based approach to copyright protection of Indigenous knowledge. The Archives Community commits to actively participate in this process in all ways that are appropriate.

The Canadian Archives Community will continue to closely monitor ongoing discussions and developments at the World Intellectual Property Organization (WIPO) on traditional knowledge and folklore and recommends that Canada participate actively in this work.

Orphan Works

The copyright owners in many archival holdings are unknown and/or unlocatable. Determining ownership and the term of copyright protection are essential steps for archives to make holdings available on online. And in the digital environment, researchers expect archival holdings to be available online rather than only in our reading rooms. Although they form a significant part of our documentary heritage, orphan works are often not selected for digitization and/or online access because of uncertainty over the legal protections that apply to their use. Orphan works are of ongoing concern to user communities across the world and they present particular challenges for mass digitization and access projects in archives. Many solutions are under study in different constituencies, and many pilot projects and new initiatives are underway, but it will take collaboration among stakeholders to find viable solutions.

We recommend that the federal government convene a working group of concerned stakeholders to further study and propose viable solutions to orphan works issues.

Term Extension

A robust public domain is an essential feature of the copyright system that provides a rich source of raw material for new creative works. Overlong terms of copyright protection inhibit the growth of the public domain to the detriment of the public interest. Proponents of term extension argue that it presents a greater incentive for authors to create new works. However, studies have produced no credible evidence that term extension results in increased creation (particularly for authors that are already dead). Legal economists Posner and Landes (*The Economic Structure of Intellectual Property Law*, Harvard University Press, 2003) argue that incentives to create as a result of term extension are likely to be very small beyond a term of 25 years.

Not only does term extension do nothing to encourage the creation of new works; it impedes the entry of works into the public domain. The holdings of Canada's archives include particularly valuable raw materials that can be used for the creation of new works by the general public, journalists, students, and scholars. Timely entry of such material into the public domain makes it easier to use and share. Excessive copyright terms present barriers that prevent the sharing of the rich cultural treasures in Canada's archives, and disrupt the balance between public and private interests.

Canada's current terms of copyright protection, with the exception of the 2015 amendments to the term of protection for sound recordings, are compliant with the minimum standard set out in the Berne Convention. Further extending the term of copyright protection would present a massive obstacle to access Canada's documentary heritage.

We oppose any extension of the terms of copyright protection.

Fair Dealing

The Supreme Court of Canada has clearly established fair dealing as a users' right as a significant means of maintaining the proper balance between the rights of a copyright owner and users' interests. The addition of education, parody, and satire to the allowable purposes of fair dealing strengthened this users' right as a counterbalance to the "digital locks" provisions added in 2012. Some publishers and authors claim that the addition of education to the list of allowable fair dealing purposes has destroyed the education market; however, other evidence refutes this. Our experience in archives is that authors and other creators rely on fair dealing to draw fair portions from others' works in order to create new works and advance knowledge. Archival institutions, many of them situated in learning institutions, rely on fair dealing to be able to make copies for their users.

We recommend that the current list of allowable purposes in the Fair Dealing provisions of the Act remain unchanged.

Recommendations

1. Permit circumvention of TPMs by libraries, archives and museums for any activity that is otherwise allowable under the Copyright Act.
2. Amend the *Act* immediately to establish that copyright in Crown works lasts for 50 years from date of creation, whether or not they are published.
3. The federal government should commission a comprehensive study that will:
 - identify the ways Crown copyright is currently addressed by various levels of government,
 - identify the many problematic issues,
 - explore the solutions adopted by other countries,
 - consult with stakeholders, and
 - recommend appropriate measures that will transform this outdated provision into a measure that serves the public interest in the digital age.
4. Replace or repeal section 14(1) (Reversion) OR amend section 14(1) to permit the author to assign the reversionary interests along with the copyrights.
5. The federal government engage without delay in a respectful, and transparent collaboration with Canada's Indigenous Peoples to amend the Copyright Act in ways that recognize a community-based approach to copyright protection of Indigenous knowledge. The Archives Community commits to actively participate in this process in all ways that are appropriate.
6. Canada participate actively in the work of the World Intellectual Property Organization (WIPO) on traditional knowledge and folklore.
7. The federal government convene a working group of concerned stakeholders to further study and propose viable solutions to orphan works issues.
8. There should be no extension of the terms of copyright protection.
9. The current list of allowable purposes in the Fair Dealing provisions of the Act should remain unchanged.

The Canadian Council of Archives/Conseil canadien des archives (CCA) is a national non-profit organization, founded in 1985 to preserve and provide access to Canadian documentary heritage by improving the administration, effectiveness and efficiency of more than 800 archives across the Canadian archival system. CCA membership includes provincial and territorial councils from across Canada, the Association des archivistes du Québec, the Association of Canadian Archivists, and the Council of Provincial and Territorial Archivists.

<http://archivescanada.ca/ArchivalSystem>

This brief has been endorsed by the following organizations:

Association of Canadian Archivists

Association des archivistes du Québec