

BRIEF OF INTERNET ARCHIVE CANADA AND THE INTERNET ARCHIVE TO THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TRADE (INDU) PURSUANT TO THE STATUTORY REVIEW OF THE COPYRIGHT ACT

December 10, 2018

Submitted by:

Lila Bailey

Internet Archive Policy Council

Introduction

Internet Archive Canada (“IAC”) is a not-for-profit digital library whose mission is to provide universal access to all knowledge. To date, IAC has digitized more than 580,000 books, micro-reproductions, archival fonds, and maps.¹ More than 300 libraries and memory institutions from across Canada have supported IAC, including: McGill University, University of Alberta, Royal Ontario Museum, Canadian Museum of Human Rights, and University of Victoria. Foundational partners included University of Toronto, University of Ottawa, Canadian Research Knowledge Network, and Library and Archives Canada/ Bibliothèque et Archives Canada. Much of the material in IAC’s collection is focused on Canadian cultural heritage and historical government publications. These efforts represent a significant contribution to the accessibility of Canadian digital heritage. IAC continues to seek opportunities and partnerships to expand access to knowledge, including digitization services for people with perceptual disabilities.² Internet Archive Canada is also a founding member of the National Heritage Digitization Strategy (NHDS).³

The Internet Archive, a California-based public charity, is building a digital library of Internet sites and other cultural artifacts in digital form.⁴ Like a paper library, we provide free access to researchers, historians, scholars, the print disabled, and the general public. Our mission is to provide Universal Access to All Knowledge. As our web archive grew, so did our commitment to providing digital versions of other published works. Today our archive contains:

- 330 billion web pages
- 20 million books and texts
- 4.5 million audio recordings (including 160,000 live concerts)
- 4.4 million videos (including 1.6 million Television News programs)
- 3 million images
- 200,000 software programs

Because we are a library, we pay special attention to books. Not everyone has access to a public or academic library with a good collection, so to provide universal access we need to provide digital versions of books. We began a program to digitize books in 2005 and today we scan 1,000 books per day in 28 locations around the world. Books published prior to 1923 are

¹ <https://archive.org/details/toronto>

² <https://ocul.on.ca/accessible-content-eportal-reaches-15000-titles>

³ <https://nhds.ca/>

⁴ <https://archive.org/>

available for download, and hundreds of thousands of modern books can be borrowed through our Open Library⁵ site. Some of our digitized books are only available to the print disabled.

The Need for Balance in Canadian Copyright Law

It appears that Canada will be required to extend its copyright term by 20 years in order to comply with treaty obligations under the Canada United States Mexico Agreement. As such, the Committee should think carefully about the overall balance of user rights as compared to this expansion of the rights of authors and publishers. Canada's flexible fair dealing regime can be a tool to ensure this balance and to support innovation and libraries in the digital age. We also suggest a new provision to give libraries the ability to provide continuous access to works in the last 20 years of their term.

Library Public Domain

The United States' Copyright Term Extension Act of 1998, which extended copyright term for 20 years, added a provision to ensure that older works would remain available to the public.

Section 108(h) of the US Copyright Act allows for libraries to reproduce, distribute, display or publicly perform a work, in facsimile or digital form, in last twenty years of any term of copyright of a published work. The library must first as long as the library completes a reasonable investigation to determine that:

1. The work is not subject to normal commercial exploitation, or
2. The work is not available at a reasonable price, or
3. The copyright owner provides notice that neither of the two conditions above apply.⁶

While the intent behind this provision is benevolent, a lack of clarity about what it means for a work to be "subject to normal commercial exploitation" has prevented many libraries from actually accomplishing the goal of continued availability of these older works. For example, the Internet Archive has attempted to use Section 108(h) with our collections, and to date we have only been able to identify 60 books out of thousands as clearly eligible.⁷

Nevertheless, the underlying purpose of Section 108(h) remains a good one. As Canada extends its own copyright term, we urge the Committee to restore balance by adding a provision to the Copyright Act that would allow Canadian libraries to make works in their last 20 years of term broadly available to the public. Importantly, to achieve the goal of ensuring continued access to older works that may go out of print before the end of their copyright term, such a provision must be reasonable and workable for libraries. To that end, we suggest the following language be added to the Copyright Modernization Act:

⁵ <https://openlibrary.org/>

⁶ See U.S.C. 108(h). Note that to date, no such notice has ever been filed.

⁷ <https://archive.org/details/last20>

“During the last 20 years of copyright protection, libraries, museums, and archives may copy and make available, including in digital form, published and unpublished works. A rightsholder may opt-out of this provision if it provides the library, museum, or archives with a notice demonstrating that the work is being made commercially available.”

Problems of Access in Canada

Libraries have historically played a unique role in providing access and expanding participation in cultural life. Digital libraries promise even more access. But Canada and Canadian libraries have experienced problems with access in the digital era. According to The Canadian Urban Libraries Council (“CULC”), the lack of availability of ebook titles has been a significant barrier to expanding collections, especially in Canadian public libraries.⁸ Because this content must be licensed, publishers can engage in practices that result in reduced access, such as withholding ebooks from libraries for a period of time, charging libraries higher prices than they charge consumers⁹, and limiting how long a library can use an ebook before the library has to purchase it again. All of these restrictions are being exercised by publishers, and the situation has not improved over the past eight years of broad ebook availability for public libraries.¹⁰ Moreover, libraries of all sorts usually cannot purchase digital titles for permanent ownership or to ensure future access, and many books are not available in digital form at all.¹¹ For Canadian ebooks, the trend appears to be worsening, with it becoming less and less likely for newer Canadian titles to be made available in ebook format.¹² Indeed only 6.65% of Canadian library systems’ collections of Canadian title are available to users in both print and digital formats.¹³ Finally, even where ebooks are available, they are seldom available in a format that is accessible to those who are visually impaired.¹⁴

Open Libraries and Controlled Digital Lending

Our Open Libraries project offers the prospect of making every library’s collection into a digital collection by allowing a library to lend a digital version of physical volumes they own. Open Libraries creates an opportunity to close the gap of available formats discussed above.

⁸ http://www.culc.ca/cms_lib/Expanding%20the%20eBook%20Market%202011.pdf

⁹ <http://fairpricingforlibraries.org/>

¹⁰ http://www.culc.ca/cms_lib/Expanding%20the%20eBook%20Market%202011.pdf

¹¹ https://www.ifla.org/files/assets/clm/news/ifla_submission_-_canadian_copyright_reform.pdf

¹²

http://www.ontariocreates.ca/Assets/Research/Research+Reports/eBOUND_Canadian+Ebooks/eBOUND_Canadian+Ebooks+in+Public+Libraries.pdf

¹³ Id.

¹⁴

<https://www.ourcommons.ca/Content/HOC/Committee/421/INDU/Brief/BR10129863/br-external/CanadianNationalInstituteForTheBlind-e.pdf>

Open Libraries is a version of Controlled Digital Lending (“CDL”) -- an emerging method whereby libraries to loan digital books to patrons one reader at a time, just like print books.¹⁵ Through CDL, libraries use technical controls to ensure a consistent “owned-to-loaned” ratio, meaning the library circulates the exact number of copies of a specific title it owns, regardless of format, putting controls in place to prevent users from redistributing or copying the digitized version. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization.

Properly implemented CDL must (1) ensure that original works are acquired lawfully; (2) apply CDL only to works that are owned and not licensed; (3) limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an “owned to loaned” ratio); (4) lend each digital version only to a single user at a time just as a physical copy would be loaned; (5) limit the time period for each lend to one that is analogous to physical lending; and (6) use technical measures to prevent copying and redistribution. These controls ensure that providing digital access to books already owned by libraries does not harm publishers or authors.

CDL has been in place for seven years in the Internet Archive’s Open Library, in partnership with many other libraries.¹⁶ We are working with Canadian libraries to expand offerings of Canadian content.

Canadian libraries can rely on fair dealing implement CDL and create a digital version of certain types of in-copyright works in their collections and to circulate that digital copy in lieu of, and according to the same terms and conditions for, the library’s original print copy. Additionally, CDL allows Canadian libraries to identify titles important to Canadian users, rather than relying on vendors from outside of Canada. Libraries participating in our Open Libraries program can, through CDL, digitize and preserve Canadian culture without the need for direct federal government support. However, the legal copyright framework could be improved to support these activities, particularly by limiting legal risk by maintaining statutory damages cap on non-commercial activities and rejecting calls to limit or restrict fair dealing.

Limited Statutory Damages for Non-commercial Infringements

Finally, as noted above, the limitation on statutory damages in cases where the infringements are for non-commercial purposes should remain in place. This provision provides certainty for libraries and other nonprofit and publicly beneficial organizations that work with in-copyright materials as part of their mission. This limitation has not lead to reckless behavior thus far, nor is it likely to do so in the future.

¹⁵ www.controlleddigitallending.org

¹⁶ <https://openlibrary.org/>