

BIBLIOTHÈQUE
ET ARCHIVES NATIONALES DU QUÉBEC

BRIEF SUBMITTED TO THE
STANDING COMMITTEE ON INDUSTRY,
SCIENCE AND TECHNOLOGY AS PART OF ITS
REVIEW OF THE *COPYRIGHT ACT*

DECEMBER 2018

INTRODUCTION

Bibliothèque et Archives nationales du Québec (BAnQ) would like to thank the Standing Committee on Industry, Science and Technology for extending an invitation to submit briefs for its review of the *Copyright Act* (R.S.C. (1985), c. C-42) (“the Act”).

BAnQ in brief

BAnQ collects, handles, preserves and promotes Quebec’s documentary heritage and a vast general collection for the benefit of current and future generations. It also serves as a major public library for all Quebecers.

BAnQ’s range of services are available to everyone throughout Quebec. These Quebec-wide services are delivered through centres located in Quebec’s various administrative regions as well as remotely. BAnQ is constantly improving and expanding its digital resources and services available on its Internet portal and digital platform.

In keeping with its mission to provide democratic access to culture and knowledge, some BAnQ services are more specialized and are geared to specific audiences, such as teens, business people, newcomers, members of cultural communities, and people with perceptual or other disabilities.

BAnQ and copyright

BAnQ appreciates the importance of copyright and is careful to comply with the *Copyright Act*. BAnQ considers it essential to strike a balance between protecting the rights of authors and providing Quebecers and Canadians with access to their documentary heritage and knowledge. It is in this context that BAnQ issues these recommendations.

RECOMMENDATIONS

1. Term of copyright

BAnQ believes that the current term of copyright protection in Canada, in accordance with the *Berne Convention for the Protection of Literary and Artistic Works*,¹ should not be extended.

Adding 20 years to the term of protection would have a detrimental effect on public access to documentary heritage since the works of thousands of authors, composers and creators would be locked for this additional period. Important collections and archival fonds would not be able to be freely handled and digitized for conservation and public dissemination. A public cultural institution such as BAnQ would be unable to bear the cost of clearing copyright for all these works during this term and would be forced to postpone the digital dissemination of these works for 20 years.

Recommendation 1: Maintain the current term of copyright in Canada.

2. Fair dealing

Since extending the term of copyright seems inevitable following the signing of the *Canada–United States–Mexico Agreement*,² maintaining and improving the exceptions provided for in the Act seems more essential than ever.

In these circumstances, BAnQ believes that the fair dealing exception³ must be maintained in its current form. The addition of education, parody and satire as permitted purposes for fair dealing in the most recent revision in 2012 promotes the transmission of knowledge and the creation of new works. Such a provision benefits library and archive users, including researchers, teachers and students.

Recommendation 2: Maintain the fair dealing exception in its current form.

¹ *Berne Convention for the Protection of Literary and Artistic Works* (amended September 28, 1979).

² Article 20.63 of the *Canada–United States–Mexico Agreement*.

³ Sections 29, 29.1 and 29.2 of the *Copyright Act*.

3. Exceptions for libraries, archives and museums

Of the 191 member countries of the World Intellectual Property Organization (WIPO), 161 have specific exceptions for libraries and archives.⁴ These exceptions are essential to allow libraries and archives to fulfil their missions. From this perspective, BAnQ believes that these exceptions must be maintained and improved, particularly to allow web sampling and digital legal deposit.

Recommendation 3: Maintain and enhance exceptions for libraries, archives and museums.

3.1 Web sampling

Public agencies with a heritage conservation mission such as BAnQ, government archives or libraries should benefit from an exception allowing them to conduct sampling from the Internet, also known as web harvesting.

This exception already exists in section 30.5(a) of the Act, but it only applies to Library and Archives Canada. The absence of such a provision for an institution such as BAnQ impedes the preservation and dissemination of digital-born documentary heritage or documents transferred in this format.

Recommendation 3.1: Add a provision in section 30.1 of the Act to authorize the reproduction and dissemination of samples from the Internet or any other similar media.

3.2 Digital legal deposit

BAnQ is responsible for the legal deposit of all documents published in Quebec for the purposes of collecting, preserving and disseminating all of Quebec's published documentary heritage.⁵ The current state of copyright law poses a number of challenges for implementing legal deposit of digital publications. Unlike paper documents, digital files cannot be handled without being

⁴ Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)*, Geneva, 2017, Standing Committee on Copyright and Related Rights, World Intellectual Property Organization, p. 6.

⁵ The *Act respecting the Bibliothèque et Archives nationales du Québec* (chapter B-1.2) requires publishers to deposit, free of charge and generally in duplicate, any document published in Quebec within seven days of its publication. This obligation is called legal deposit. A publisher who contravenes the legal deposit requirements of the Act is guilty of an offence punishable by a fine.

reproduced within the meaning of the Act. BAnQ has put in place a procedure for obtaining permission from each copyright holder so that, at a minimum, it can carry out the operations required to ensure the long-term preservation and distribution of digital publications. This situation is far from ideal and requires time, energy and considerable administrative management.

In order to encourage the implementation of legal deposit of digital publications, BAnQ should benefit from an exception similar to that found in section 30.5(b) of the Act, which allows Library and Archives Canada to effect the fixation of a copy of a publication that is provided by telecommunication under legal deposit.

Recommendation 3.2: Extend to BAnQ the right to effect the fixation of a copy of a publication that is provided by telecommunication under legal deposit, similar to section 30.5(b) pertaining to Library and Archives Canada.

4. Non-commercial user-generated content

Quebec and Canadian public libraries are renewing and adapting to the digital age. In 2016, BAnQ launched the Square Banque Nationale project,⁶ a digital creation laboratory for young people aged 13 to 17, which will be incorporated into the new BAnQ Saint-Sulpice library⁷ once it opens.

Many of the Square's activities, such as audio and video creation, remixing or glitch art, would not be possible without the non-commercial user-generated content exception.⁸ This exception promotes digital creation and is of undeniable value so that users (young and old) can develop skills to help them become active creators and contributors to our society.

Recommendation 4: Retain the exception for non-commercial user-generated content.

⁶ <http://square.banq.qc.ca/>.

⁷ <http://saintsulpice.banq.qc.ca/>.

⁸ Section 29.21 of the *Copyright Act*.

5. Crown copyright

Section 12 of the Act provides that Crown works (by federal and provincial governments⁹) are protected for a period of 50 years following their publication. When Crown works are not published, the term of protection is perpetual.

This protection is problematic for BANQ since it restricts the distribution and use of thousands of documents in its collections and archives, even when the legislation on access to documents of public bodies and archives¹⁰ provides that these documents must be accessible.

Advocates of maintaining Crown copyright argue that this protection is essential for controlling the integrity and authenticity of content, that it generates revenue and that it prevents private entities from exploiting government works. Others argue that public documents should be freely accessible in a democratic society, that countries without Crown copyright, such as the United States,¹¹ do not face issues of integrity or authenticity of content, that the creation of wealth and heritage through the accessibility of public documents exceeds the benefits that can be generated by the exploitation of works, and that Crown copyright is contrary to the concept of open government put forward by our governments.¹²

In keeping with its mission to provide democratic access to culture and knowledge, BANQ believes that official legislative, administrative and judicial Crown texts should be in the public domain, or at the very least, be subject to limited protection to allow ample opportunities for public dissemination and use.

Recommendation 5: Repeal or revise section 12 of the Act to provide ample opportunities for public dissemination and use.

⁹ *Alberta Government Telephones v. CRTC*, 1989, 2 SCR 225.

¹⁰ *Act respecting access to documents held by public bodies and the protection of personal information* (chapter A-2.1); *Archives Act* (chapter A-21.1).

¹¹ *Copyright Act 1976* (17 U.S.C.).

¹² Nicolas Sapp summarizes the issues well in an article published in 2000 [in French only]: Nicolas Sapp, "Le droit d'auteur de la Couronne à l'ère des nouvelles technologies de l'information," 24th Conférence des juristes de l'État, 2000.

6. Technological protection measures

Technological protection measures (TPMs), also known as “digital locks,” are frequently used to restrict access to a work and control its reproduction.

As libraries and archives are increasingly working in a digital environment, the number of works in collections and archival holdings that can be protected by TPMs is constantly growing.

Under the Act’s current provisions,¹³ libraries, archives and museums are not permitted to circumvent TPMs, even for the purpose of preserving documentary heritage. Therefore, BAnQ cannot carry out the operations required to ensure the long-term preservation and distribution of TPM-protected documents.

This situation has led no fewer than 53 countries to adopt provisions allowing libraries and archives to circumvent TPMs.¹⁴

Recommendation 6: Authorize libraries, archives and museums to circumvent TPMs where uses or manipulations are permitted by the Act, particularly under sections 30.1 et seq.

7. Contractual clauses limiting or excluding exceptions in the Act

Contracts or licences for the acquisition of e-books sometimes contain contractual clauses limiting or excluding the use of the exceptions provided for in the Act. These clauses are often imposed by publishers or distributors through non-negotiable membership contracts.

As a result of these clauses, library users may not be able to handle or reproduce works in the same way as paper-based works.

Several legislatures have limited the effect of this type of contractual clause. For example, Irish copyright legislation provides that

(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.¹⁵

¹³ Sections 41–41.22 of the *Copyright Act* (R.S.C. (1985), c. C-42).

¹⁴ *Supra*, note 4 on page 10.

¹⁵ *Copyright and Related Rights Act, 2000*, s. 2(10).

Recommendation 7: Protect the exceptions provided for in the Act from contractual clauses that may limit or exclude them.

8. Indigenous intangible cultural heritage

Canada is a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples*,¹⁶ which states in Article 31 that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”

BAnQ, as the custodian of part of Indigenous intangible cultural heritage, is particularly sensitive to the importance of recognizing and protecting this heritage.

Copyright in Canada is currently not adapted for the protection of cultural heritage, traditional knowledge and traditional cultural expressions that often cannot be linked to an author because of, among other things, a community-based approach to ownership and a different conception of the temporality of ownership.

Recommendation 8: Pay special attention to the recognition and protection of Indigenous intangible cultural heritage during the copyright review process.

SUMMARY OF RECOMMENDATIONS

1. Maintain the current term of copyright in Canada.
2. Maintain the fair dealing exception in its current form.
3. Maintain and enhance exceptions for libraries, archives and museums.
 - 3.1. Add a provision in section 30.1 of the Act to authorize the reproduction and dissemination of samples from the Internet or any other similar media.
 - 3.2. Extend to BAnQ the right to effect the fixation of a copy of a publication that is provided by telecommunication under legal deposit, similar to section 30.5(b) pertaining to Library and Archives Canada.

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples.*

4. Retain the exception for non-commercial user-generated content.
5. Repeal or revise section 12 of the Act to provide ample opportunities for public dissemination and use.
6. Authorize libraries, archives and museums to circumvent TPMs where uses or manipulations are permitted by the Act, particularly under sections 30.1 et seq.
7. Protect the exceptions provided for in the Act from contractual clauses that may limit or exclude them.
8. Pay special attention to the recognition and protection of Indigenous intangible cultural heritage during the copyright review process.