

To: Canada. House of Commons Standing Committee on Industry, Science and Technology.
From: Amanda Wakaruk, BComm, MLIS, MES, Copyright Librarian

Re: Personal submission, *Copyright Act* review

June 14, 2018

This personal submission puts forth one recommendation, based on evidence gathered from twenty years of professional experience: **Remove copyright protection from government works made available to the public.**

Section 12 of the *Copyright Act*, which pertains to Crown copyright, creates barriers to accessing and using government information. Any necessary controls over government works are now rendered via the provisions of the *Access to Information Act*. Thus, Crown copyright serves no purpose. There is no justifiable rationale for the government to hold economic control over publications that were created to fulfill a government mandate. Economic incentives related to copyright are meant to encourage the creation of new works. The creation of government works is motivated by factors associated with good governance, not economic gain. Indeed, the government's own policies make it clear that economic exploitation of government works is best conducted by private industry.¹

For more than four decades, parliamentarians (e.g., 1985 House of Commons Committee,² MPs in the House of Commons, 1981, 1993³), government employees (e.g., 1981 study,⁴ 1984 white paper,⁵ 2002 report⁶), and academics (e.g., Judge,⁷ Vaver,⁸ Dryden⁹) have recommended that Crown copyright be reviewed or abolished. During the previous review of the *Copyright Act*, the Government of Canada received more than 200 submissions¹⁰ calling for Crown copyright to be abolished. Canada is the only Commonwealth country to retain language that is functionally unchanged from the original wording of the 1911 UK *Copyright Act*.

¹ TBS Policy on Title to IP Arising Under Crown Procurement, s3.3 <http://www.ic.gc.ca/eic/site/068.nsf/eng/00005.html>

² Sub-Committee of the HC Standing Committee on Communications and Culture on the Revision of Copyright recommended that, "Crown copyright be abolished for some categories of materials and that the scope be greatly restricted for other categories." 1985.

³ Waddell, June 12, 1981, page 10545 and Kaplan, June 2, 1993, page 20215, Debates of Canada.

⁴ Torno, Barry. Crown Copyright in Canada: a Legacy of Confusion. Ottawa : Research and International Affairs Branch, Bureau of Intellectual Property, Consumer and Corporate Affairs Canada, c1981.

⁵ Minister of Communications and Minister of Consumer and Corporate Affairs. From Gutenberg to Telidon, A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act. 1984. Excerpt relevant to Crown copyright:

<https://drive.google.com/file/d/0B13VrrzqeRbuNG9KV0hBdGNIMTA/view>

⁶ Industry Canada. Supporting culture and innovation: report on the provisions and operation of the Copyright Act. 2002.

<http://publications.gc.ca/collections/Collection/lu4-19-2002E.pdf>

⁷ Judge, Elizabeth F. "Crown Copyright and Copyright Reform in Canada." in Geist, Michael, ed. In the Public Interest: The Future of Canadian Copyright Law. Toronto [Ont.]: Irwin Law, 2005. https://www.irwinlaw.com/sites/default/files/attached/Three_05_Judge.pdf

⁸ Vaver, David. Copyright and the State in Canada and the United States. 1995.

<https://web.archive.org/web/20100527140536/http://www.lexum.umontreal.ca/conf/dac/en/vaver/vaver.html>

⁹ Dryden, Jean. Rethinking Crown copyright law. Policy Options. 2018.

<http://policyoptions.irpp.org/magazines/september-2017/rethinking-crown-copyright-law/>

¹⁰ Geist, Michael. The Final Copyright Consultation Numbers: No Repeat Of Bill C-61. April 9, 2010.

<http://www.michaelgeist.ca/2010/04/copycon-final-numbers/>

Perpetual, unfettered access to government information is of foundational importance to a functioning democracy. Intentional and unjustified barriers to government information bolsters the democratic deficit. The barriers created by potential Crown copyright enforcement are especially egregious given the current Government of Canada commitment to Open Government and being “open by default.” What is open about “all rights reserved” protections for publicly funded works that are freely accessible online? The ephemeral nature of web content combined with the spurious and at times maximalist interpretations of section 12 by some government employees have resulted in the loss of government works that could have served current and future scholars, journalists, researchers, and citizens.

My professional work experience with government information began in 1998, when I was employed in the Government Information Division at a large urban public library. In this role I helped patrons identify, locate, and interpret government reports, parliamentary documents, and publications. It was easy to see the value in these resources, but difficult to explain to self-employed contractors why they could not copy federal standards or building codes. If their taxes paid for these resources and they were required, by law, to follow them then why could they not copy them in support of their livelihood? Twenty years later, this remains a question without a satisfactory answer.

In the early 2000s, I found myself working as a government information librarian at a large, comprehensive university in Ontario, where I helped faculty members and students identify, locate, and interpret government data sets, research papers, legal documents, and publications. It was easy to see the value in these resources, but difficult to explain why they sometimes disappeared from government websites and were no longer available in paper. When the federal election was called in 2004, access to MPs’ official (parl.gc.ca) websites was removed. A professor with whom I was working had been using a report linked from Toronto MP Sarmite Bulte’s site, titled, “Prime Minister’s Task Force on Women Entrepreneurs.” This report was being used both in class and as a resource for a major government-funded research project. After making a few phone calls, copies were sent to the constituency office for me to pick up in person. To this day the report is not held by Library and Archives Canada or the Depository Services Program and is only available online via a US-based NGO that hasn’t updated their website in more than a year. I was not given permission to make additional copies or provide online access to a digital copy of this report for educational or research purposes. Put another way, I was prevented from acting as a steward for this cultural work and, as a result, the digital version is now classed as “at risk” and the print copy as “fugitive” in the language of government information librarianship. In fact, this type of work falls outside the parameters of either federal program noted above, but because it was accessible on a parl.gc.ca domain Crown copyright was assumed.

Unfortunately, confusion around Crown copyright is longstanding and the shift to digital publishing has only served to exacerbate the issues. Specifically, programmatic changes without adequate support as well as misinterpretation and misapplication of the provision have undermined the longstanding role of academic librarians as stewards for government information. This threatens both Canada’s cultural record and the ability of Canadians to assess their governing bodies.

In the late 2000s, I began working in a library at a large research university in Alberta, where I provided an annual guest lecture for a Native Studies research course that drew on 19th-Century survey reports documenting interactions between Cree peoples and government surveyors. One year, a student sought me out a few weeks after the lecture to explain how reading those documents and the resulting discussion had inspired her to pursue a career in law focused on issues related to aboriginal land rights. I introduced her to the Royal Commission on Aboriginal Peoples, but we were unable to access the related (350) academic research reports because the federal government had made them available in 1997 via a CD-ROM that ran on an operating system that was obsolete a few years after its release. Furthermore, the copyright on the CD-ROM was held by a private company that had since dissolved. Multiple exchanges with both the company's former president (who wanted to help us but was unsure about Crown copyright restrictions on the underlying works) and the federal government about this copyright issue led nowhere. It was almost ten additional years before a government agency made those works available to the public, in 2018. Academic libraries were willing and able to preserve and provide access to these resources a full twenty years prior to the Government of Canada but were hampered by copyright overreach. It is unclear how copyright protection of government works serves the public good.

One of the ways librarians serve the public good is by acting as stewards for cultural works, so that future generations can learn from and build upon them. In the current context, this includes harvesting and preserving web-based born digital and digitized government information. Libraries were developing these preservation and access systems decades before the Government of Canada announced a move to digital publishing, removed masses of un-archived web content, and closed the the Crown Copyright Licensing unit... all without first implementing a digital preservation plan.¹¹ In an effort to prevent web content losses, academic librarians across the country attempted to capture government websites prior to their removal. In some cases institutional policies required that librarians first ask the rights holder for permission; these requests were sometimes denied by government employees, who cited Crown copyright restrictions.¹² Content losses are difficult to calculate,^{13,14} although it's clear that deleted government notices, speeches, and publications have hampered the work of academics¹⁵ and journalists.¹⁶

¹¹ Wakaruk, Amanda. "What the heck is happening up north? Canadian federal government information, circa 2014." DTTP. 42.1 (Spring 2014) pp 15-20. <https://era.library.ualberta.ca/items/8fcea4f89-6fd6-41e4-a653-5fd592545f1f>

¹² See slides titled, "Federal Government Correspondence" in the presentation, Wakaruk, Amanda. "Heavy is the head that wears the crown (copyright)." Kingston, Ontario. ABC Copyright Conference. June 29, 2017. <https://doi.org/10.7939/R3WH2DT50>

¹³ McNally, Wakaruk, Davoodi. Rotten by Design: Shortened Expiry Dates for Government of Canada Web Content. Proceedings of the Annual Conference of CAIS, 2015. <https://journals.library.ualberta.ca/ojs.caais-acsi.ca/index.php/cais-ascii/article/view/909/817>

¹⁴ Wakaruk, McGoveran, and Lake. "Here today, where tomorrow? Monitoring and making sense of Government of Canada web content changes in a post-depository environment." Ottawa. Canadian Library Association Annual Conference. June 4, 2015. <http://hdl.handle.net/10402/era.41980>

¹⁵ See Discussions and Conclusions in, "McNally, Rathi, Evaniew, and Wu. "Thematic Analysis of Eight Canadian Federal Broadband Programs from 1994-2016." Journal of Information Policy, 7: 38-85. 2017. <http://www.jstor.org/stable/10.5325/jinfopoli.7.2017.0038>"

¹⁶ Petrou. "Jason Kenney's speech to Islamic Society of North America removed from government (and personal) websites." Maclean's. Jul 18, 2013.

<https://www.macleans.ca/uncategorized/jason-kenneys-speech-to-islamic-society-of-north-america-removed-from-government-and-personal-websites/>

Crown copyright was also cited as one of the reasons more than 170,000 federal government publications were deemed incompatible with an Open Government Licence and removed from the Open Government Portal in 2016.¹⁷ As I write this submission, a mere 278 publications (out of potentially more than one million) are in the Open Government Portal. Furthermore, terms of use on Government of Canada websites are inconsistent and confusing, placing the onus on the user to obtain legal opinion related to relying on exceptions and restricting uses to non-commercial purposes. Most PDFs of this same content clearly state that Crown copyright is in force, that “all rights are reserved” and that “all requests for permission to reproduce this document or any part thereof shall be addressed to the Department of...” How does this fulfill the goals of Open Government? Crown copyright is clearly antithetical to the aims of Open Government, as it establishes a mechanism for unnecessary controls over access to and the use of government information.

The issues described above informed the House of Commons e-petition on Crown copyright,¹⁸ which was tabled in the House of Commons on October 20, 2017. The petition asked parliamentarians to add section 12.1 to the *Copyright Act* as follows, “12.1 Works noted in section 12 are no longer protected by copyright upon being made available to the public.” Almost 1,500 Canadian citizens and residents from all provinces and territories signed the petition. In addition, I heard directly from supporters in the private and government sectors.

Government publications should be made available to the public without copyright protection as such protections are no longer relevant and present real barriers to scholarship, journalism, and democracy. I ask the Committee to address the issue of Crown copyright as part of their work during the current review of the *Copyright Act*.

“Crown copyright comes from and is justified by a particular non-democratic conception of government.”¹⁹

¹⁷ Compare publications available in 2016 <https://web.archive.org/web/20160424031901/http://open.canada.ca:80/vl/en/doc> with publications available today https://open.canada.ca/data/en/dataset?portal_type=info&q=

¹⁸ See <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-1116> and <http://www.fixcrowncopyright.ca>

¹⁹ Vaver, David. *Copyright and the State in Canada and the United States*. 1995.

<https://web.archive.org/web/20100527140536/http://www.lexum.umontreal.ca/conf/dac/en/vaver/vaver.html>