

Archives and Copyright in Canada: An Outsider's View

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Copyright is a private property right which, in Canada, arises automatically when a work is created by a Canadian citizen or by a national of a country with which Canada has an international agreement.¹ The copyright owner is deemed to be the author or his assigns. Canada's domestic copyright law is "the legal expression of the rights granted by Parliament to a creator to protect his work."² What is protected is the work itself; not the ideas, but the unique expression of those ideas whether published or not. In unpublished written or printed works, the copyright holder's privileges are often called his literary rights. Whatever the medium, the rights which are protected are the publication, performance, and reproduction of the work or any significant part of it. Infringement refers to the unauthorized exercise of any of the exclusive rights of the copyright owner, the act of dealing in or with infringing copies, and the authorization of any act which amounts to infringement.

Canadian copyright law protecting Canadian creators' rights was first expressed in a Lower Canadian statute of 1832. At Confederation, the British North America Act conferred exclusive jurisdiction over copyright to the federal government. The most recent Copyright Act which took effect in 1924 was modelled on the British law of 1911 and differed significantly from the 1909 American law.³ Although revised versions of these British and American acts finally came into force in 1956 and 1978 respectively,⁴ the 1924 Canadian law still remains virtually unchanged. Although resisting revision for over half a

1 Canada is currently bound by two international agreements: the 1928 Rome Text of the Berne Convention and the 1952 text of the Universal Copyright Convention. The major thrust of both documents is to provide minimum standards of copyright and to guarantee that signatory nations provide the same protection for foreign nationals covered by the conventions as they do for their own citizens. These agreements therefore restrict the degree of flexibility that can be called upon in any revision of Canadian law. Nevertheless, provided proposals do not transgress the two conventions, neither is central to the issue of copyright in Canadian archives.

2 A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (n.p.: Consumer and Corporate Affairs Canada, 1977), p. 3.

3 Jean E. Dryden, "Copyright in Manuscript Sources," *Archivaria* 1 (Winter 1975-76): 39.

4 The U.K. act is the Copyright Act, 1956 (4 & 5 Eliz. 2 c. 74); the American statute, Public Law 94-553, formerly Revision Bill S-22.

century, the current Act (RSC 1970, c.30) has long been criticized by the archives community as “vague, inadequate, and incomprehensible”.⁵ While use of archival materials is rapidly accelerating, the statute’s handling of unpublished documents is “unclear and open to argument”.⁶ Nowhere, in fact, does the Act specifically mention archival holdings such as letters and diaries, referring instead to “literary work[s]. . .whatever [their] mode or form. . .of expression.”⁷ Photocopying and microform reproduction, new technologies which can facilitate the archivist’s task of preservation and diffusion, are only covered by applying sections of the Act designed for the era of hand-copying. New mediums such as sound recordings and photographs produced by means other than wet chemistry are not even mentioned. Just as important is a new perception that copyright ought to do more than protect an author’s economic and creative rights. As the Economic Council of Canada stated:

it must also be recognized that technological and other developments are rapidly increasing the . . .*general* public interest in the total information system and everything associated with it, including copyright. This general interest, embracing such matters as the desirability of maintaining ready, low-cost public access to information and minimal interference with the many complex processes by which human beings exchange . . .information. . .should be adequately reflected in federal government policy-making.⁸

More concisely, there is another side of copyright which has previously been neglected:

Just as a copyright proprietor and his heirs have the right to own and control their copyrighted property, so the public has the right to know. . .⁹

To this principle may be added a new awareness of the role of copyright in fostering national cultural development by encouraging creativity, scholarship, and publication.

Official recognition that copyright issues had outgrown the current law began after World War II. In 1957, the Ilsley Commission, formally established three years earlier as the Royal Commission on Patents, Copyright, Trade Marks and Industrial Design, tendered its *Report on Copyright*. Because the law is so complex and affects the interests of authors, their heirs, publishers, archivists, librarians, scholars, and the public, revision calls for the skill of a circus juggler. Governments are less than agile, and nothing came of the Ilsley Commission’s suggestions. In 1971, the Economic Council of Canada approached the problem with more modest goals. Although influential in later studies, its *Report on Intellectual and Industrial Property* merely posed the policy issues which would have to be considered in revising the law. Since then,

5 Dryden, 39.

6 *Ibid.*, 40.

7 The Copyright Act, in *Ibid.*, 41.

8 Keyes and Brunet, 144-145.

9 R.H.S., “A Copyright Commission in the Public Interest?” *Publishers’ Weekly* 199 (17 May 1971): 35.

the Bureau of Intellectual Property of the Department of Consumer and Corporate Affairs has been hard at work on concrete proposals. In April 1977, its efforts bore fruit when A.A. Keyes and C. Brunet published their working paper, *Copyright in Canada: Proposals for a Revision of the Law*.

The Copyright Committee of the Association of Canadian Archivists (ACA) responded to the Keyes-Brunet report in early 1979.¹⁰ Though it represents a start, one twelve-page paper is not sufficient to alert the Canadian archival and scholarly communities to the implications of revision. Yet one report is virtually all they have. Few of the discussions on copyright revision have focused on specifically archival issues, namely that these materials are usually unique, unpublished works, frequently by authors long dead, often never intended for publication, and thus less affected by profit considerations than the works of commercial authors. What articles there are in archival journals are usually British or American. Those in U.S. publications are frequently outdated as it is only since 1978 that American unpublished documents have been covered by statutory copyright.¹¹

This paper is an attempt to broaden the debate. Concentrating on the problems the ACA identified as important—those dealing with unpublished printed documents and, to a lesser extent, unpublished non-print media such as photographs and sound recordings—the paper outlines the current legal situation and the Keyes-Brunet proposals. It then assesses them in the light of the ACA's own recommendations and recent British and American legislation. The goal is a clearer understanding of the major copyright issues affecting Canadian archives and some suggestions that respect the rights of the author or his assigns while furthering the public's access to information.

DURATION

Section 6 of the Canadian Copyright Act states:

In the case of a literary, dramatic or musical work in which copyright subsists at the date of the death of the author. . .but which has not been published. . .before that date, copyright shall subsist until publication and for a term of fifty years thereafter. . .¹²

According to Keyes and Brunet, this section covers not only professional authors but also the letters, diaries, and memos of non-professional writers; in short, "any work of archival value".¹³ Thus, copyright on written archival materials produced by private citizens currently subsists in perpetuity, provided the work remains unpublished.

Because copyright persists indefinitely, researchers are free to study the documents deposited in an archives, but they cannot legally quote or photocopy them unless they are prepared to trace each copyright owner. Such a situation clearly places impediments in the path of scholarship. This, in turn, retards the country's cultural development. Even those who view copyright as a

10 See its *Response to the Working Paper on Copyright* (n.p., n.d.).

11 Literary property was previously protected under common law copyright.

12 The Act, in Dryden, 43.

13 Keyes and Brunet, 64.

way of nurturing Canadian creativity through protection of an author's right to profit by his work find the situation absurd. As the American copyright expert, Melville B. Nimmer, argues: "Economic encouragement of creativity. . . does not seem to require. . . perpetual protection".¹⁴ Others have backed his stand: "An author is likely to write whether or not his heirs are assured of benefiting from any of the fruits of his labors."¹⁵ Keyes and Brunet agree with these critics:

The works of professionals are generally in the hands of people who wish to exploit pecuniary rights and therefore these works will usually be made available. Such is not necessarily the case, however, with letters, diaries, and manuscripts. . . [A] balance must be sought between the desire of owners to protect and exploit their material and the desire of researchers and historians to gain access to, and use of, copyright material.¹⁶

They therefore propose that copyright in unpublished literary material produced by private individuals ought to subsist

until publication. . . and for 50 years thereafter, but that the total term of protection not exceed 75 years after the death of the author, or 100 years after his death where the work has been deposited in an archives.¹⁷

For unpublished anonymous and pseudonymous works, the terms of protection are to be based on the date of the work's creation since it is self-evidently impossible to determine the death rate of an unknown author.

According to the authors of *Copyright in Canada*, some writers have suggested broadening the definition of publication which the current Act defines as "the issue of copies. . . to the public".¹⁸ Under a broadened definition, an individual who deposited his papers in an archives would be deemed to have published them.¹⁹ Since published works enter the public domain fifty years after their publication, such a revision has immediate appeal. On deeper reflection, the current definition seems wiser. In the first place, the fact that a public-minded copyright holder would actually set in motion the process by which he would forfeit the legal right to his documents is not calculated to encourage donations. Moreover, the broader definition merely forces the archivist from the frying pan into the fire. Although he would be entitled to receive papers written by the donor, few individuals have authored every document in their possession. As a result, the archivist who accepted documents not written by the donor himself would be guilty of publishing them without the consent of their author or copyright owner and thus be liable for infringement of the law. Neither the ACA nor Keyes and Brunet have explicitly recognized these problems, but both have steered clear of any new definition of publication.

14 Melville B. Nimmer, in Karyl Winn, "Common Law Copyright and the Archivist," *American Archivist* 37 (July 1974), 385.

15 Winn, 385.

16 Keyes and Brunet, 64.

17 *Ibid.*, 65.

18 The Act, in Dryden, 41-42.

19 Keyes and Brunet, 174.

If the ACA is willing to fall in with Keyes and Brunet on this matter, it does disagree with them on another. Although the archivists welcome any limitation on the duration of copyright, the ACA Copyright Committee objects to the Keyes-Brunet proposal on two grounds. The first criticism is directed at the recommendation that copyright subsist for an extra twenty-five years when papers have been placed in an archives. According to the ACA, Keyes and Brunet have confused access limitations with copyright restrictions. For example, Keyes and Brunet claim that people who deposit material in an archives

are probably encouraged by the assurance that their works will remain undisclosed until the expiration of a given period. Should the term of protection be drastically reduced, copyright owners might well destroy their works. . .²⁰

If protection of privacy is at issue, the problem should be resolved by access restrictions for a term that suits the donor, not blanket copyright extensions. From another perspective, it “seems unreasonable to argue that the rights of copyright holders [i.e. the author or his assigns] should be enhanced by the actions of [the donor, i.e.] a person who in many cases is an unaffected third party”.²¹ The archivists also argue that the proposal is unnecessarily ambiguous. Not only would it be necessary to define an “archives” but also what constituted deposit in an archives. Imagine that an individual sent a letter to his lawyer, a copy to his brother, and kept a copy himself. If one of the copies were eventually placed in an archives, but the others remained in private hands, when ought copyright to lapse? If a donor gave his papers to a repository for copying and then kept either the copy or the originals, would the papers have been “deposited” in an archives?²² The fact that the new American law and the British statute make no distinction for items placed in an archives suggests that it would be much simpler to leave out this part of the recommendation.

The ACA’s second objection is that the seventy five year copyright after the author’s death is too long. Apparently, Keyes and Brunet’s only rationale for this figure is that the traditional method of counting generations is in twenty five year intervals, and seventy five years guarantees the passage of three generations before a document enters the public domain.²³ If the seventy five year figure is not sacrosanct, then the American statute’s protection of unpublished works for life plus fifty years makes just as much sense. Thus, the ACA’s recommendation that

Copyright on unpublished writings should subsist for the life of the author and for a maximum of 50 years after his or her death, whether or not the material has been placed in an archival repository²⁴

seems sounder than the Keyes-Brunet proposal. There is, unfortunately, still

20 *Ibid.*, 64.

21 *Response to the Working Paper on Copyright*, 4.

22 *Ibid.*, 3.

23 Keyes and Brunet, 65.

24 *Response to the Working Paper on Copyright*, 4.

one flaw. Like the authors of *Copyright in Canada*, the Association of Canadian Archivists has failed to make any provision for assuming the death date of an author whose death has not been publicly recorded.

The duration of copyright in unpublished works produced by the government is also problematic under the current statute. Section 11 of the Act reads as follows:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall . . . belong to Her Majesty and . . . continue for a period of fifty years from the date of the first publication of the work.²⁵

At first glance, it seems that the Act's intent is to limit the government's exercise of copyright to fifty years; but, as Keyes and Brunet point out, by preserving the Crown's prerogative, it is not clear whether the government is even bound by the Act. As a result, work produced by government departments, whether published or unpublished, may be protected either permanently or at the whim of the Crown.²⁶ Keyes and Brunet propose to clarify the situation by making the Crown explicitly subject to the Act. Should the government wish to retain prerogatives to protect itself from the misuse or distortion of its documents, then the new Act would include an exhaustive list of items covered by this privilege. Although the Association of Canadian Archivists supports this proposal, its special concern for internal reports and memoranda which may never be published has prompted it to propose tightening up the statute even further. Any new legislation it approves would provide "a statutory time limit of 50 years after creation of the materials for Crown copyright on unpublished materials".²⁷ The Copyright Committee further suggests that "officers who are authorized to control Crown copyright should be clearly specified. . . ." ²⁸

This latter provision is eminently sound since it ensures that researchers who wish to reproduce copyrighted government materials would at least know whom to approach for permission. The other recommendation may not go far enough. Although the British Act provides perpetual copyright for unpublished government works,²⁹ Section 105 of the new American law legislates that copyright protection is unavailable for any work produced by the U.S. government or its officers acting in their official capacity. The rationale behind this provision is that documents prepared at public expense belong to the people. Although the Canadian government's reputation for secrecy means it would be unlikely to enact such a clause, there is no reason why the Canadian archivists ought not to go on record as supporting the principle.

Though deeply concerned with the duration of copyright in unpublished government and private papers, the ACA's Copyright Committee has been

25 The Act, in Keyes and Brunet, 223.

26 Keyes and Brunet, 223.

27 *Response to the Working Paper on Copyright*, 11.

28 *Ibid.*

29 P.F. Carter-Ruck and E.P. Skone James, *Copyright: Modern Law and Practice*, (London, 1965), p. 175.

strangely reticent concerning the issue of corporate records, merely agreeing with the Public Archives of Canada that copyright should subsist for one hundred years after their creation.³⁰ Keyes and Brunet do not even address the issue. Although the ACA may have had valid reasons for proposing this time period, it leaves them to the imagination of the reader. What is clear is that the discrepancy between the fifty year limit proposed for government records, the fifty year or seventy five to one hundred year proposal for private papers, depending on which group is speaking, and the one hundred year copyright for corporate records does pose a clear frustration to scholarship. Private papers frequently complement government records, and corporate documents dovetail with public and private sources. Under the proposed revisions, a scholar studying a recent individual active in both government and business would be free to study the whole range of documents relating to his subject. But, should this researcher follow the path of scholarly activity to its end product, he might find that the private and business papers which combine with the records of the subject's government activity for a full picture of the man were still protected by copyright. If the copyright holder chose to prevent their publication or quotation, the scholar would find himself with a publishable interpretation he could not fully document in published form.

With regard to unpublished sound recordings, the ACA is more perceptive. The current Copyright Act affords no protection to this medium. Keyes and Brunet propose that Canada reject the complex provisions of the American law which protects the recording for the life of the author plus fifty years, or seventy five years from its issue to the public, or one hundred years from its creation, whichever comes first. Instead, it favours following the simpler British system where copyright is vested in the maker of a recording or the person who commissioned it for fifty years after it was made.³¹ The ACA concurs but wisely adds that in order to protect interviewees from exploitation:

Some protection of the rights of persons interviewed in oral history recordings should also be provided in any revised Copyright Act.³²

The duration of copyright in photographs also affects the archivist and researcher. In this case, Keyes and Brunet sacrifice the interests of both these groups to their desire for a law which treats all artistic works consistently. In pursuit of the elusive goal of a "simple law",³³ the authors of *Copyright in Canada* recommend that the duration of copyright in photographs be extended from fifty years after making the original negative, as in the current law, to fifty years after the death of the author.³⁴ According to the ACA, the death date of the author is more difficult to establish than the date the photograph was produced.³⁵ As a result, the question of whether a photograph were still under copyright would only be confused to the detriment of scholars and archivists alike. The Copyright Committee therefore proposes that the present law be retained; that is, that copyright should extend "50 years after the making of the

30 *Response to the Working Paper on Copyright*, 4.

31 Keyes and Brunet, 84-85, 89.

32 *Response to the Working Paper on Copyright*, 5.

33 Keyes and Brunet, 66.

34 *Ibid.*

35 *Response to the Working Paper on Copyright*, 4.

original negative.”³⁶ Though more sensible than the Keyes-Brunet recommendation, the ACA solution has failed to recognize one fact that the other proposal did take into account: that photographs are no longer produced only by means of a negative. Should the ACA’s wording be accepted, the provisions for photographs would be outdated before the new act was passed.

OWNERSHIP

The second aspect of copyright in photographs concerns the ownership of copyright. Under the current act, copyright is vested in the owner of the negative or the person who ordered the plates. Keyes and Brunet suggest that the wording be changed to the owner of the “material on which the photograph is taken”³⁷ in order to cover situations where the negative technique has not been used. They also suggest that the relevant consideration is not who ordered the plates but whether the work was commissioned. The “ownership of the copyright in any commissioned work” ought accordingly to be “vested in the person commissioning the work, in the absence of an agreement to the contrary.”³⁸

The archivists claim that both these recommendations are “unnecessarily complicated”.³⁹ According to the ACA, the person owning the material on which the photo was taken is likely to be either the photographer or the person commissioning the work. Such an argument seems reasonable, and Keyes and Brunet might reconsider whether they could not avoid their clumsy wording and by-pass the issue of negatives altogether by vesting copyright in either of these two people. The archivists further argue that it might be difficult to establish who owns the rights to a photograph since it would not be an easy matter to discover whether a given work had been commissioned.⁴⁰ Unfortunately the Copyright Committee has no alternatives to offer. According to Keyes and Brunet, making the creator the first copyright owner in all cases is no solution since this would result in a spate of contracts incorporating clauses where the photographers signed their rights away to their employers or the people who commissioned the work.⁴¹ Ferreting out this kind of contract cannot be any easier than finding out whether the photograph was commissioned. Unless the ACA can develop a better solution, researchers and archivists may just have to live with one headache or another.

The question of copyright ownership also touches on literary works. No one disputes that the creator is first owner of copyright, but Keyes and Brunet do not recognize that this fact causes problems for archivists and scholars who wish to quote from or publish materials still protected by copyright. If the repository owned the copyright, then gaining permission to use works by donors who have died would be a simple matter. As it now stands, each researcher must establish whether the author’s will contained any provisions regarding copyright. If not, he must consult the author’s children, or, if they too have

36 *Ibid.*, 6.

37 Keyes and Brunet, 71.

38 *Ibid.*

39 *Response to the Working Paper on Copyright*, 5.

40 *Ibid.*

41 Keyes and Brunet, 71.

died, each of their children, any of whom could prohibit publication or quotation. Because few researchers can afford the time or money, a strict respect for copyright would lead to a reduction in scholarship. Jean Dryden has suggested a partial solution to the problem, provided that the donor of the material is also its author and thus the first owner of copyright. Under Dryden's proposal, the donor-author would sign an agreement relinquishing his literary rights to the repository at the time of the donation.⁴² Such a stipulation would not likely be popular in situations where the archives had solicited the donation. After years of wooing a donor, the archivist could only be reluctant to risk scaring the prize away by suggesting the assignment of literary rights. Nevertheless, the solution is reasonable for unsolicited donations of an author's own works. In either case, it seems that the archivist who adopts this course of action ought also to accept the obligation of ensuring the donor is made aware of the rights he is signing away.

Unfortunately, the problem of copyright ownership in archival materials is seldom as simple as generally suggested in this paper. To elaborate on the distinction raised by the issue of a broader definition of publication, take the case where John Doe, or his assigns, holds the copyright to his own papers. An archives may maintain physical possession of the collection, but neither Doe nor the repository has control over copyright in his correspondents' letters and papers, even if these form a substantial part of the John Doe collection. In the case of a collection containing several hundred letters written to Doe over a period of years, there could easily be several hundred different copyright owners. To complicate the matter further, if the John Doe collection were in a state of disarray when accessioned, and some of the papers he accumulated were unsigned, it might be difficult to determine who the author or first copyright holder of any one particular paper was. Keyes and Brunet do not adequately deal with this problem, merely suggesting in general terms that problems relating to copyright in archival materials ought to be resolved by contractual arrangements with the copyright holder.⁴³ The response of the archivists was brief and to the point:

If Keyes and Brunet really mean that archival repositories should establish an enormous bureaucracy to seek out, and sign contracts with, every copyright holder. . . then the recommendation is manifestly absurd.⁴⁴

There is one solution which would avoid the time-consuming task of tracing scores of copyright holders and also deal with recalcitrant owners who refuse permission to quote from their property. Under it, scholarly publishing would be exempt from the provisions of the Copyright Act. Such a solution would not deny copyright holders' rights, only circumscribe them. As a result, some of the barriers to scholarship would be lifted and the nation's cultural development furthered. Ideal as it might sound to the scholarly community, such a proposal is unlikely to win the support of those revising the Canadian law. In the first place, such a blanket exemption prevents copyright holders from financially benefitting from publication of all or part of their literary property.

42 Dryden, 44-45.

43 Keyes and Brunet, 174.

44 *Response to the Working Paper on Copyright*, 9.

It also takes control of this property out of their hands and turns it over to the writers and publishers of scholarly works. Although most of the people who hold copyright in archival works are merely the heirs or assigns of the author and not the author himself, diminishing their rights still weakens the very principles on which copyright is founded. Such legal and moral rights are not sacred. If they were, proposals for substantial revision would be pointless. Nevertheless, if there is a way to minimize this deterioration, such an option must be preferred. The British have the makings of a sensible solution to the problem. According to Section 7(6) of the Copyright Act, it is legal to publish a work which incorporates all or part of an unpublished work where the owner of copyright is unknown provided notice is given in accordance with Board of Trade regulations prior to publication.

Such a system could be applied in Canada by requiring public notice of intent to quote or publish. If the copyright owner did not step forward, then the scholar could proceed to a copyright commission. This tribunal, composed of a jurist and one representative each of the users and copyright holders would then decide whether it were in the public interest to publish or quote the documents. Such a commission could also act as a court of last resort for scholars denied the right to use an author's papers by some intransigent literary executor. Should the right of publication or quotation be granted, the publisher would be levied a fee payable to the copyright holder. The estate would have the option of judicial appeal.⁴⁵ What constituted the public's interest would have to be determined, but a tribunal system would limit the rights of copyright holders less severely than a general exemption at the same time as it provided a better balance between their rights, the public's right to know, and the goal of national cultural development.

Until some solution to the problem is enacted, the scholar, the publisher, and the repository which aids and abets infringement can only serve scholarship if they continue to flout the law. Fortunately, there is not one instance up to 1961 in the United States where unlawful use of a correspondent's copyrighted letters led to a court case for damages.⁴⁶ Although copyright holders are becoming more militant,⁴⁷ one archivist, at least, still feels that the risks remain small if reasonable caution is exercised.⁴⁸

FAIR DEALING

The final area of copyright revision which affects archival activity is a huge one reaching out from photocopying and microform reproduction to the related topic of fair dealing and, once again, the question of general copyright exemptions for archives. Based on the principle of protecting the work itself and not the ideas contained in it, Section 3(1) of Chapter C-30 of the *Revised*

45 Adapted from "A Copyright Commission in the Public Interest?", 35.

46 Winn, 383.

47 See, for example, the *Estate of Hemingway v. Random House* where Ernest Hemingway's widow sought damages for publication of A.E. Hotchner's *Papa Hemingway* which was based on unpublished taped interviews with the novelist. For comments on this case, see Paul M. Morley, "Common Law Copyright in Spontaneous Oral Conversation," *William and Mary Law Review* II (Fall 1969): 254-255.

48 Winn, 382-3.

Statutes of Canada says that copyright includes “the sole right to produce or reproduce the work or any substantial part thereof in any material form”. Though not mentioned specifically, photocopying and microform reproduction clearly fall under this section. The Act also considers it a direct infringement to perform any act which only the copyright owner has the right to do, regardless of whether the person taking the action had knowledge that copyright subsisted. Accordingly, the archives is legally responsible for any photocopying of copyrighted items it duplicates for patron use.⁴⁹ The only way in which an archives might hope to extricate itself is by taking refuge in Section 17(2)(a) which says that fair dealing “with any work for the purpose of private study, research, criticism, review, or newspaper summary” does not constitute an infringement.

Unfortunately, an archives that tries to claim fair dealing runs into three roadblocks. In the first place, under Canadian law, fair dealing is not a right but can only be used as a defence in court if a person or institution is charged with infringement. In the second place, whether the amount copied can be deemed “a substantial part” of a work is something only the courts can decide after an alleged infringement on a case by case basis. The most serious obstacle is that H.G. Fox, a Canadian copyright expert, and Keyes and Brunet both agree that fair dealing is currently not an acceptable defence in any case involving unpublished material.⁵⁰ The legal authority they cite for this opinion is *British Oxygen Co. Limited v. Liquid Air Limited*:

In this case, a letter from British Oxygen Co. to a customer was obtained by Liquid Air Limited. The latter had several copies prepared, and sent one copy, together with a letter criticizing it, to a firm of stockbrokers. The objective of Liquid Air Limited was to discredit a commercial competitor. The legal decision was that Liquid Air Limited had infringed copyright and that the defence of ‘fair dealing’ for the purpose of criticism was not acceptable in this case.”⁵¹

One of the central arguments included in the judgment was that it “would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary.”⁵² The same restrictive approach characterizing this decision resurfaces in the issue of copyright exemptions, for under the current Act, there are no statutory exceptions made for archives.

Keyes and Brunet do not propose any specific changes regarding copyright. Instead, they recommend that photocopying be exempt from any stated statutory provisions and that the new Copyright Act encourage the formation of collectives so that copyright owners can protect their interests. These collectives would be private organizations which would accept the assignment of creators’ rights, collect the royalties paid for copying privileges, and pass the payment on to the copyright owners.⁵³ With reference to fair dealing, Keyes and Brunet suggest that it is so difficult to define its scope that any new act

49 Keyes and Brunet, 176.

50 *Response to the Working Paper on Copyright*, 5.

51 *Ibid.*, 6.

52 *Ibid.*

53 Keyes and Brunet, 164-165.

ought merely to state the general principles and let case law develop a working definition. They do add that whatever definition of fair dealing emerges, it ought to apply to all materials protected under the Act, including unpublished works.⁵⁴ *Copyright in Canada* does recommend that archives be permitted to copy material in order to preserve works that are damaged or deteriorating but that no other statutory exemption be allowed.⁵⁵

The Keyes-Brunet proposals are a step in the right direction, but the Association of Canadian Archivists has wisely recognized certain weaknesses inherent in them. Although it accepts the principle of copyright collectives, the ACA points out that archivists ought to be consulted regarding their workings.⁵⁶ The Association's concern over the detail of the collectives is warranted. Since many archival materials such as memoranda have little economic value when compared to the manuscript of a novel, it is likely that many copyright holders would not bother to make arrangements with such a body. It therefore behooves the archivists to press for a clarification of the status of copyrighted items whose rights have not been turned over to the collectives. The archivists further point out a flaw in the wording of the proposal that photocopying be allowed for preservation. By recommending this conservation activity only when the material is "deteriorating or damaged",⁵⁷ Keyes and Brunet risk losing all or part of a unique document; for once deterioration begins, the original is permanently damaged.⁵⁸ The ACA does agree with the Keyes-Brunet suggestion of extending fair dealing to unpublished works, noting that the British Oxygen Company case was a situation where commercial gain was involved, not research and private study. It therefore does not seem appropriate to the ACA to apply this precedent to archival situations.⁵⁹ With reference to the Keyes-Brunet preference for an evolving definition of fair dealing, the archivists point out that there have been few legal decisions relating to unpublished materials. Consequently, it could take years for a pattern to emerge in case law.⁶⁰ Until it did, archivists would continue in limbo.

Although their criticism is sound, the archivists have once more missed an opportunity to press for a liberalization of Canadian law. Under the new American code, fair use is defined, not as a defence, but as the

right to use copyrighted materials in a reasonable manner without the copyright owner's consent. In fact, the new law specifically stipulates that the doctrine of fair use is a limitation on the copyright owners' exclusive rights to the works.⁶¹

If adopted in Canada, such a liberal interpretation of fair dealing might also open the door to a greater number of copyright exemptions for archival institutions.

54 *Ibid.*, 148-149.

55 *Ibid.*, 175.

56 *Response to the Working Paper on Copyright*, 9.

57 Keyes and Brunet, 175.

58 *Response to the Working Paper on Copyright*, 10.

59 *Ibid.*, 6.

60 *Ibid.*, 7.

61 Henry P. Tseng, *New Copyright U.S.A.: A Guide for Teachers and Librarians* (Columbus, OH: 1979), p. 251.

Keyes and Brunet present a number of reasons why they sponsored the minimum encroachment on copyright, their strongest argument being that "the labourer is worthy of his hire, that compensation should be in proportion to use, and that each user should pay his fair share."⁶² They further add that exemptions for archives or libraries amount to forcing one group to subsidize another. Keyes and Brunet then argue that

Copyright deals with the rights of authors first and not with the cultural objectives of society as manifested in any policy concerning the preservation and archival storage of copyright works. The existence of such a policy presupposes certain value standards. . . such as "scholarly value" in terms of the choice of works to be preserved. Such a subjective criterion is impossible to incorporate into a Copyright Act.⁶³

And finally, the authors of *Copyright in Canada* point out the restrictive stance taken by the British law which provides that unpublished works in archives may only be copied if more than fifty years have elapsed from the end of the calendar year in which the author has died and more than one hundred years, since the work was created.⁶⁴

Although these arguments are not without merit, archivists find themselves on the opposite side of the debate.⁶⁵ The ACA recommends that archives ought to be able to reproduce any document, whether copyrighted or not, for a number of reasons. The first of these is to protect the original from theft by keeping it under lock and key and loaning out the copy. Unless this kind of protection is made legal, future generations risk "losing" a valuable document merely because the copyright owner could not be found or would not agree to microform reproduction or photocopying. If the copyright revisers cannot bring themselves to accept this blanket exemption, a viable alternative might be the extension of the proposed copyright tribunal's mandate to cover copying as well as quoting. The second type of exemption proposed by the ACA is the copying of entire collections of material to make copies available to researchers in other institutions. Since anyone wishing to incorporate the documents in a book would still have to seek the copyright holder's permission, this proposal seems as reasonable as the first. The final exemption proposed is the right to copy an entire literary or artistic work "provided that the recipient of the copy is advised that this is for research purposes only."⁶⁶ This kind of exemption is particularly important for artistic works like photographs and maps where copying a part may be "virtually useless".⁶⁷

All these exemptions would result in a reduction of the copyright holders' rights, but, as the Economic Council of Canada has argued, the copyright system "must make room for the effective operation of such institutions as libraries, which like the copyright system are a vital part of the broad, publicly sanctioned information policy of society. . ."⁶⁸

62 Keyes and Brunet, 164.

63 *Ibid.*, 145, 173.

64 *Ibid.*, 173.

65 See *Response to the Working Paper on Copyright*, 7-10.

66 *Ibid.*, 7.

67 *Ibid.*

68 Keyes and Brunet, 145.

If archives cannot copy for security reasons, inter-archival loans, and the diffusion of documents to researchers, then they cannot effectively fulfil their social function. What may be the most persuasive reason to adopt these policies is the American law which has decided it can live with the restriction of copyright owners' rights for a greater public good. According to the American law, archives and libraries may copy an unpublished literary work already on deposit with them for preservation, security, to place a single reproduction in another library or archives for research purposes, or to replace a lost or damaged work.⁶⁹ The only catch is that the copy must be in "facsimile form, that is, in eye-readable rather than machine-readable form".⁷⁰ The same restriction applies to the British law. This limitation points out one final area which the archivist ought to have clarified. Do Keyes and Brunet include computer storage of copywrited documents in their proposal regarding copying for preservation, or merely microform reproduction and photocopying? Though less important at present, this form of storage will become increasingly significant as the twenty-first century approaches.

CONCLUSION

Copyright is an arcane area of the law, and those who probe it risk being overwhelmed. Keyes and Brunet have illuminated the current statute and offered guidelines for a new act which would, for the first time, make explicit provision for archival materials, limit the duration of copyright in this area, and provide ground rules to alleviate the confusion within which archivists and researchers currently exist. Yet, *Copyright in Canada* cannot be seen as a decisive victory for either archivists or researchers. Beside the new American law, Keyes and Brunet's proposals stand revealed for what they are: an honest but essentially conservative attempt at revision which ranks the free flow of information behind the rights of authors. Because Keyes and Brunet have been forced to mediate between so many groups and hear so many viewpoints, they have frequently failed to understand the unique problems unpublished materials present. Moreover, when modernizing one clause, they have sometimes left problems unresolved in another or created new inconsistencies to plague the archivists.

The Association of Canadian Archivists has corrected Keyes and Brunet when they confused access restrictions and copyright's role in donor privacy. It has also pointed out the implications of letting case law decide what fair dealing means and asked for clarification of such undefined terms as "deposit in an archives". These contributions are useful, but such achievements represent little more than the minimum effort that ought to have been expected from the ACA. In general, the archivists' *Response to the Working Paper on Copyright* has been just what its title suggests: a reaction. The paper has been hastily prepared, inadequately researched, and at times, weakly argued. In its meagre twelve pages, there is only one mention of the new U.S. law and none of the potentially workable solution the British act uses to assist researchers

69 *Ibid.*, 174.

70 Tseng, 254.

when copyright holders are unknown. Canadian archivists have also shown themselves to be a timid lot. In the more than ten years copyright has been under scrutiny, only Jean Dryden and a few others have laid the issue before the readers of archival journals. The ACA's *Response* is scarcely less timid. Instead of supporting the American exemption from copyright for government documents, the ACA has contented itself with a mere fifty year limit. Instead of arguing that fair dealing must be made a right, the archivists have settled for extending the more restrictive Canadian version to archival materials and taking their chances on future interpretations of the concept.

All legal reform takes place against a backdrop of competing interests, all vying to make the strongest impact. The ACA represents only one small group amongst the lobbies who have a vested interest in copyright. If the archivists cannot offer more than a weak response to Keyes and Brunet, there are other groups who will. It may not be too late to strengthen the ACA's hand. To do so, archivists must study copyright legislation in other countries and especially pay closer attention to the American law and its implementation. They must broaden and intensify the dialogue they have begun. And they must lobby more actively to ensure their viewpoint is heard. Keyes and Brunet have themselves recognized the importance of continuing the dialogue. Amongst their final suggestions are the following proposals:

That continuous evaluation be maintained of the impact of existing and emerging intellectual property systems.

That provision be made for a means to conduct and maintain a continuing review and study of copyright law and practice [and]. . .

That a mechanism be provided to initiate and conduct regular liaison, consultation and discussion with private and public copyright interests in Canada, and with foreign copyright offices and international organizations.⁷¹

These are recommendations that Canadian archivists must actively support. Only then will they be able effectively to protect their interests and those of the researchers they exist to serve.

71 Keyes and Brunet, 233.

Résumé

La question du droit d'auteur au Canada n'est pas encore résolue. L'auteur, a analysé les recommandations du rapport Keyes-Brunet et a porté un jugement sur le commentaire de l'Association des archivistes canadiens relativement aux besoins des archivistes. Il a également considéré les changements relatifs récents touchant le droit d'auteur au Royaume Uni et aux États-Unis et a fortement suggéré certaines approches au problème afin d'arriver à une meilleure entente.