

Copyright In Manuscript Sources

by JEAN E. DRYDEN

The problem of copyright is a vexing one which has concerned publishers, authors, librarians, archivists, and legislators in Canada, Britain, and the United States for some time. A revision of the British law was effected in 1956, but efforts to revise and clarify the Canadian and American copyright legislation have dragged on for years. The main impetus behind the demands for change has come from those who recognize the problems resulting from technological developments which make large-scale copyright infringements (particularly of published material) cheap, fast, and virtually undetectable. Current legislation must be revised to take account of this new technology. At the same time, a number of other aspects of the legislation should be clarified, particularly those clauses which affect archival holdings. In this era of "total archives", each type of archival medium is affected by an aspect of copyright legislation, each of which must be critically examined. However, this paper will concentrate on the basic problem of copyright in the manuscript holdings of a repository, with particular reference to Canadian copyright legislation.

A brief note on the history of Canadian copyright legislation is in order. The Canadian Copyright Act was passed in 1921 and came into effect in 1924. It has remained virtually unchanged since then. It is largely based on the British law of 1911, and differs significantly from the American legislation passed in 1909. The Canadian Copyright Act has long been regarded as vague, inadequate, and incomprehensible to all but a few lawyers. Nevertheless, change has been a long time coming. A Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (the Ilesley Commission) submitted its report and recommendations on copyright in 1957. No action was taken. The Economic Council of Canada again considered the problem in 1971 when it issued its *Report on Intellectual and Industrial Property*. At present, plans for the revision of the Act are well under way. For some time now, the staff of the Bureau of

Intellectual Property in the Department of Consumer and Corporate Affairs has been working on the revision of the legislation. A working paper setting out proposed changes is expected to be ready for discussion and criticism by late 1975. After considering the comments and feedback received from interested parties, the Department will produce a final revision, and the new legislation will be introduced by the government, possibly late in 1976.

Some mention must be made of the difficulties in trying to reach the topic of copyright in the Canadian context. With a few notable exceptions, such as the Royal Commission and Economic Council reports mentioned above, most of the writing on copyright deals with the American situation. Much has been written about the proposed revision of American copyright legislation, and while an attempt can be made to adapt their proposals to the Canadian situation, significant differences in the current legislation of the two countries prevent complete transference of solutions. Nevertheless, the scarcity of Canadian writing on the subject necessitates the use of American sources. This presents a further difficulty. Many of the sources are articles found in various American publishing and law periodicals not readily available in most Canadian libraries. Some discussions of the effectiveness of the British law of 1956 have been written, but again the problem of access to British periodicals is encountered.

If research material on the general question of Canadian copyright is sketchy, discussions of copyright in manuscript¹ material are practically non-existent in the literature of any country. This dearth of information may be a result of the vagueness of copyright legislation regarding manuscripts. Generally speaking, most repositories interpret the Act to mean that copyright in a letter lies with the author of that letter, and permission to publish that letter, or a part thereof, must be sought from the author or his heirs. Any copyright problem resulting from photoduplication of the letter is solved by invoking the fair dealing clause which states that copyright is not infringed by fair dealing with the work for the purposes of private study or research. The law thus stated seems simple. Unfortunately, this interpretation is nothing more than an educated guess on the part of archivists and librarians who for some time have been dealing with copyright problems on the basis of *ad hoc* decisions made with inadequate legal advice or none at all. A detailed study of the clauses of the Act which apply to manuscript material will demonstrate just how unclear and open to argument the current law is, and will underline the need for revision of the legislation.

The first problem is that nowhere in the Act are archival holdings such as letters or diaries specifically mentioned. Can, in fact, such documents be protected by copyright? The Act states that "copyright shall subsist . . . in

1 It should be made clear that throughout this paper the word "manuscript" will be used in the archival sense to include documents such as letters and diaries found in archival holdings as opposed to an author's unpublished manuscript of a book or article.

every original literary, dramatic, musical and artistic work. . .'² and defines "every literary, dramatic, musical and artistic work" as including "every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings . . ."³ There are varying opinions about whether this definition includes personal letters. Harold G. Fox states unequivocally: "It is obvious that a letter is 'an original literary work' and therefore entitled to copyright."⁴ Other writers, however, have reservations. H.B. Cox questions whether a letter is a work at all, although he does not present any argument to the contrary.⁵ Bruce McDonald carefully examines the meaning of a "work" and the definition of originality in his attempt to define what may be copyrighted. Within his definitions, which are quite broad, personal letters and diaries could be considered copyrightable.⁶ It should be pointed out that it is virtually impossible for legislators to define precisely just what constitutes a literary work. While it could be argued that perhaps most personal letters are short on literary merit, such letters are valuable for the information they contain and for what they reveal about the author's personality. For these reasons, most people would agree that personal letters and diaries are protected by copyright. If they are not, then there is no problem, and much ink and the thought have been wasted by archivists and historians. Rather, the conclusion is that copyright in archival material must be dealt with specifically in any future legislation.

Once it has been assumed that archival material is included in what may be protected by copyright, the meaning of copyright should be discussed. The Act defines copyright as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever . . . ; if the work is unpublished, to publish the work or any substantial part thereof . . ."⁷ This section seems to cover all situations; however, there is one concept in particular which is so vaguely defined as to render interpretation difficult. The problem area is the meaning of "publication" as it affects archives.

The question of what constitutes publication is a crucial one and has aroused much controversy. The Act does define publication as "the issue of

2 Canada. Laws, Statutes, etc., *Revised statutes of Canada, 1952*, Chap. 55, s.4, ss.1. Hereafter cited as *R.S.C., 1952, Chap. 55*.

3 *R.S.C., 1952, Chap. 55, s.2*.

4 Harold G. Fox, *The Canadian law of copyright and industrial designs*. 2d ed., Toronto, Carswell Co., 1967, p. 95.

5 Henry Bartholomew Cox, "Private letters and the public domain," *American Archivist*, Vol. 28, no. 3 (July 1965), p. 385.

6 Bruce C. McDonald, *Copyright in context; the challenge of change*. Ottawa, Economic Council of Canada, 1971, pp. 11-12.

7 *R.S.C., 1952, Chap. 55, s.3, ss.1*.

copies of the work to the public.’’⁸ This is extremely general and is difficult to apply to archival material. Several American writers have argued that the mere fact that manuscripts have been placed in a repository constitutes publication.⁹ However, this argument collapses in the Canadian situation because the Act specifically mentions the availability of copies as a criterion of publication. Furthermore, if one can accept this view that deposit in a repository constitutes publication, then repositories have been acting illegally in permitting researchers to read the documents not written by the donor of the collection, since (as will be discussed) the donor rarely holds the literary rights to the entire collection. Common sense would seem to indicate that this view is unreasonable since strict acceptance of it would severely impair the archival and historical professions.

A more reasonable view follows from the few legal cases which have discussed what constitutes publication. These cases ‘‘have indicated that this requires printing or multiplication of copies’’¹⁰ (although the same writer later stated: ‘‘It is impossible to state categorically what constitutes a publication.’’¹¹) Generally speaking, most writers who have attempted to define publication concur with the notion that some sort of multiplication of copies (not necessarily printed) must occur.¹² In other words, most archival material may be considered to be unpublished. However, the question can immediately be raised — is a repository publishing when it provides photocopies for researchers? Is it publishing when it microfilms entire collections for security reasons, or to reduce wear and tear on the original documents, or for inter-library loan, or to send copies to other repositories? The view that publication somehow involves making copies has serious implications when applied to the photocopying, microfilming, and diffusion policies of archival repositories. In the vast majority of cases, the repository does not possess the literary rights to its collections and has no right to authorize photocopying or microfilming. Obviously, any new legislation must attempt to clarify the meaning of publication as it applies to archival material.

8 *R.S.C.*, 1952, Chap. 55, s.3, ss.2.

9 See Karyl Winn, ‘‘Common law copyright and the archivist,’’ *American Archivist*, Vol. 37, no. 3 (July 1974), pp. 376-386; Seymour V. Connor, ‘‘Literary property in archival depositories,’’ *American Archivist*, Vol. 21, no. 2 (April 1958), pp. 143-152; and Cox, p. 385.

10 ‘‘Personal letters: in need of a law of their own,’’ *Iowa Law Review*, Vol. 44, no. 4 (Summer 1959), p. 706.

11 *Ibid.*, p. 709n.

12 See Gordon Henderson, ‘‘Copyright: protection for originality,’’ *Canadian Bar Association, Journal*, n.s. Vol. 1, no. 2 (April 1970), p. 22; John C. Hogan and Saul Cohen, *An Author's guide to scholarly publishing and the law*. Englewood Cliffs, N.J., Prentice-Hall, 1965, p. 27; and William S. Strauss, ‘‘Protection of unpublished works,’’ In: Copyright Society of the United States of America, *Studies on copyright*. South Hackensack, N.J., F.B. Rothman, 1963, p. 198.

Before examining the problems of photocopying and diffusion in greater detail, the question of who in fact does hold copyright in archival material must be discussed. According to the Act, "the author of a work shall be the first owner of the copyright therein."¹³ If he wishes, "the owner of the copyright in any work may assign the right, either wholly or partially . . ."¹⁴ Other types of manuscript material are covered by separate clauses. So far as government records are concerned, the Act states:

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, subject to any agreement with the author, belong to Her Majesty . . .¹⁵

As far as the records of companies are concerned, the Act states:

where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright . . .¹⁶

In both cases, the department or company holds copyright only in copies of their outgoing letters. Copyright in the letters which were written to that department or corporation rests with the actual author or his heirs. It is clear from this discussion that ownership of copyright in most collections of documents is held not only by the donor but by numerous individuals.

A closely related problem is the length of time that copyright subsists in a work. The general term is "the life of the author and a period of fifty years after his death."¹⁷ This clause is quite clear. However, the next section deals with material that is still unpublished at the time of the author's death. It 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 . . .¹⁸

In other words, if a work is never published the copyright "is of unlimited duration,"¹⁹ and by virtue of Section 12 (5) rests with the heirs unless specifically assigned elsewhere. A similar situation applies to government records since copyright there "shall continue for a period of fifty years from

¹³ *R.S.C., 1952, Chap. 55, s.12, ss.1.*

¹⁴ *R.S.C., 1952, Chap. 55, s.12, ss.4.*

¹⁵ *R.S.C., 1952, Chap. 55, s.11.*

¹⁶ *R.S.C., 1952, Chap. 55, s.12, ss.3.*

¹⁷ *R.S.C., 1952, Chap. 55, s.5.*

¹⁸ *R.S.C., 1952, Chap. 55, s.6.*

¹⁹ McDonald, p. 29.

the date of the first publication of the work.’’²⁰ Again, if publication does not take place, the department presumably holds copyright in perpetuity.²¹

The above discussion about the ownership and term of copyright makes it clear that archival repositories face a serious problem. Assuming that publication involves making copies in some way, then according to a strict interpretation of the law, researchers are free to read and study most manuscript sources (except those to which access is restricted in some way), but they cannot quote or photocopy these documents unless the literary rights were specifically transferred to the repository, or unless the researcher is prepared to undertake the time-consuming task of tracing the author or his heirs to request permission to publish. Nor can repositories disseminate their holdings. Clearly this is absurd. The existing law must be changed to take account of actual practice and the needs of the researcher who uses archival material.

In all fairness, it must be observed that the law is not quite so absurd as the foregoing discussion makes it appear. The legislators were not completely oblivious to the needs of historical researchers, as the fair dealing clause shows. This clause states: “any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary” does not constitute an infringement of copyright.²² Fair dealing is another phrase in the Act which has been left extremely vague, and much debate has gone on in learned journals over the meaning of this section, which has been the escape route taken by many a researcher faced with a copyright problem. American case law has developed criteria for determining what American law calls fair use.²³ Such guidelines are useful but the question has been raised as to whether fair dealing applies to unpublished works. Fox is most emphatic in stating that publication of an unpublished work “cannot fall within the term ‘fair dealing’.”²⁴ Other writers come to similar conclusions (with some qualification).²⁵ It appears then that archivists and researchers have been relying on a straw man to defend them. The need for a complete revision of the copyright legislation as it applies to archival material becomes even more urgent.

One seemingly obvious solution to the problem would be to have donors of manuscripts sign a specific agreement relinquishing the literary rights to the repository. However, as was discussed earlier, a donor rarely owns

20 *R.S.C., 1952, Chap. 55, s.11.*

21 Fox, p. 236.

22 *R.S.C., 1952, Chap. 55, s.17, ss.2a.*

23 George A. Gipe, *Nearer to the dust; copyright and the machine*. Baltimore, Williams & Wilkins, 1967, pp. 168-169.

24 Fox, p. 425.

25 See Hogan, p. 84; Winn, p. 380; and Louis Charles Smith, “The Copying of literary property in library collections,” *Law Library Journal*, Vol. 46, no. 3 (August 1953), pp. 200-201.

copyright in any more than half of a collection; and therefore such an agreement would not be valid for letters written by others. A more viable solution which has been suggested by a number of Canadian and American writers²⁶ would be a reduction in the length of the term of copyright in unpublished material. As the law stands now, copyright is held in perpetuity by the author or his heirs. The historian who is trying to track down a number of descendants (who may not even be aware of the letters in question) to seek permission to quote or photocopy is faced with a time-consuming and potentially frustrating task. This task would be much easier if some limit were placed on the duration of copyright in unpublished works. The question that follows is just how long the limit should be. The Ilsley Commission recommended that:

the copyright in literary . . . works as to which there has been no publication . . . should expire seventy-five years after the author's death or one hundred years after the work was made, whichever period ends later.²⁷

It is quite clear from the absence of copyright litigation involving archival material that there has been little objection on the part of copyright holders to the current use of manuscript material in historical research. Thus it seems unlikely that copyright holders would be hurt if a shorter limit on copyright in unpublished material were imposed. A more reasonable limit would be fifty years after the death of the author.

This, however, does not help the researcher who is working with documents of more recent date because it does not settle the question of what constitutes publication. This is a thorny question which appears to have three aspects: direct quotation used in a published work; photocopying of specific documents for research purposes; and reproduction of entire collections either for security, preservation, or diffusion. Dealing first with the issue of direct quotation, it would definitely remain the responsibility of the researcher wishing to quote a particular letter (or letters) in a book or article to seek the permission of the writer of that letter or his heirs.

As far as the second issue is concerned, the photocopying machine has become an indispensable aid to researchers; no longer do they have to copy documents laboriously by hand. It seems entirely reasonable that an historian should be able to obtain copies of material needed for his research. Obviously, the idea expressed in the fair dealing clause was well-intentioned. However, modern technology has made it possible to reproduce large quantities of material quickly and cheaply. Most repositories are fully aware that they do not have the right to grant permission to reproduce documents, and have attempted to shift the problem of seeking permission

²⁶ See *Iowa Law Review*, Vol. 44, no. 4 (Summer 1959), p. 710; Cox, pp. 384, 387; Canada. Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on copyright*. Ottawa, Queen's Printer, 1957, pp. 41-42.

²⁷ *Report on copyright*, p. 41.

onto the researcher. Few repositories go as far as the Library of Congress which refuses to photocopy any document without the written permission of the copyright holder.²⁸ Yet the Library of Congress is probably alone in acting in a legal fashion if the current law is strictly interpreted. Most repositories go ahead and photocopy extensively, thinking it sufficient to give a vague warning to the researcher of his responsibility in regard to copyright. It is clear from the absence of lawsuits or public outcry that there is no objection on the part of authors or heirs to the photocopying of their letters for historical research.

Standard practice in regard to photocopying appears to be based on common sense, yet it violates current legislation. One solution has already been discussed — that of limiting the copyright in unpublished material to fifty years from the death of the author. A further solution would be to extend the fair dealing clause so that it applied specifically to unpublished archival material and permitted a reasonable amount of photocopying for purposes of research, with the quantity to be left to the discretion of the repository. At present, most repositories provide single copies of specific documents to researchers as part of their service, and no objection has been raised by copyright holders. Such a clause would sanction current practice and enable archivists to carry on without being troubled by nagging doubts about copyright.

A more serious problem arises when repositories reproduce entire collections, be it by microfilming or by photocopying. Such a diffusion of complete collections, while done in the interests of research, really must be considered publication, and cannot be undertaken lightly. Of course, there would be no problem with material in which copyright had expired under the new limit suggested above; however, this could be applied with certainty to only a limited amount of material since the date of each author's death must be taken into account. What further steps must be taken to solve this problem? To stop the protective microfilming and diffusion programs would severely hamper the interests of historical research, but clearly the task of seeking permission of each author or his heirs before reproducing a collection is an impossible one. A possible solution can be seen when the activities of an archival institution are considered. It seems reasonable to argue that the protective microfilming, interlibrary loan and diffusion programs are part of the functions of an archives. The uncertain position that these programs presently hold would be clarified by the addition of a clause stating that the reproduction of collections to enable an archives to fulfill its everyday functions is not an infringement of copyright. Such a clause would of course specifically mention microfilming for the preservation of the original documents or for security, and for interlibrary loan or diffusion purposes. Again, this clause would merely articulate common practice but in

28 Winn, p. 380.

doing so would provide some peace of mind for many archivists concerned about copyright.

The above discussion examines a number of problem areas in current copyright legislation and proposes a number of solutions. It remains to summarize these proposals. In the first place, archival material must be specifically included in the list of what may be protected by copyright. Secondly, archival material must be considered unpublished, and conditions under which copies may be made must be clearly stated. Suggested conditions are the extension of the fair dealing clause so it applies to unpublished material, and the addition of a clause permitting researchers a reasonable amount of photocopying to be left to the discretion of the repository. Another proposed clause would state that reproduction of entire collections to enable an archives to carry out its mandates is not deemed an infringement of copyright. A limit of fifty years from the date of writing or the death of the author must be placed on the copyright in unpublished material.

The foregoing deals with problems facing archivists now. It is clear that the law must be changed. However, it is not sufficient to change the law just so it catches up with present practice. The new legislation must accommodate the changes being thrust upon archives by rapidly developing technology. Hopefully, farsighted and discerning discussion now will produce good, clear, just copyright legislation which will serve archivists and researchers for years to come.

Résumé

Cet article discute de certaines implications de la loi canadienne du *copyright* pour les sources manuscrites conservées dans les dépôts d'archives et en réclame une révision. Parce que cette loi définit maladroitement certains termes comme travail littéraire, publication, auteur, il est difficile pour l'archiviste de l'utiliser sans y contrevenir; seule la clause autorisant toute utilisation honnête de documents pour fins de recherche a permis jusqu'ici de mettre le matériel archivistique à la disposition du chercheur. Bien que l'absence de protestations de la part de ceux qui détiennent les droits d'auteurs sur la documentation archivistique manuscrite puisse être interprétée comme une acceptation des pratiques courantes, la loi n'en demeure pas moins vague. Il ne fait aucun doute qu'elle devrait être révisée afin de tenir compte spécifiquement de l'utilisation du matériel conservé dans les archives et sanctionner les pratiques courantes que les dépôts d'archives ont dû adopter quant à la reproduction de leurs documents.