

The Association of Canadian Archivists and Copyright Revision: An Update

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Copyright in Canada involves the legal recognition of the exclusive right of a creator to determine the use of a work and to share in the benefits produced by such use.¹ Copyright protection in Canada arises automatically and without formalities when a work is created by a Canadian citizen or by a national of any country with which Canada has an international copyright agreement. Canada adheres to the two major international copyright conventions (the 1928 Berne Convention and the Universal Copyright Convention of 1952). The major underlying principle of both is that whatever copyright protection is given to Canadians must also be afforded to nationals of other member countries.²

In Canada, the copyright owner of a work is recognized to be the author of that work or his or her assigns. Copyright protection extends to the work itself and not to the ideas expressed in the work. However, the unique expression of such ideas definitely falls under the protection of Canada's copyright legislation. It does not matter here whether the work is published or unpublished; the original manner in which the ideas are expressed is protected. Finally, in order for a work to be afforded copyright protection, it must be "fixed" in a material form. Although the Canadian *Copyright Act* does not specifically mention this criterion, Canadian courts have deemed it necessary since it is difficult to prove the existence of an unfixated work.

The problem of copyright has concerned publishers, authors, librarians, archivists, and legislators in Canada for some time. More than sixty years have elapsed since the last revision of Canada's *Copyright Act*. While the intervening years have witnessed the advent of radio, television, photocopiers, computers, and a host of information storage and retrieval devices, efforts to revise our copyright legislation in order to meet the problems resulting from these technological developments have moved at a snail's pace. Archivists realize that current copyright legislation must be revised to account for the new technology. As Jean Dryden has said, "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."³ Archivists also realize that changes and/or clarifications must be made to

1 Canada, Department of Consumer and Corporate Affairs, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa, 1984) p. 1.

2 *From Gutenberg to Telidon*, p. 4.

3 Jean Dryden, "Copyright in Manuscript Sources," *Archivaria* 1 (Winter, 1975-1976), p. 39.

those clauses in the current legislation which affect archival holdings. The Association of Canadian Archivists' Copyright Committee has been lobbying the federal government regarding these and other concerns for almost ten years.

A brief sketch of the history of Canadian copyright legislation is in order. The *Copyright Act* was passed in 1921 and came into effect in 1924. It has remained virtually unchanged since then. The *Act* has long been regarded as vague, inadequate, and incomprehensible to all but a few lawyers.⁴ It is, in many ways, seriously inadequate as far as archivists are concerned. While use of archival materials is increasing rapidly, the Canadian statute's handling of unpublished materials is "unclear and open to argument."⁵

In 1957, the Royal Commission on Patents, Copyright, Trade Marks, and Industrial Designs, (known as the Ilsley Commission), submitted its recommendations on copyright, but nothing came of them. The Economic Council of Canada considered the problem of copyright in 1971. The Economic Council stated that copyright ought to do more than protect an author's economic and creative rights:

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.⁶

As Gina La Force noted, "Although influential in later studies, [the Economic Council of Canada's] *Report on Intellectual and Industrial Property* merely posed the policy issues which would have to be considered in revising the law."⁷

Finally, the Bureau of Intellectual Property of the Department of Consumer and Corporate Affairs investigated the possibilities of revising the current copyright legislation in the mid-1970s. In April 1977, its work resulted in A. A. Keyes and C. Brunet's working paper *Copyright in Canada: Proposals for a Revision of the Law*.

The ACA Copyright Committee responded to Keyes and Brunet's working paper in January 1978 in *Response to the Working Paper on Copyright*. The objective of the ACA *Response* was to comment on those aspects of Keyes and Brunet's paper that presented the most serious problems for archivists. In its response the ACA Copyright Committee welcomed improvements made upon previous proposals for revising the *Copyright Act* such as the right to copy for preservation purposes. However, the ACA Committee found many of the proposed changes espoused by Keyes and Brunet to be entirely unacceptable to archivists. For example, the working paper argued that the defence of "fair dealing" should be acceptable only in cases involving published (not unpublished) material. Furthermore, it argued that all photocopying, except that done by the owner of the copy-

4 *Ibid.*, p. 39.

5 *Ibid.*, p. 40.

6 Gina La Force, "Archives and Copyright in Canada: An Outsider's View," *Archivaria* 11 (Winter 1980-1981), p. 38.

7 *Ibid.*

right, should continue to be considered as an infringement of copyright.⁸ Archivists hoped to see these provisions modified, but Keyes and Brunet's proposals provided no substantial changes in the present law.

The primary responsibility of archivists is to acquire and preserve archival material and to make it available to the public. With respect to copyright, archivists realize that the rights of creators must be respected, but suggest this could be accomplished by less restrictive legislation which should also permit archivists to fulfil their responsibilities as efficiently as possible. If Keyes and Brunet's proposals became law, they could prove disadvantageous to the operation of Canadian archives by hampering researchers and by slowing down, if not preventing, the dissemination of knowledge.⁹

The major concerns of archivists with respect to revision of the current copyright legislation remained unchanged in the six years that elapsed since the ACA Copyright Committee's *Response to the Working Paper on Copyright* in 1978. Archivists were given another opportunity to express these concerns when the federal government released its *White Paper on Copyright* in May 1984. Realizing that the right of creators to control the use of their works and the right of users to fair access will always be a fundamental tension in copyright protection, the government brought down a *White Paper* aimed at striking a fair balance between the rights of creators and those of users. Immediately, the ACA Executive struck a new Copyright Committee to be chaired by Corrado Santoro of the University of Manitoba Archives. The original mandate of the 1984/85 ACA Copyright Committee was to review the government's *White Paper* and to draft a brief for submission to the ACA Executive on the sections of the *White Paper* pertaining to the archival profession. When completed, the brief was to be presented to the membership for its approval at the 1985 Annual General Meeting in Edmonton.

The work of the ACA Copyright Committee began in June 1984. Each member of the committee reviewed the government's *White Paper* and was asked to submit comments to the chairman by December 1984. He was assigned the task of editing and compiling their comments for a report which could be submitted to the ACA Executive prior to the 1985 Annual General Meeting of the ACA. However, when the Conservative government elected in September 1984 called for briefs from the public on copyright in February 1985, the ACA Copyright Committee's plans to consult the profession had to be changed. The Copyright Committee had to draft a final version of a submission to the Parliamentary Standing Committee on Communications and Culture by 15 March 1985. There was no time for the ACA Executive's perusal of the brief, nor any time for the ACA membership's approval because the Annual General Meeting was still three months away. The ACA Copyright Committee's mandate was thus changed from submitting a rough draft of a brief to the ACA Executive in time for the 1985 Annual General Meeting to preparing the ACA's position on the *White Paper* for the Standing Committee on Communications and Culture. The Copyright Committee worked hard and produced a fine brief considering the time constraints it had to work under. The brief reached the

8 A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa, 1977), pp. 147-49 and 175.

9 ACA Copyright Committee, *Response to the Working Paper on Copyright* (1978) p. 1.

Parliamentary Committee just before the deadline of 15 March.¹⁰ It is published below in the hope that it will stimulate further discussion of intellectual property rights between the archival community in Canada and those responsible for revising our current copyright legislation.

The *White Paper* will be helpful to archivists *if* implemented. Among the revisions it proposes, archivists should be pleased to see the addition of separate categories for sound recordings, cinematographic works, and computer programmes. The exemption allowing archival institutions to reproduce collections for reference and preservation purposes is a welcome addition, as is the provision bringing unpublished materials into the public domain in the same manner as published materials.¹¹ However, there are still several areas in the *White Paper* which have not been sufficiently defined or where inappropriate changes have been made. These areas are discussed in the submission which follows. A final note: as Chairman of the ACA Copyright Committee, I was invited by the Parliamentary Standing Committee on Communications and Culture's Sub-Committee on Copyright Revision to attend its public hearings on copyright revision in Toronto on 11 June 1985. Questions concerning the ACA brief were posed. The minutes of these proceedings can be found on pages 9:28 to 9:38 of the *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, Issue No. 9, Tuesday, June 11, 1985, Toronto, Ontario. At the time, the Sub-Committee on Copyright Revision was impressed with the ACA brief. It is unfortunate for archivists and users of archives that the Sub-Committee's report entitled *A Charter of Rights for Creators* contains none of the enthusiasm for our concerns which was expressed by the Sub-Committee at the public hearings in June. The Sub-Committee on Copyright Revision specifically stated that there is to be no fair dealing with unpublished materials. The *Report* gives one the feeling that this Sub-Committee simply does not understand who archivists are and what they do. The ACA Copyright Committee's *Response to A Charter of Rights for Creators* also appears in this section of *Archivaria*.

Association of Canadian Archivists' Committee on Copyright: A Submission to the Parliamentary Standing Committee on Communications and Culture, March 1985

1. General Comments

To strike a balance between the rights of creators and the rights of users to reasonable access to copyrighted materials is a difficult task. The major problems for archivists are

¹⁰ Many thanks must go to the members of the ACA Copyright Committee: Jean E. Dryden of the Provincial Archives of Alberta; Grace Hyam of the Public Archives of Canada; Ruth May and Kathryn Dean of the University of Manitoba Archives; and Dr. Robert Morgan of the ACA Executive. Their fine comments and suggestions in regard to the proposals in the *White Paper* proved extremely valuable in editing and compiling the brief.

¹¹ *From Gutenberg to Telidon*, pp. 10, 83, 43, and 57.