5(b): that the new revisions re: "fair use" apply to *all* unpublished materials and *not* just *certain* unpublished works.

5(b)i: that the new legislation clearly state that copying *unpublished materials* for reference/research purposes is to be a "fair use" with respect to these materials.

5(b)ii: that an attempt be made to clarify what is meant by "normal exploitation" and "legitimate interests" with respect to the "fair use" of materials in an archives.

5(c): that the proposed exemption re: archival purposes be expanded or revised to specifically state that it is a "fair use" to make copies of unpublished, out of print or otherwise unavailable material already in archivists' collections for reference/research, or preservation purposes, and that "fair use" also extend to the making of copies of these materials so that they may be loaned or deposited in another library or archives for reference or research purposes.

5(d): that broadcasters *be required* to keep an archival copy of ephemeral recordings for study and/or research purposes.

6(a): that the present copyright legislation re: duration of copyright in photographs *be retained*, i.e., fifty (50) years from the making of the original negative.

6(b): that this section (works of unknown authors) be expanded or revised so that users may apply to a *Revised Copyright Appeal Board* for a licence to publish unpublished materials where the owner of the copyright is not known (or unlocatable).

6(c): that the *Crown* announce its intention not to enforce copyright on unpublished government records that are open for research.

6(d): that the *revised copyright legislation* specifically define copyright duration in *unpublished corporate records* to be the life of the author (Corporation) plus fifty (50) years. This recommendation is consistent with the life-plus-50 provisions afforded other works, as well as our recommendation that copyright ownership be vested in the employer, subject to an agreement to the contrary.

Association of Canadian Archivists' Copyright Committee: A Response to A Charter of Rights for Creators

In June 1985, the Executive of the Association of Canadian Archivists extended the mandate of the ACA Copyright Committee for one more year. Its new mandate for 1985-86 was to monitor the activities of the Parliamentary Standing Committee on Communications and Culture's Sub-Committee on Copyright Revision.

The Parliamentary Sub-Committee on Copyright Revision (henceforth referred to as the Sub-Committee) received over three hundred written briefs, including that of the ACA, and heard testimony from 111 witnesses at public hearings held in Ottawa,

Toronto, and Montreal.[1] After examining the many briefs, and listening to the testimony offered by representatives from both the creative and user communities regarding their concerns about the recommendations expressed in *From Gutenberg to Telidon: A White Paper on Copyright*, the Sub-Committee finally issued its long awaited report entitled *A Charter of Rights for Creators*.[2]

The title of the Sub-Committee's report is interesting in itself — *A Charter of Rights for Creators*. Not only did the Sub-Committee set about making recommendations for the revision of Canada's copyright legislation, but it intended all along to write a charter of rights for creators. Of course, there is nothing wrong with protecting the statutory and common law rights of creators. However, in its excitement over the issue, the Sub-Committee managed to tilt further the balance of rights in favour of creators to the disadvantage of users. *From Gutenberg to Telidon* attempted to strike a fair balance between the rights of creators and those of users with much more success than the Sub-Committee's report has done. For example, *From Gutenberg to Telidon* spoke of a "fair use" doctrine similar to the American concept and including a list of factors to be considered in determining whether a use was "fair." More importantly for archivists, *From Gutenberg to Telidon* suggested that this new fair use doctrine applied to all copyright subject matter that was generally available to the public, regardless of whether such material had been published in the traditional sense. On the other hand, the Sub-Committee rejected this fair use doctrine outright. It found the American concept vastly different from our present concept of "fair dealing." Furthermore, the Sub-Committee rejected the concept that fair dealing existed in unpublished works — much to the frustration of archivists.

If one examines the history of copyright revision in Canada over the past thirty years, beginning with the Ilsley Commission in 1957 and ending with the former Liberal Government's *White Paper* in 1984, it is not unreasonable to assume that these efforts at revision attempted to strike a fair balance between the rights of creators and those of users. The notion of striking a fair balance between both groups not only seems to be an unwritten rule of copyright revision, but also seems very reasonable indeed.

In light of the above, the Sub-Committee drafted a report which by its very title reduces the long-standing notion in copyright revision of striking a fair balance between the rights of creators and those of users.

The Sub-Committee's report was the result of the deliberations of five Members of Parliament. In its work, the Sub-Committee was spurred on by many groups and individuals to be bold and innovative in the development of a Canadian copyright system which would provide strong support to creative activities and to Canada's cultural evolution.[3] A recurring theme, both at the public hearings and later during the Sub-

1 *A Charter of Rights for Creators, Report of the Sub-Committee on the Revision of Copyright of the Standing Committee on Communications and Culture* (Ottawa, October 1985), p. xii.

2 The archival community expressed its concerns on 11 June 1985 in Toronto. Representatives from both the ACA and the AAQ gave testimony as it pertained to their respective briefs. See the *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, issue no. 9, pp. 9:28-9:38, testimony of C.A. Santoro of the ACA, and issue no. 10, pp. 10:28-10:36, testimony of Marcel Caya of the AAQ.

3 *A Charter of Rights for Creators*, p. xii.

Committee's weighing of the various positions, was the obligation of any new copyright act to support the rights of the creator.[4] Constantly changing technology has drastically altered the relationship between creators and the users of their works.[5] The Sub-Committee welcomed the challenge of making the *Copyright Act* a charter of rights for creators.[6]

By not opting for a fair use doctrine, the Sub-Committee's report becomes more restrictive than the *White Paper on Copyright*. By not extending fair dealing to unpublished materials, the notion of striking a fair balance between the rights of creators and those of users is further reduced.

Archivists have no intention of depriving copyright owners of their just rewards. The task of archivists is to acquire, preserve, and make available archival materials to the public. Archivists realize the rights of creators must be respected, but suggest this could be accomplished by means of less restrictive legislation which permits us to fulfill our responsibilities as efficiently as possible. Not only do we wish to see a law which protects the fruit of creativity, but one which will provide reasonable access to this fruit. Archivists maintain that any new copyright legislation must be worded in such a way as to strike a fair balance between the rights of creators and those of users so that creativity continues to be encouraged.

It is submitted that the Sub-Committee's report could prove harmful to the operation of archives in Canada. By not extending fair dealing to unpublished works, archivists suggest that research will be hampered and the dissemination of knowledge will become more difficult.

If one examines the minutes of proceedings and evidence of the Sub-Committee for 9 May 1985, the Minister of Communications, Marcel Masse, was repeatedly asked about the direction he would like to see the Sub-Committee take as it pertained to copyright revision.[7] To these questions, the minister replied:

> In my opinion, the copyright law should first and foremost protect the products of creativity. Then it can set restrictions so that the public will have reasonable access to these products. We feel that the law should be worded in order to maintain a fair balance between authors' rights and society's needs so that we can encourage creativity — this is our goal — while providing access to the works of art. This is in the economic interest of authors. If the first part is too heavily weighted, it is obvious that there will be fewer consumers and that there will be an economic loss to authors ... So there has to be a balance between the two. I hope that the law will achieve this balance. But today, it is up to me to emphasize the author's viewpoint.[8]

After pouring through some three hundred briefs, the Sub-Committee was still looking for a direction as to how it would strike a fair balance between creators and the users of

4 *Ibid.*, p. xii.
5 *Ibid.*, p. xi.
6 *Ibid.*, p. xii.
7 *Minutes of Proceedings and Evidence of the Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright*, First Session, 33rd Parliament, 1984-85, issue no. 1, p. 1:33, testimony of Mr. Orlikow, MP, member of the Sub-Committee.
8 *Ibid.*, p. 1:31, testimony of the Hon. Marcel Masse, Minister of Communications.

their works. After the minister stressed the importance of a fair balance, he reminded the Sub-Committee of his main reason for appearing before it. He left no doubt that he was there on behalf of the creators.

One could argue that the minister's position, heavily weighted in favour of creators, may have influenced the Sub-Committee's interpretation of a fair balance between the rights of creators and those of users — an interpretation which archivists suggest is further reduced due to the fact that there is to be no fair dealing with unpublished works. Although *From Gutenberg to Telidon* was referred to as a document which did not necessarily embody government policy, it is reasonable to assume the above reference credited to Mr. Masse does embody the present government's policy.

Is it any wonder then that the Sub-Committee drafted a report heavily weighted in favour of creators? The Sub-Committee asked the government for direction, and the government gladly provided it through the testimony of the Minister of Communications and Culture who represented the concerns of creators. The question was no longer one of whether a charter of rights for creators should be written, but how it should be written. The Sub-Committee's report answers this question much to the displeasure of Canadian archivists.

Although the Sub-Committee's report attempts to deal consistently with the wide range of technologies and media archivists must deal with, it failed to resolve our major concern which centres upon the applicability of fair dealing in unpublished materials. This failure indicates a lack of understanding on the part of the Sub-Committee as to who we are and what we do. It did not care to understand the connection between users and creators. By denying fair dealing in unpublished works, archivists submit that the notion of striking a fair balance between creators and users is further reduced, thereby diminishing creative activity.

The members of the Sub-Committee did not seem to understand the basic nature of copyright. Statements in praise of the 1924 *Act*, and the equating of copyright ownership with ownership of real property, makes one wonder about their grasp of the issue.[9]

They certainly do not understand the nature of archives or how archival material is used. Throughout its report, the Sub-Committee implies that copyright owners are clearly identifiable. There are occasional references to difficulties in identifying and locating copyright owners, but what these difficulties mean in practice is something the Sub-Committee either has not grasped or has chosen to ignore.

Another major problem for archivists, which the Sub-Committee has definitely not understood, is that a single collection of archival material often involves literally hundreds of copyright owners, and a single research project by a typical user of archives may involve countless owners of copyright. It is clear that ownership of copyright in most collections is held by numerous individuals including the donor. This poses a serious problem for archival repositories. Should the Sub-Committee's recommendations become law, and assuming publication involves making copies in some way, then a strict interpretation of the law would mean that researchers would be allowed to look at and study unpublished materials, but they would not be allowed to copy or quote from these materials unless the literary rights were transferred to the repository, or unless they were

9 *A Charter of Rights for Creators*, pp. 3, 9.

prepared to undertake the time-consuming task of tracing the author or his/her heirs to request permission to publish. In addition, archival repositories could not disseminate their holdings. As Jean Dryden states, "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."[10]

It is further submitted that a large proportion of most archival holdings was not created with a profit motive in mind, and by far the largest number of the sources of these materials does not really care if copyright is asserted on its behalf. Yet, copyright will fully apply and no doubt will hinder research by stopping some copying for research purposes only.[11]

Contractual arrangements with the donors are not a solution to copyright problems since the donor rarely holds copyright on the entire collection being deposited in the archives.[12] It is impossible to locate every copyright owner represented in a collection. Even if collectives representing copyright owners were formed, as recommended by the Sub-Committee, it is unlikely that authors of unpublished material such as letters, memos, and manuscripts would belong to a collective. Nobody can force creators to join collectives, and the problem regarding the use of this material would continue.

The archival exemptions afforded to archives, or recommendations 88 and 89 in the Sub-Committee's report, suggest a further lack of understanding by the Sub-Committee as to what we do.[13] In order to preserve unique unpublished materials of a significant nature, archivists should be able to make copies of such materials for preservation purposes. Indeed, we do this all the time. *From Gutenberg to Telidon* gives us this exemption, and so does the Sub-Committee. However, the Sub-Committee places a slight proviso on the exemption by stating that the material must not be available through the normal channels of trade.[14] Since copies of unpublished materials are virtually never available through the normal channels of trade, this proviso suggests a lack of understanding. Overall, recommendation 88 is fine as it stands.

On the other hand, recommendation 89 does not make sense at all. Obviously, it has not been well thought out. The members of the ACA Copyright Committee, along with other archivists, have repeatedly argued for an exemption stating that it should be a fair use, or at least, not an infringement of copyright to reproduce collections already in an archives for security, preservation, interlibrary loan, and for diffusion purposes. If one considers these practices to be part of the functions of an archives, then such an exemption would only be legitimizing what we are doing already. To stop the protective microfilming and diffusion programmes would severely hinder research, but the task of obtaining the permission of each author or his/her heirs before reproducing a collection is an impossible one.[15] Again, an exemption legitimizing this common practice would have provided many archivists with some peace of mind.

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10 Jean E. Dryden, "Copyright in Manuscript Sources," *Archivaria* 1 (Winter 1975-76), p. 44.

11 ACA Copyright Committee, *Brief on Archival Concerns re: From Gutenberg to Telidon: A White Paper on Copyright.*

12 Public Archives of Canada, *Comments and Recommendations in Response to the Working Paper on Copyright*, brief submitted to Consumer and Corporate Affairs Canada, November, 1977, p. 17.

13 *A Charter of Rights for Creators*, pp. 68-70.

14 *Ibid.*, p. 69.

15 Dryden, "Copyright," p. 46.

According to recommendation 89, the legitimate researcher requiring a copy of a document or documents for his private research could obtain a copy of the document(s) in archives A by going to archives B and having them request a copy on his behalf. Why cannot the researcher request the documents directly from archives A, since the proposed use of the document is supposedly the same? Would there be a limit on the number of documents one could have copied in this way? This recommendation is not logical. The Sub-Committee was obviously thinking of libraries rather than archives. On the other hand, archivists were asking for an exemption which would legitimize present practices, especially those concerning diffusion programs.

It is submitted that recommendation 89 be removed entirely, or changed extensively to accommodate requests for copies of documents by legitimate researchers directly from the archives holding the original documents. In addition, it is submitted that any new copyright legislation provide a clause allowing archival institutions the flexibility to reproduce collections already in their holdings for security, inter-institutional lending, and diffusion purposes. Such a clause should be deemed to fall within the boundaries of fair use or fair dealing.

The single most serious area of concern for archivists, with respect to the Sub-Committee's report, is the section on fair dealing. *From Gutenberg to Telidon* suggested substituting a fair use rule for the existing fair dealing provision of the *Act*.[16] As we have seen, the Sub-Committee rejected this suggestion outright. It argued that substituting a fair use criterion would expand the defence of fair dealing to permit any use whatsoever as long as it did not inflict economic damage on the copyright owner. It was the view of the Sub-Committee that fair use implied that rights in intellectual property are definitely second class rights, very different from rights in physical property.[17]

It is submitted that the reproduction of unpublished materials used only for private research and reference purposes does not in any way deprive the copyright owner of any expected economic reward and thus should not interfere with the incentive function of the system. After all, much of the material in archives, such as personal correspondence, was produced in the pursuit of objectives other than monetary gain.[18] Restrictions on access to this type of material are unacceptable as they deny access to the materials while not providing any economic rewards to the owners of the copyright. Is this what the Sub-Committee really wants?

The exclusion of fair dealing in unpublished materials in any new copyright legislation will hinder research activities. Without the dissemination of information, creativity itself will be hampered. Certainly, the Sub-Committee does not wish to see this happen.

The Sub-Committee argues throughout its report that a strong public purpose must justify any exception from copyright liability.[19] Obviously, it felt that fair dealing in unpublished materials, which would definitely assist the research community, as well as further the dissemination of knowledge, was not a strong public purpose. On the other

16 *From Gutenberg to Telidon*, pp. 39-40.
17 *A Charter of Rights for Creators*, p. 9.
18 Jim Keon, "The Canadian Archivist and Copyright Legislation," *Archivaria* 18 (Summer 1984), pp. 97, 94.
19 *A Charter of Rights for Creators*, p. 9.

hand, the Sub-Committee may have misunderstood the whole issue, not realizing the disastrous implications its decision will have upon the future of creativity in this country.

Recommendation number 86 in the Sub-Committee's report which states that unpublished material be specifically excluded from the fair dealing provisions, is totally unacceptable to archivists and to users of twentieth-century materials.[20] H.G. Fox in his authoritative study *The Canadian Law of Copyright and Industrial Designs* states that fair dealing is not an acceptable defence in any case involving unpublished material.[21] A.A. Keyes and C. Brunet make the same point in their proposals for a revision of the copyright law.[22] In both cases, the legal authority cited is *British Oxygen Co. Limited* v. *Liquid Air Limited.*

In this case, a letter from the British Oxygen Company 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.

The judgement stated, "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."[23] It is important to note that the two aspects of fair dealing which are of most concern to users of archival materials, namely "research" and "private study," were not mentioned in this judgement.

The Canadian *Copyright Act* states that "any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" is not an infringement of copyright.[24] The term "any work" is very general, and it does not seem unreasonable to assume, as many archivists have done, that this clause applies to both published and unpublished material.

It is submitted that the judgement in the case of *British Oxygen Co. Ltd.* v. *Liquid Air Ltd.* should be considered in the context of that particular case, a case in which commercial advantage was definitely a factor, and research and private study were not. It does not seem reasonable to argue, on the basis of this decision, that fair dealing may never be accepted as a defence in an action involving unpublished material.[25]

Archivists assume that a "dealing" is fair if it does not damage the copyright owner financially, does not constitute an invasion of privacy, and does not injure the reputation of the copyright owner or his/her family in any way. As we have just seen, some authorities, including the Sub-Committee, claim that this fair dealing clause applies only to published material. Archivists must take the position that "any work" means any work, including any unpublished work. At worst, the current law is unclear. But if the

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20 *Ibid.*, p. 66.

21 H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2nd edition, (Toronto, 1967), pp. 424-25.

22 A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, (Ottawa, 1977), p. 65.

23 *British Oxygen Company Limited* v. *Liquid Air Limited*, 1925, 1 ch. 383.

24 *Copyright Act*, R.S.C., 55, s. 17(2)a.

25 The rationale for fair dealing in the case of *British Oxygen Co. Ltd.* v. *Liquid Air Ltd.* was first advanced in the ACA Copyright Committee's *Response to the Working Paper on Copyright* (1978), pp. 5-6.

new copyright legislation states specifically that the fair dealing clause applies to published material only, the situation of archivists and users of archives will be very difficult indeed. It is absolutely essential to archivists that the fair dealing provisions be applicable to unpublished material. The existing law must be changed to take account of actual practice and the needs of the researcher who uses archival material.

Another aspect of fair dealing that is troublesome to archivists is the principle that the copying of a work in its entirety may not be considered fair dealing. This principle has been established by legal decision, and the reasoning behind it is understood. However, archivists having responsibility for artistic works, such as photographs and maps, feel that a copy of a portion of such a work is virtually useless. Manuscript archivists fear that a strict interpretation of the law might prevent the copying of an entire letter or memorandum. It is submitted that archivists should be permitted to copy an entire artistic or literary work deposited in the archives for the use of a researcher, provided that the recipient of the copy is advised that the copy is provided for research purposes only, and that he may not copy the item further, or publish it, without the permission of the copyright owner.[26]

The rationale of the Sub-Committee regarding fair dealing is illogical. The Sub-Committee states that the present fair dealing clause should be retained because there has been very little litigation in Canada relating to the issue. "This alone is a good reason not to alter drastically the existing fair dealing provision."[27] The implication that the value of a law is in inverse proportion to the number of times it is used is rather surprising. By this standard, the Sub-Committee must consider the Canadian Charter of Rights and Freedoms to be the worst law ever to come into effect in this country, since so much litigation is resulting from it.

Archivists submit that the reason why the fair dealing clause has not been invoked very much is because so many copyright owners are unaware of their rights. In addition, it is further argued that many copyright owners simply do not care to enforce their rights. Much of the material in archives, such as personal correspondence, was produced in the pursuit of objectives other than economic gain. These copyright owners deposited their materials with an understanding that they be made freely available for research purposes. They do not wish to be bothered by researchers seeking permission to copy. In fact, many of them get upset at us for inconveniencing researchers in this way. This lack of knowledge on the part of copyright owners is the time-bomb ticking away beside our photocopy machines.

Problems of archivists in the area of photocopying have already been mentioned with regard to fair dealing. Photocopying is an area of great concern to archivists because researchers and other members of the public have come to expect that an archives will provide photocopies of selected material in its custody. Some members of the public take the position that they, as taxpayers, are entitled to receive this service from a publicly funded archival institution.

Most archival repositories provide single copies of archival material to researchers as part of their service. It is clear from the absence of lawsuits or public outcry that there is no objection on the part of copyright owners to the photocopying of their materials for the purpose of private research.

26 *Ibid.*, pp. 6-7.
27 *A Charter of Rights for Creators*, p. 64.

This standard practice in regard to photocopying is simply based on common sense. However, it violates the current legislation. The Sub-Committee suggests two solutions to the reprography-for-research problem. One is that copyright owners should form collectives and research institutions should negotiate blanket licences with these collectives. The other is that the definition of "publication" could be broadened.

Neither of these proposed solutions offered by the Sub-Committee seems practical for archivists. Collectives will not work because they require copyright owners to come forward to assert their rights, but copyright owners in archival material generally do not know or care about their rights. The material was usually written for totally non-commercial reasons. The authors have forgotten writing the items, and their children, grandchildren and great-grandchildren are completely unaware of the materials.

The Sub-Committee's report suggests that the terms "fixation" and "publication" require careful definition (recommendation 50 and 54), since one or the other of these terms provided the key point in determining length of term of copyright in recommendations 18, 51, 70, 74 and 78.[28] The definition of publication in the current legislation is too general to be meaningful. The Sub-Committee discussed in its report the importance of a broader and more precise definition of "publication," not just to determine the length of term of copyright, but also to clarify the concept of fair dealing. Unfortunately the intentions of the Sub-Committee in this regard are not sufficiently clear to make a final judgement on this matter.

However, it is submitted that any new copyright legislation ought not to define "publication" so that the depositing of an item in a public research institution constitutes publication. If this were to be the case, archivists would not be able to accept any donation without the consent of all the copyright owners whose material comprises the donation, unless, of course, the authors or copyright owners had been deceased for at least fifty years.

Furthermore, it is submitted that archives be allowed to provide researchers with a single copy of unpublished material for private study or research purposes, and that the making of this copy ought not to be defined as publication in the sense of "issuing copies to the public." The Sub-Committee's recommendations regarding fair dealing would certainly be more acceptable to archivists if the new legislation included an acceptable expanded concept of publication like the one just outlined here.

However, as stated earlier, the Sub-Committee's intentions with respect to an expanded definition of publication were not made clear, and it is unlikely archivists will see an acceptable definition of publication like the one outlined above.

A Charter of Rights for Creators makes other recommendations which are good. For example, recommendation 7 recognizes restoration and preservation activities, such as an archives is likely to undertake within its ongoing mandate.[29]

Some of the difficulties posed by oral history interviews are acknowledged in the discussion on page 69 of the Sub-Committee's report.

As far as Crown copyright is concerned, archivists are generally in favour of the recommendations that there be no copyright in government works (recommendation 11)

28 *Ibid.*, pp. 104-108.
29 *Ibid.*, p. 8.

and that federal and provincial public documents have the same copyright status (recommendation 12).[30] While this eliminates the problem of deciding who holds the copyright in government works/public documents, and therefore who to contact if one is seeking the right to reproduce them, there is one question which should be clarified in any new legislation. Do "public documents" include unpublished correspondence, memos, and reports written by civil servants?

Archivists are also in general agreement with recommendations 15-17 which make it clear that employers hold copyright in works created by their employees in the absence of any agreement to the contrary.[31]

In regard to photographs, archivists generally agree, because of the changing technology, with the change in ownership of copyright in photographs from the owner of the original negative to the person who composed the photograph (recommendation 36).[32] This makes the issue of ownership clearer, although difficulties will still be encountered in finding the owner of copyright for many of the amateur photos which are preserved in archives. One may have to approach a revised Copyright Appeal Board in order to obtain a license to publish a photo when the owner of the copyright in the photograph cannot be located or is unknown.

Finally, the Sub-Commitee's report recommends that perpetual copyright should be ended and that the term of copyright should be the life of the author plus fifty years, or seventy-five years after the fixation of the work if the author's death date cannot be determined. This provision will be helpful to archivists, but we would still face a situation in which virtually nothing written in the twentieth century could be photocopied unless the copyright owners could be identified and their permission obtained.

In conclusion, *A Charter of Rights for Creators* fails to strike a fair balance between the rights of creators and those of users. For archivists, the most serious drawback of the report is its refusal to apply the concept of fair dealing to unpublished works. Archivists must have a fair dealing clause that is applicable to unpublished works, and the issue is as important to the users of unpublished materials. How can creativity, as well as the dissemination of knowledge, flourish if such a restriction upon unpublished materials continues to exist?

Clearly, this is absurd. The existing law must be changed to reflect the actual practice of archival institutions, as well as the needs of the researcher who uses archival material. The Sub-Committee on Copyright Revision obviously did not understand who archivists are and what we do. If it did, it may have acted boldly enough to extend fair dealing to unpublished works. Instead, it succumbed to the pressures of larger lobby groups for creators, publishers, the recording industry, and broadcasters.

In light of the above, the ACA Copyright Committee recommends:

i) that the fair dealing clause be extended so it applies to both published and unpublished material;

ii) that the copying of an entire literary or artistic work which has been deposited in an archives should be permitted, provided that the recipient

30 *Ibid.*, pp. 10-11.
31 *Ibid.*, p. 14.
32 *Ibid.*, p. 30.

of the copy is advised that this is for private study or research purposes only, and that no further use may be made of the copy without the permission of the copyright holder;

iii) that any new copyright legislation specifically define what is meant by "private study" and "research" with respect to the fair dealing clause;

iv) that the making of copies for research purposes or private study ought not to be defined as "publication" in the sense of "issuing copies to the public";

v) that any expanded concept of "publication" ought not to define "publication" so that the depositing of materials in a public research institution constitutes publication;

vi) that it should not be an infringement of copyright for archival institutions to reproduce collections already in their holdings for security, preservation, interlibrary loan, and for diffusion purposes. These practices should be considered to be part of the functions of an archives.

Should these recommendations prove fruitless, then the most direct method of adequately dealing with the needs of archivists to carry out their responsibilities to make information available to the public is by the provision of an express exemption within the *Copyright Act*. As Jim Keon outlines in *Archivaria* 18: "Such an exemption should be framed so as not to interfere with the intended economic incentive functions of copyright legislation (that is, the commercial exploitation of published works). The exemption should not be so all encompassing, however, as to override the non-commercial interests of an author such as his right not to make a work public or his moral rights."[33]

33 Keon, "The Canadian Archivist and Copyright," p. 96.