



Canadian Council of Archives
Conseil canadien des archives

Dear Colleagues,

The Canadian Council of Archives (CCA) Statutory Review Working Group was established to examine and address issues related to the Canadian archival community in the current review of the Canadian Copyright Act. The Working Group is composed of:

Nancy Marrelli, Chair

Jean Dryden, appointed by the Association of Canadian Archivists

Frédéric Giuliano, appointed by l'Association des archivists du Québec

The Working Group has prepared the draft document (included below), outlining issues and positions on a variety of copyright issues that are of importance to archives and archivists. We invite input from the archival community as we prepare for active participation in the statutory review. You can post your comments or suggestions on Arcan-L or send them to the Working Group Chair:

Nancy.Marrelli@Concordia.ca. Please respond by April 20.

Thank you for your participation in this important endeavour.

Nancy Marrelli

DRAFT

COPYRIGHT ISSUES AND POSITIONS
Copyright Statutory Review Consultation
April 11, 2018

Crown Copyright (*Copyright Act*, section 12)

Issue

Successive studies of Crown copyright have noted its confusing nature, particularly regarding the precise nature of royal prerogative, the jurisdictions to which Crown copyright applies, and which government entities are covered. Furthermore, because the 50-year term of copyright protection for Crown works is triggered by publication, millions of unpublished documents in Canadian government and other archives are potentially subject to perpetual copyright, and require the permission of the government in question if they are to be reproduced and used. Yet, governments should not exercise their copyrights to limit accessibility and use. There is no obvious quick fix; Crown copyright is a complex matter that is long overdue for a comprehensive rethink and revision.

Position

We recommend that the federal government commission a comprehensive study that will identify the ways that Crown copyright is currently addressed by various levels of government, identify the many problematic issues, explore the solutions adopted by other countries, and recommend appropriate measures that will transform this outdated provision into a measure that serves the public interest in the digital age.

Reversion (*Copyright Act*, section 14 (1))

Issue

If an author has assigned the copyright in her papers to another party (e.g., an archive center or a publisher), the ownership of the copyright will revert back to the author's estate 25 years after her death, and the estate will own the copyright for the remaining 25 years of the copyright term. This provision cannot be overridden by an additional contract. In addition to being undue interference in the freedom of an author to enter into a contract, this provision is an administrative nightmare for archives to manage.

Position

We recommend that the clause be repealed OR amended to permit the author to assign the reversionary interests.

Technological Protection Measures – TPMs (*Copyright Act*, section 41.1)

Issue

The 2012 amendments to the *Copyright Act* introduced a provision that prohibits the circumvention of technological protection measures (TPMs). A TPM is any technical means that controls access to the work, or that prevents certain uses of a work. With very limited exceptions to provide alternate copies for users with perceptual disabilities and for encryption research, interoperability, and computer security, this prohibition overrides any other user rights included in the *Copyright Act*. This means that circumventing a TPM is not permitted even in order to carry out allowable activities such as making a copy for preservation or collection management purposes, or under fair dealing.

Position

Circumvention of TPMs should be permitted for any activity that is allowable under the Copyright Act.

Sound Recordings (Copyright Act, section 23(1)(b) and 23(1.1))**Issue**

In 2015 the Copyright Act was amended as part of the Budget omnibus bill, to extend the term of protection for sound recordings in certain circumstances. Stakeholders had no open, public opportunity to provide input for these important amendments.

Position

We believe it is essential that there always be open public consultation of all stakeholders when amendments to the Copyright Act are proposed.

Term Extension**Position**

The archival community strongly opposes any extension to terms of copyright protection.

Fair Dealing (Copyright Act, sections 29, 29.1, 29.2)**Position**

We recommend that the current list of allowable purposes in the Fair Dealing provisions of the Act remain unchanged.

Orphan Works**Issue**

Orphan works are works for which the copyright holder is unknown or unlocatable. Although they form a significant part of our documentary heritage, they are often not selected for digitization and/or online access because of uncertainty over the legal protections that apply to their use. Orphan works are of ongoing concern to user communities across the world and they present particular challenges for mass digitization and access projects in archives.

Position

We recommend further study to find viable solutions to orphan works issues.

Indigenous Knowledge

Issue

There is a growing belief in both Canada and internationally that copyright laws should be amended to address copyright protection for Indigenous Knowledge. Archivists are particularly concerned with the category of Indigenous Knowledge commonly referred to as Traditional Cultural expressions (TCEs) (e.g., stories, songs, names, dances, performances, ceremonies, etc.). While the Copyright Act currently protects TCEs just as it does any other types of expression, the copyright system represented in the Act is based on the idea that copyright is owned by an author for a term of copyright based on that author's life. The system does not reflect an Indigenous approach that is based on ongoing community ownership of stories, songs, dances, names, etc. that were created by author(s) who died well over fifty years ago. For additional information please see note below*.

Position

We urge the federal government to engage in a respectful, and transparent collaboration with Canada's Indigenous Peoples in order to amend the Copyright Act in ways that recognize a community-based approach to copyright protection. The Archives Community commits to actively participate in these consultations in all ways that are appropriate.

***NOTE on Indigenous Knowledge**

Definitions from World Intellectual Property Organization (WIPO) - Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions.

http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=396139

Traditional Cultural Expressions

WIPO uses the terms "traditional cultural expressions" and "expressions of folklore" to refer to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms.

Traditional Knowledge

There is as yet no accepted definition of traditional knowledge (TK) at the international level. "Traditional knowledge," as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the

content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.

In international debate, “traditional knowledge” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.