Information Bulletin #10
Copyright for Archivists
Canadian Council of Archives Copyright Committee

Changes to Copyright Law for Archives as a Result of Bill C-11

After many false starts and years of discussion and delay, Bill C-11, the Copyright Modernization Act (previously known as Bill C-32), passed through all stages of Parliament on June 29, 2012 and it received Royal Assent the same day. However, its provisions did not come into effect until they were brought into force.

As a result of the publication of the official regulations on November 7, 2012, (http://www.gazette.gc.ca/rp-pr/p2/2012/2012-11-07/html/si-tr85-eng.html), many sections of The Copyright Modernization Act (Bill C-11) came into force, effective that date. Other provisions came into effect on August 13, 2014, and January 2, 2015.

Bill C-11 can be found at:
http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-11/C-11_4/C-11_4.PDF

The updated Canadian Copyright Act is available at:
http://laws-lois.justice.gc.ca/eng/acts/C-42/index.html

General Comments

Public Domain

The *Copyright Act* as amended by Bill C-11 does not change the term for works that are in the public domain. The general term of protection for almost all works is still the life of the author, plus 50 years. For certain works (such as sound recordings, performer's performances, communication signals, and pseudonymous or anonymous works) the term is simply 50 years.

Works that were in the public domain prior to the amendment of the *Copyright Act* remain in the public domain.

Digital Copies

Copyright law protects creative expression, no matter the medium used.

In general terms, digital copies of a work are no different than physical copies in copyright law. Digital works are protected by copyright similar to works in physical form. Some users' rights, however, are more prescribed when a work in digital form is involved.

Where an archive is entitled to make a paper copy for a patron, it is equally entitled to make a digital copy, with a few specific exceptions. The exceptions most relevant to archives are noted in the specific provisions discussed below. In certain cases, archival employees may be required to take certain extra precautions when making digital copies.

The general intention of the revised *Copyright Act* is to put digital works on a level playing field with physical works, both for users and for copyright owners. The most notable exception is for "technological protection measures", discussed on page 7 of this document.

Self-serve Photocopiers and Patrons Making Copies

The Supreme Court of Canada has held that libraries and archives are not responsible for the acts of their patrons. Where an institution allows the use of self-serve photocopiers or cameras, the institution is entitled to presume that its patrons will use these tools within the bounds of the law.

In its decision, *CCH Canadian Ltd.* v. *Law Society of Upper Canada (LSUC)*, the Supreme Court wrote approvingly about the Great Library's self-serve photocopier notice. Such a notice would also be appropriate and useful in archives, and should be posted visibly near photocopiers and other devices routinely used to make copies. The notice should read:

> The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This institution is not responsible for infringing copies made by the users of these machines.

CHANGES TO THE *COPYRIGHT ACT* EFFECTIVE NOVEMBER 7, 2012, AUGUST 13, 2014, AND JANUARY 2, 2015

Repeal of sections 10 and 13(2) of the *Copyright Act*

Bill C-11 eliminates special treatment of photographs.

Before Bill C-11:

- The term of protection was the life of the individual who owned the original negative or plate (who may or may not be the photographer) plus 50 years; or

  when the negative or plate was owned by a corporation, the term of protection was 50 years from the time the photo was taken,

  the exception being that where the corporation that owned the negative or plate had as its majority shareholder the actual photographer, the term was the life of the photographer plus 50 years.

- When a photograph was commissioned, the first owner of copyright was the commissioner, so long as the commission was paid and there was no agreement to the contrary.

After these provisions of Bill C-11 came into effect in November 2012:

- Photographs are treated the same as any other copyright-protected work—the photographer is the author and first owner of copyright. The photograph is copyright-protected for the life of the photographer plus 50 years.

To summarize:

- The copyright in photographs taken prior to November 7, 2012, is first owned by the person who commissioned the photograph, if the photograph was commissioned and paid for. If a photograph was not commissioned, the first owner of copyright is the owner of the negative or the camera if there is no negative.
- Photos taken by a camera owned by a corporation between 1962 and November 6, 2012 are protected for the life of the actual photographer plus 50 years, but the first copyright holder is the corporation.
- Beginning November 7, 2012, **ALL** photographs are protected for life plus 50 years. The first owner of copyright in a photograph is the photographer.

Sections 15 to 17.2 of the *Copyright Act*: modifications for performers' performances

Bill C-11 adds a new right for performers to control their performances. This is the exclusive right for the owner of copyright in a performer's

performance to make the performance available to the public by telecommunication or over the Internet, or to reproduce or rent any sound recording of performers' performances.

Moral rights have also been extended to performers' performances.

These provisions are intended to make the rights in a performer's performance more closely in line with the rights given to other authors of copyright-protected works. The changes that came into effect in August 2014 allowed the WIPO (World Intellectual Property Organization) treaties dealing with these issues to be ratified.

Section 29 of the *Copyright Act*: expansion of fair dealing to include parody, satire and education

Parody, satire, and education are now allowable purposes for the user's right of fair dealing, in addition to the previous purposes of research, private study, review, criticism, and news reporting.

Sections 29.22 to 29.24 of the *Copyright Act*: new users' rights

These new users' rights permit the use of works without infringing copyright, subject to certain conditions. These new users' rights include:

- creating non-commercial user-generated content (“mash-ups”).
- copying for private purposes under the following conditions:
    - the copy is made from a legal, non-infringing copy
    - the copy is made from a copy that is not borrowed or rented
    - the copy will not be given away
    - the copy is made for the individual’s personal use only.
- copying a broadcast work for later listening or viewing (“time-shifting”) under stringent conditions (legal broadcast, one copy only, private use, for a reasonable time then destroyed).
- making back-up copies of legally owned or licensed materials (“source copies”) to protect against loss or damage, solely for personal use.

Section 29.4 to 30.04 of the *Copyright Act*: major modification of educational institutions' users’ rights

Many new users' rights for education have been added to the *Copyright Act*.

For a complete overview of these rights, see *Copyright Matters!* published by the Council of Ministers of Education, Canada, available free here:

http://www.cmec.ca/140/Programs-and-Initiatives/Copyright/Copyright-Matters-/index.html

Notably, educational institutions (including archives in educational institutions) may now play movies for educational purposes in a classroom setting without needing a public performance licence or permission from the movie publisher.

Section 30.1 of the *Copyright Act*: provisions for libraries, archives and museums to copy obsolete formats

Libraries, archives, and museums already had the right to make copies of works that are in obsolete formats. This right has been expanded by Bill C-11 to include the right to make copies of works that are in formats that are *becoming* obsolete, or where the technology to use the original works is *becoming* unavailable.

Section 30.2 of the *Copyright Act*: changes to inter-library loans, and provision for digital inter-library loans

Among other rights, this section of the *Copyright Act* allows for inter-library loans. Although the standard term in copyright law is "inter-library," this provision applies equally to archives and museums.

The law requires that the requester of the inter-library loan may only be given a single copy of the work, and allows an institution to act as an "intermediary" on behalf of a patron—allowing an archive, library, or museum to do anything on behalf of the patrons of another institution that it could do on behalf of its own patrons.

Bill C-11 made two key changes to this section.

1. A requirement for all inter-library loans is that the library, archive or museum must inform the person for whom the copy is made that the copy is to be used solely for research or private study, and that any use of the copy for a purpose other than research or private study may require the authorization of the copyright owner.

2. A new provision allowing for *digital* inter-library loans, subject to an *additional* condition. The providing library, archive, or museum must take measures to prevent the end user from:

> (*a*) making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;
> (*b*) communicating the digital copy to any other person; and
> (*c*) using the digital copy for more than five business days from the day on which the person first uses it.

Materials provided for inter-library loan should include notices stating that the copy is provided solely for research or private study, and prohibiting the above listed uses. Such a notice accompanying a digital transmission should be sufficient to meet these required measures, as encoding technological limitations to the digital file would be unreasonable under most circumstances. This is a promise that should be elicited from receiving institutions.

Section 30.21 of the *Copyright Act*: provisions for archives to provide copies of unpublished works

This section includes provisions allowing archives to provide copies of unpublished works (including unpublished photographs) under more viable conditions.

The amended section 30.21 of the *Copyright Act* changes the obligation from an archive being "satisfied" to an obligation to "inform" the person receiving the copy that it can only be used for research and private study and that use for a different purpose may require the authorization of the copyright owner.

An obligation to "inform" is an obligation that can be met more easily than an obligation to be "satisfied."

Other conditions in the existing section 30.21 remain. The archive may only copy the work if:

- the person who deposited the work, if a copyright owner, does not prohibit copying at the time the work is deposited;
- copying has not been prohibited by any other owner of copyright.

Section 30.71 of the *Copyright Act*: the right to make temporary reproductions for technological processes

This new users' right allows the creation of temporary copies as a result of technological processes, so long as the end use is non-infringing, and the copy forms an essential part of that technological process. This is a practical provision intended to make the *Copyright Act* more technologically neutral. Many technologies make incidental, temporary copies purely as a result of their normal functions (e.g. such as automatic caching).

Section 31.1 of the *Copyright Act*: Network Services

This provision specifies that service providers do not infringe copyright by simply transmitting infringing material.

Bill C-11 includes provisions dealing with requirements for service providers to send notices to infringing subscribers in what is called a “Notice and Notice” system. These provisions came into effect January 2, 2015.

Section 32.01 of the *Copyright Act*: new right for users with print disabilities

The *Copyright Act* allows for non-profit organizations, including archives, to make copies for users with "perceptual disabilities," subject to detailed conditions.

Bill C-11 adds the right for non-profit organizations to send materials to patrons or users with "print disabilities" *outside of Canada*, provided that the *author* of the work is either a Canadian citizen or permanent resident, or a citizen or permanent resident of the requesting country. This right does not apply to large-print books or cinematographic works (movies), or if the work is reasonably believed to already be commercially available in that format in the requesting country.

"Print disability" is defined identically as "perceptual disability" in the *Copyright Act*, except that a "print disability" only applies to reading, and does not apply to artistic works. They are both defined as including:

- severe or total impairment of sight or the inability to focus or move one's eyes;
- the inability to hold or manipulate a book; or
- an impairment relating to comprehension.

Section 32.21 of the *Copyright Act*: new users' right for personal use of commissioned photos and portraits

This new users' right allows the personal use of photographs or portraits that have been commissioned for individual use.

Sections 38.1 and 42 of the *Copyright Act:* changes to remedies for copyright infringement

Bill C-11 significantly limits the liability for statutory damages relating to non-commercial infringement.

Previously, statutory damages available to litigants who sued for copyright infringement ranged from $500 to $20,000 for *each* infringement. The new statutory damages provision limits these damages to $100 to $5,000 for *all infringements* for non-commercial infringers.

Sections 41 to 41.22 of the *Copyright Act*: prohibition on circumventing technological protection measures and removing rights management information

Bill C-11 introduces a new prohibition to circumvent any technological protection measures that guard a copyright-protected work.

A technological protection measure is any technical means that controls access to the work, or that prevents certain uses of a work (such as preventing copying a work, for example). Encryption, region coding on DVDs, and password-protection are examples of common forms of technical protection measures. These measures are also referred to as "digital rights management (DRM)" or "digital locks."

This prohibition supersedes *all* of the users' rights outlined by the *Copyright Act*; even if a user's right would apply to the end use intended, a user still may not circumvent or break a technological protection measure. The narrow exceptions to this prohibition — encryption research, interoperability, and computer security—are unlikely to apply to archival uses.

Circumvention of a technological protection measure triggers the same liability and remedies as copyright infringement. However for an archive, library, museum, or educational institution, the only remedy that a court may award is an injunction and not damages, if it can prove that the user didn't know and had no reasonable grounds to believe that this

circumvention was illegal. Although criminal remedies are possible for commercial circumvention of technological protection measures, these criminal provisions do not apply to a person acting on behalf of an archive, museum, library, or educational institution.

Bill C-11 also prohibits the removal of "rights management information" that is attached to a copyright-protected work. This is defined as information embedded in or attached to a work that identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or the holder of any rights in the work, the performance or the sound recording, or concerns the terms or conditions of the work’s, performance’s or sound recording’s use.