

Comments on

A Framework for Copyright Reform
and
A Consultation Paper on Digital Copyright Issues

Submitted by

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1. INTRODUCTION

The Canadian archival community welcomes the ongoing opportunity to be a part of the process of reform of the Canadian Copyright Act. The vibrant network of archives and archivists across every part of Canada is an important component of the cultural and heritage infrastructure of this country. We know it is important to articulate our needs and position in relation to copyright since copyright is an important element for the healthy development of culture and heritage in Canada.

Archives are the memory of the nation

Archivists safeguard for present and future generations the essence of who Canadians are and what we have done. Our timeline is the very long term, not the immediacy of the current marketplace. We maintain and provide access to the records reflecting the great diversity of Canadian life: ordinary Canadians and everyday life, those who have attained fame and fortune, institutions which act on an international level and those based in Canadian neighbourhoods, the records of the humble and anonymous and those of well-known Canadians past and present. Archives house the diaries of Mackenzie King and those of a Prairie housewife during the Depression, photographs by Karsh and photos taken by YMCA campers. Most of our holdings have high research value but no direct commercial value in the marketplace.

Copyright is important legislation for archivists. We look to this legal framework to guide us in maintaining the balance between the creators of our archival materials and the researchers who come to us because they need to access those materials.

Archives are special places in relation to copyright - by our very nature we represent the balance between creators and users which copyright legislation tries to achieve. Our materials originate with creators, our users are those seeking to access them. Our users are often creators themselves, and our holdings are frequently the inspiration or background for new works, thus use of archival material frequently has an indirect impact on the economy. Since our "clients" are both creators and users, we balance the rights of one and the other as part of our daily business.

In order to serve society as a whole, to function effectively as the memory of Canada, and to serve both the creators and users of archival holdings, we seek balance in the copyright legislation. The rights of the creators must be defined and respected, and we must be able to provide to our users fair and reasonable access to primary information about Canadian life. The balance should not tip too far in one direction or the other, and in the Digital Environment this presents many new challenges.

The Digital Environment/Information Age provides wonderful opportunities for Canadians - employment, creation in the arts and in the sciences, new business ventures. The business of archives is acquiring and making available vast quantities of diverse information about Canada and Canadians, and we do it now in the Digital Environment, an environment where many diverse users expect our holdings to be available on-line, and much of the research on our holdings is done from a distance. Our goal is to ensure that we are able to meet the expanding information needs of our users while respecting the rights of creators.

2. RESPONSE TO A FRAMEWORK FOR COPYRIGHT REFORM

The Canadian archival community welcomes the opportunity to comment on this most recent approach to the process of change in Canadian copyright legislation.

We believe a staged approach to copyright reform is viable as long as the process is open, with ample opportunity for input at all stages. Archivists wish to caution however, that the Copyright Act is a complex and synergistic whole and the delicate balance must be maintained at each stage of a phased approach to changes in the legislation. All stakeholders must be consulted at all stages, and there must be sufficient time for careful consideration of all proposed amendments. The archival community anticipates active participation in all phases of change to this legislation which is of crucial concern to us. We believe it is essential to ensure open exchange and dialogue with the diverse groups which are affected directly and indirectly by changes in the Act.

Archivists seek balance at every stage in the process of change in the copyright legislation. We are uniquely placed to be constantly called upon to maintain this balance since our clientele includes the creators who deposit material with us and the users who need to access that material, often for the creation of new material as part of the economic and cultural process. We believe it is essential that the balance between the rights of creators and fair and reasonable access to original work must be maintained in this Information Age.

Archivists want to ensure that issues which affect culture and heritage are addressed along with those with direct and immediate economic implications, since our holdings are an integral part of the heritage and culture of Canadian society.

We are very concerned about the proposed agenda for changes to the Copyright Act.

- We have already expressed major concerns around the ratification of the WIPO Treaties. There is a need for timely and serious discussion of these issues, particularly the extension of the period of protection to life plus seventy years from life plus fifty years. This extension will block on-line access for an unduly long period, to many of our *unpublished* holdings from unknown or unlocatable rights holders. Most of these holdings have little or no direct commercial value but high research value.
- We have ongoing concerns about Crown Copyright. Archives across the country have Crown holdings of various kinds. Protecting unpublished Crown documentation in perpetuity is in conflict with the stated government goals to make government information available on-line.
- Audio-visual and multi-media works are increasingly a part of Canadian archival holdings, and rights issues for these materials desperately need to be clarified.
- We want to ensure that we can proceed with preservation of materials in our holdings, regardless of the medium, so that these materials will be available to future generations.
- We feel it is essential to clarify some of the basic issues. Of prime concern is a clear and contemporary definition of publication.

Archivists want our concerns to be part of the agenda for change.

2.1 INTRODUCTION

The objectives of the copyright reform process are stated clearly in the Introduction to *A Framework for Copyright Reform*:

- to create opportunities for Canadians in the new economy;
- to stimulate the production of cultural content and diversity of choices for Canadians;
- to encourage a strong Canadian presence on the Internet; and,
- to enrich learning opportunities for Canadians.

Archivists are in agreement with these principles, and in our own institutions we are moving forward with many projects which have these same objectives. We are making great strides to use all the opportunities of the latest technologies to acquire, process, and make available to Canadians and other researchers around the world, much primary unpublished documentation, the rich heritage of our diverse archival institutions across all parts of our country. The new technology allows us to provide access to our holdings in ways which were unimaginable only a short time ago. When posted on a web site, holdings such as photographs, genealogical information, correspondence, and a vast array of other documentation can be available to anyone with access to an Internet connection. Researchers in Nunavut, Camrose, or Gander can access this information as easily as someone who can visit the archives in person, whether the archives itself is in Labrador, Vancouver Island, or les Îles-de-la-Madeleine.

2.2 COPYRIGHT: A PUBLIC POLICY FRAMEWORK

Copyright affects many sectors of the Canadian economy, including many indirect or secondary effects. It has a major impact on the cultural/social fabric of our society.

The copyright-related sectors which immediately spring to mind may be publishing, film, sound recording, visual arts, software, etc. Archivists know from our daily experience, however, that the *indirect* value and impact of our holdings on the economy is substantial. Archives are frequently part of the creative process, very often the first and the last step in that process. We hold and make available for all, as appropriate, the memory of our society and culture. Creation is a layered process and the past is frequently a part of it. Our holdings are a rich source of information and inspiration, a significant part of the infrastructure for creative endeavour. As such we are important stakeholders in the copyright process, although for the most part our holdings do not have great direct commercial value. The contributions of archives to the GDP may not be direct, but they are none the less significant. For example, film, video, and television production depend heavily on archival resources. *Canada: A People's History* is using archival materials from every part of this country, just as commercial film and television producers do every day. These creators ultimately deposit into archives their research and production materials, and they in turn become source materials for others as part of this ongoing layered process.

Copyright affects many important cultural and social aspects of Canadian life as well, often completely independent of economic benefit or impact. Issues of access and use of materials are important considerations for copyright, and these are of great concern to archivists. Canadians and others learn about who we are and what we do by

accessing the records we produce while living our lives and carrying out our affairs. Increasingly our users access this kind of material in the digital environment, on the Internet. It is important to remember that the vast majority of our holdings have no direct commercial value, but high research value. Canadians need access to these materials such as family photographs, genealogy materials, home movies, and other materials which document our daily life.

Our interest in copyright is twofold. We recognize and accept fully that we have responsibilities towards the creators of the records in our care but also to those who wish to access those records. We support the need for protection of the rights of creators and for access as an important public policy objective. We must remember however, that many of the creators of the material in Canadian archives are completely unknown or unlocatable. This creates tremendous difficulty since it is unpublished material. **Public policy must include reasonable ways and means to provide access to these materials so Canadians can understand and appreciate our own history.**

2.3 CONTEXT

The modernization of the Copyright Act through Phase I (1988) and Phase II (1997) has resulted in major changes in the application of the law in Canadian archival institutions. Of particular note are the clarifications of many aspects of the legislation, procedures to deal with published materials where the copyright holder cannot be located, and limited exceptions to use or reproduce copyright materials for archives, non-profit educational institutions, libraries, and museums, and the term of protection for photographs.

Concerns from the archival community about some elements of the 1996 WIPO treaties (WCT and WPPT) have already been expressed. That part of the WIPO treaties which extends the general principle of term of copyright to life plus seventy, from life plus fifty, is of major concern to archivists. We believe that this additional period of protection limits access unduly. The archival community is also concerned that once 30 countries ratify the WIPO treaties, the provisions will come into effect in Canada (as a signatory). As of July 15, 2001, the WCT had been ratified by 26 countries, and the WPPT by 24 countries. There is a need for serious discussion of the issues in these two treaties, and a need to balance the Act in consequence.

The Canadian archives community is mindful of the review requirement under Section 92 of the Copyright Act, under which the review document on the revised Act must be sent to Parliament no later than September 1, 2002. Some provisions of the Act came into effect only in 1998 and 1999 and the period of review will be considerably shorter than originally envisioned in 1997. The process of consultation and review will require timely and careful consultation of the various stakeholders by the Minister of Industry, and the archival community looks forward to the opportunity to contribute to the review process in positive and thoughtful ways. We would like to be sure that the consultations are carried out in such a way that there is ample time for useful exchange.

2.4 THE REFORM PROCESS

The Archives community welcomes the opportunity to participate in the process of copyright reform in which the Government "will consider issues, consult Canadians, and propose legislative amendments, when necessary, in a gradually staged manner."

Copyright is an ongoing issue in the current environment of fast-paced technological change. We are living in "interesting" times, rather than the more stable times of the last century in which copyright reform could be approached in a somewhat leisurely way, with major revamping of the legislation occurring only after decades of minor adjustments.

The reform framework outlined in this document by the Departments of Industry and Canadian Heritage proposes a continuous and staged approach to amendments to the Copyright Act, and this is a practical response to this changing reality.

Legislation such as the Copyright Act is a complex and synergistic whole, however, and the balance which the legislation seeks to embody and enact on behalf of all Canadians is a delicate one. It will be extremely important to guard against losing sight of the broad aims and objectives of the legislation while dealing with discrete issues and problems. We must avoid plugging one hole in the dike only to create ten others which will then require urgent attention. It will be especially important that all stakeholders are consulted and that there be sufficient time for careful consideration of all the stages and amendments. The process can be timely and efficient but should clearly provide opportunity for widespread consultation with the diverse groups which will be affected directly or indirectly by the legislation.

The archival community anticipates active participation in the review process under section 92, especially concerning the exceptions outlined in the 1997 legislation, which have come into force since that time.

Archives have a number of other concerns as well, and we especially welcome the priority consideration of "clarifying the law where it will reduce the risk of unnecessary litigation" since there are many areas which directly affect archives in this way. We share the belief that priority should be given to revisions which will preserve the integrity of the Act, and will have full analysis and consultation. We understand however, that there are many stakeholders and building consensus is a difficult process. All the stakeholders must have an opportunity to participate. We look forward to participating in the process of developing the agenda, determining the priorities, and building consensus. Archivists have some major concerns which we feel need to be addressed with some urgency.

2.5 THE AGENDA

The issues listed in the Agenda section of the document as those which have been identified as outstanding matters encompass many things which are of great concern to the archival community, including:

- Access issues
- Audio-visual works/ photographs
- Digital issues
- Government as owner and user of copyright works
- Rights management in an on-line environment
- Technology-enhanced learning
- Term of protection
- Traditional knowledge and folklore
- Transition period for unpublished works

The views of the Canadian archival community on many of these issues have been presented to the Departments in depth in meetings, and in the document prepared by the Copyright User's Forum, *Discussion Paper on Digital Copyright Issues*. While the annex to *A Framework for Copyright Reform* contains a superficial summary of many of the outstanding issues, we hope and expect that serious policy analysis documentation will be forthcoming from the Departments of Industry and Heritage on these and other matters. We believe this approach will foster exchange and debate, and can help build consensus on these important issues. In our opinion, thorough analysis of these complex and important issues is an important part of the process.

Among the issues which concern archivists are:

2.5 a) Ratification of the WIPO Treaties

Of particular concern to Archives is the extension of the period of protection to life plus seventy years from life plus fifty years. This extension will block on-line access for an unduly long period, to many of our unpublished holdings from unknown or unlocatable rights holders, most of which have little or no direct commercial value but high research value. We believe the term of protection should not be increased.

2.5 b) Crown Copyright

Archives across the country have Crown holdings of various kinds. Protecting unpublished Crown documentation in perpetuity is in conflict with the stated government goal to make government information available on-line. For example, why would there be a copyright restriction on correspondence in the 1920s between a government department and a Canadian citizen, when that person has deposited the correspondence in an archives and there are no privacy issues outstanding?

2.5 c) Audio-Visual and Multi-Media Works

These are increasingly a part of Canadian archival holdings, and rights issues for these materials urgently need to be clarified. It is often difficult if not impossible to determine who is the rights holder for some of this material and this makes clearing the rights impossible for both archivists and our users. For cinematographic work, is the author the director, the producer, the camera operator, the editor, or another? For multi-media works we need to clarify the scope of protection and who is the author.

2.5 d) Preservation Measures

Archivists want to ensure that we can proceed with the copying which is essential for the preservation of materials in our holdings, *regardless of the medium*, so that these materials will be available to future generations.

2.5 e) Defining Publication

Clearly defining when a work is published is of great concern to Archives. Whether or not a work is published affects copyright protection in significant ways. Most of our holdings are traditionally unpublished. This is a major issue in the Digital Environment. Is material published if it appears, with the permission of the rights holder, on a web site for 12 hours/24 hours/3 months? Does the Act currently exclude electronic publication since it could be considered to be by "telecommunication"? This needs to be clarified. It is impossible to apply the law if it is unclear.

Archivists want these and other concerns to be part of the agenda for change to the legislation.

2.6 RECOMMENDATIONS IN RESPONSE TO A FRAMEWORK FOR COPYRIGHT REFORM

The Archives community recommends:

- Balance between effective legal protection of the rights of creators and access to users for the benefit of society as a whole must remain a primary objective in all efforts to revise the copyright legislation.
- Changes to the copyright legislation in a staged approach should be accompanied by the need to maintain an overview of the whole Act, and there must be balance at each stage of change to the Act.
- The process of change should include an open process of exchange with ample opportunity for input at all stages from all concerned stakeholders.
- The Departments of Heritage and Industry should undertake the production and wide dissemination of serious policy analysis documentation of the many complex outstanding issues to be addressed in reform of the copyright legislation. This documentation should serve as the basis of exchange and debate and will help build consensus.
- The agenda for changes to the Copyright Act should include consideration of issues of culture and heritage as well as issues with direct economic implications.

2.7 CONCLUSION

The Canadian archival community heartily endorses the concept put forward in *A Framework for Copyright Reform*, that copyright is a public policy framework. Copyright legislation, and public policy in general, must meet the very broad range of needs of Canadian society as a whole, and should not be based upon a narrow range of interests.

Archival holdings are part of the cultural heritage which is an integral part of Canadian society. There are a great number of outstanding issues relating to copyright reform

which are important to archivists, and which are not prominent in the agenda put forward in this consultation paper, and we recommend that these issues be addressed in order to ensure that the Canadian copyright environment meets the needs of *all* Canadians. We intend to be part of the broad and ongoing consultation and public debate of the important economic and social issues which are embedded in this important legislation.

The Archives community is committed to working closely with Government and other stakeholders to build consensus and work towards careful and considered changes to the Copyright Act to benefit all Canadians in a fair and balanced way.

3. RESPONSE TO CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

3.1 INTRODUCTION

The Canadian archival community is pleased to have the opportunity to participate in the process of reform of the Copyright Act to accommodate the Digital Environment.

We believe it is important that the delicate balance between the rights of creators and the rights of those who wish to use the material for a variety of purposes be maintained in any revisions to the Act.

It is clear to Canadian archivists that the Digital Environment has created situations where there is concern and lack of clarity. We believe that the copyright legislation should present a clear and balanced legal framework in which all those concerned with copyright understand what are their rights and their responsibilities. There are many areas which have become murky in the Digital Environment, and the legislation must move forward to resolve issues such as defining what is publication and who are Internet Service Providers. We are in a time of very fast-moving technological change, however, and precipitous change is likely to make things worse rather than better. We wish to emphasize the need for careful and thoughtful reflection of the issues from all perspectives. We believe that a well-planned process of in-depth study, consultation, and consensus building is essential to a positive process of change.

Archivists are particularly concerned that research and private study must not be penalized in the digital environment, and that technological means do not interfere with these important activities.

We believe that as much as possible the current provisions of the Copyright Act should be made technologically neutral. For example, the migration of digital works must be permitted for preservation purposes.

We are very concerned about implementation of the WIPO treaties, particularly the extension of the term of protection to life plus seventy years, which we believe is too long a period of restriction.

Since it is important for archivists to continue to make information available in the Digital Environment, and to simultaneously protect the rights of creators, simple and effective rights clearance procedures must be developed for making materials available on the Internet, including unpublished materials.

3.2 THE DIGITALLY NETWORKED ENVIRONMENT

This Consultation Paper outlines in considerable detail the many diverse initiatives which the Canadian Government has undertaken to develop and implement public policy which enables and encourages the appearance and development of cultural and heritage content on the Internet.

The Canadian archival community, with the support of Government, and the educational and research communities in Canada and abroad, have been and will be an integral and important part of efforts to make available on the Internet significant portions of the vast and diverse documentation which is held in Canadian archives. This documentation presents Canada, Canadians, and Canadian creation and heritage to ourselves and to the world. Archives are our collective memory and through them we provide a distinctive window on Canadian culture and heritage, who we are and what we have accomplished.

Government policy and programming have helped create a Canadian society which is "wired" and which is very interested in using the Internet to both provide and use information and services of many kinds. Canadians have succeeded in creating "a platform for promoting a strong and visible Canadian presence around the globe." Canadians and others have developed a strong and increasing expectation and demand for information and services on-line. Those ever-increasing expectations include providing access to archival holdings on-line, to a growing user base which includes diverse researchers from near and far. Government at the federal and provincial levels, and other institutions such as universities, have supported these efforts to make our holdings available on-line, greatly increasing the access to our archives, and to Canadian culture and heritage.

There has been much discussion and debate about how to enable and encourage e-commerce, including the legal framework to protect Canadian creators and rights holders. Archivists are not often directly involved in e-commerce, but many archives provide services which indirectly contribute to the creation of new works and new products which are part of e-commerce. We are often indirectly involved in these enterprises as creators use our holdings as inspiration and the basis of new materials.

Archives also carry out an important social and cultural role by documenting and making accessible our history and culture. Archivists are under increased pressure to provide access to our holdings on the Internet. It is now even more important than ever to have a simple and clear procedure for rights clearances to enable us to make archival materials available on the Internet. This is particularly a problem for unpublished archival materials which often have unknown or unlocatable creators. These materials constitute a significant portion of archival holdings.

In the Consultation Paper, the Departments indicate that their proposals are based on the following general premises and assumptions, and they raise some fundamental questions:

The ICTs (Information and Communications Technologies) allow for rapid and essentially costless reproduction and communication of material, including copyright works, whether or not these have been authorized. From a copyright perspective, the ICTs, though they open

the possibility to much larger international markets for copyright material, also facilitate infringing reproductions and communications of such materials.

Some rights holders consider that their ability to assert their copyright in relation to a work or other protected subject matter is considerably diminished in the Internet environment once the material is made available in that environment. In comparison with the analogue world, Internet-based infringers are potentially more numerous, more anonymous, and may operate from within jurisdictions that provide relatively little copyright protection.

Some rights holders may be deterred from making their copyright material available on-line.

Many rights holders wish to avail themselves of the potential benefits of digitizing their material and selling to the large markets now open to them via the Internet. They are using or are contemplating the use of technological means for protecting and identifying their material. Some rights holders are prepared to make material available now, while others would make their material available if they could control when and how their material would be disseminated, though some would prefer that their material not be made available at all. . . .

The cost of making copyright material available or having access to material is partly a function of the availability of the services of Internet intermediaries such as ISPs. Thus, a competitive ISP sector in Canada benefits both the rights holders and the users by ensuring a low cost platform for storing and transmitting content. Thus, it also promotes the government's objectives in relation to the dissemination of content for and by Canadians.

In order for a competitive ISP sector to continue to thrive in Canada, the framework rules under which they operate should be clear, simple to adhere to, fair and take due account of the framework rules under which they operate in other jurisdictions.

The Archival community is in basic agreement with the premises and assumptions above. The Internet is a powerful communications tool. There is no question that there is the possibility of unauthorized reproduction and communication of copyrighted material in the digital environment and that this presents some difficult situations for copyright protection. This does not change the fact that we also believe that any changes to the policy framework for copyright should not hinder the potential of the Internet to provide appropriate access to Canadian cultural and heritage content. Providing wide access to our research materials via the Internet fits with Canada's cultural, social, and economic policy objectives of dissemination of content for and by Canadians, thereby fostering awareness and in its turn providing opportunity for innovation and creation of new Canadian content.

We think it is important to clearly define what is an Internet service provider or ISP. We support the establishment of reasonable framework rules for ISPs, as suggested in the document, and on the basis that they are a "common carrier" similar to a telephone company. This could include provision that ISPs act expeditiously to remove or disable access to infringing information once they are made aware it is an infringement.

Archival material presents some very particular challenges in the Digital Environment. All material in Archives has research value but most of our holdings have no real direct commercial value. Most (although not all) of the millions of letters and other documents in Canadian archives are unpublished and by unknown or unlocatable creators, mostly ordinary Canadians who created material carrying out their daily lives.

There are many advantages to making some of this material available on the Internet for research, although rights clearances can be next to impossible. (Examples might include: diary of an unknown domestic worker in the 1930s, letters home from a soldier whose location is unknown, family photographs where the photographer is unknown.) It is important to protect the economic and moral rights of creators, but we must also take into consideration that we should not hamper access with unduly long periods of restriction. It is important to note that many archival materials do not have direct economic value but are important research materials. Archivists believe that balance is extremely important.

Archivists are also very concerned about issues such as tampering with, and misrepresentation or misuse of, original documentation. Although there may not be direct commercial value to a document, it is important that the integrity of the document be protected in the digital environment. We have responsibilities to the creators of the documents in our custody to do everything possible to ensure that their work is not misrepresented.

3.3 INTERNATIONAL INITIATIVES

It is clear that the digital environment increases potential accessibility to works, but it also exposes works to increased potential infringement, and this is true across all national boundaries. In December 1996 the World Intellectual Property Organization (WIPO) concluded two international treaties to address some of these issues: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Canada has signed these treaties but they have not yet been presented to Parliament for ratification, and Canada is not yet bound by them.

The archival community has already expressed a number of concerns about the need to maintain the balance in the Act and how some of the terms of these treaties will affect that balance in Canada. Archivists are particularly concerned about the extension of the general term of copyright protection from life plus fifty years to life plus seventy years. The vast majority of holdings in Canadian archives is unpublished material which has research value but little or no direct commercial value. Copyright holders are frequently unknown and/or unlocatable. Extending the period of protection for this material makes it impossible to make it available for researchers on-line for an additional twenty years, while it also does not provide creators (who are mostly ordinary citizens, often anonymous) with any financial benefit since the direct commercial value is nil. The extension benefits those very few of the creators of archival material who do reap financial benefits, but it penalizes researchers from widespread on-line access to their cultural and historical heritage for an additional twenty years. No copyright collective can act on behalf of all the ordinary people who are the creators of most archival documents: the person who wrote a fan letter to a jazz musician in 1929, the unknown writer of a history of a garden club, the author of a letter signed with just a first name, an initial or a nickname, unidentified authors of reports or planning documents of extinct organizations, the creators of amateur film at YMCA camp, family photographs at Expo '67, or amateur film of the mudslides at St-Jean-Vianney in 1971.

The archival community would like a full consultation and open discussion on ratification of the WIPO treaties, with plenty of opportunity to make any necessary adjustments to maintain balance in the Canadian framework, and to ensure that there is appropriate flexibility in implementation. We are particularly concerned that the number of ratifying countries is quickly approaching thirty, and the treaty will soon come into force.

3.4 CORE PRINCIPLES

The Consultation Paper sets out core principles for the Copyright Act in the digital environment:

- The framework rules must promote Canadian values.
- The framework rules should be clear and allow easy, transparent access and use.
- The proposals should promote a vibrant and competitive electronic commerce in Canada.
- The framework needs to be cast in a global context.
- The framework should be technologically neutral, to the extent possible.

We feel, however, that the framework core principles should also include a clear indication that the Departments are committed to balance in the Act, including exceptions for the use of copyright materials for non-profit educational institutions, libraries, archives, and museums. **The Digital Environment should not penalize research and private study.**

3.5 PROPOSALS

3.5 a) Making Available Right

Archives would like any making available right to be clear and easy to implement. It must be clear who has the right to authorize the making available of works on the Internet and other networks, and the length of the term of protection for making available. It is important to have in place a simple rights clearance procedure so that it is easy to clear the rights to works which are protected.

It is crucial to archivists that the Act include a clear definition of publication. Whether or not a work is published affects copyright protection in significant ways, including issues such as making work available on the Internet. Most of our holdings are traditionally unpublished. We need clarity about publication in the Digital Environment. Does the Act currently exclude electronic publication since it could be considered to be by "telecommunication"? Is material published if it appears, with the permission of the rights holder, on a web site for 12 hours/24 hours/3 months/10 minutes? This needs to be clarified. It is impossible to apply the law if it is unclear.

3.5 b) Legal Protection of Technological Measures

Archivists have acute and special concerns in this matter. Because our role is to acquire, preserve and make available records of permanent value, we must consider the issue of access, both in the near future, and potentially for hundreds of years. The Act currently permits specified uses of copyright material deposited in an archives, (e.g. fair dealing, statutory exceptions for libraries, archives and museums, and the exception permitting

the carrying out of statutory obligations under access or privacy legislation). Making it illegal to have access to devices that might circumvent technological protection measures thwarts the intention of these exceptions for legitimate uses. For example, circumvention devices should be allowable to provide access to materials in the public domain.

In the long term, the use of technological protection measures will create a problem for archivists and our researchers. Given the rate at which software and hardware become obsolete, there is no assurance that technologically protected material will still be accessible by the time it is transferred to an archives. By the time a work eventually falls into the public domain, the technology that will allow archives to unlock the content may not be readily available. If there is an unconditional ban on devices that might be needed to circumvent any technological measures that had been employed by the copyright owner to protect the work, the term of protection could effectively be extended indefinitely. In other words, a work that by law should fall within the public domain may in practice remain inaccessible. In practice, the work may be lost to any kind of access. We already see this regularly for digital materials which were created within the last fifteen years and which are now beginning to arrive in Canadian archival institutions. To carry out our long-term mission, archivists must have the means to resist the technical obsolescence which will otherwise lead to the loss of essential information.

The archival community believes that there should be a straightforward prohibition to restrict specific illegal acts, rather than a blanket additional layer of technological protection. Our concerns here are twofold:

- We believe that the copyright framework should not override the legitimate balances which have been built into our current Act, prohibiting in the digital environment access which is not currently an infringement.
- Because of galloping technological obsolescence, we also believe that for preservation purposes only, we must be able to apply these devices before the period of protection is ended. If we do not migrate digital information into robust and enduring formats and continue to refresh it with changes in hardware and software, we will lose access to all the information in these documents. We have already lost important early databases, other electronic records, and audio-visual and multi-media records where the useful active life of the original platform is extremely short. In fact ongoing migration of this data is the only way to ensure ongoing access. Archivists are the custodians of our documentary heritage. We must ensure that this important part of our heritage does not become unintelligible hieroglyphics which we can hold in our hand but cannot access.

3.5 c) Legal Protection of Rights Management Information

Archivists recognize that it can be very useful to embed in digital documents certain rights management information, including visual, moving image, and multi-media materials. This would address some of the difficult situations which present themselves daily in most Canadian archives - where the rights holder is very often completely unknown. We do have concerns about the accuracy of the information, however.

Our preoccupations on this issue are:

- Legal restrictions on the removal or alteration of Rights Management Information should apply only where the material is protected by copyright,
- The removal or alteration of Rights Management Information should be permissible when it interferes unreasonably with the authorized display or reproduction of copyright material.
- We also have concerns about the currency, accuracy, and pertinence in the Canadian jurisdiction, of the information on such claims.

3.5 d) Liability of Network Intermediaries Such as Internet Service Providers, in Relation to Copyright

It is important to clearly define what is an Internet Service Provider or ISP. We support the establishment of reasonable framework rules for all ISPs, on the basis that they are a "common carrier" similar to a telephone company. A notice and takedown provision also seems appropriate. We believe this should include provisions for moral rights to deal with situations where materials may have been permitted to be reproduced freely, but where misrepresentation of a work has taken place, for example altering of a photograph or textual document.

3.6 RECOMMENDATIONS IN RESPONSE TO CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

- Ensure that the process of change is well-planned, and that it includes in-depth study, consultation, and consensus building.
- Make a commitment to balance in the legislation which will assure the rights of creators are protected, and that there is reasonable access to users of materials which have research, social, cultural, and historical value.
- Organize a full consultation and open discussion on ratification of the WIPO treaties, with plenty of opportunity to make any necessary adjustments to maintain balance in the Canadian framework, and to ensure that there is appropriate flexibility in implementation.
- Ensure the provisions in the Copyright Act dealing with the Digital Environment do not penalize research and private study.
- Define what is publication in terms of the Act.
- Establish simple and effective rights clearance procedures for making material, including unpublished materials, available on the Internet.
- Ensure that legal use of materials as provided now in the Act is not prohibited by technological measures.
- Clearly permit migration of digital works in Archives for preservation purposes before they have become obsolete, even though they may still be under the term of protection.
- Limit legal restrictions on the removal or alteration of Rights Management Information to situations where the material is protected by copyright, where it does not interfere with authorized use of the material, and where the information is accurate.
- Define what is an Internet Service Provider (ISP).
- Include moral rights issues in notice and takedown provisions for ISPs.

3.7 CONCLUSION

We see the Act as an interactive whole, and believe it is crucial to ensure a healthy Canadian copyright environment in which the needs of both creators and users are respected.

4. CONCLUDING REMARKS

In the Digital Environment archivists are striving to meet the expanding information needs of our users while respecting the rights of creators and rights holders. A carefully crafted and fair balance between protection of the rights of creators and reasonable access for our users is a primordial concern for archivists. The archival heritage is a significant part of the Canadian social and economic fabric, and Archivists want our concerns to be part of the agenda for change in the copyright legislation in Canada.

We are pleased to engage in the debate and discussion of these important issues, and would like to ensure that as other copyright initiatives come forward, we have adequate opportunity to examine them and to make comments on how they affect the archival milieu.