Canadian Copyright Law Revision: Issues of Importance to Archival Institutions

Presented to
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by
The Bureau of Canadian Archivists Copyright Committee

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Section 92 Review

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INTRODUCTION

Section 92 of the *Copyright Act* obligates the federal government to report to Parliament on the operations of the Copyright Act by September 2002. The report must be referred to a Parliamentary committee for review. The Parliamentary committee is obligated to report back to Parliament within one year.

This review document has been prepared by the Bureau of Canadian Archivists Copyright Committee to assist government officials in identifying the issues of importance to archivists for the section 92 review. The vibrant network of archives and archivists across every part of our country is an important component of the cultural and heritage infrastructure of Canada. We believe 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. Therefore this document contains a complete list of the copyright law revision issues affecting archives.

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 mandate is to serve society as a whole, to provide ongoing 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.

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. Since our "clients" are both creators and users, we balance the rights of one and the other as part of our daily business.

We would be pleased to clarify or discuss any of the issues in this document, and remain committed to developing balanced copyright legislation which respects the rights and needs of both creators and users.

Note: the issues appear in this document in no particular order.

ISSUE 1: Maintenance and management of archival collections in "for profit" archival institutions

DISCUSSION: Section 30.1 of the *Copyright Act* provides a comprehensive set of provisions for maintaining and preserving archival collections. Archival records are fragile. To preserve them, it is often necessary to copy the originals to permit use for research, or to save the information they contain.

Section 30.1 limits the preservation and management exceptions to non-profit institutions only, thus preventing the application of conservation measures to records in private sector archives for which the corporation does not hold the copyright. However, the historical records in a business archives are as much at risk as the records in a university or government archives. Archival functions in Canada are performed not only by publicly-funded institutions such as the national and provincial archives or university archives, but also by corporations such as London Life, Imperial Oil and the major banks. Many companies preserve their valuable historical records for the benefit of the entire country. We believe that the private sector must be encouraged to retain and preserve its historically significant records.

RECOMMENDATION: That the Act be amended to apply section 30.1 to all archival institutions by removing the distinction between "non-profit" and "for profit" archives for purposes of this section.

ISSUE 2: Off-air taping

DISCUSSION: Section 30.5 provides the National Archives of Canada with an exception which permits it to acquire copies of radio and television transmissions through off-air taping. The mandate of the National Archives is to conserve private and public records of national significance. However, provincial, territorial and local archives also have a mandate to preserve various aspects of Canadian history, including the records of local and regional broadcasts. If local and regional archives are not permitted to record broadcasts of regional and local interest in a manner similar to that provided to the National Archives, these archival records are at risk of being lost forever.

RECOMMENDATION:
That the Act be amended to extend the provisions in section 30.5 to official archives as defined in the existing *Copyright Act*.

ISSUE 3: Permit an archives to make copies of its holdings for other archives' holdings

DISCUSSION: Access to Canada's archival heritage would be greatly facilitated if an archival institution were permitted to make a copy of a collection (or a portion thereof) in its holdings for the permanent collection of another archives. Archival material is one-of-a-kind. For example, only the National Archives has

the papers of Prime Minister Mackenzie King. Researchers who want to consult this material must travel to Ottawa. Yet such collections are of potential interest to scholars across Canada.

RECOMMENDATION: That the Act be amended to provide that an archives be permitted to make a copy of materials in its holdings for the permanent collection of another archives.

ISSUE 4: Expand Section 30.21 to apply to other subject-matter

DISCUSSION: Section 30.21 permits an archives to make a single copy, for the purpose of research or private study, of an unpublished work in its holdings, subject to a number of conditions. Limiting its application to works means that significant portions of archival holdings, most notably "other subject-matter", is excluded from the exception. This places an unnecessary limitation on the service which an archives can provide to its researchers

RECOMMENDATION: That the Act be amended to expand the application of section 30.21 to other subject-matter.

ISSUE 5: Statutory conditions on the exception in Section 30.21

DISCUSSION: Section 30.21 permits an archives to make a single copy, for the purpose of research or private study, of an unpublished work in its holdings, subject to a number of conditions. This exception, as it applies to works deposited in an archives on or before January 1, 1999, has two conditions. First, an attempt to locate the copyright owner, and second, records of the copying must be kept. These conditions are problematic for archives. In a government sponsored consultation stakeholders met to discuss amendments to section 30.21 and section 7 which shortens the term of copyright protection for unpublished works. Stakeholders reached a consensus consisting of two amendments. First, section 30.21 would be amended to remove the two conditions. Second, section 7 would be amended to provide copyright protection to unpublished works whose authors died between 1930 and 1948. This consensus is now being considered by the government.

RECOMMENDATIONS:
1. That section 7 be amended to provide the following:

- where an author died before January 1, 1930 with a work which had not been published by December 31, 2003, the work is protected until December 31, 2003. If, however, the work is published on or before December 31, 2003, the work is protected for 20 years from the date of publication.

- where an author died between January 1, 1930 and December 31, 1948 with a work which had not been published by December 31, 2003, the

work is protected until December 31, 2017. If, however, the work is published on or before December 31, 2017, the work is protected for 20 years from the date of publication.

2. That section 30.21 be amended to remove the conditions of locating the copyright owner and having to keep records.

ISSUE 6: Machines for reprographic reproduction installed in institutions

DISCUSSION: Section 30.3 provides that an archives, library, museum or educational institution is not liable for copies made on a self-serve copying machine on its premises provided that the institution has an agreement with a collective society. This condition poses a problem for those archives that do not have an agreement with a collective society. For many archives, there is little incentive to enter such an arrangement because typically, such agreements explicitly exclude unpublished works and photographs, which together form the majority of archival holdings.

RECOMMENDATION: That the Act be amended to provide archival institutions with immunity from liability for copyright infringement on self-serve machines where the institution does not meet the condition in section 30.3(2) with respect to licensing from a reprographic reproduction collective.

ISSUE 7: Term of copyright in photographs

DISCUSSION:
Prior to the1997 amendments photographs were protected for 50 years from the time the photograph was created. Archivists liked this term rule because it is relatively easy to apply. It is easier to determine the date of a photograph than it is to determine the date of death of a photographer. Bill C-32 lengthened the term of protection to the life of the author plus 50 years, but only for some photographs. The term of protection for photographs now depends upon whether the author of the photograph is a natural person or a corporation.

The distinction in the existing law between the corporate author and the human author of a photograph is complex. The need to investigate the share ownership of a corporation in order to determine term can be both difficult and complicated. By the time photographs are deposited in archives, it may be impossible to determine the details of the share ownership of a corporation. Archivists are faced with the choice of conducting extensive research or making assumptions about the corporate status of the millions of photos already in their holdings. However, eliminating corporate ownership of photographs and its related term rule would add an even more complex layer of difficulty to the process. It would be necessary to identify the photographer of each photo in a corporate situation, and determine his or her date of death simply to establish the term of protection. This would clearly be almost impossible in the case of photographs for which the individual photographer is not identified, the

corporation is no longer in business, and appropriate corporate records do not exist—a not untypical scenario in Canadian archival collections. It is important to remember that some of the corporations involved may have been out of business for many decades with little or no surviving documentation.

We would like to point out that even as the law stands now, since the 1997 amendments came into force, it is impossible to apply the life plus 50 years rule if we have a photograph by an unknown photographer. Professional photographers usually mark their photos very clearly and with some research it is often (but not always) possible to determine the death date of an individual photographer. However, many of the photos in our collections were taken by ordinary individuals and families and there is no record at all of who is the photographer. These photographs by unknown creators are a significant part of the documentary heritage of Canadian society and they should be available not only for research, but also for diffusion on the Internet, and for publication. These rights holders are unknown and therefore unlocatable. A viable rights clearance procedure for these important amateur photographs would simplify the situation considerably.

RECOMMENDATION: That the Act retain corporate ownership of photographs and its related term rule.

ISSUE 8: Defining who is the "author" of a photograph

DISCUSSION: Under the *Copyright Act* the first owner of copyright in a photograph is not the "author," but the person who owns the initial negative or plate. Photographers would like this rule changed so that the photographer is the "author." The government declined to make the suggested amendment in Phase II because it had not consulted all interested parties.

The amendment proposed by photographers would make determining who owns the copyright in a photograph easier in certain cases. Under the amendment being sought by photographers knowing who the photographer is would determine initial ownership. Information about the photographer is more likely to be available to archivists than information about who owned the negative, plate or photograph and this would simplify determining the copyright holder.

We would like to point out that many of the photographs in archival collections are unidentified as to creator. The 50-year term rule was easier for Archives to apply because it is often possible to ascertain the approximate date a photograph was taken, and after 50 years it becomes public domain. But with life+50 if no identification of photographer is available the photo goes into Limbo. As we pointed out in item 7 above, since the 1997 amendments came into force, it is impossible to apply the life plus 50 years rule if we have a photograph by an unknown photographer. Many of the photos in our collections were taken not

by professional photographers, but by ordinary individuals and families and there is no record at all of who is the photographer. These photographs by unknown creators are a significant part of the documentary heritage of Canadian society and they should be available not only for research, but also for diffusion on the Internet, and for publication. These rights holders are unknown and therefore unlocatable. A viable rights clearance procedure for these important amateur photographs would simplify the situation considerably.

RECOMMENDATION:
Amend the *Copyright Act* to provide that the "author" of a photograph be changed from the person who owns the initial negative or plate to the photographer, but the Act should retain corporate ownership of photographs and its related term rule as above.

ISSUE 9: Ownership of copyright in a commissioned photograph

DISCUSSION: Section 13(2) provides that the first owner of copyright in a commissioned photograph is the person who commissions the photograph. In the Parliamentary process leading up to the 1997 amendments, photographers asked for an amendment to provide that the first owner of copyright in any photograph, whether commissioned or not, be the photographer. An amendment was made which provides that a person commissioning a photograph becomes the first owner of copyright only after "valuable consideration" is actually paid. The proposed amendment would make determining who owns copyright in a photograph easier. An archivist would only need to determine who the photographer is to determine initial ownership. The secondary inquiry of whether the photograph was commissioned would not be necessary.

RECOMMENDATION: That the Act be amended to provide that the first owner of copyright in a commissioned photograph is the photographer.

ISSUE 10: Continued existence of crown copyright

DISCUSSION: Section 12 provides that the Crown holds copyright in any work it prepares or publishes. These provisions follow a Commonwealth tradition which vests copyright in the Crown as a creator of works under the same rules that protect the creators of all other kinds of works. However, in the United States there is no copyright in government works. The United Kingdom and Australia have reviewed, or are reviewing, the continued existence of Crown copyright in their respective jurisdictions. The issue of whether or not Crown copyright should continue to exist in Canada requires serious consideration.

RECOMMENDATION: That the federal government undertake a thorough review of the future of Crown copyright in Canada. The Canadian archives community would like to participate in this review.

ISSUE 11: Term of copyright protection for Crown works

DISCUSSION: Section 12 provides that any work which is prepared or published by the Crown is protected until it is published and for an additional 50 years after publication. The result is that Crown works which are never published are protected by copyright in perpetuity. In Phase II a similar rule for non-Crown unpublished works was repealed. The rule was replaced by a new rule which provides the same term of copyright protection whether a work is published or not. Works protected by Crown copyright are the only works which remain protected by copyright in perpetuity unless they are published.

RECOMMENDATION: That the Act be amended to provide that the term of copyright protection for works protected by Crown copyright be consistent with the term for other works.

ISSUE 12: Public performance in an archives

DISCUSSION: Archival records include speeches and performances, film, video, sound recordings, oral histories, and multimedia works of various kinds. It is unclear whether viewing or listening to these works in an archival institution constitutes a public performance. Section 29.5 provides educational institutions with an exception for public performance in face-to-face teaching situations. This exception should be extended to archives so that audiovisual materials may be similarly used for research, private study and educational purposes.

RECOMMENDATION: That the Act be amended to permit the public performance of audiovisual materials on the premises of an archival institution for the purposes of research and private study.

ISSUE 13: Clearing rights for unknown and unlocatable copyright owners of unpublished works

DISCUSSION: Archival researchers and authors are frequently unable to locate a copyright owner to ask for permission to use a protected work because the creator is either unlocatable or unknown. Section 77 permits someone who cannot locate a copyright owner to ask the Copyright Board for a licence. The Board can issue a non-exclusive licence to use the work, subject to whatever terms and conditions the Board thinks appropriate. However, this provision applies only to **published** works. The rights of many of the **unpublished** works and other subject matter in Canadian archives are held by unknown and/or unlocatable copyright holders. Currently, if a work is unpublished, as most works in archival holdings are, the archival researcher who cannot locate the copyright holder cannot include an archival record in his/her research or publication without infringing copyright. Archivists believe we need to find a viable solution to the issue of rights clearance for unknown and/or unlocatable copyright owners of unpublished works and other subject matter.

RECOMMENDATION: That a policy paper be developed and discussions be undertaken with the stakeholders to find solutions to the problems of clearing rights for unknown and/or unlocatable copyright owners of unpublished works and other subject-matter in the holdings of an archives.

ISSUE 14: Clarify who is the author of an audiovisual work.

DISCUSSION: Archival holdings include cinematographic works and (except for those which possess no dramatic character) these are normally protected for the life of the author plus 50 years. The Act provides no guidance in determining who is the author of a cinematographic work, making it difficult for an archives to calculate the term of protection or obtain a waiver of moral rights. It would be helpful if the Act provided clear guidance on this matter.

RECOMMENDATION: That the Act be amended to provide greater certainty in determining who is the author of a cinematographic work.

ISSUE 15: Multimedia works

DISCUSSION: The exponential development of the multimedia industry is raising two copyright issues. The first is clarifying the scope of protection attaching to multimedia works. The second is defining who is the author of a multimedia work. Clarification is needed on both these issues.

RECOMMENDATION: That the Act be amended to clarify the scope of copyright protection and authorship of multimedia works.

ISSUE 16: Private copying of sound recordings

DISCUSSION: Sections 77 to 88 permit individuals to copy pre-recorded musical works, performers' performances, and sound recordings for their private use. Eligible copyright owners receive remuneration from a levy paid by manufacturers and importers of blank audio recording media on their sales. The Canadian Private Copying Collective (CPCC) was formed to collect the levy, and to distribute the funds to the collective societies representing eligible authors, performers, and makers of sound recordings. The amount of the levy is determined by the Copyright Board. The Act provides only one statutory exemption from the levy, i.e., to organizations representing persons with perceptual disabilities. CPCC recognizes the need for additional exemptions because it has voluntarily instituted a zero-rated purchaser system under which a variety of registered purchasers of blank audio recording media do not have to pay the levy. This system, however, is at the discretion of CPCC and could be cancelled at any time. The matter of exemptions to the levy needs to be revisited. Archives use various blank recording media in the preparation of preservation

copies of sound recordings in their archival holdings and we believe that the costs of these should not include the private copying levy.

RECOMMENDATION: That the need for exemptions from the private copying levy be reviewed.

ISSUE 17: Extending the term of copyright to life plus 70

DISCUSSION: Both the European Union and the United States have recently extended the term of copyright to life of the author plus 70 years. Under the terms of the international treaties it has signed, Canada is not obligated to follow suit, but the realities of a global economy and the proximity of the United States make it likely that Canada will be under heavy international pressure to extend its term.

Archivists oppose such an extension of term. Copyright directly affects how readily documentary heritage can be used. Effective public policy must maintain a balance between a vigorous public domain and appropriate protections for the rights of copyright owners. Too short a period of copyright protection may discourage authors from developing new works; too long a period of protection may limit the creation of new discoveries and new products that must draw on the work of others. To extend the term of copyright protection upsets that balance. Such a term extension is unlikely to generate any new spurt of creative energy for the public at large. Instead it will only delay by 20 years the time when the public can draw fully on the material for research, study, and teaching. In particular, it would severely limit the implementation of the government's stated priority to embrace digital technologies as a means of making Canada's culture and heritage more accessible.

RECOMMENDATION: That the existing term of copyright protection of the life of the author plus 50 years be maintained.

ISSUE 18: Protecting Folklore

DISCUSSION: "Folklore" is a term used to refer to traditional forms of artistic expression of a people, group, or community. Examples include tales, poetry, riddles, songs, music, dances, plays, paintings, decorative art, apparel, architecture, totem poles and Aboriginal designs. The legal protection of folklore is becoming an important issue because the use of traditional forms of artistic expression is increasing in popularity.

Aboriginal people benefit, to the same extent as other Canadians, from the protection offered by the *Copyright Act*. However, because of the unique nature of folklore, the protection offered by the *Copyright Act* is often not available. There are four problems. First, copyright protection is available to an "author". This term is not defined but may be interpreted to mean the person who actually draws, writes or composes the work. In the case of folklore, such as traditional

songs and dances, it is often difficult to identify an author. Because there is no identifiable author, the protection under the *Copyright Act* may not be available.

Second, the *Copyright Act* applies to all original literary, dramatic, musical, and artistic works that are "fixed" in material form. Folklore that is embodied in oral traditions is not usually "fixed". For example, dances, songs and stories often are not "fixed' and therefore fall outside the protection of the *Copyright Act*.

Third, copyright protection does not last forever. It usually ends when the author of the work has been dead for 50 years. Traditional songs, dances, and stories have been around for generations, with the result that most folklore fell into the public domain long ago. Most folklore can be freely used by anyone simply because any copyright protection that did exist has expired.

Fourth, copyright is based on the legal concept of property. But the creators of folklore see their work as gifts that no longer belong to their creators once they are shared with the community. Harmonizing the latter view within a legal system based on legal rights attaching to property is difficult.

Archival holdings include folklore, and archives are interested in further acquisitions which would document this area more fully. From the archival perspective, the current copyright law may be a barrier to such an initiative if donors are concerned about how their materials will be used. It would be helpful to have these matters clarified.

RECOMMENDATION: That the federal government, in collaboration with Aboriginal people, review the complex issues involved in the protection of intellectual property to ensure that Aboriginal interests and perspectives are adequately protected.

ISSUE 19: Protection of non-original databases

DISCUSSION: In Canada "original" databases are protected under the copyright law. However, protection for "non-original" databases has become an issue in copyright revision because of the Federal Court of Appeal decision in *Tele-Direct (Publications) Inc. v. American Business Information Inc* and *CCH Canadian Limited v. The Law Society of Upper Canada*. These cases decided that there was no copyright in telephone book yellow pages or the summaries of judicial decisions because there was insufficient skill, judgement and labour involved in the overall arrangement of the compiled information and its arrangement. These decisions alter the threshold of "originality" required for copyright protection. Before this decision, a work was "original" as long as it was not copied from someone else. After this decision, skill, judgement and labour in the overall arrangement of the compiled information are required for the work to be original.

Archival holdings include databases of various sorts, and database holdings are expected to increase. Archival institutions are also creators of databases, i.e.,

their catalogues and indexes. From an archival perspective, it would be helpful to have this complex area clarified.

RECOMMENDATION: Clarify whether and how to protect non-original databases.

ISSUE 20: "Droit de suite" for visual artists

DISCUSSION: Copyright protects works by giving the copyright owner a number of exclusive legal rights to do specified things with a work. Visual artists, such as painters and sculptors, have requested a new right called "droit de suite". If provided, a droit de suite would give visual artists the legal right to share in any capital gain which results from the resale of a work.

Whether to provide a droit de suite has been widely debated in Canada and abroad. In Canada, the right has been recommended in some government reports and rejected in others. Archival institutions more commonly acquire artistic works as gifts (possibly in exchange for a tax credit) because archives have limited acquisition budgets for direct purchases. Artistic works which have been deposited in archives have been removed from the commercial marketplace, therefore in the event that a droit de suite right is introduced in Canada, archivists believe that acquisitions of artistic works by archival institutions should be exempt from the application of the new right.

RECOMMENDATION: That if the *Copyright Act* is amended to provide visual artists with a droit de suite, it should include an exception applicable to the donation and purchase of artistic works to or by archival institutions.

ISSUE 21: Rights over the use of performances fixed in an audiovisual work

DISCUSSION: Section 15 provides performers with the right to authorize the first fixation of their performances. This first fixation right with respect to audiovisual works is subject to a "cut-off provision". Generally, as a result of section 17, performers lose all rights in audiovisual fixations made with their consent. Performers would like additional rights over the use of their performances after they are fixed. Specifically, performers would like moral rights as well as legal rights over the reproduction, public performance, and communication to the public by telecommunication of a performance when it is fixed in an audiovisual work.

From the archival perspective, such an amendment would add another layer of rights to audiovisual holdings, an area in which copyright administration is already very complicated. For this reason, archivists would prefer that this right not be added to Canada's *Copyright Act*. However, if the right is added, archivists request that audiovisual works deposited in an archives be exempt from such a right for research and private study purposes.

RECOMMENDATION: That if the *Copyright Act* is amended to provide performers with new rights over the use of their performances fixed in an audiovisual work, an exception applicable to the use of performers' performances fixed in an audiovisual work for archival research and study be provided.

ISSUE 22: Levy on blank video recording media

DISCUSSION: Section 3 provides that reproduction of a work without the permission of the copyright owner is an infringement of copyright. Applying this rule to private copying of audiovisual works means that using a videocassette recorder (VCR) to copy a movie or television program is an infringement of copyright. Sections 79 to 88 permit the copying of an audio work for private use in return for the payment of a levy on blank audio recording media. The issue is whether a levy on blank video recording media (similar to the levy for audio) should be legislated.

As noted in the discussion of the private copying of sound recordings (issue 16), copyright owners voluntarily provided a zero-rate system for certain categories of users of blank recording media. The Act provides only one statutory exemption from the blank audio recording media levy, i.e., to organizations representing persons with perceptual disabilities. CPCC recognizes the need for additional exemptions because it has voluntarily instituted a zero-rated purchaser system under which a variety of registered purchasers of blank audio recording media do not have to pay the levy. This system, however, is at the discretion of CPCC and could be cancelled at any time. Moreover, the system only applies to cassettes. If a levy system is introduced for blank video recording media, it should be accompanied by a zero-rate system for archival institutions that use blank video recording media to carry out preservation activities for their holdings.

RECOMMENDATION: That if the *Copyright Act* is amended to introduce a levy on blank video recording media, a zero-rate purchasing system applicable to archival institutions also be provided.

ISSUE 23: Reversion clause

DISCUSSION: Where the author of a work is the first owner of the copyright in that work, any copyright acquired by contract becomes void 25 years after the author's death. The term of copyright is not changed. The copyright becomes part of the author's estate and only the estate has the right to deal with it. Some conditions apply. There is no reversion where the author disposes of the copyright by will for the period following the 25-year limit. Section 14 also does not apply where a work has been assigned as part of a collective work, or where a licence has been granted to publish a work or part of a work as part of a collective work.

From an archival perspective this reversion provision in the *Copyright Act* creates yet another layer of complexity to an already complex chain of ownership. This is a significant issue because most archival donations are effected through a deed of gift or a contract rather than a will.

RECOMMENDATION: That the Act be amended to repeal the reversion clause in section 14.

ISSUE 24: Clarifying the meaning of "publication"

DISCUSSION: An amendment is required to make it clear whether or not communicating a work on the Internet publishes the work, and if so under what conditions. Publication is defined in the existing law as making copies of a work available to the public. Under this definition it is unclear whether the simple digital communication of a work to the public makes "copies" available to anyone. It is possible to say that communicating a work digitally merely provides the ability to make copies, but does not itself make copies available. It is important to know whether or not a work is published because some exceptions do not apply to works that have been published. An example is the exception permitting archival institutions to copy, for research or private study, only unpublished works deposited in an archive. Publication is also used to calculate the term of copyright in works prepared by the Crown. With the advent of the Internet and the World Wide Web, "electronic publishing" has emerged as an alternative to conventional means of making copies of a work available to the public.

RECOMMENDATION: That the Act should be clarified to include a clear and contemporary definition of publication.

ISSUE 25: Clarifying that fair dealing applies in the digital environment

DISCUSSION: Sections 29, 29.1 and 29.2 of the *Copyright Act* provide that fair dealing with a work for the purpose of research, private study, criticism, review, or news reporting does not infringe copyright. However, whether communicating a work over the Internet publishes a work under the existing definition of "publication" is not certain. This is significant since there is a legal question as to whether the "fair dealing" exception applies to both "published" and "unpublished" works. If communicating a work over the Internet does not publish a work, then the application of fair dealing to the use of works on the Internet would remain uncertain.

RECOMMENDATION: That the Act be amended to clarify that fair dealing applies to works communicated over the Internet.

ISSUE 26: Maintenance and management and technological obsolescence

DISCUSSION: Section 30.1 permits an archive to make a copy of a work, under certain circumstances, for the purpose of maintaining or managing its permanent collection. The wording of this section is problematic because it would appear that archives can make a copy for preservation purposes only ***after*** the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain archival works that are in digital or magnetic formats, it is often necessary to migrate works to new formats and to new technological environments while the technology that enables them to "access" and "read" the original digital or magnetic format is still available. Once the technology becomes unavailable, migrating the work may in fact be impossible. From an archival perspective, the ongoing preservation of digital or magnetic works will require successive migrations over time as generations of software and hardware become obsolete.

RECOMMENDATION: That the Act be amended to permit the making of a copy in an alternative format at the point at which the continued availability of the technology required to use the original becomes limited and is at risk of obsolescence.

ISSUE 27: Machines for non-reprographic reproduction installed in institutions

DISCUSSION: Section 30.3 absolves libraries, archives, museums, and educational institutions from liability for copyright infringement by patrons using self-serve copying machines located on their premises, provided they post a warning about copyright near the machine and have an agreement with a collective society. The exception is limited to machines which make copies "by reprographic reproduction". An amendment is needed to extend the principle in section 30.3 to all self-serve machines, including computers.

RECOMMENDATION: That the Act be amended to extend the principle in section 30.3, which currently is applicable only to copies "by reprographic reproduction", to all self-serve machines, including computers.

ISSUE 28: Temporary copy exceptions

DISCUSSION: Under the *Copyright Act*, a copyright owner in a work or other subject-matter is provided with the sole and exclusive right to reproduce a work or other subject-matter or a substantial part thereof. Temporary reproductions are often made in the course of the technical process of communicating a work or other subject-matter on a communications network, including the Internet. These temporary reproductions are often an infringement of copyright. Exceptions permitting the making of a temporary copy for the following three purposes are required:

- transmitting, routing, connecting, and accessing
- browsing
- caching

RECOMMENDATIONS:

1. That the *Copyright Act* be amended to provide a new exception permitting the making of a transient copy of material in order to transmit, route, or provide network connections.
2. That the *Copyright Act* be amended to provide a new exception permitting the making of a transient copy of material for the purpose of viewing or browsing.
3. That the *Copyright Act* be amended to provide a new exception to permit automatic caching of material in the course of communicating a work to the public using digital technology.

ISSUE 29: Hosting by Service Providers

DISCUSSION: Archivists support the establishment of reasonable framework rules for all Internet Service Providers (ISPs), on the basis that they are a "common carrier" similar to a telephone company. It is very important that the copyright law should define who are "service providers" so it can be ascertained clearly whether or not institutions such as archives are service providers when they provide Internet services to their patrons.

A carefully considered notice/takedown procedure also seems appropriate. Archivists are concerned about authenticity and integrity of creations and we would like to extend notice/takedown to cover moral rights (rights of paternity and integrity). Such provisions would deal with situations where materials may have been made available for reproduction, but misrepresentation of a work has taken place (for example altering of a photograph or textual document).

RECOMMENDATIONS:

That the Act be amended to provide:

1. A clear definition of a Service Provider
2. Moral rights protection to deal with situations where a work has been altered.

ISSUE 30: Rights management information

DISCUSSION: "Rights Management Information" means information attached to a work or other subject-matter that identifies the work or other subject-matter, author, performer, performance, producer of a sound recording, copyright owner, or any information regarding the terms and conditions for use or the work or other subject-matter. A new provision of this nature must be drafted carefully so as to avoid hindering legitimate activities. Archivists recognize that it can be very useful to embed certain rights management information in digital documents, 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. Archivists do have concerns, however:

1. Legal restrictions on the removal or alteration of Rights Management Information should apply only where the material is protected by copyright.
2. The removal or alteration of Rights Management Information should be permissible when it interferes unreasonably with the authorized display or reproduction of copyright material.
3. The information should be current, accurate, and pertinent in Canada to be protected.

RECOMMENDATIONS: That the Act be amended to provide that:

1. Legal restrictions on the removal or alteration of Rights Management Information should apply only where the material is protected by copyright.
2. The removal or alteration of Rights Management Information should be permissible where it interferes unreasonably with the authorized display or reproduction of a copyright material.
3. The information should be current, accurate, and pertinent in Canada to be protected.

ISSUE 31: Technological Protection Measures

DISCUSSION: 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 believe that this would be an unintended consequence of such a provision. Archivists must have the means to resist the technical obsolescence which will otherwise lead to the loss of essential information.

RECOMMENDATIONS:

1. Archivists believe that there should be a straightforward prohibition to restrict specific illegal acts, rather than a blanket additional layer of technological protection.
2. Archivists also believe that for preservation purposes only, we must be able to apply these devices before the period of protection is ended.