

CANADIAN COPYRIGHT LEGISLATION
AND
ARCHIVAL MATERIAL

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M.A., The University of British Columbia, 1988

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARCHIVAL STUDIES

in

THE FACULTY OF ARTS

(School of Library, Archival, and Information Studies)

We accept this thesis as conforming

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THE UNIVERSITY OF BRITISH COLUMBIA

FEBRUARY 21, 1992

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ABSTRACT

This thesis analyses the nature and common law history of copyright, highlights the problematic aspects of the current Canadian legislation with respect to archival material, proposes revisions to the law which would take into account the special nature of this material, and provides some suggestions to archivists who have to deal with the copyright dilemmas encountered in the daily, routine administration of an archival institution. Copyright legislation has traditionally grouped archival and library material under one section on special exemptions, notwithstanding the fact that archival material has characteristics which dictate a treatment fundamentally different from that of library material. Therefore, this thesis focuses on copyright as it relates specifically to archival material in order to present recommendations for its adequate treatment under the copyright law. This is not a legal paper, and does not presume to give an exhaustive legal study of all of the ramifications of copyright legislation. It is intended as a review of those copyright issues which are of special interest to archivists.

Because Canada derives its common law tradition from Great Britain and is often influenced by American legislation, the earlier British legislation and more recent copyright legislation in the United States and Great Britain are studied and compared to the present Canadian legislation. Because legal trends generally first appear in court decisions before they become codified in statute, decisions found in recent case law, as well as their discussion in current legal literature are examined. The official recommendations which have been made to the Canadian government for the revision of copyright law are also analyzed.

It is concluded that the Canadian statute must be revised to reflect the unique nature of archival material. Archival documents are not created for sale, distribution, display, or publication. They are the instruments of transactions, natural by-products of practical activities, means to purposes; they lack the autonomy of final products, and are non-commercial by nature. This thesis recommends that a separate piece of copyright legislation for archival material be introduced to deal effectively with these unique characteristics.

ACKNOWLEDGEMENTS

I am greatly indebted to my original committee members, Luciana Duranti, Richard Hopkins, Norman Prelypchan, and Basil Stuart-Stubbs (who later retired). Without their constant encouragement, friendly support and thoughtful advice this thesis might never have been completed. I must also thank Terry Eastwood, Mary Sue Stephenson, and Ronald Hagler for helping to contribute to my basic knowledge about archives and information systems, as well as Marcel Caya, Greg Brown, Nancy Marrelli, and Shirley Spragge for consenting to be interviewed about copyright.

INTRODUCTION

Property rights are found in some of the oldest legislation in the English speaking world. Infringement of property rights, or trespass, is among the most widely understood legal concepts. Copyright is also a property right-- albeit a more modern one. The term copyright is used to describe the right held by an author to protect his or her work from unlawful copying by others. Copyright is a legal right to protect one's intellectual property from economic exploitation by others and as such is similar to other property rights.

But copyright is also distinct from other property rights. It is 'sui generis' or in a class of its own because it is a property right which is subject to expiration after a certain designated term. It is also subject to other restrictions such as the definition of what type of works are eligible for copyright protection and the determination of who owns those rights (it is not always the physical creator of the work.)

Jeremy Phillips, a noted British copyright scholar, states that "intellectual property is the Carmen of commercial law; it is a subject with charm, personality, and a force of character, attributes which are more tellingly depicted by the impressionistic strokes of the artist's brush than by anatomical dissection."¹ Copyright, notwithstanding all its charm and personality, is primarily economically based. It was created to protect authors from the exploitation of their work by others who could simply copy the work and use it for their own economic or moral gain, without any expenditure or effort other than the relatively inexpensive cost of paper and ink. In protecting authors, copyright legislation

¹Jeremy Phillips, An Introduction to Intellectual Property Law (London: Butterworths, 1986), v.

strives to foster a nation-wide climate of intellectual productivity and inventiveness.

Phillips states that "intellectual property law plays a vital part in the physical well-being of the individual, and in the commercial vitality of the economy. For it is an important function of intellectual property law that it stimulate . . . the creation of ideas and inventions, their disclosure for the benefit of all . . . and their commercial exploitation so as to facilitate the greatest potential exploitation of their practical or concrete embodiments."²

The economic motivation behind copyright is no less strong today than it was when first embodied in statute over two hundred years ago. In 1971, the copyright industry accounted for 2.1% of Canada's gross national product, or 1.7 billion dollars. By 1984 this had grown to 8 billion dollars.³ The income generated by copyrighted works in the computer industry, in particular, is an increasingly important figure in the economy of many developed countries (in 1989 the United States spent one hundred billion dollars on non-defense research and development - much of it going to high technology industries⁴). Because of this, the protection of intellectual property and inventions through the legislative umbrella of copyright, patents and trademarks has become increasingly important. The economic consequences of revising any copyright legislation can be enormous.

²Ibid., 7.

³A.A. Keyes and C. Brunet, Copyright in Canada: Proposals for a Revision of the Law (Ottawa: Consumer and Corporate Affairs Canada, 1977), and Canada, Department of Consumer and Corporate Affairs, From Gutenberg to Telidon: A White Paper on Copyright (hereafter The White Paper) (Ottawa: 1984), 2.

⁴Brian Dumaine, "Closing the Innovation Gap," Fortune (December 2, 1991): 56.

In addition to protecting an author's often prodigious economic returns from intellectual property, copyright has the added task of stimulating the cultural growth of a country by allowing for a relatively unimpeded flow of information. Copyright legislation must navigate a narrow passage between the economic protection of an author's investment and the free dissemination of information for the cultural or intellectual enrichment of society. In order for ideas to develop, they must be shared, reviewed, and discussed. Too much protection could lead to a stagnant society with little intellectual, cultural or economic growth. Copyright legislation strives to accommodate these two opposing needs at the same time: protection of an author's investment in his or her work and the public dissemination of knowledge.

In an attempt to accommodate these two opposing needs, Canada has issued only two pieces of legislation, the 1921 Copyright Act and Bill C-60, a partial revision to the Act, which was passed in 1988. In contrast to this copyright legislation in Great Britain has had a long and colorful history-- over thirty pieces of legislation deal with copyright since its first embodiment in a statute in 1710. For over two hundred years, British parliament has struggled to create laws that reflect the values and economies of its contemporary society. Canadian legislation, however, has yet to fully embrace all of the issues and problems of intellectual property rights of the late twentieth century.

One of the largest gaps in the present Canadian legislation is the lack of any specific and unified treatment of archival material. The present government has stated that the long overdue supplement to Bill C-60 will contain substantial revisions of the treatment of archival material.⁵ It can only be hoped that the

⁵Grace Hyam, "Copyright Revision: Awaiting the Second Stage," *Archivaria* 27 (Winter 1988-89): 175.

legislators will respond to the special needs of the archival community in preparing this very important piece of legislation.

The current Canadian statute defines copyright as the "sole right to produce or reproduce the work, or any substantial part thereof, in any material form whatever."⁶ This includes reproduction by hand copying, photocopying, or transferring the work into another medium (e.g., photographing a painting, sketching a photograph, inputting a textual work onto a computer disk.)

Copyright can therefore greatly narrow the potential use of archival material--material which can often be preserved or used only by copying or transferring it to another medium.

An additional problem is the term of protection for unpublished works. This is defined by statute as extending from the date of publication of the work plus fifty years.⁷ Since most archival documents are never published this creates a term of perpetual protection, thus remarkably limiting the free flow of information that is essential to research, and to the development and the cultural enrichment of society--one of the statute's intended objectives.

Because the ultimate purpose of most archives⁸ is to achieve widespread public dissemination of the information found in their holdings, the restrictions imposed by copyright have long constituted a fundamental problem for the administration of reference and use. In institutions such as these, the essential tension is greatly

⁶Revised Statutes of Canada, 1921, c. 30 (hereafter Copyright Act 1921) s. 3(1).

⁷Copyright Act 1921, s. 7.

⁸The term archives has been translated into English as a homonym. It is used to describe both the institution which houses archival material and the material itself. See Frank Evans, Donald Harrison, and Edwin Thompson, "A Basic Glossary for Archivists, Manuscript Curators, and Records Managers," The American Archivist 37 (July 1974): 415.

magnified between the owners of copyright, who can create enormous economic returns by carefully controlling the distribution of the works they own, and the general public, who in the information age of the late twentieth century demand immediate and accurate copies of works. Archivists have become the mediators between public dissemination and the protection of an author's rights.

The inadequacies of the current legislation in dealing with archival material have not gone unnoticed by the archival community. There have been numerous requests that revision of the statute should take into consideration the special nature of archival material, which is composed primarily of unpublished works by either unlocateable or unknown authors. The Association of Canadian Archivists (ACA) has submitted several briefs to the government, advising it of the special characteristics of archival material and suggesting that archives require specific exemptions from the present legislation in order that archivists may make their holdings fully available to the public.⁹ Representatives of both the ACA and the Association des archivists du Quebec (AAQ) have testified before the Subcommittee on the Revision of Copyright in an attempt to make the legislators aware of the unique nature of archival material.

This is a delicate moment in the history of copyright legislation in Canada. As information increasingly becomes a commodity in its own right there is added pressure on the government to revise the now outdated statute of 1921. The time has come for archivists to educate themselves about copyright legislation and lobby the government with proposals for a revision which will best suit the needs of both authors and users of archival material.

⁹See Corrado Santoro, "The Association of Canadian Archivists and Copyright Revision: An Update," Archivaria 21 (Winter 1985-86): 111-135.

The purpose of this thesis is to introduce and explain the nature and common law history of copyright, to highlight inadequacies in the current legislation, to suggest revisions to the law which would take into account the special nature of archival material, and finally, to provide practical suggestions for archivists who have to deal with copyright dilemmas encountered in the daily, routine administration of an archival institution.

The statutes and case law of other common law countries are analyzed, with emphasis given to the United States and Great Britain, the mother of both the common law tradition and the earliest notions of an author's right to copy. Comments made by copyright scholars and archivists regarding judicial decisions are also examined.

Although the legislation in common law countries has continually grouped archival and library material under one section on special exemptions, this thesis focuses on the unique characteristics of archival material. Archives are defined as those documents which are "created or received by a physical or juridical person in the course of a practical activity."¹⁰ Archives are the documents (in any medium) which result from the actions and transaction of daily life. They are not collections of idiosyncratic, unique items and are not created for dissemination or publication. They are instead organic, natural accumulations of documents interrelated by the procedures and processes through which business or personal affairs are conducted.¹¹

¹⁰Luciana Duranti, "Diplomatics: New Uses For and Old Science (Part I)," *Archivaria* 30 (Summer 1990): 15-16.

¹¹For a thorough discussion of the nature of archival records, see Victoria Blinkhorn, "Appraising Artists' Records" (Master of Archival Studies Thesis, University of British Columbia, 1988), 10-25 .

Archives came together by a natural process-- like Topsy, they grewed. They were not singled out for preservation (herein lies their distinction from the pieces in a Museum Collection) on account of their believed value for esthetic, historical or any other purposes. . . . They are there: a physical part of the facts which has happened to survive.¹²

Museum pieces and library materials (eg. books, journals) are very different. They are created as single works able to stand alone, separate from the author's other creations. Moreover, they are usually created for commercial purposes while archival material is never produced to be sold. It may happen that some archival documents, when inactive, acquire commercial value, but this is not a consequence of their nature and is actually totally independent of it. For example, a document may acquire value in the marketplace because of its seal, signature, or illumination, however, these items were not included in the document in order that it might acquire commercial value, but instead for administrative and legal purposes required by the routine of the creating office or person; and if a document acquires commercial value for its content, such content was included in the document for communicative purposes necessary to the course of activities and transactions and was never meant to be commercially exploited.¹³ Because archives, library, and museum items are so very dissimilar due to the disparate processes which lead to their creation, this thesis concludes that archival material should receive separate treatment under the legislation. Therefore, only recommendations which are related to archival material will be presented here.

¹²Hilary Jenkinson, "Reflection of an Archivist," A Modern Archives Reader ed. Maygene Daniels and Timothy Walch (Washington D.C: National Archives and Records Service, 1984), 19.

¹³Giorgio Cencetti, "Sull' Archivio come 'universitas rerum'," in Cencetti, Scritti Archivistici (Il Centro di Ricerca Editore: Roma, 1970), 50.

Because Canada derives its common law tradition from England, the earliest germs of common law copyright are found in sixteenth century English case law. In order to more fully understand the original nature and intent of the legal concepts behind copyright this thesis begins with a discussion of the early English cases and statutes which deal with the right to copy. The first chapter reviews the development of copyright in England from its beginnings in the fifteenth century up to its first embodiment in legislation in 1710, and concludes with a brief comparison to the philosophy of copyright which is held by European countries.

In order to provide an understanding of how the British legislation has been interpreted and used in Canada, the second Chapter reviews the Canadian copyright legislation of 1841, 1889, 1921, 1987, and discusses the various reactions of contemporary scholars and authors.

The third Chapter analyzes in detail and suggests solutions to the problems and issues in the current legislation which are of particular interest to archivists: copying for preservation and security, the testamentary disposition of rights, the term for unpublished works, crown copyright, the ownership and term of copyright in photographs, copyright in works for hire, and fair dealing.

In providing suggestions for revision to the Canadian statute this Chapter analyzes the current trends in copyright found in the decisions in recent Canadian, American and English case law. Legal reviews which discuss the judicial decisions, and archival literature which addresses the particular need of archivists are also examined.

The fourth Chapter makes recommendations for changes to the law which more effectively take into account the special nature of archival material, suggesting

that the majority of it be exempt from copyright protection. This chapter examines the distinction between archival material and literary and artistic works. Definitions provided by diplomatics, a four hundred year old science which examines the origin and purpose of records, are used to elucidate the differences between works which are the result of transactions (archives) and those which are produced as either an end product or as the expression of personal thoughts and ideas (literary and artistic works). Because archives are the unique residue of transactions and were never produced with the intent of dissemination it is concluded that copyright protection is irrelevant to the majority of archival works, the only exceptions being personal papers and those works which were created as end products such as reports or briefs.

Appendix One provides practical suggestions to archivists and librarians who must deal with donors and users of copyrighted material under the current legislation. It also includes excerpts from various liability forms which can help protect the archives against misunderstandings and possibly help to prevent litigation.

Appendix Two reviews the most current activities in copyright revision as pursued by the ACA, the AAQ and the Society of American Archivists (SAA).

CHAPTER ONE: EARLY BRITISH LEGISLATION

In the time of Henry II of England (1154-89) books were published by "having them read over three days successively before the University or other judges appointed by the public; and if they met with approbation, copies of them were then permitted to be taken, which were usually done by monks, scribes, illuminators, and readers trained up to that purpose." ¹⁴

During this time period there was no notion of an exclusive right to copy a work. Copying books by hand was a laborious and time consuming task which required the employment of a highly trained scribe or monk. "Authors could have no monopoly after publication [an oral act] . . . public utility, as well as the nature of the thing, must have rejected any such pretense." ¹⁵

The Anglo-Saxon notion of an individual's exclusive right to copy a written work has its roots in fifteenth century Britain and the invention of the printing press. The printing press was introduced by Caxton into England in the middle of the fifteenth century and, at first, printing was seen as "only a more expeditious method of copying. The first printers, both in England and in Scotland, considered it in this light and printed every book that came their way, without any notion of being restrained, whether by literary property or by any other consideration." ¹⁶

¹⁴Hay Campbell, "Information for Alexander Donaldson and John Wood, Booksellers in London . . .," The Literary Property Debate: Six Tracts 1764-1774, *The English Book Trade: 1660-1853*, ed. Stephen Parks (New York: Garland Publishing Inc., 1975), 27.

¹⁵Ibid.

¹⁶Ibid.

Quite rapidly, however, the Crown began to see the advantages it could obtain by controlling the printing trade.

"Caxton founded his press in Westminster in 1476, and soon afterward the Crown began to take an acute interest in this dangerous art and to assert prerogative rights regarding it. A Royal printer appeared in 1485, and from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of stated kinds."¹⁷

This right to print or copy a book was limited in the extreme. Only those stationers with a royal grant or patent were allowed to print books for the public. As long as the Crown could oversee those who were given the royal patents it could control the entire book trade. However, problems gradually developed in outlying districts, particularly in Scotland and Ireland where the power of the Crown diminished with the increased distance from Court.¹⁸ The Crown retaliated with a powerful weapon, a group of English tradesman united under one cause-- the desire to secure and defend the highly lucrative rights to print all of the books and pamphlets in the country. Roughly seventy years after the establishment of the first royal printer, the system of individual patents and licenses evolved into a more general Royal permission granted to a specific group of tradesmen. Enforcing the exclusive grants and patents had proved too difficult for the Crown. By enlisting an entire group of tradesmen with the right to copy,

¹⁷Benjamin Kaplan, An Unhurried View of Copyright (New York and London: Columbia University Press, 1967), 2.

¹⁸This rebellion increased until in the 1600's the Scottish and Irish printers were blatantly disobeying the law and publishing and selling books and pamphlets which were printed without Royal approval. See The Literary Property Debate: Six Tracts 1764-1774.

the Crown had a powerful ally on its side when it needed to invoke the terms and conditions of the printing licenses.

"When Queen Mary chartered the stationers by letters patent of 4 May 1557, the fellowship, in exchange for the large trade advantages they then secured, undertook to become in practical effect sompnours and pursuivants of the royal censorship, to play the part of 'literary constables'. Printing was confined to the members of the Stationers' Company and others as might be authorized by the Queen."¹⁹

Perhaps the most significant influence on the development of copyright was the Reformation. The vicious and often bloody conflict between the new religion, Protestantism, and the old religion, Catholicism, had its beginnings early in the sixteenth century. By the middle of the century, the English Crown desperately required some method to abate the flow of the Protestantism which was spreading quickly due to the speedy and efficient printing press. Copyright became a powerful tool of censorship in the hands of the Crown.

A noted copyright historian, Harry Ransom, writes that:

"At first the Church favored the development of the press . . . it emphasized the desirability of cheap printing and the consequent wide distribution of literature. The Reformation discouraged that policy by inspiring a literature for which the Church did not approve wide distribution . . . religion was a fertile field for the growth of printed literature."²⁰

¹⁹Ibid., 3.

²⁰Harry Ransom, The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710 (Austin: University of Texas Press, 1956), 22.

The Church and the monarch controlled the distribution and dissemination of religious ideas by controlling the company of stationers. The establishment of printing in the hands of a limited company of tradesmen, the stationers, "was entirely agreeable to the spirit of the established religion of those times, averse to free enquiry, and having no other means left of opposing the Reformation than by obstructing the progress of knowledge and true literature, then fast gaining ground by means of the invention of printing."²¹ The exclusive right to print a book (either new or old) was obtained by filing an entry in the official Company of Stationers Registry. No other printer or stationer could then legally print, copy or sell that book anywhere else in England, Scotland or Ireland.

There were also two other arguments in favor of an exclusive right to copy being vested in the stationers: no harm to the general public would be incurred since books were a luxury, only to be bought by the wealthy; and an exclusive right to printing insured the steady and constant flow of business in England. As Ransom writes:

"Books were not staple commodities but 'rarities' for which few men spent more than they spent on superfluous wants; therefore property rights in books was not against the public interest, as a monopoly in staple commodities would have been. The second argument was that a protected property right guaranteed a prosperous trade, a plentiful supply of cheap books, and orderly printing; whereas lack of protection roused confusion and hampered business."²²

In tracing the development of English copyright it is important to note that these royal grants and privileges were created to provide economic protection for the

²¹Campbell, 28.

²²Ransom, 70.

printers and political protection for the Crown. They "do not . . . stand on any notion of original composition for they might be granted for ancient as well as new works."²³ The Royal grants in effect created publishing monopolies. In fact, they bore a far greater resemblance to the prescripts of a government censorship policy rather than any lofty notion of creator's rights and protection of artistic endeavor. Indeed contrary to any notion of author's rights, the Act of Queen Mary actually inhibits individual creativity by "striking against author as much as against other, and, paying no regard to literary property, prohibits them from even publishing their own works without license."²⁴ In fact the licenses were never "granted to authors, to prompt them to write, but to printers and publishers to induce them to make correct and useful editions of books which lay in manuscript."²⁵

What later came to be known as copyright was at this stage an exclusive legal right held by publishers and stationers to copy, print or sell a written work either new or ancient. Authors lost all rights to a work when they sold it to a printer. They had no control over the format of the material, its subsequent reprinting, or any editorial comments the publisher wished to add to increase its marketability. In fact there is a possibility that the printer added a great deal of material to a manuscript work in his capacity as printer, typesetter, and editor. "It was clear that book property arose from two distinct acts of creation-- the author's

²³Kaplan, 4.

²⁴Campbell, 28.

²⁵Ibid., 32.

composition and the printer's reproduction of the text. . . the printer might be responsible for the literary integrity and quality of text."²⁶

The right to copy a printed book thus increasingly became the property of the printer, the producer of the final, saleable product, and not of the author, who merely provided the raw material.

"Right of copy was the stationer's and not the author's. Increasingly . . . manuscripts had to be purchased in a business way . . . but upon entry (the registration of the stationer's publications) the author dropped away and it was the stationer who had the right of multiplication of copies against others of the Company (of stationers)."²⁷

This system gradually decayed over the ensuing years due to "the general disgust at the variable stupidity of the censors," and the increasing difficulty of enforcing the licenses in Scotland and Ireland.²⁸ The creation of the monopolies in some instances had led to an abrupt decrease in the quality of the books being published. "Nothing came from the Royal Press (as the licensee vainly termed it) but the most illegible and uncorrect (sic) bibles and books that ever were printed in any one place in the world. Nothing was studied but the gaining of money by printing."²⁹ A powerful minority of stationers had "managed to usurp general assignment to the Company [as] . . . more and more privileges fell into their possession."³⁰ The

²⁶Ransom, 28.

²⁷Kaplan, 3.

²⁸Ibid., 6.

²⁹Campbell, 32.

³⁰Ransom, 54.

book trade had also grown a great deal in the previous 100 years and there was now increased hostility on the part of other minor printers and stationers.

Milton Friedman, a noted scholar of economics, theorizes that the abolition of the royal licenses was an inevitable step in the movement of society towards democracy. He writes that "the overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western world. It was a sign of the triumph of liberal ideas."³¹ The abrogation of royal printing licenses was indeed an integral step away from the suffocating censorship of the crown towards a free, democratic society.

In 1695, this system of printing grants and licenses, which had begun in 1518 and culminated in the Printing Act of 1662, expired through nonrenewal. The stationers, who had for centuries been fully protected by the government, sought relief from the possibility of free competition. They "came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security."³²

In response to this emotional and persuasive campaign, the Statute of Anne was passed in 1710 which protected existing books for a period of 21 years and new books yet to be published for a period of fourteen years from the date of publication, with the provision of an extension for another fourteen years upon the discretion of the author. However, Kaplan suggests that we should not be lead

³¹Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962), 137.

³²Kaplan, 7.

astray by this apparent concern for authors. "It is hard to know how far the interests of authors were considered in distinction from publishers. I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute."³³

It was noted by one contemporary that "the claim of literary property is almost entirely confined to a particular society-- the booksellers of London."³⁴ In fact, the literary property debates that ensued after the statute of Queen Anne was passed were conducted entirely by publishers (although authors are occasionally mentioned, it appears that they took no part in the debates).

The statute was for the most part considered fair "by this equitable rule, the legislature has secured to every author, who chuses [sic] to take advantage thereof, such reasonable profit as was deemed to be a suitable recompense for his labour and trouble; and has at the same time, guarded against the bad consequences which must have arisen from a perpetual monopoly."³⁵

However, the statute did not pass entirely without criticism and there was some discussion that it should be repealed.³⁶ A minority of publishers argued that the previously existing monopolies had created perpetual copyright at common law. Other publishers argued that all previously published books had entered the public

³³Ibid., 8.

³⁴Campbell, 15.

³⁵Ibid., 9.

³⁶Ibid., 61.

domain and were free to be reprinted by anyone who cared to invest the capital in them.³⁷

This was a very contentious issue, and here we see the beginnings of what has since become a long standing debate about when a work is considered to enter into the public domain and, consequently, whether any copyright should be allowed to exist in perpetuity.

One noted intellectual of the eighteenth century argued against perpetual copyright by reasoning that "it is impossible to suppose the legislature could intend so absurd a thing, as to grant the sole privilege of printing or disposing of any book to the author, for a limited number of years, if, independently of such grant and de jure, the full property was vested in the author to perpetuity."³⁸ However, other scholars argued vehemently that a man's literary property was no different from other real property such as land, grain, and cattle. "If a man's ideas are his own . . . it would surely be very hard to be deprived of all right to them, the moment he turns them to any profit to himself or others (i.e. publication); as unreasonable as if the farmer were allowed a property in his corn and grass while growing in his field but denied it whenever he brings them to market."³⁹

It was argued that literary property was the same as all other personal property and, because of this, the rights to publish or reprint it should exist as long as the physical entity, the book, existed. The flaw in this argument is twofold. Firstly,

³⁷Ibid.

³⁸Ibid. 9.

³⁹Literary Property Debates: 1774-75, 27.

literary property is not just another type of real property like land, cattle, and crops. Literary property has no discrete physical presence like a plot of land or a bushel of grain. It has its foundation in knowledge and ideas and is the unique embodiment of those ideas. As a result of this, it can be easily copied and reproduced with a minimum amount of labor. The copy can then easily pass for the original and be sold as the original. This is not usually true for real property. It is this fundamentally physical difference between real and intellectual property that created the need for copyright protection in the first place.

Secondly, as a result of the incorporeal nature of intellectual property, copyright works and inventions are valuable, both financially and culturally, only when they are communicated. They create value for all of society, not just for the owner of the work, for it is through the open communication of scientific theories, facts and ideas that society as a whole develops and grows.

This benefit which accrues to all of society creates an overwhelming need to allow intellectual property to pass at some point into the public domain.

Real property, such as land and crops is usually valuable only to its owner and does not need to be shared or communicated in order to establish and multiply its value.

However, the ownership of real property does have some similarities to the ownership of intellectual property and involves the balancing of the rights of individuals against the rights of society as a whole, which is central to any discussion of intellectual property. There are cases involving real property owned by individual citizens, where the needs of the general public may override individual property rights just as they do in intellectual property. These situations

determine government actions such as replevin (a government takes re-possession of public property, generally artifacts, which are in the hands of private persons), expropriation (a government takes possession of private, real property for public use), and escheat (land reverts to the government when there are no heirs).

Society as a whole does not derive direct benefit from the real property which is owned by individuals, such as discrete bundles of land, cattle or crops. Real property does not grow or develop as a result of increased exposure to the public. However, the opposite is true for intellectual property. It is generally the case that ideas, theories and artistic works, when communicated and discussed, stimulate more ideas, theories and artistic works, thereby increasing the development and continued growth of a society.

It was this overwhelming concern for the increased development and intellectual growth of society that ultimately saw the demise of perpetual copyright in England. After many years of public debate it became widely accepted in England and its colonies that copyright in published works should exist for a limited period of time.⁴⁰ The author or publisher would be allowed to reap the benefits of his work for a determined period, then the work would become part of the public domain and could be used by anyone who chose to reprint it.

W. Kenrick, in an application to the English Parliament, recognized the overriding concerns of society and the need for a limited term of copyright protection. His application stated that "it is vain for individuals to talk of possessing a property . .

⁴⁰In Canada, copyright exists in perpetuity in unpublished works. This is generally recognized as a section of the statute that requires extensive revision. This topic will be addressed more fully in Chapter Three.

. or to contend of such possession, if it militates against the general interests of Society."⁴¹ During this same time period, a Scottish printer and bookseller, A. Donaldson, argued that "it is impossible to deny that a suitable encouragement is due to the author of every useful book. . . but from thence to pretend, that the author of every book has *de jure* an original inherent property therein, even after publication, and that none can reprint the same without being guilty of an invasion of the author's property, does not seem to have a proper foundation in any known principle of law or justice. How detrimental this would be to the advancement of learning."⁴²

This concern for the advancement of learning was also echoed in the House of Lords. One member wrote that "if there is anything in the world common to all mankind, science and learning are in their nature *publici juris*; and they ought to be as free and general as air and water." However, he also recognized the need to balance the public right to knowledge against the author's right to economic protection. He went on to state that "those high gifts of genius and judgement . . . if they are properly exerted for the service of mankind, deserve the respect, the care and the attention of society."⁴³

This was the foundation for the copyright legislation of 1710. It was deemed that a period of twenty-eight years was sufficient time to allow an author to receive a satisfactory economic return for his labours. Twenty-eight years after initial publication the work entered the public domain and was available to all citizens to

⁴¹W. Kenrick, "An Address to the Artists and Manufacturers of Great Britain," The Literary Property Debates: 1774-1775, 3.

⁴²Campbell, 7.

⁴³Ibid., 29.

copy, quote, or reprint. The Statute of Anne did not, however, explicitly state what rights were covered under the legislation. Copyright is strictly defined for the first time in 1769, when Lord Mansfield, Chief Justice of King's Bench, wrote, in his reasons for judgement in *Millar v. Taylor*, that the right of copy was "an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."⁴⁴

Copyright, at this stage in history, dealt only with the exact duplication of a printed or manuscript work. "Copyright did not bar others from using it, still less from dealing with the same subject matter, rather it barred them from reproducing a similar text."⁴⁵ Imitation, translation, and abridgement were all deemed acceptable uses of copyrighted material in the eighteenth century. In fact, in the late eighteenth century, imitation of classical works was seen as a virtue.

We can see here the development of the modern concept that the ideas contained in a book cannot be copyrighted; only the unique physical embodiment or expression of those ideas is protected by copyright. "A man who bought a published work may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work."⁴⁶ A book could be abridged, imitated, translated and criticized without punishment. It simply could not be copied.

⁴⁴Kaplan, 14.

⁴⁵*Ibid.*

⁴⁶*Ibid.*

We can also recognize the similarity of these rules to the philosophy of "fair dealing" that is present in most modern Anglo-Saxon copyright legislation. The Canadian Act states that "any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary" is not an infringement as long as it does not interfere with the economic exploitation of the work by the copyright owner.⁴⁷ These were also valid exemptions in the seventeenth and eighteenth century. In some cases, abridgements for the purpose of literary review were considered necessary, provided that the abridgement did not interfere unduly with the sale of the original work.⁴⁸

Another aspect of modern day fair dealing is the reproduction of some works for educational purposes which do not interfere with the financial profits of the copyright owner. Again, we can see the early beginnings of this concept in the following eighteenth century case.

In *Wilkins v. Aikin*, Lord Eldon discussed the hypothetical case of a man who, while writing a history about the mapping of England, reproduced maps published by another. Eldon suggested that, if the reproduction were for the purpose of merely illustrating the history, it might be permissible; whereas an obvious infringement of copyright would be the reproduction of the maps solely for profit. It is important to note the underlying concerns regarding the economic exploitation of copyrighted works, for herein lies the kernel of Anglo-Saxon thought on intellectual property. Legislation exists primarily to provide **economic** protection for those who have invested time or money in the creation of a work. Limited use

⁴⁷Copyright Act 1921, s. 27(2(a)).

⁴⁸Kaplan, 11.

of intellectual property is allowed only if it does not constitute an economic infringement upon the investment of the creator.

Copyright legislation was created to protect the economic investment of those who had created the final saleable product-- usually the stationers or publishers.

Copyright was seen as an indemnity against the huge financial risks undertaken by publishers.⁴⁹ Publishing was not the healthy, thriving industry that it is today. In order to ensure the continued intellectual development of the population, the legislation had to protect those people who at that time were the most influential in bringing the books to market-- the publishers and stationers. Authors were often protected economically by the safety net of patronage, whereby a wealthy aristocrat (or bookseller) would support an artist in return for his or her artistic creations. There was no recognized need to protect an author's rights to the integrity of his or her work: copyright protected only the physical duplication of a work-- this was all publishers were interested in. After publication and transfer of the rights to the publisher the author lost any right to recall, modify or suppress the work.

There was a lingering sense of publication as equal to the initiation of a work into the public domain. The creator of a work "is the author of it, but not the proprietor; and as soon as he divulges it to the world, he gives up his words and thoughts to the public; he cannot possibly recall them, nor can he hinder any person from repeating and spreading them."⁵⁰

⁴⁹Campbell, 12.

⁵⁰Ibid., 11.

There was also no recognized need to provide for the economic survival of authors by investing them with the first right to publish works which had been commissioned . It was assumed that publishers would pay the authors a reasonable amount for the rights to their work but that the publishers would sustain an equal or greater financial loss in the preparation of the book for publication and sale. The publisher was editor, copy corrector, type setter, printer and vendor.

In fact, the British legislation shows a complete lack of emphasis on either the notion of "author" or any standard definition of what is a "copyrightable work". It appears to be concerned only with the physical copying of a work, new or old, which is done for economic gain. (It has been suggested that this is a very apt reflection of the British shopkeeper's mentality).

In direct contrast to this is the European philosophy of intellectual property which is outlined in the international treaty, the Berne Convention.⁵¹ Indeed, even the terms used in the treaty reveal a marked contrast between the two schools of thought: the European *droit d'auteur* versus the British 'copyright'. As the term suggests, the European philosophy is heavily weighted towards the protection of author's rights.

Moral rights are an important part of the Roman Berne Convention (RBC). They grant the author continuing control over his or her work despite its exploitation by or sale to others.

⁵¹This convention originally was written in Paris, 1886. It has been revised several times: Berlin 1908, Rome 1928, Brussels 1948, Stockholm 1967, and Paris 1971. Canada currently subscribes to the Rome 1928 treaty.

"The author alone decides when the work is ready for release and the manner of its exploitation; the work must be properly credited; it must not be modified in a manner prejudicial to the author's original intent ; the author may even be entitled to recall the work if it no longer reflects his or her views; the author is front and center stage; later exploiters and users of the work are secondary players and stand in the wings."⁵²

This is in direct contrast to the early English legislation wherein the author gave up all rights upon sale to a publisher.

Although the RBC grants almost unlimited rights to an author, there are strict limitations on the definitions of author and of eligible works. Primary to both of these is the notion of individual creativity. The RBC takes a relatively narrow view of who is eligible for authorship. Only physical persons can be considered authors. This rules out the possibility of droit d'auteur being initially held by corporations, offices, governments, or legal partnerships, and therefore works created by these juridical persons cannot be protected under droit d'auteur unless there is a specific contract to the contrary.⁵³ "Only [an] author's literary, artistic and related works are protected. Any work that is not produced by an author is outside the ambit of the Convention."⁵⁴

The definition of author requires the exercise of creativity on his or her part. In the RBC, author means a person "who applies his or her personal creativity to

⁵²David Vaver, "Copyright in Foreign Works: Canada's International Obligations," The Canadian Bar Review, 66 (1987): 82.

⁵³*Ibid.*, 102.

⁵⁴*Ibid.*, 101.

produce a literary or artistic work. . . performers, sound recorders, broadcasters, and the like are neither authors nor do they create literary and artistic works."⁵⁵

In contrast to this, the Anglo-Saxon tradition of copyright recognizes all juridical persons as eligible for copyright ownership. Originally the Crown or the royal printer was the owner of all copyrights. In the eighteenth century, printing houses, rather than individual printers, could be the owners of copyright. In fact, a provision was made in the Statute of Anne for printers to apply for the copyright of classical works which had been written hundreds of years earlier. Clearly no notion of author as the sole copyright owner ever existed in English legislation.

The RBC also differs from Anglo-Saxon copyright in that the Convention severely restricts the type of works which are eligible for protection. A work must firstly be produced by an author (as defined above) and secondly must exhibit creative and original thought. The RBC "requires . . . intellectual creativity . . . as a precondition to granting protection."⁵⁶ If a work is not deemed to be creative it is not protected. As stated in the RBC, "the work must be one produced by an author qua author, that is exercising the faculties of an author; [the word] 'work' itself implies some intellectual creativity."⁵⁷ In fact, films "to which the author has not given an original character," and photographs are not categorized as literary and artistic works by the RBC. They are instead classed as derivative works.⁵⁸ Again, this is in direct contrast to the British legislation, which did not

⁵⁵Ibid., 103.

⁵⁶Ibid., 82.

⁵⁷Ibid., 92.

⁵⁸Ibid., 93.

include any requirement whatsoever on the nature of the work. As outlined above, copyright licenses were granted for both new and previously published (and thus derivative) ancient books.

Thus, we can see that the Anglo-Saxon philosophy, which developed as the result of government censorship and economic pressures, is markedly different from the European notion of *droit d'auteur*, which emphasizes author's rights and the necessary element of creativity. The early English legislation makes no mention of moral rights, the need for a work to embody original, creative thought, or the requirement that the owner of the copyright must be the author. The original petitioners for copyright legislation were booksellers and stationers. Their concerns were related to obtaining economic protection against the investments they had made in bringing manuscripts to the market.

English copyright is primarily "a vehicle to help propel works into the market: it is more an instrument of commerce than of culture", and in some ways is more similar to unfair competition legislation than it is to the European concept of *droit d'auteur*.⁵⁹

⁵⁹Ibid., 83.

CHAPTER TWO: EARLY CANADIAN LEGISLATION

In nineteenth century North America, publishers and authors were increasing at a rapid rate, and the publishing industry was gradually becoming an important segment of the domestic economy. Although there were few Canadian authors at the time, legislators felt it necessary to provide for the protection of both the fledgling publishing industry and those authors who would hopefully one day become important figures in the Canadian scene.

In 1841, the Act for the Protection of Copy Rights was passed in the Province of Canada. This act repealed the Lower Canada Act of 2 Will. 4 c.53 and unified the treatment of copyright throughout the country. The Act provided copyright protection for:

"Any person or persons resident in this Province, who shall be the author of any book, map, chart of musical composition . . . or who shall invent, design etch, engrave, or cause to be engraved, etched or made from his own design any print or engraving . . . and the legal assigns of such persons . . shall have the sole right and liberty of printing, reprinting, publishing and vending such book, map, chart, musical composition, print, cut, or engraving."⁶⁰

The term of protection was twenty-eight years with a possible renewal of fourteen years if the author was still alive or if, being dead, had left either a widow or a child.⁶¹ This is simply an extension of the earlier British Act, the 1710 Statute of Anne, which provided for a term of protection of fourteen years which could be

⁶⁰Laws, Statutes etc., 4 & 5 Victoria, An Act for the Protection of Copy Rights in this Province, c. 61, s. I.

⁶¹*Ibid.*, s. II.

renewed for another fourteen years after its expiration. As it will be seen, this is a continuing trend in copyright legislation: as the general life expectancy of the population increases so does the term of protection.

Unlike the 1710 Statute of Anne, the Canadian legislation enumerates the types of works which are eligible for copyright protection: books, maps, charts, music; prints, woodcuts and engravings. While providing increased specificity, the creation of a list of eligible works within the statute has necessitated frequent updating of the Act as new technologies and categories of works emerge. This has been especially crucial in the rapidly growing area of computer technology.

Another difference between the original British Act and the Canadian Act of 1841 is the inclusion in the latter of artistic works-- music, prints, woodcuts and engravings-- as well as the original English concept of protection for literary property.⁶² Artistic works such as those listed above were deemed to have the same qualities as literature (i.e. they were incorporeal personal property) and therefore required the same type of protection. Although the term artistic works is used throughout the discussions of this category, there is no requirement of artistic or creative quality for the work. English case law has interpreted this to mean that "anything more elaborate than a straight line qualifies as an 'artistic work' and a ruled form with a few headings can be protected as a copyright literary work."⁶³

⁶²The current English legislation approaches the categorization of works from a different angle. In England, artistic works are classed as derivative works and are treated differently in terms of length of protection and ownership of copyright. See Copyright Act 1956.

⁶³*British Northrup Ltd. v. Textcam Blackburn Ltd.*, F.S.R. 241 (1973), R.P.C. 57 (Ch. D 1974) and *Bulman Group Ltd. v. One Write Accounting Systems Ltd.*, 62 C.P.R. (2d) 149 (Ft. Ct. 1982) as quoted in *Vaver*.

The Canadian Act provides protection for authors who actually create the works, as well as for those who cause such works to be created. Thus, the artist who conceives of a design for a print is the first owner of the copyright in that print, not the person who may have actually made the wood cut or the engraving under the direction of the artist.⁶⁴

According to the 1841 Act, in order for an author to secure the copyright of a work, it must be registered in the Office of the Registrar of the Province and a copy must be deposited in the Legislative Library. "No person shall be entitled to the benefit of this act unless he shall, before publication, deposit a printed copy of such book . . . in the office of the Registrar of the Province, which Officer is hereby directed and required to record the same forthwith in a book to be kept for that purpose."⁶⁵ This grew out of the original system in eighteenth century England where works had to be registered with the Company of Stationers in order for copyright to be granted.⁶⁶ At that time, all works had to be registered, because copyright was granted to both new and old works. Authorship was often not relevant to the determination of who owned the copyright, therefore a system had to be created which assigned the rightful ownership to those stationers who applied for it.

Moreover, the 1841 Act stated that copyright ownership also had to be noted on every title page of every copy of the work that was printed: "no person shall be

⁶⁴This is crucial to the understanding of the present day difficulties in assigning copyright ownership in photographs and films where a number of people are usually involved in the production and design of the work. This topic will be discussed more fully in the section on ownership of copyright in the 1921 Act.

⁶⁵An Act for the Protection of Copy Rights in this Province, s. V.

⁶⁶A system for the registration of copyright also exists in the United States.

entitled to the benefit of this Act unless he shall give information of Copy Right being secured, by causing to be inserted in the several copies of each, and every edition published during the term secured."⁶⁷ This is the only clause that does not resemble the earlier English legislation. It is taken instead from the American legislation of that period. In 1892, Daniel Wilson, President of the University of Toronto, suggested that "Canadian legislators forthwith proceed to take this [the American legislation] as their model [in drafting the Canadian Act]."⁶⁸ As it will be seen, the practice of using the legislation of other Anglo-Saxon countries as a model for Canadian legislation is widespread-- the Canadian 1921 Act is almost a verbatim copy of the 1911 British Act.

After the confederation of the provinces in 1867, a statute governing the newly formed nation of Canada needed to be written. In 1889 an Act was passed that revised the earlier 1841 Act. The revision is very similar to the original act and changes only three relatively minor clauses:

"1) Copyright had to be registered with the Ministry of Agriculture.

2) Copyright could be owned by any inhabitant of Canada or a citizen of any country which had a copyright treaty with Canada [the Berne Convention had been written in 1886].

3) A license to copy a work would have to be obtained if the copyright owner could not be found."

⁶⁷ An Act for the Protection of Copy Rights in this Province, s. VI.

⁶⁸ Daniel Wilson, Canadian Copyright, paper read before the Royal Society of Canada, May 31, 1892, 7.

Wilson rekindled the debate of 200 years earlier regarding an author's right to perpetual copyright. He argued that an author's eternal right to his work "is his, as is the land which the industrious settler has . . .redeemed from the wilderness or as the manufactured goods of the producer who by labor and . . .skill transforms the raw material . . . into the marketable goods."⁶⁹ This argument is almost identical to that used in 1774 to support an author's right to perpetual copyright in England. However, in nineteenth century Canada as in seventeenth century England, there were other scholars who had more persuasive arguments against perpetual copyright.

Robert Lancefield, a Hamilton librarian, wrote that, during the discussion of the petitions when the new copyright act was presented at Ottawa,

"The protection of the printers and publishers was only one of the reasons advanced for the passing of the Act. But while that is the most important reason others were not wanting. The author is but one of those that enter into the making of a successful book; the publisher, with his wide and varied connections and ready facilities is frequently equally as important a factor than the author, and occasionally even more so."⁷⁰

As to whether or not an inexperienced and unknown author should be entitled to an equal share in the profits of a book, Lancefield asked the following question: when a publisher buys a manuscript from an author and proceeds to turn it into a marketable book, does the author also expect to share in the debts incurred if the book sales fail to cover the publisher's expenses? Obviously, Lancefield states, the answer is no. To support his argument, Lancefield cited the statistics which

⁶⁹Ibid.

⁷⁰Ibid., 9.

proved that even the largest and most experienced publishing houses in London suffered an economic loss for one out of every ten manuscripts they bought. The point made by Lancefield is that publishers need to be protected by copyright law since they make an equal or possibly greater investment in literary property than the author does, and as a result assume most of the financial risk, particularly with unknown authors, and in nineteenth century Canada there were few well known, successful authors. In fact, it appears that Canadian authors were thoroughly uninterested in the new legislation. "The passing of the Copyright Act in 1889 almost without attracting the notice of the Canadian authors and those specially interested in science and letters is significant," writes Wilson.⁷¹

An important concern for the legislators had been the establishment and advancement of the Canadian publishing trade. By ruling out perpetual copyright in favor of a limited term copyright, the legislators hoped to encourage publishers to publish Canadian editions of works which were part of the public domain rather than rely on the importation of books from England and the United States. A limited term copyright would also have provided for the cultural and educational enrichment of Canadian society by allowing works to enter the public domain within forty-two years of publication.

By the turn of the century, many changes had occurred throughout the country: new areas had been settled, rich resources had been discovered in the West, and immigrants poured into North America by the thousands. Canada continued to grow and develop. There were more authors and publishers, and new technologies had been developed for recording information. In 1921 a new Copyright Act was

⁷¹Ibid., 11.

passed which was almost a verbatim copy of the British legislation of 1911. It received royal assent in 1925.

The 1921 Act established that all "original literary, dramatic, musical and artistic works were covered by the new law if the author was at the date of the making of the work a British subject" or a citizen of a foreign country which adhered to the Berne Convention of 1908.⁷² The categories of works which were protected were : architectural works, films, photographs, perforated rolls (as used in player pianos), engravings, and portraits.

As was the case in England, the term 'original' did not imply any notion of artistic quality or expertise. A work had to be original only in the sense that it was not the copy of another work.⁷³

The rights protected by the statute were defined as:

"The sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

a) to produce, reproduce, perform or publish any translation of the work,

b) in the case of a dramatic work, to convert it into a novel .

⁷²Copyright Act 1921, s. 5(1). For a thoughtful and thorough discussion of the Canada's role in international treaties such as the Berne Convention and the Universal Copyright Convention see Vader.

⁷³For a thorough discussion of the requirements of copyright protection in Canada, see R. Barrigar, "Copyright Law: A Legal Interpretation," in Copyright Law: Business and Legal Applications, (Toronto: Insight Press, 1988), 2-12.

- c) in the case of . . . non-dramatic works, or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise
- d) . . . to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered
- e) . . . to reproduce, adapt and publicly present the work by cinematograph, if the author has given the work an original character, and
- f) . . . to communicate the work by radio communication."⁷⁴

The term of protection for published works was fifty years from the date of death of the author.⁷⁵ This is an increase from the British term of protection of twenty-eight years with a renewal period of fourteen years, but as noted earlier, the term of protection tends to increase as the life expectancy of the population increases. The rationale for the length of the term is that the author and his/her dependent children should have a right to the economic benefit of his/her work-- two generations has been the rule of thumb. The work then enters the public domain to be used and enjoyed by all.

Copyright in unpublished works, however, was to "subsist until publication or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter."⁷⁶ The result of this clause is that copyright exists in perpetuity for the vast majority of unpublished works, which is never published,

⁷⁴Copyright Act 1921, s. 3(1).

⁷⁵*Ibid.*, s. 6.

⁷⁶*Ibid.*, s.7.

performed or delivered in public. This clause of the legislation creates a very important distinction between published and unpublished works. Unpublished works are protected by the legislation until such time as they become published and for a period of fifty years after, whereas published works can be copied and used freely fifty years after the death of the author⁷⁷.

Publication is defined by the 1921 Act as:

"The issue of copies of the work to the public and, does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, exhibition in public of an artistic work or the construction of an architectural work of art."⁷⁸

There has been some debate in Canada as to whether or not unpublished works deposited in a public institution (archives or library) are to be considered published, and therefore whether they are subject to the limited term of copyright protection-- fifty years from the date of death of the author.⁷⁹ It is doubtful that this would become an interpretation of the term 'publication'. In the case of incoming correspondence contained among personal papers donated to an archives by the recipient of the material, this would entail the automatic publication of

⁷⁷Photographs were protected for a term of fifty years after the creation of the original negative.

⁷⁸Copyright Act 1921, s.4(1).

⁷⁹Jean Dryden, "Copyright in Manuscript Sources," Archivaria 1 (Winter, 1975-76): 39- 46. It has since been determined by common law in the United States and the United Kingdom that deposit in a public institution is not publication and does not change the term of protection to that of a published work.

material which the copyright owner, the author of the correspondence, did not even know had been donated.⁸⁰

The 1921 Statute abolished the clause that a work had to be registered in order for copyright to subsist in it. The only criteria listed in the statute were that the work must belong to one of four classes, literary, dramatic, musical or artistic; that it must be original (not a copy), and that it must have been created by a British citizen or a national of one of the subscribers to the 1908 Berne Convention. This is a reflection of the British legislation of 1911. Registration was not required for copyright to subsist in British works, because the act of creation was sufficient.⁸¹

The Canadian Act of 1921 protected photographs for a term of "fifty years from the making of the original negative." The owner of the copyright was defined as "the person who was the owner of the negative at the time when the negative was made."⁸² This clause has created a great deal of discussion as to who the owner of copyright in a photograph should be: the possessor of original negative, the photographer, the set designer or director, the sitter, or the employer. This is due, in part, to the wide variety of situations in which a photograph can be taken.

With the explosive growth of government bureaucracy in the twentieth century
Crown copyright suddenly became an area of interest. The copyright in works

⁸⁰In *Salinger v. Random House Inc.*, 811 F. 2d 90 (2nd Cir. 1987), Salinger was the author, and copyright owner, of letters contained in the fonds of another person which had been donated to a library. In this case, donation of the letters was not deemed publication. The material was treated as unpublished.

⁸¹*Ibid.*, s. 10. It is also no longer necessary to register a work in the United States in order for copyright to subsist in it: the act of creation is sufficient. See Melville Nimmer, Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works, (St. Paul, MN: West Publishing Co., 1979), 173.

⁸²*Ibid.*

which are "prepared or published by or under the direction or control of her Majesty of any government department shall . . . belong to Her Majesty and in that case shall continue for a period of fifty years from the date of the first publication."⁸³

Due to an increasing public awareness of the plight of the common laborer and the growing strength of the labor movement, a specific clause was introduced into the 1921 legislation to cover works made by employees. The copyright in works made in the course of employment was deemed to be first owned by "the person by whom the author was employed".⁸⁴ This is a reflection of the early tradition of Anglo-Saxon copyright. Copyright legislation was created to protect the person who made the largest financial sacrifices in bringing the work to the market (originally the stationer). Therefore the employer is considered to be the first copyright owner. The same influence is seen in the section on works made for hire. The copyright in works which are "ordered by some other person and made for valuable consideration" shall be owned by "the person by whom the plate or other original was ordered."⁸⁵ Once again the person who took the financial risk in the creation of the work is the first copyright owner. This position is also supported by the fact that in a work for hire the client usually has ultimate control over the final product. The actual physical creator of the work may make many of the small decisions as to the details of the work but the client usually states the initial requirements when he orders the work, and gives final approval of the work.

⁸³Copyright Act 1921, s. 12. The opposite is true in the United States: on the grounds that the government is considered as existing to serve the people, all works prepared for or by the government are considered to be in the public domain from the moment of creation and can be freely copied.

⁸⁴*Ibid.*, s. 13(2).

⁸⁵*Ibid.*

A rich theoretical discussion of the persons involved in the creation of a work is found in the discipline of diplomatics, the study of documents and the documentation process. In diplomatics, the person who causes the work to be created is defined as the author: "the author of the act is the person whose will produces the act."⁸⁶ Other persons involved in the creation of a document are: the writer, who has control over the physical form of the work and "is responsible for the tenor and the articulation"⁸⁷ of the work, the countersigner, who is responsible for "validating the physical and intellectual form" of the work, and the addressee, "the person to whom the document is directed".⁸⁸

In the case of works made by employees, the person whose will caused the work to be created is the employer, while the employee merely carries out the directions of the employer. Thus the copyright is first owned by the author-- the employer. The same is true of works made for hire. The person whose will caused the work to be created in the first place is the consignor. The person hired to do the work carries out the wishes of the consignor. Thus, once again, the copyright is first owned by the author of the work-- the consignor.

Thus, it is clear that the 1921 legislation, which has been criticized for assigning copyright haphazardly maintains the same unifying philosophy throughout its many clauses: copyright is first owned by the author of the work.⁸⁹ Copyright

⁸⁶Duranti, "Diplomatics Part III" *Archivaria* 30 (Summer 1990): 12.

⁸⁷Ibid., 7.

⁸⁸Ibid.

⁸⁹See discussion regarding the supposed inconsistencies in the 1921 legislation in Barry Torno, Ownership of Copyright in Canada (Ottawa: Consumer and Corporate Affairs, 1981), 9.

scholars and legislators might consider abandoning the common definition of author, which often corresponds more directly to the diplomatic definition of writer-- the person who is responsible for the articulation of a work rather than the originating idea or impetus for the work. Scholars and legislators might instead adopt the richer and more accurate definitions found in diplomatics.

The use of diplomatics allows scholars to define more accurately the persons involved in the many complex situations in which modern works can be created, and reveals the underlying simplicity of the 1921 legislation-- copyright is first owned by the author of the work. The confusion which resulted from the legislation derives not from the Act itself but rather from a bereft modern definition of author.

One of the most important sections in the 1921 legislation is section 14 (4), which discusses moral rights. This clause allowed for the author to have some control over his/her work even after the copyright had been assigned or sold to someone else. "Independently of the author's copyright and even after the assignment . . the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation, or other modification of the work that would be prejudicial to the honor or reputation of the author."⁹⁰ This provides the author with a great deal of control over the dissemination of his/her work even after the rights have been sold. A work must always be attributed to the correct author and that author has the right to control any subsequent modification of the work no matter who owns the copyright or where the work is located (within Canada).

⁹⁰Copyright Act 1921, s.14(4).

This clause is a substantial variation from the early English legislation, which was concerned solely with the economic aspects of a work. In one case in which a British author wished to remove a book from publication on the grounds that it was defamatory and would cause his reputation to suffer, the presiding judge refused to have the book withdrawn, and succinctly summed up the British notion of copyright by stating in his reason for judgement that "the mud may cling but the profit will be secured."⁹¹ It has been suggested that the inclusion of moral rights early in Canadian legislation may be due to the unique combination of civil and common law that exists in Canada.⁹²

Another section of the 1921 legislation that is absent from the British Act of 1911 is the section on Performing Rights. This section provides for the registration of all copyrighted material owned by the performing societies with the Minister at the Copyright Office.⁹³ Each society shall also "file with the Minister of the Copyright Office statements of all fees, charges or royalties that such society . . . proposes to collect."⁹⁴ These statements were then to be published in the Canada Gazette,⁹⁵ thus providing for the orderly and efficient administration of copyright in what was becoming a large and productive field.

One of the most contentious sections of the 1921 Act is 27 (2(a)) which is now known as the Fair Dealing section. It lists several exceptions to the infringement

⁹¹Phillips, 193.

⁹²As was discussed in Chapter One, moral rights which are absent in British copyright are an extremely important concept in the civil law notion of *droit d'auteur*.

⁹³Copyright Act 1921, s. 66(1)

⁹⁴*Ibid.*, s.66(2).

⁹⁵*Ibid.*, s. 67(1).

of copyright. The most crucial clause is the one which deals with private study and research. "Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary" is an exemption under this section.

The Fair Dealing section does not create or grant a right to use copyrighted material as the United States section on Fair Use.⁹⁶ Section 27 (2(a)) is interpreted far more narrowly. Rather than creating a right to use copyrighted material, fair dealing can be used only as a defense to an infringement of copyright. It is still an infringement of the law to use copyrighted material in the manner described in section 27(2). Section 27(2) only allows a person to use fair dealing as a defense to an unlawful act.

This clause has caused a great deal of confusion for most users and administrators of copyright. In fact, the statute does not define private study, research, criticism or review nor does it state whether fair dealing applies to unpublished works. This has been left for common law to determine. The courts have decided that fair dealing cannot and should not be defined by percentage or amount, rather "It must be a question of degree. You must consider the number and extent of quotations and extracts. . . next you must consider the proportions . . . but after all is said and done, it must be a matter of impression."⁹⁷

⁹⁶See Leon Seltzer, Exemptions and Fair Use in Copyright (Cambridge: Harvard University Press, 1978), and William Patry, The Fair Use Privilege in Copyright Law (Washington D.C.: The Bureau of National Affairs, 1985).

⁹⁷Lord Denning in *Hubbard v. Vosper*, 1 All E.R. 1023 (1971).

In a 1925 case, it was deemed that the use of an unpublished letter for the purpose of criticism was not "fair dealing" precisely because the work was unpublished. The Court felt that the author of the work had never intended it to be used by the public: unpublished works were not to be considered subject to the exemption of fair dealing.⁹⁸ This has serious implications for the administration of copyright in archival institutions and will be discussed more fully in the following chapters.

The 1921 Act firmly established the following rights under copyright protection: "the sole right to moral rights, right to first publication, the right to exhibit, perform or display the work, and in the case of a lecture to deliver the work in public."

Due to the rapid advances made in communication technology in the late twentieth century and the wide dissemination and use of photocopiers, computers, fax machines, magnetic tapes and optical disks, there has been enormous pressure to revise the 1921 Act. Britain has passed a new copyright law in 1956, and several subsequent revisions, the United States has written one in 1976, and Australia in 1968 and 1980. Canada partially updated its seventy year old legislation only very recently-- a final, complete package of copyright revision is not ready yet.

In 1971, the Economic Council of Canada published the Report on Intellectual and Industrial Property as the third and final study in a series on consumer affairs, competition policy and policy concerning intellectual and industrial property. The Council attempted to "bring all these hitherto rather specialized and under-

⁹⁸British Oxygen Co. Ltd. v. Liquid Air Ltd., 1 Ch. 383 (1925).

researched policies more into the mainstream of economic policy making . . . and also to relate them better to each other."⁹⁹

The Council recognized three main themes in its discussion on economic policy and intellectual property: the importance of the general public and consumer interest, the importance of the efficient allocation of the resources available to the economy, and the economic importance of knowledge and information.¹⁰⁰ The revisions suggested in the report were an attempt to balance the conflicting needs of users, government administrators and copyright owners. Unfortunately, the report was largely ignored by legislators.

In 1977, a report from Consumer and Corporate Affairs was published with the title, Copyright in Canada: Proposals for a Revision of the Law. Keyes and Brunet, the authors of the working paper, tried to "reflect contemporary concerns of a broader philosophical nature. . .with constant references to society's newly affirmed needs for instant access to information."¹⁰¹ Although they realized that the interests of the general public were an important aspect of any copyright study, they were also cognizant of the fact that copyright is nevertheless a private property right. "Identifying exclusively . . . the public's right of access to information is a bias that should be resisted in that it would eventually lead to the demise of the concept of private property in copyright law."¹⁰² Keyes and Brunet were generally very conservative in their proposed revisions for Canadian

⁹⁹Economic Council of Canada, Report on Intellectual and Industrial Property (Ottawa: 1971), 217.

¹⁰⁰*Ibid.*

¹⁰¹Keyes and Brunet, iii.

¹⁰²*Ibid.*, iv.

copyright legislation often following the revisions contained in the 1956 British Act. However, this report was also largely ignored by the legislators.

In 1984, a second report detailing the much needed revisions to the copyright act was published by Consumer and Corporate Affairs entitled, From Gutenberg to Telidon: A White Paper on Copyright. This paper, while attempting to strike a fair balance between the rights of creators and those of users, found that "the importance of the work of the individual creator will continue to grow as our society moves ahead into the information age."¹⁰³ This is a very different direction from that taken in the 1971 Economic Council Report, which emphasized the economic aspects of copyright within the broader spectrum of the economy of Canada. However, the authors of the White Paper cautioned that "nobody should be under the delusion that copyright legislation, by itself, will solve either the economic or social problems of all authors."¹⁰⁴ The paper recognized three central areas for revision: the establishment of collectives to administer royalty payments to copyright owners, the inclusion of computer programs within the list of eligible works, and the strengthening of an author's moral rights.

Later in 1984, another government-commissioned study was released: A Charter of Rights For Creators. This paper is quite a radical step away from the earlier Keyes and Brunet report and the White Paper on Copyright. A Charter of Rights has been heavily criticized by some copyright scholars for being biased towards

¹⁰³The White Paper on Copyright, 2.

¹⁰⁴Ibid., 3.

creators from its inception (hence the title) and for listening unduly to pressure groups who are, in fact, not Canadian and do not represent Canadian interests.¹⁰⁵

In 1987, a partial revision to the Copyright Act was finally passed. The revision, Bill C-60, was written largely in response to the needs outlined in the 1984 White Paper. Bill C-60 included computer programs within the category of literary works, expanded the moral rights of authors, and provided for the establishment of collectives to collect user fees.

Bill C-60 states that the definition of "literary work includes tables, compilations, translations, and computer programs."¹⁰⁶ The result of this is that copyright protection in computer programs exists for the term of the life of the author plus fifty years-- the same as for other literary works. This is a particularly crucial area of copyright in the 1980's and 90's, due to the massive economic expansion of the computer industry. Bill C-60 also makes provisions for the copying of programs for back-up purposes and for reasons of computer program compatibility (for example the translation from one computer language to another).¹⁰⁷ This section was a much needed improvement over the earlier 1921 legislation which naturally did not cover computer programs in the list of works eligible for copyright protection.

¹⁰⁵See Vader, 78 and Santoro, "The Association of Canadian Archivists Copyright Committee: A Response to A Charter of Rights for Creators," *Archivaria* 21 (Winter 1985-6), 126.

¹⁰⁶R.S.C. Bill C-60. An Act to Amend the Copyright Act, 1987 c. 10 (4th supp.), s. 10(1(2)). Hereafter R.S.C. c. 10, 1988.

¹⁰⁷It is possible that, with the continuing development of technology, media will be produced which are not as fragile as the current magnetic floppy disks (eg. optical disks). J. Peter Sprung in "Copyright Protection for Computer Software," Copyright Law: Business and Legal Applications (Toronto: Insight Press, 1988) suggests that this will probably become an obsolete and possibly damaging phrase in the near future.

One of the most difficult problems associated with the protection of computer programs is determining exactly what elements are covered by copyright. After an initial attempt at submitting computer programs for patentability, creators of computer programs turned to copyright as a means to protect their property. The debate which ensued from this move towards copyright protection has centered around whether or not computer programs are ideas and therefore not subject to copyright protection, or whether they are unique expressions of those ideas and hence copyrightable just like any other literary work.

In order to understand the applicability of copyright to computer programs, it is necessary to outline the steps involved in creating a program. First, a programmer develops an overall program design from his or her original idea. A source code, or high level language, which contains all of the necessary elements of the program, is written. The source code is then converted or translated into a code which can be read by the computer. This is termed the object code or low level language. The object code (which is generated from the source code) is what actually runs the computer.

The first stage, designing the program, typically requires the most time, energy, creativity, and skill. The translation phase (putting the design into object code) does not require as much time or expertise and is usually completed by a junior or less experienced programmer. The paradox results from the fact that copyright legislation protects only the tangible expression of ideas-- not the design ideas themselves.

This has lead some experts to believe that copyright may not be the appropriate legislation under which to protect computer programs. Licklider, of the Massachusetts Institute of Technology, stated before the Commission on New Technological Uses of copyright works (CONTU) that: "In the actual world of programming, all the people want is the effect of the action to the program. They don't care a thing for the particulars of the expression . . . so, I submit, you're probably protecting the wrong thing."¹⁰⁸

One of the largest problems in determining what copyright should protect is the fact that these unique expressions of ideas (or literal code) are intended to be read by machines. Computers can, quite rapidly, convert an object code written in one language back to the source code. Programmers then insert a minimum of idiosyncrasies to make the program look like a new, creative work. The computer then translates this slightly different source code into a new object code-- possibly in a different language. This sort of process was never done (and could never be done) with the more traditional literary works: novels, short stories, essays, and poems. Because computer languages are so much more limited than human language (hence the term 'code'), it is much easier to mutate and translate them, unlike human language, where often a simple change in wording can result in a dramatically different meaning. Hence a program which appears to be quite different from another may have, in fact, been copied from the first program; then minor changes are made by the computer to obscure the fact that the program was actually copied. Consequently, while there are some differences between the two programs, possibly written in different languages, there has not been enough time, energy and individual creativity applied on the part of the author of the second

¹⁰⁸CONTU meeting, No. 18, 131 as quoted in Current Developments in Copyright Law 1986, 476.

program for it to be considered a new work in its own right and thus subject to copyright protection. Computer programs, because they involve the use of highly technological devices, have created a whole new area of controversy for copyright scholars to debate and analyze.

Computer programs are also different from the traditional literary works in that they are factual works. They are "instructions or statements to be used . . . in a computer, in order to bring about a desired result."¹⁰⁹ Thus, there may be great similarity between programs out of necessity-- facts can usually be represented in only a finite number of ways, as opposed to works of the imagination where modes of expression are almost infinite. This has lead some copyright experts to wonder whether there is a limited number and type of program which can be subject to copyright-- that is, only those programs which are original and unique enough to be considered works of authorship would be applicable for copyright protection. All other programs, which are simply statements of fact or 'laws of nature', would be ineligible for copyright protection. These programs would be considered to be in the public domain.

In 1983, a case came before the American courts, *Apple Computer Inc, v. Franklin Computer Corp.*, which involved the alleged infringement of an operating system produced by Apple. An operating system is the program that schedules operations, manages storage, controls input and output and other various "housekeeping" activities which are done by the computer. The design of the operating system is naturally very highly constrained by the type of machine it

¹⁰⁹R.S.C. c.10, 1988

runs on. The question before the courts was whether or not this type of program, an operating system, was copyrightable.

The defense openly admitted copying Apple's operating system but argued that "the idea of the operating system software was indistinguishable from its expression," and thus not subject to copyright protection.¹¹⁰ Franklin further claimed that, because the system was so constrained by physical requirements (due to the nature of operating systems), if it were to market a personal computer compatible with the Apple II, it was required to use the same operating system.

The court did acknowledge the problem surrounding computer programs and the coalescence of idea and expression that can happen as a result of the often severely limited number of ways available to express the ideas found in programs. If there is only one way of expressing an idea, the idea and expression are said to 'merge'. Copyright cannot apply to cases such as these since copyright cannot protect ideas, it can only protect the unique expression of ideas. The court stated that "if other programs could not be written to represent the ideas in the operating system, there would be a merger of expression and idea for which copyright protection could not be given."¹¹¹

The court, however, found for Apple and stated that "compatibility is a commercial and competitive objective which does not enter into the somewhat metaphysical issue of whether particular ideas and expression have merged."¹¹²

¹¹⁰Robert M., Newbury, "Copyright Protection for Computer Programs," Current Developments in Copyright Law 1986, 491.

¹¹¹Ibid.

¹¹²Ibid.

The defense of compatibility was not strong enough to warrant use of Apple's program-- even though compatibility may be one of the most vital marketing tools a program can have.

A second case involving a similar defense appeared the following year, *Apple Computer, Inc. v. Formula International, Inc.*. Again, an exact copy of Apple's operating system had been produced by the defense. The court held that Apple had no right to protection against Formula for writing a program "which performed the exact same function or purpose" but could be protected against a program which performed the function "in the exact same manner." Again the court recognized that grounds for a merger of idea and expression could be found if there was only one way to write a program which performed the functions of the Apple operating system. However, the defense did not provide enough evidence to convince the court of this. Again the court found in Apple's favor.

These two decisions have shown that programs in which idea and expression merge, will be considered to be unprotected by copyright legislation. However, the burden of proof lies with the defendant to show that a program can only be written in one specific way-- which is likely to be rather difficult to prove. While computer languages are limited, in comparison to human language, they are not so completely bereft of expressive capability as to be virtually identical even when expressing the same ideas. They are, after all, written by humans who are capable of expressing their ideas in a myriad of ways. If the defense fails to prove that only one method of expression exists for any given idea, the court will probably find that infringement has occurred.

Other questions have arisen as to what other types of programs could be copyrighted in addition to operating systems. Discussions have centered primarily around programs located in read only memory (ROM), source and object codes, video display, and file structure and arrangements.

In *Apple Computer Co., Inc v. Franklin Computer Corp.*, the question came before the court as to whether object code, the code read by the computer, could be eligible for copyright protection. The court found that copyrightability did not depend on the level of the code or whether the work communicates directly to humans. The court held that "a computer program represents copyrightable subject matter, regardless of whether the program is presented in source code, designed to be read by a human reader, or in object code, which normally can be read only by the computer."¹¹³

The defendant argued that programs located in ROM, which can be accessed and read only by the computer, should not be eligible for copyright protection since ROM is essentially a utilitarian device and therefore not subject to copyright. The court held that "it is the embodiment of the expression within the ROM which is protected."

This case was a breakthrough in the early thinking about copyright and computer programs. It moved the discussion away from protection of only the literal code, which was considered to be just a series of statements or instructions which run a machine, towards the doctrine of computer programs as the unique expression of ideas which incidentally run a machine and which happen to be located in a type

¹¹³Ibid., 476.

of medium which can only be accessed and read by machines. In this philosophy computer programs are considered to be much more similar to other traditional literary works-- that is the unique, creative expression of ideas rather than some rudimentary non-creative device which simply runs a machine.

In one of the most important cases to date, *Whelan Associates Inc., v. Jaslow Dental Laboratory Inc.*, the court discussed such complex matters as what part of a computer program can be copyrighted: the logic and ordering of elements within a program, the file structure, and the screen display or just the literal, object code.

The court found that "it is surely true that limiting protection to computers' literal codes would be simpler and would yield more definite answers than does our answer here. Ease of application is not, however, a sufficient counterweight to the considerations we have adduced on behalf of our position."¹¹⁴

The court compared the logic and ordering of elements within a program to the sequence and ordering of items in a traditional compilation or derivative literary work which had previously been determined as acceptable for copyright protection.

"Although the Code does not use the terms 'sequence,' 'order,' or 'structure,' it is clear from the definition of compilations and derivative works, and the protection afforded them, that Congress was aware of the fact that the sequencing and ordering of material could be copyrighted, i.e., that the

¹¹⁴ Morton David Goldberg, "Current Judicial Developments in Copyright Protection for Computer Software," Current Developments in Copyright Law 1988, 94.

sequence and order could be parts of the expression, not the idea of a work."¹¹⁵

The court also compared file structures (the arrangement and ordering of data fields) within a computer program to the more commonly known blank form. A huge breakthrough on the heretofore muddled situation involving the copyrightability of file structures was decidedly cleared up by the court's decision. The court agreed with defendants that "file structures in a computer program may be analogized to blank forms . . .and that blank forms may be copyrighted if they are sufficiently innovative and that their arrangement of information is itself informative."¹¹⁶

Screen outputs were also considered by the court. Screen displays were attributed some evidentiary value in revealing the nature of the underlying program. The court stated that "there is necessarily a causal relationship between the program and the screen outputs. The screen outputs must bear some relation to the underlying program, and therefore have some probative value."¹¹⁷

The fact that screen displays are meant to be read by humans weighed heavily in the court's decision to grant them protection because-- as the court stated-- "the screen outputs are vivid and easily understood (at least as compared with the obscure details of computer programs)"¹¹⁸ This was the first time screen displays

¹¹⁵Ibid., 96.

¹¹⁶Ibid., 99.

¹¹⁷Ibid.,

¹¹⁸Ibid.

were allowed to be admitted as evidence in a suit involving the copyright infringement of a program.

With regard to the nature of programs as copyrightable material the court found that, "there is thus no statutory basis for treating computer programs differently from other literary works in this regard."¹¹⁹ The court reaffirmed the notion that computer programs are copyrightable in that idea and expression do not merge but are, in fact, entirely separate. The court stated that "the conclusion is thus inescapable that the detailed structure of the [plaintiff's] program is part of the expression, not the idea, of that program."¹²⁰

Another problem presented by computer programs is their highly technical nature. Few judges are well versed in the intricacies of computer programming and the nuances of machine code. This has lead the courts to rely more heavily upon the conduct of the defendant in cases where the similarity of expression between two programs must be determined. If the work is a verbatim copy, it is likely that infringement will be found if the court determines that the idea can be expressed in more than one way.

In order for a court to determine whether or not one program is a copy of another it must analyze the similarity of expression. If one program is found to be substantially similar to another it will be found to be an infringement. The problem is in determining what is substantial and what is not. The courts have struggled over this throughout the 1980's. In addition to looking at the conduct of

¹¹⁹Ibid., 97.

¹²⁰Ibid., 99.

the defendant, courts must take into consideration the importance of the section of the program that has been copied. This is a very subjective test, in which the court relies upon expert testimony regarding the nature of computer programs and their component parts. If a program contains a small amount of a copied work, but the portion copied is one of extreme importance to how the program runs, this would likely be found to be an infringement. It is not a strict question of quantity-- how much has been copied-- but rather one of quality-- how important or significant is the section that has been copied.

In *Whelan v. Jaslowe* the court found that:

"the copyrights of other literary works can be infringed even when there is no substantial similarity between the works' literal elements. One violates the copyright of a play or book by copying its plot or plot devices . . . By analogy to other literary works, it would thus appear that the copyrights of computer programs can be infringed even absent copying of the literal elements of the program."¹²¹

From these illustrative cases it is clear that the doctrine of copyright with respect to computer programs has evolved from an early narrow approach to programs as patentable procedures or processes which are utilitarian in nature towards a much broader philosophy of programs as the unique expression of an author's original ideas. This philosophy classifies computer programs very closely with other traditional literary works.

Under the *Whelan* and the *Apple* decisions, copyright is now considered to exist in both object and source code, in ROM, in video displays, in file structures, and in

¹²¹*Ibid.*, 91.

the overall logic and ordering of elements within a program. In order to prove infringement, substantial similarity must be found, which is primarily a subjective, qualitative test in which output such as screen display can be admitted as evidence. Most importantly, computer programs are considered to be not ideas, which are uncopyrightable, but the unique expression of an author's original work, and thus eligible for copyright protection as a sub-category of literary work.

J. Peter Sprung, a noted Canadian specialist in copyright protection and computer software, agrees with the recent decisions of the American courts. He writes that, "the adoption of 'look and feel' tests to decide infringement brings us close to the kind of proprietary rights we need to protect in computer programs, and to encourage the publication and dissemination of new ideas." ¹²²

In addition to including computer programs as a type of literary work, Bill C-60 also expands upon the moral rights given to authors in the 1921 legislation. Moral rights are defined as "the right to the integrity of a work and . . . the right to be associated with the work as its author . . . and the right to remain anonymous." The infringement of the "integrity of the work" is further defined as follows:

"The author's right to the integrity of a work is infringed only if the work is to the prejudice of the honour or reputation of the author,

a) distorted, mutilated or otherwise modified; or

b) used in association with a product, service, cause or institution."¹²³

¹²²Sprung, 12.

¹²³R.S.C., Ch. 10, s. 14(2(2)), 1988.

Moral rights can be extinguished but cannot be assigned or transferred, and they "subsist for the same term as the copyright in the work," (fifty years from the date of death of the author).¹²⁴ This is due to the fact that moral rights exist to protect the integrity of the author only. The legislation has no interest in protecting the integrity or reputation of someone who has bought the work in question. This means that the author of a work can still exert a considerable amount of control over his/her work even when he/she has sold the reproduction rights. Anyone who publishes or exhibits a work in which moral rights subsist must take care not to inadvertently distort or modify the works or use them in association with a product, service, cause, or institution that would prejudice the author's reputation. This section on moral rights is potentially a very powerful piece of legislation. Archival institutions and libraries which produce exhibits must ensure that the reputation of the author is not distorted or modified by neighboring works within the exhibit, by the sponsors of the production or by the institution in which the exhibit is held.

As has been suggested by Grace Hyam, the author's right to remain anonymous is also a potential problem for archival institutions.¹²⁵ One of the main entries in archival description is the author of the work.¹²⁶ Although this has not been tested by the common law, Hyam suggests that if the name used in the description can be found through the use of the historical method, it is unlikely that this would be considered an infringement of moral rights.

¹²⁴Ibid., s. 14(2(1)).

¹²⁵Hyam, 176.

¹²⁶Bureau of Canadian Archivists, Planning Committee on Descriptive Standards, Rules for Archival Description (Ottawa: Bureau of Canadian Archivists, 1990).

Bill C-60 also makes special provisions for the collective administration of copyright.¹²⁷ Under this scheme owners of copyrighted material can collectively appoint an association or corporation to administer the copyright for them. The society or association:

"a) carries on the business of collective administration for the benefit of those [authors] who by assignment. . . authorize it [the collective] to operate on their behalf . . .and;

b) operated a licensing scheme applicable to a repertoire of works of more than one author, pursuant to which the society. . . sets out the classes of uses for which and the royalties and terms and conditioned on which it agrees to authorize [the use of said works]."

This allows for groups of copyright owners (most likely authors and publishers) to join together to form collectives which deal primarily with the assignment and payment of royalties. It has been suggested that these collectives would collect royalties from libraries as a blanket payment for the photocopying that is done on the premises of the library (by both staff and library patrons).¹²⁸ It is unlikely, however, that the establishment of collectives will have any impact on archival institutions. Donors hold copyright for only that material which they have created. The copyright on all incoming correspondence is owned by the author-- not the addressee. In fact, very few donors (with the exception of literary figures) are aware of copyright. Since "there has been little objection on the part of copyright holders to the current use of manuscript material in historical research" it seems

¹²⁷This is very similar to the British Public Lending Right 1979 wherein authors and publishers collect royalties from libraries in accordance with the frequency with which a book is checked out.

¹²⁸Jim Keon, "The Canadian Archivist and Copyright Legislation," Archivaria 18 (Summer 1984): 91-98.

unlikely that the establishment of collectives will radically change the administration of copyright in the majority of archival institutions.¹²⁹

While Bill C-60 has addressed some of the problems found in the 1921 copyright legislation (computer programs, moral rights, and collectives), there remain areas that desperately demand revision: the term of protection for unpublished works, which currently exists for perpetuity; the copying out of print copyrighted material for preservation and security needs, which is currently an infringement under the Act; and the owner of copyright in photographs, who is the owner of the negative at the time of creation of the original (a cumbersome, impractical provision).

The government cannot claim ignorance as a defense against accusations that it has not been sensitive to archival issues. Beginning with Jean Dryden's article in the first issue of Archivaria, there have been many reports and papers detailing the special concerns of archivists in copyright legislation. Gina La Force examines the current proposals for revision to the legislation, Jim Keon provides an excellent review of copyright and its implications for archives, and Grace Hyam discusses the recent partial revision and its possible effect on archives.¹³⁰ The ACA Committee on Copyright has also remained an important force in submitting archival concerns to copyright legislators.¹³¹

¹²⁹Dryden, 45.

¹³⁰Gina La Force, "Archives and Copyright in Canada: An Outsider's View," Archivaria 11 (Winter 1980-81): 37- 53, Keon, Hyam.

¹³¹Santoro, "An Update," and Gabrielle Blais, "Public Advocay and Awareness Committee Report," ACA Bulletin 15, no. 6 (July 1991): 10.

In summary, copyright legislation in Canada has moved from a relatively narrow concern for the economic protection of the fledgling publishing industry to a complex and comprehensive area of the law which attempts to cover all new and developing communication technologies while providing for an author's moral rights to a work, the publisher's rights, and the user's rights through a limited term of protection and the fair dealing clause. However, further work is needed in the areas of: the term for unpublished works, the copying of out of print copyrighted material for preservation and security needs, and the assignment of ownership of copyright in photographs and works for hire.

CHAPTER THREE: CURRENT CANADIAN LEGISLATION

The copyright issues of most concern to archivists are copying for preservation and security, the testamentary disposition of rights, the term for unpublished works, crown copyright, the ownership and term of copyright in photographs, rights to interviews, copyright in works for hire, and fair dealing. Therefore, these issues will be discussed in some detail.

Preservation and Security

A standard and highly recommended practice for record creators is the copying of unique and important records for the purposes of vital records management.¹³² This is also done by archival institutions for inactive records which have been selected for permanent preservation in an historical archives and which are deteriorating and fragile or subject to heavy use. They are routinely copied and then stored in environmentally sound conditions while the copy is used for answering users' reference questions.

Without this practice thousands of documents would be destroyed every year simply due to use. Many of the documents in Canadian archives are written on acidic paper which deteriorates at a rapid pace when exposed to light and humidity. However, the copying of documents, regardless of the good intentions behind it, is an infringement under the present Canadian legislation. Both records managers and archivists, who are ensuring the longevity of Canadian archives, are breaking the law.

¹³²Carol Couture and Jean Rousseau, The Life of a Document (Montreal: Vehicule Press, 1987), 136.

The American Copyright Act of 1976 contains a section on special exemptions for the reproduction of copyrighted material undertaken by libraries and archives.

Section 108 allows a library or archives to make one copy of a work provided that:

- "(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are
 - (i) open to the public, or
 - (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part but also to other persons doing research in a specialized field; and
- (3) the reproduction or distribution of the work includes a notice of copyright."

In the United States an unpublished work can be reproduced by a library or archives under the conditions described above for the purposes of preservation, security, conservation and research use. In fact, the same section of the 1976 Act states that these special rights given to libraries and archives:

"Apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for the purposes of preservation and security or for deposit for research use in another library or archives of the type described if the copy or phonorecord reproduced is currently in the collections of the library or archives."¹³³

Only one copy of each work can be made and it must be made by the archives which has the original. This is to prevent the widespread multiplication of copies.

¹³³Copyright Act, U.S. Code, vol. 17, sec. 108b (1976).

There is a strict prohibition against the creation of multiple copies or the systematic creation of copies in subsection (g). There is also the further restriction that the copy made must be in facsimile form: storage on a machine readable data base would be an infringement of the Act.¹³⁴

Section 108 allows the archivist to preserve and maintain the holdings of the archives by allowing for original documents to be stored off site in environmentally controlled conditions, while the user is provided with duplicates for normal reference requests. This section also allows for the duplication of material for the purpose of research use at another archives or library. In fact, it is often the case that archival fonds are split between repositories. Archives A will have half of a fonds (e.g., the personal correspondence of an individual) while archives B may have the other half (e.g., all of the professional papers of the same individual). Archival institutions are traditionally loathe to part with their holdings. Section 108 circumvents this problem by allowing each archives to maintain the full fonds: one half will be original records, the other half duplicates.

A published work can also be reproduced for conservation or replacement purposes if a copy is unobtainable at a reasonable price. The same is true for out of print works. At the request of the user, a library or archives may duplicate in facsimile form a work which is out of print. The duplicate must then become the property of the user, and the archives or library must "have no notice that the copy would be used for any purpose other than private study, scholarship or

¹³⁴Congress, Senate, Copyright Revision, 94th Cong., 2nd sess., 1975, Report No. 94-473, printed in Current Developments in Copyright Law 1977, 512.

research."¹³⁵ A copyright notice must be prominently displayed on the request form and at the place where requests are made.

These are both very important revisions to the American Copyright Statute. An archives or special collections division often has unique published works which are deteriorating or could be helpful for a researcher at a different location. This section allows for an archives or library to both preserve the materials in its holdings and to improve the resources available to its users-- without damaging the economic rights (right to publish, vend, distribute etc.) of the copyright holder.

Section 108 contains a further provision that removes liability on the part of the library or archives and its employees for the use of unsupervised duplication machines within the library or archives, provided that "such equipment displays a notice that the making of a copy may be subject to the copyright law."¹³⁶ This is a welcome revision to the statute. Without it the liability of the librarian or archivist is at best unclear.

The overriding restriction of Section 108 is that the duplication must not take the place of a work which could be subscribed to-- in the case of serials-- or bought in whole-- in the case of published monographs. This section succeeds in bridging the delicate gap between the preservation and dissemination of information held in public libraries and archives and the protection of an author's right to the economic return derived from his or her original works. It maintains a delicate balance between a creator's rights to receive economic benefit from his or her work and the

¹³⁵Ibid., (e).

¹³⁶Ibid., (f(1)).

overall benefit which accrues to the general public in the pursuit of research and knowledge.

The Australian Copyright Amendment of 1980 also provides for the duplication of deteriorating, lost or stolen works if the library or archives is satisfied that a replacement is not available within a reasonable time and at an ordinary commercial price.¹³⁷

The British Copyright Act of 1956 also makes special provision for the duplication of out of print published works.

"[In the case of] published literary, dramatic or musical works, [copyright] is not infringed by the making or supplying of a copy of the work, or part of it, by or on behalf of the librarian . . . [provided that] at the time when the copy is made, the librarian . . . does not know the name and address of any person entitled to authorize the making of the copy, and could not by reasonable inquiry ascertain the name and address of such person."¹³⁸

This is a more sweeping exemption than that found in the American legislation. It allows the librarian or archivist to copy any published work for which the copyright owner remains unknown or unlocateable after a reasonable inquiry has been undertaken.

The subsequent Copyright Designs and Patents Act 1988 (effective in Great Britain in November 1988) does not radically alter this exemption. The conditions

¹³⁷ Laws, Statutes, etc., Copyright Amendment Act, 1980, 1980, no. 154, s. 51A.

¹³⁸ Laws, Statutes, etc., 4&5 Eliz. 2, Copyright Act 1956, c. 74 (hereafter Copyright Act 1956), s. 7(5).

regarding the class of institutions able to make copies, and the further requirements necessary to satisfy this exception (such as a written disclaimer signed by the requestor) are to be contained in regulations which at this date have not yet been written.

The 1988 Copyright Act also makes provisions for the copying of unpublished literary, dramatic or musical works in whole or in part for the purposes of research or private study. This provision does not apply if, at the time of the copying, the librarian or archivist "is or ought to be aware either that the work had been published or that the copyright owner had prohibited copying of the work."¹³⁹ The regulations will probably contain requirements relating to copying fees and satisfaction on the part of the librarian or archivist that the material copied will only be used for private research.

The Act contains a third provision which allows a library or archives to copy unpublished literary, dramatic or musical works for the purpose of preservation or for supplying a replacement copy to another library. Again, the specific regulations which will further define this exemption have not yet been written.

Through a combination of the 1956 and the 1988 Acts, the British legislation has created practical exemptions which support the customary needs of archives and libraries without unduly infringing the author's rights: the need to copy out of print material, the need to copy for preservation and security, and the need to make limited copies for research and private study..

¹³⁹David Lester and Paul Mitchell, Joynson-Hicks on UK Copyright Law (London: Sweet and Maxwell, 1989), 172.

In Canada, Keyes and Brunet, in their 1977 Proposals for a Revision of the Law, suggest that "no statutory exceptions be provided to libraries and archives with respect to copyright material deposited therein, other than to permit the making of a copy for the sole purpose of preserving the material which is deteriorating or damaged."¹⁴⁰

The subsequent 1984 proposal for the revision of the Act, The White Paper on Copyright, is less restrictive than Keyes and Brunet. It recommends that "an exemption be introduced . . . permitting libraries and archives to make limited numbers of copies of unpublished, out of print or otherwise unavailable material already in their collections for reference or preservation purposes."¹⁴¹

The 1986 report of the sub-committee on the Revision of Copyright titled, A Charter of Rights for Creators, takes the middle ground between these two stances and allows copying for preservation but restricts copying for reference to situations similar to inter-library loan. It recommends that:

"The revised law should provide an exception to permit an archival institution to make a copy of a work which is not otherwise available and which is already in its collection, for the purpose of preserving the archival copy (and)

an exception should be provided to permit an archival institution to make a copy of a work where the latter has

¹⁴⁰Keyes and Brunet, 175.

¹⁴¹The White Paper on Copyright, 43.

received a request for a copy of the work from an individual researcher for the purpose of private research."¹⁴²

Clearly, the Canadian legislation needs to take into account the special needs of archives in drafting the copyright revisions and to include either very specific and detailed exemptions, as in the American legislation, or more general exemptions as found in the British and Australian legislation.¹⁴³ The copying of archival material for preservation and security needs rarely, if ever, effects the economic or moral rights of an author.¹⁴⁴ The American legislation has been in place for almost twenty years, with a periodic review every five years, and there has been no great outcry on the part of copyright owners that their rights are being infringed. The Canadian government might take this into consideration as well as the lack of harm done to copyright owners by duplication for archival purposes when drafting the final revision to the Canadian Copyright Act.

Testamentary Disposition

The British Act of 1956 created a special exemption for the transfer of copyright in the case of physical disposition of a work in a will. Ordinarily, copyright can be transferred only through a written instrument. The 1956 Act allows for the transfer of copyright with the physical transfer of the material in a testamentary

¹⁴²Canada, Department of Consumer and Corporate Affairs, Recommendations of the Sub-Committee on the Revision of Copyright: A Charter of Rights for Creators, (Ottawa: 1986), (hereafter A Charter of Rights for Creators), 13.

¹⁴³There have been repeated recommendations made to the Canadian government regarding this issue. See: Keyes and Brunet, Santoro, Laforce, Keon.

¹⁴⁴An exemption for the copying of works for research needs other than those mentioned by The White Paper, where the copy probably becomes the property of the archives and not the researcher, more properly belongs in the section on fair dealing.

disposition.¹⁴⁵ The legislators made the assumption that, unless expressly noted otherwise, a testator who makes arrangement for the physical transfer of a copyrighted work will also imply the transfer of the copyright. Archivists experienced in the acquisition of private documents know that, in most instances, the average donor is completely unaware of the existence of copyright in the documents he or she is donating, and that he or she is usually willing to transfer it with the physical ownership of the material after the archivist provides an explanation of the issues surrounding copyright.

A clause regarding the testamentary disposition of copyright would be extremely practical for the Canadian revision. It would clear up the many cases where material is donated through a will to a library or archives but the copyright is not expressly mentioned. Currently, the donated material is physically owned by the archives but the copyright is owned by the heirs of the estate of the deceased. It can be an extremely cumbersome and time consuming task to determine who the living heirs are and where they can be located in order to obtain copyright permission. This clause would greatly simplify the use of archival material, thus enhancing the benefit accruing to society through the increase of knowledge and culture without unduly harming the creator of the work.

Both Keyes and Brunet and the White Paper on Copyright include an exemption of this type in their proposals. "The devising of any unpublished material, protected by copyright, presumes devising of the copyright therein, unless a contrary intention is evidenced in the will."¹⁴⁶

¹⁴⁵The 1988 Act (s 93) extends this section to include the bequest of sound recordings and films as well as any material thing which may embody the work (for example a master tape).

¹⁴⁶Keyes and Brunet, 73. See also The White Paper, 60.

Term of Protection for Unpublished Material

As mentioned earlier, copyright for unpublished works in Canada currently subsists until publication and for a period of fifty years thereafter. The majority of unpublished works in Canadian archives will never be published-- particularly after the death of the author (with the exception of a few famous figures). Therefore, this clause effectively creates an indefinite and often perpetual term of copyright protection for unpublished archival material, rendering the vast majority of archives unusable.

The United Kingdom and the United States both have created limited terms of copyright for unpublished material.¹⁴⁷ The British Act of 1956 allows for the reproduction or publication of unpublished material provided that:

"Where at a time more than fifty years from . . [when] the author of a literary, dramatic, or musical work died, and more than one hundred years after the time . . during which the work was made,

(a) copyright subsists in the work, but

(b) the work has not been published, and

(c) the manuscript . . is kept in a library, museum, or other institution . . the copyright. . . is not infringed by a person who reproduces the work for purposes of research or private study, or with a view to publication¹⁴⁸

¹⁴⁷As will be discussed later, unpublished material is treated very differently from published works under the Fair Dealing section.

¹⁴⁸Copyright Act 1956, s.7(6).

This unifies the legislation with respect to published and unpublished materials and allows researchers to use material, well after the lifetime of the authors, wherein they and their heirs have been given a reasonable amount of time to reap the economic rewards of their labors.

The present Canadian system has not gone without criticism. Almost every article written on Canadian copyright calls for the elimination of perpetual copyright in unpublished works.¹⁴⁹ However, as the ACA Copyright Committee has pointed out in its "Response to A Charter of Rights for Creators", while the suggestion of limiting the term for unpublished works to the life of the author plus fifty is a great improvement on the present situation, it still leaves undetermined the unfortunately prevalent case of works with unknown or unlocateable authors. The section on term of protection for unpublished works must therefore include a clause which allows for the publication or use of works either fifty years after the date of death of the author (for works with known authors) or one hundred years from the date of creation (for works of unknown authorship). This would provide ample opportunity for the author and his/her immediate heirs to reap economic benefit from his/her works while allowing the public to freely use any unpublished work after the fairly reasonable time period of one hundred years has elapsed.

Crown Copyright

Presently, the Crown holds perpetual copyright in all the works produced by or for the Canadian government. It has been suggested that this is too prohibitive given

¹⁴⁹See Dryden, LaForce, Keon, Keyes and Brunet, The White Paper, Santoro, The Isley Commission Report on Copyright (Ottawa 1957).

that the government is elected and funded by the citizens and is supposed to act in their best interest. Section 11 of the Copyright Act of 1921 reads:

"Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in such case shall continue for a period of fifty years from the date of the first publication of the work."¹⁵⁰

Keyes and Brunet have interpreted this to mean that, for published works, "the Crown holds an overall proprietary right exercisable at the Crown's discretion at any time and which could prevent use of material covered by the prerogative."¹⁵¹ Furthermore it is uncertain whether the Crown is, in fact, bound by the Copyright Act. Keyes and Brunet suggest that it is not. "Section 16 of the Interpretation Act provides that the Crown is not bound unless an Act so provides; the Copyright Act does not so provide. . . to what extent may the Crown use copyright material of other if it is not bound by the Act?"¹⁵²

This is clearly an area that requires extensive revision. The State is no longer considered to be supreme above the people in a modern democratic society. Keyes and Brunet suggested that "Apart from any prerogative the Crown might wish to retain, the Crown should not be in a different position from anyone else under the Canadian Copyright Act."¹⁵³

¹⁵⁰Copyright Act 1921, s. 11.

¹⁵¹Keyes and Brunet, 223.

¹⁵²*Ibid.*

¹⁵³*Ibid.*, 224.

The Charter of Rights for Creators suggests that:

"The Crown . . . should be subject to the provisions of the Copyright Act. . . statutes, regulations and judicial decisions should be in the public domain. . . there should be no copyright in government works except as follows:

- a) a moral right of integrity . . .
- b) works produced by a Crown agency . . .
- c) custom-made statistics and statistical works (to be sold to users on a cost recovery basis)."

Written submissions to parliament, legislatures, or public bodies of inquiry should be in the public domain from the time of receipt.¹⁵⁴

The ACA Committee on Copyright has suggested that, since the Crown is never ending, some works created by, for, or under the direction of the Crown should be open for research.¹⁵⁵ However, the ACA proposal is not strong enough. Crown prerogative needs to be abolished for all except those categories of works outlined above by the Charter of Rights for Creators.

Almost the opposite of the Canadian situation is found in the United States. There, all material created by, for, or under the direction of the government is in the public domain from the day of its creation (with the exception of defined categories of restricted material). It is assumed that, since the government is

¹⁵⁴ A Charter of Rights for Creators, 3.

¹⁵⁵ Interestingly, The White Paper (58) suggested that no revisions be made regarding Crown copyright.

elected and funded by the general public, all materials produced by it or under its direction should belong to the general public.

Crown copyright in the United Kingdom is not as open as government copyright in the United States but is a good deal less restrictive than in Canada. Works under Crown copyright which are subject to the 1988 Act follow a schedule similar to that for non-Crown material.¹⁵⁶ Copyright for published works subsists for a period of fifty years from the date of publication. Copyright in unpublished works subsists for 125 years after the date of creation or, upon publication (if less than 75 years has elapsed), for a period of fifty years.

While rather restrictive, this system is preferable to the present situation in Canada. There is no rational reason why the government should enjoy more protection against competition than the average citizen. It is agreed upon by copyright scholars that protection should exist for a limited term in order that the public, as a whole, may benefit from increased knowledge and cultural experience through use of copyrighted works. This topic will be discussed more fully in Chapter Four.

Term of Protection for Photographs

The duration of copyright protection for photographs is currently fifty years from the date of creation of the original negative-- for both published and unpublished

¹⁵⁶The schedule for works created under the 1956 Act is somewhat more complicated: Acts of Parliament, Public Bills, Private Bills, Personal Bills and unpublished works, made by for or under the direction of the House of Commons and the House of Lords, all follow a different schedule.

works.¹⁵⁷ This can create the situation where a book is protected by copyright for fifty years after the date of death of the author but the photographs in the book are protected for a much shorter period, fifty years after the making of the original negative.¹⁵⁸ There is no readily apparent reason why photographs should be treated any differently from the other members of the class of artistic works: paintings, drawings, sculptures, etc. Both the Keyes and Brunet Proposals and the White Paper recommend that the term of protection for photographs be extended to fifty years from the date of death of the author in order to unify the term for all members of the class of artistic works.¹⁵⁹

The ACA copyright committee is against changing the present term of protection. It argues that, for many thousands of archival photographs, the date of death of the 'composer' is extremely difficult to determine, whereas the date of creation can be estimated fairly closely, thereby freeing the photos for use by the public after a reasonable term of protection is provided for the 'composer'. This is exactly the kind of balance that the legislation should provide. Although maintenance of the term of protection at fifty years from the date of creation makes the act less uniform and straightforward, it provides the correct balance between author's rights and user's rights. Complex social situations often require complex solutions. The desire to have an Act that is streamlined and unified should not outweigh the need to have an act that is both equitable and enforceable.

¹⁵⁷R.S.C., 1921, c. 30, s. 10. See also Jill Jarvis-Tonus, "Copyright Considerations for Photographic Collections Current Problems, Possible Reforms," Paper presented to the Ontario Archives Association, Toronto, 22 March, 1991.

¹⁵⁸In the U.K. the term of protection under the 1956 Copyright Act was fifty years from the date of publication. The 1988 Act changed this to fifty years from the date the photograph is first made available to the public.

¹⁵⁹The White Paper, 56, Keyes and Brunet, 66, see also Dryden, Keon, La Force.

Ownership of Copyright in Photographs

Photographs have traditionally been treated as a class of their own, distinct from literary works. Originally there was some hesitation, on the part of the Courts, as to whether photographs were copyrightable, on the grounds that they are largely a mechanical representation of reality. However, a copyright provision for photographs first appeared in the United States in an Act of 1870, which became section 4952 of the Revised Statutes and is now Section 5(j) of Title 17 of the Code. This provision came before the American Supreme Court in the case of *Bleistein v. Donaldson Lithographing Co.*¹⁶⁰ The works in question were chromolithographs of a circus performance. The Court, presided over by Justice Holmes, held that, even though the lithographs were "drawn from life," there was a sufficient amount of creativity and personal choice involved in the arrangement and development of the scene (choice of camera, lens, angle, etc.) to qualify the works for copyright protection.

This decision was later reaffirmed in a situation involving the photograph of a street scene which included the New York Public Library on Fifth Avenue. The Court held that:

"It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light shade, position etc."¹⁶¹

¹⁶⁰*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, 47 L. Ed. 460 (S. Ct 1903).

¹⁶¹*Pagano v. Beseler Co.*, 234 F. 2d. 963 (S.D.N.Y. 1916).

Once the copyright in photographs was established, the next important question became: who is the first owner of copyright in photographs? The 1921 Canadian statute assigned copyright ownership to the person who owned the negative at the time the original negative was made.¹⁶² While this may have been an adequate definition eighty years ago, when photographic technology centered upon the making of one large plate negative through wet chemistry, this definition of first owner has caused a great deal of consternation in recent years. Due to the modern technology of photography, the original negative is no longer as crucial to the photographic process. There is a large variety of photographic processes available, from albumin to Polaroid, where there is no original negative and yet these images can be reproduced and copied.

There is the additional practical problem of determining who owned the first negative when it was originally created. In the case of many photographs in Canadian archives, which were not necessarily acquired with all or any of the related paper files, it can be impossible to determine who originally owned the negative of the print at the time the photograph was taken.

This cumbersome definition of the first owner of copyright in photographs has received a great deal of criticism from copyright scholars.¹⁶³ Keyes and Brunet write that "The Canadian Copyright Act does not deal with the subject of ownership clearly. . . he who takes the picture may or may not be the owner of the copyright."¹⁶⁴ They suggest that, due to the recent advances in photographic

¹⁶²Copyright Act, 1921, s 9.

¹⁶³See Torno, 9.

¹⁶⁴Keyes and Brunet, 69.

technology which allows the capturing of images without the use of wet chemistry, "ownership in a photograph vest in the person owning the material on which the photograph is taken."¹⁶⁵ This is not a radical departure from the 1921 definition. This change is parallel to the change made in the 1956 British Act regarding copyright in photographs, which also updated the ownership of copyright based on newly developed technology.

In the 1984 White Paper on Copyright, the authors stated, with regard to the 1921 Canadian Act, that "ownership of the physical embodiment of a photographic work is itself insufficient criterion for establishing authorship." They recommend that first ownership in photographs be assigned to "the person who composed the photograph, e.g. the photographer." The authors state that "this is consistent with the general principle of copyright law as expressed in section 12(1) of the Copyright Act that the author be the first owner of the copyright."

The committee which wrote the Charter of Rights for Creators accepts the recommendations given in the White Paper, and states that "the ownership of copyright in photographs should vest in the person who composed the photograph [except for employees who make a work in the course of their employment.]"¹⁶⁶

What has spurred this dramatic reversal of opinion in the seven years between the Keyes and Brunet proposal and the White Paper? As mentioned earlier some have suggested that the copyright committee has been unduly influenced by pressure

¹⁶⁵Ibid., 70.

¹⁶⁶A Charter of Rights for Creators, 6.

groups who are not and do not represent Canadians.¹⁶⁷ The answer may be found in the Canadian tradition of patterning legislation on that of other Anglo-Saxon countries.

Both the American Act of 1976 and proposals which were later embodied in the British Act of 1988 contain the suggested revisions to the Canadian Act that have been described above regarding ownership of copyright in photographs. Both acts vest first ownership of copyright in photographs in the person who composed the photograph (the term author is used in the United States legislation).¹⁶⁸

As mentioned earlier, photography has changed a great deal since the 1921 Act. The creation of photographs is now much more complicated than it used to be. There may be many people involved in the creation of a photograph such as a set designer and several technicians, both in the taking of the photograph and in developing it. The technique of making photographs has changed dramatically. Every photograph is not necessarily produced from an original negative (Polaroids produce no negative) and the person who has made the largest economic investment in the photograph (in terms of time, money or creative energy) may no longer be the person who owns the material on which the photograph is taken.

In the area of commercial photography (as in software development) it is often the case that one person formulates and develops an idea for a work while most if not all of the technical work is carried out by a staff technician. In the Proceedings of

¹⁶⁷Vader.

¹⁶⁸The American legislation (1790 and 1802) has always vested copyright ownership in photographs in the author of the photo. The English legislation of 1911 vested ownership in the person who owned the negative at the time the negative was made. The 1956 Act amended this to the person who owned the material on which the photograph was first made.

the Subcommittee on Copyright Revision, the example is given of a popular Kodak advertisement in which several infants of different nationalities appear in one long photograph promoting color film. Donald Spring, executive director of the Photo Marketing Association, states that one person in the creative division of Kodak came up with the idea, someone else selected, dressed, and positioned the children while yet a third actually took the photograph¹⁶⁹. In order to preserve the main intent of copyright, that is to encourage Canadians to create intellectual property, first ownership of copyright should reside in the person whose will caused the work to be created-- the diplomatic definition of author presented in Chapter Two. In this case the person whose idea it was to create the photograph would own copyright (ignoring for the moment the fact that he/she produced the work as part of his/her employment). The rather awkward phrase "composer of the photograph" in the case cited above would presumably award copyright to the person who dressed and positioned the infants-- not the person who expended the most creative effort in bringing the work to market-- an assignment which would clearly violate the primary goal of all copyright legislation.

Therefore, in order to provide encouragement for Canadians to create intellectual property, the first owner of copyright in photographs (as well as in textual works) should be the person whose will caused the work to be created-- not necessarily the composer or the actual photographer.

In addition to providing a definition of author for photographs which is more closely aligned with the underlying spirit of copyright, the incorporation of this clause into the photographic (and artistic works) section would unify the

¹⁶⁹Proceedings of the Committee on the Revision of Copyright, 15:73.

assignment of rights across all categories of works. The determination of the first owner of copyright should not rely upon the medium in which the work was created. This is an artificial distinction necessitated by what must have been considered in 1921 as significant differences between photographic and textual works. There is, however, no conceptual difference between the person who is primarily responsible for the creative impulse behind a photograph, a sculpture or a novel.

Copyright in Interviews

This is an area of copyright that can have serious results for archives which preserve oral history interviews. As has been noted by Corrado Santoro and others,¹⁷⁰ the current statute makes no explicit mention of copyright ownership in oral interviews. This issue has been decided in the United States, not by statute, but by a policy of the Copyright Office. The Compendium of Copyright Office Practices (1984) states that:

"A work consisting of an interview often contains copyrightable authorship by the person interviewed and the interviewer. Each has the right to claim copyright in his or her own expression in the absence of a valid agreement to the contrary."¹⁷¹

Quite equitably, both the interviewer and the interviewee hold copyright in their own expressions. However, the situation is notably different in Canada.

¹⁷⁰Santoro, "An Update," 118, The White Paper, 30.

¹⁷¹In R. Bernstein, "Subject Matter of Copyright, and Jurisdiction," in Current Developments in Copyright Law 1986, 82.

Under the 1921 statute, copyright in audio works (records or perforated rolls) is vested in "the person who was the owner of the original plate at the time when the plate was made."¹⁷² Interviews are not specifically mentioned. This treatment parallels that established for photographs. Protection in audio works (and photographs) extends for "fifty years from the making of the original plate from which the contrivance was directly or indirectly derived."¹⁷³

In complying with the emphasis on vesting rights with the creators of works, the Charter of Rights for Creators recommends that the first owner of rights in audio-visual works should be changed to "the person principally responsible for the arrangements undertaken for the making of the work."¹⁷⁴ Because this section does not refer specifically to interviews but instead to all audio-visual works it is necessarily broad. The section must allow for complex employment situations which may involve several employees or commissioned works.

The ACA Committee on Copyright suggests that:

"Oral history interviews and their accompanying edited transcripts be specifically mentioned in the revised Copyright Act with copyright vesting in the interviewer, subject to any agreement to the contrary;

that for complex professional productions involving many people, the determination of who owns the copyright be better defined."¹⁷⁵

¹⁷²R.S.C., c.30, s.11

¹⁷³Ibid.

¹⁷⁴A Charter of Rights for Creators, 30.

¹⁷⁵Santoro, "An Update," 118.

While it may not be necessary to elucidate the treatment of oral histories in the statute (alternatively, the distinction could be provided in another form such as the American example of the Copyright Office Compendium given above) this suggestion is at once both too specific (the first clause) and too vague (the second clause). Oral histories and transcripts are no different from other interviews or transcripts, and do not require specific statutory treatment. The statute cannot enumerate special treatment for every single type of work which might possibly be created. Instead, it should attempt to define broad categories and classes of works using functional characteristics rather than relying upon media or intellectual form as the sole determining factors.

Are interviews really that different from other audio-visual works? They can be created under both simple and complex employment situations-- communications networks hire an interviewer, a corporate executive decides who should be interviewed, a team of researchers do all the necessary background work, someone else edits the tape, yet another person produces the transcript. Should the first ownership of rights automatically devolve to the person who owned the substrate (plate, tape or disk) on the which the interview was recorded?

While the process of creating an interview can be similar to that of other audio-visual works, there are nevertheless two distinct parties involved-- two juridical persons (at least) are responsible for the content of the interview. While the set up, questions and editing can be determined by the interviewer (or producer) the content of the answers is wholly subject to the will of the interviewee. Interviews are unlike other audio works in that there are two distinct wills who cause the expressions in the work to be created. Interviews are really conversations-- both the interviewer and interviewee use creative thought to shape the content of the

word produced. They are really works of joint authorship and therefore both interviewer and interviewee should each hold copyright in their own unique expression.

Again the definition of author as discussed above for photographs, which assigns copyright to the person whose will caused the work to be created would remedy this situation. In simple situations where an interview is undertaken and funded by the same person, copyright should be assigned to the interviewer and interviewee in their own unique expressions. For more complex situations the ownership of the interviewer's rights would probably devolve to the producer.¹⁷⁶

Works Made For Hire: Works Created by Independent Contractors and Employees

A further complication to the first ownership of copyright is works which are made by contractors and employees as presented by the Kodak case described above. The ownership of copyright in this class of works has been the subject of much discussion and litigation in recent years. Traditionally, in England and Canada, ownership of copyright in these works vested in the commissioner and the employer. However, bureaucratic organizations and employment contracts are not as straightforward as they were in the past. Many people today are free-lance professionals and are employed for specific projects or contracts, rather than through full time permanent employment. This is often due to the huge increase in

¹⁷⁶See the discussion of *Hemingway v. Random House* included in the section on fair dealing for an interesting but exceptional discussion of copyright in oral conversations.

cost a company incurs when it provides complete benefits (insurance, holiday pay, sick leave etc.) to all of its full time employees.¹⁷⁷

Society and the work force has changed a great deal since the writing of the 1921 Act. There has been an overall trend in the recent revisions made to British, American and Canadian legislation which is a reflection of the evolution of modern society. This movement in the legislation focuses attention on the person who is largely responsible for the actual creation of the copyrighted work. The addition and amplification of an author's moral rights, the change of ownership of copyright in photographs to the photographer, and the vesting of ownership of rights in commissioned works in the creator all reveal an increased interest on the part of society to protect the actual creators of works rather than obscure persons such as the owner of the medium on which a photograph was produced or the commissioner of a work.

This is a reflection of modern society, which no longer follows the simple employment arrangements of master/ servant or master/apprentice, where skilled employees were few and most workers simply carried out the desires of their masters with little thought to their individual rights. The pool of skilled labor has increased dramatically in the last seventy years, with many modern employees having a great deal of responsibility and freedom in their everyday work routine. The organization of businesses has changed from a steep pyramid with one employer making most of the decisions which are carried out by many. Today, businesses have fewer layers of managers and supervisors and more people

¹⁷⁷Lee Iococca states that "high wages are not the real problem [in the car industry] . . . the real problem lies in all the fringe benefits. Chrysler, Ford and GM are now paying \$3 billion a year just for hospital, surgical, medical and dental insurance." Lee Iococca with William Novak, Iococca: An Autobiography (New York: Bantam Books, 1984), 304-306.

making significant decisions and assuming responsibility for those decisions. Gone are the sweatshops of old where hundreds of unskilled laborers toiled for hours over mundane, repetitive tasks with little creativity and no latitude for individual thought.

These changes can be clearly seen in the recent revisions made to Copyright Laws governing Works Made for Hire. In the 1921 Canadian Act, first ownership of copyright in works made for hire vested in the person who ordered the work and paid valuable consideration for it-- the commissioner or the employer.¹⁷⁸ Keyes and Brunet, following the recommendations of the Isley Commission, propose that this clause be maintained as written and "should extend to all literary, dramatic, musical and artistic works that are commissioned."¹⁷⁹ They go on to state that "certain views expressed to the Department regarding [this section] stressed that ownership should in all cases vest in the creator, and that it should be the responsibility of persons commissioning the works . . . to ensure, by contract, that all the rights they need are acquired." While they are willing to grant that this view has a "simplistic logical appeal" they maintain that the "absence of a statutory presumption in favor of commissioners and employers would result in a spate of contract and collective agreements incorporating clauses to the opposite effect."¹⁸⁰

As was the case for the ownership of copyright in photographs discussed above, the White Paper and the Charter of Rights for Creators reverse the proposals made

¹⁷⁸Copyright Act 1921, c.30, s.13(2).

¹⁷⁹Keyes and Brunet, 70.

¹⁸⁰*Ibid.*, 71.

by Keyes and Brunet, and recommend that the section on commissioned works, 12 (2), be repealed and that the revised Act provide that "subject to an agreement to the contrary the author of any work is the initial owner of the copyright therein, notwithstanding the fact that the work was commissioned."¹⁸¹ The issue of copyright in works made by employees was left open for discussion.¹⁸²

The British Act of 1988 also includes this change. The ownership of copyright in commissioned works vests initially with the creator rather than the commissioner. If a commissioner wishes to obtain rights to a work he or she commissions he or she must provide a written contract which states these changes from the statutory regulations.¹⁸³

The hesitation expressed by Keyes and Brunet about the results of removing a statutory presumption in favor of commissioners and employers can be understood by considering the cases that have recently been heard in the United States. Without a clear statutory statement in favor of commissioners and employers, the Courts have had to make decisions about works for hire on a costly, time consuming, case by case basis. Indeed, these cases reveal that the section on works for hire in the 1976 Act is not nearly as black and white as the statute may make it seem. There is a great deal of grey area surrounding the definition of a work for hire versus work made in course of regular employment. In the United

¹⁸¹The White Paper, 31.

¹⁸²See also Torno, 39-57. Torno believes that ownership should always vest in the author, regardless of whether the work was created by an independent contractor or an employee in the regular course of his employment. This is a radical departure from other copyright revision proposals and from the legislation of other Anglo-Saxon countries..

¹⁸³It is uncertain what the results of this change will be. The 1988 Act came into effect in 1989. This section has not been in use long enough to have developed a very extensive history of litigation.

States, this complex area has gradually evolved into a determination of the amount of control imposed by the commissioner upon the creator and, more recently, has relied upon the well defined law of agency to provide definition of employer, employee and independent contractor. The courts have tended to vest the first ownership of copyright in commissioners who have imposed some sort of control upon the creation of the work.

The 1976 Act defines a works made for hire as:

"(1) a work prepared by an employee within the scope of his or her employment; or
 (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture . . as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas . . ."184

The Act vests first ownership of copyright in a work made for hire in the employer or person for whom the work was prepared:

"In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."185

The question before the courts has been whether section 101 should be interpreted narrowly so that only those works which fit the detailed list of works (part of a collective work, part of a motion picture, a translation, . . .) are to be considered

¹⁸⁴Copyright Act 1976, s. 101.

¹⁸⁵Ibid., s. 201(b).

Works for Hire (a reading similar to the proposals contained in the Canadian White Paper), or whether this section should be interpreted broadly in the traditional sense of Work for Hire, wherein all commissioned works and works made by employers have copyright vested in the commissioner and the employer.

In the 1984 case of *Aldon Accessories Ltd. v. Spiegel Inc.*, which was heard before the Second Circuit Court of Appeals, Aldon Accessories commissioned a series of small statuettes to be manufactured by a company in Taiwan.¹⁸⁶ Spiegel Inc. ordered the statuettes from the Taiwanese company and sold them through their catalogue business. Aldon Accessories claimed that the statuettes were works for hire and that they, as commissioners, owned first copyright in the works. One of the partners in the firm had spent a fair amount of time (three days) supervising and directing the work of the Taiwanese manufacturers, rejecting and suggesting changes to the design, although he did not in fact make the drawings or the prototype on which the statuettes were made.

Spiegel Inc. claimed that the statuettes were not works made for hire under section 101 of the 1976 Act and therefore copyright was owned by the manufacturer. Spiegel had therefore not infringed copyright by ordering statuettes from the Taiwanese firm.

The Court of Appeals agreed with the trial judge's instruction that:

"A work for hire is a work prepared by what the law calls an employee working within the scope of his employment.

¹⁸⁶See United States Patent and Trademark Office, United States Patent Quarterly, (Washington D.C.: Bureau of National Affairs Inc., 1984), in William Patry, "Works Made for Hire: Crisis in the Courts," Current Developments in Copyright Law 1988, 177-268.

What this means is, a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation."¹⁸⁷

The Court cited several other cases where it was found that "if an employer supervised and directed the work an employer/employee relationship could be found even though the employee was not a regular or formal employee."¹⁸⁸

The Court also turned to the legislative history of the Statute to try and determine if Congress intended for this new clause to substantially alter the previous case law, which was shaped by the 1909 statute and stated that copyright in works made for hire was vested in the employer and commissioner. The Court found that "nothing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law applying the concepts of 'employee' and 'scope of employment'."¹⁸⁹

In a more recent case, *Easter Seal Society v. Playboy Enterprises et. al.*, the U.S. Court of Appeals found that the Aldon Accessories interpretation of "actual control" is

¹⁸⁷*Ibid.*, 183.

¹⁸⁸*Ibid.*, see also *Epoch Producing Corp. v. Killiam Shows Inc.*, 522 F. 2d 737, 187 USPQ 270, (2d Cir. 1975), cert. denied, 424 U.S. 955, 189 USPQ 256 (1976); *Picture Music Inc. v. Bournew, Inc.*, 457 F. 2d 1213, 173 USPQ 449 (2d Cir.) cert. denied, 409 U.S. 997, USPQ 577 (1972); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 253 F. Supp. 841 (S.D.N.Y. 1965), rev'd 375 F. 2d 639, 153 USPQ 149 (2d Cir. 1967) cert. denied, 389 U.S. 1036, 156 USPQ 719 (1968).

¹⁸⁹See *Aitken, Hazen Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F. Supp. 252, 257-58, 218 USPQ 409, 413-14 (D. Neb. 1982). The Act itself does not define the terms employer, employee.

flawed with respect to some areas of the work for hire doctrine.¹⁹⁰ The court stated that any commissioner ('buyer') who exercised control over the creation of a work could be considered a co-author and thus would be entitled to sue a third party for infringement, despite any ruling on whether or not the work was made for hire. Secondly, the Court stated that the Aldon Accessories interpretation creates a situation that is difficult for buyers and sellers (the physical creators of a work) to predict, thus making business arrangements "exceedingly difficult."¹⁹¹

Thirdly, the Court stated that this interpretation does not eliminate the need for a legal definition of employee and independent contractor. By simply establishing the test of actual control, this interpretation creates the possibility that a regular employee who in the course of his employment creates a work with a minimum of supervision is considered an independent contractor, and thus the copyright in the work would vest in him rather than in his employer, which is a direct contradiction to section 101 of the Act. Moreover, the Court found that the Aldon Accessories decision is really more of an interpolation than an interpretation since the 'actual control' language is not found anywhere in the statute.

The Court of Appeals thus turned to the well established law of agency to help solve the confusion surrounding works for hire, where a servant is "subject to the employer's right to control the manner of performance."¹⁹² The Court stated that this was a more acceptable interpretation since it would allow for greater

¹⁹⁰Easter Seal Society for Crippled Children and Adults of Louisiana, Inc., v. Playboy Enterprises, et. al., no., 85-3741, (U. S. Crt of App. 5th Cir. 1987) in Patry, "Works Made for Hire: Crisis in the Courts," 218.

¹⁹¹Ibid., 215.

¹⁹²Ibid., 201.

predictability for commissioners, creators, employees and employers. It would also explain section 101(2) as a special instance case where independent contractors may sign away their copyright to commissioners.¹⁹³ This interpretation bypasses the potential problem created by Aldon Accessories where copyright could vest in a regular employee whose work was not supervised. Moreover, the Court states that this interpretation provides a certain moral symmetry, in that a commissioner is a considered statutory author if and only if he/she is responsible for the negligent acts of the creator of the work (a master is responsible for the acts of his/her servants).¹⁹⁴

Thus, it can be seen that, when the statute is changed to conform to the changing nature of the work force, and copyright is vested in the creator of a commissioned work rather than the commissioner, a crucial dichotomy is created between works made in the course of employment (copyright vests in the employer), and works made by independent contractors (copyright vests in the contractor). The emphasis in the court room has then naturally shifted towards refining the definitions of employee, employer, and independent contractor.

With the 1988 change in the work made for hire clause, the United Kingdom also experienced the same confusion surrounding the definitions of a work made in the course of employment (a contract of service) and a work made by an independent contractor. Here, as in the United States, cases must be decided on an individual basis. Several tests have been put forth for the determination of whether a work is made in the course of employment versus independent contract, although the

¹⁹³ Although it is unclear why anyone would need special statutory permission to sign away their copyrights.

¹⁹⁴ Ibid., 221.

British courts have tended to rely heavily upon the degree of control exercised by the employer as in the Aldon Accessories ruling in the United States.¹⁹⁵

In *Ready Mixed Concrete Ltd., v. Minister of Pensions and National Insurance*, Justice McKenna stated that a contract of service exists if the following conditions are met.

"(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service to his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make the other master. . . but the use of the word sufficient implies that the degree of control necessary will still fluctuate from case to case.

(iii) The other provisions of the contract are consistent with its being a contract of service."¹⁹⁶

A more recently emphasized characteristic of works made in the course of employment has been the "mutuality of obligation" test. Judge Dillion in *Nethermere Ltd., v. Taverna*, stated that, in order for a contract of service to exist

"There must be mutual obligations on the employer to provide work for the employee and on the employee to perform the work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service."¹⁹⁷

¹⁹⁵Lester and Mitchell, 78.

¹⁹⁶*Ready Mixed Concrete Ltd., v. Minister of Pensions and National Insurance*, 2 Q.B. 497 (1968), 2 W.L. R. 775 (1968), 1 All. E.R. 433 (1968), 4 K. I. R. 132. in Lester and Mitchell, 78.

¹⁹⁷*Nethermere Ltd., v. Taverna*, I.R.L.R. 240 (1984) in Lester and Mitchell, 80.

The British cases have not relied upon the law of agency, as suggested by the United States Court of Appeals, but rather have chosen a more flexible, if less predictable, path of individual, case by case examination, and the application of several guidelines or tests which the courts may or may not choose to follow.

Neither the British nor the American statutory revision has cleared up the complex and often unfair situation surrounding works made for hire. Without a clear statutory presumption in favor of commissioners or any satisfactory statutory definition of employer, employee, and independent contractor it is necessary to rely upon the time consuming and often contradictory decisions of the courts. As stated by D. Lester and P. Mitchell, "in these circumstances one can only pray for a sensible and practical approach by the courts."¹⁹⁸

Thus, it can be seen through the American and British experience of copyright litigation that the doctrine of Works Made For Hire began with a traditional common law definition very similar to that provided by diplomatics (an author is the person whose will caused the work to be created), which has become less widely applied in recent years. In the early twentieth century, 'author' or 'copyright owner' was interpreted to mean the person who took the greater financial risk in bringing the work to market: historically the stationer or publisher, later the employer or commissioner. Recently, we have seen increased emphasis on the worker (note the increase in strength of labor unions) and increased emphasis on the individual in general (the recent growth of democracy versus autocracy). The Work for Hire doctrine has accordingly shifted away from

¹⁹⁸Lester and Mitchell, 64.

the automatic presumption that he who pays for a work is the statutory author, towards an interpretation which considers whether the commissioner actually exercised control over the creation of the work (Aldon Accessories, Ready Mixed Concrete), and a determination of first owner of copyright based on the definition of master and servant found in the well established law of agency.

The White Paper on Copyright and The Charter of Rights for Creators follow the trend that has taken place in British and American legislation. The Charter recommends that:

"First ownership of copyright should be vested in an employer in the case of works created by employees in the course of employment, subject, as now, to any agreement to the contrary. . . [and] the copyright in commissioned engravings, photographs and portraits should vest in the author."¹⁹⁹

The Charter does not define author, employer or employee but rather calls for a clarification of this in the revision.

However, as revealed by the American and British litigation, the statutory vestment of the ownership of copyright in commissioned works in the person who creates the work is not a solution to the multitude of problems found in the current Work Made For Hire doctrine. Vesting ownership in the physical creator simply increases the workload of the courts in their attempt to define a work made for hire as opposed to a work made in the regular course of employment.

¹⁹⁹ A Charter of Rights for Creators, 4.

It is preferable instead to expand the definition of author as first owner of copyright to works made for hire rather than create a rigid statutory presumption in favor of either employee or employer. Works made for hire are by definition works made under contract for valuable consideration. Diplomats tells us that the author of a contract is both parties-- commissioner and commissionee. "An action may be bi- or multilateral, that is, may involve reciprocal obligation of two or more parties: in such case each party will be author and addressee of the related document."²⁰⁰ The application of this definition of author concomitant with the already well established notion of author as first owner of copyright would result in a situation of shared rights. Both commissioner and commissionee would statutorily have first ownership of rights. This would place the burden of determining sole ownership on the work for hire contract, otherwise the rights-- and profits-- would be divided equally between commissioner and commissionee. While some may argue that this does not solve the inherent conflict between commissioner and commissionee (it merely transfers it to another legal instrument) it does more clearly reflect the present complex state of affairs surrounding works made for hire. Vesting first ownership of rights statutorily with the commissioner does a disservice to those commissionees who provide most or all of the creative thought and energy which goes into a work. Vesting first ownership statutorily with the commissionee deprives the initiator of the idea (the commissioner) of any economic reward for a work that without his/her original motivation would most probably never have been created. The only stipulation which must be added to this section is that the act in consideration must be a creative act-- one directed towards a work which requires creative input of some sort. A commissionee who creates a work simply by carrying out a set of

²⁰⁰Duranti, "Diplomatics: Part III," 6.

orders or instructions should not be statutorily vested with copyright.²⁰¹ This would direct the emphasis of any future litigation towards determining who had creative control over a work-- was the commissionee simply carrying out the plans of the commissioner or did he/she influence the creative process which lead to the production of the work.

The vesting of first ownership of copyright in both commissioner and commissionee does not conflict with either the spirit of the traditional interpretation of this section or the growing trend towards assigning rights to the actual physical creators. In fact, it is exactly this that the courts have been trying to determine: who is responsible for the creative work-- conceptualizing, visualizing and developing the idea behind the work in order to eventually bring it to market? Indeed, lobby groups who claim to represent creative artists in Canada, should support legislation which assigns copyright equally to those responsible for the creative effort behind a work rather than a rigid assignment of rights to the person who simply physically created the work.

Vesting copyright equally in commissioner and commissionee for creative acts has two advantages. Firstly, it will force the negotiation of copyright ownership into the sphere of contract agreement, which is much more preferable than having to resort to litigation after the fact. Secondly, it will provide a clear and predictable situation for all parties involved in the creation of a work. Both commissioners

²⁰¹One example is the bronze sculpture which is to reside outside the Canadian embassy in Washington D.C.. The sculpture was designed by Haida artist, Bill Reid. However, the actual physical creation of the work was commissioned out to a foundry in New York. The foundry simply carried out the artist's instructions. The overly simplistic and unnecessarily rigid proposal made by A Charter of Rights for Creators could possibly vest copyright in the foundry.

and commissionees will know what they will have to prove in order to be assigned copyright-- creative control over the work.

Fair Dealing²⁰²

The section of copyright law related to fair dealing has been the subject of a great deal of litigation, discussion and heated debate in recent years. It is also an area of copyright legislation that is of paramount importance to archivists and librarians. Archives and libraries exist primarily to make their holdings available and accessible to the public. Without a clear statement of the limitations on a copyright owner's exclusive rights (right to first publication, distribution, vending, performance, display etc. of a work), librarians and archivists exist in a hazy, uncertain atmosphere of doubt and fear-- never knowing whether or not they are complying with or violating the law when they permit researchers to use and copy works, or provide users with copies. With the modern advances in copying technology (fax machines, computer downloading through modems and optical scanning), this has become a problem of increasing magnitude: researchers are aware of the new technologies available and want to take advantage of them.

Fair dealing is an attempt to ease the fundamental tension that exists between the protection of the rights of the copyright owner and the enhancement of the knowledge and cultural awareness of the general public through use of

²⁰²One subtle yet crucial difference between U.S. and Canadian law is reflected in the terminology. In the U.S. *fair use* is interpreted as an exemption from the monopoly created by copyright (ie. no infringement has occurred) whereas in Canada *fair dealing* can only be used as a defense to an infringement that has already occurred. The term *fair use* will be used when dealing with U.S. legislation.

copyrighted works.²⁰³ As early as 1785 this fundamental problem was summed up by Lord Mansfield in his opinion in *Sayre v. Moore*:

"We must take care to guard against the two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labor; the other that the world may not be deprived of improvements nor the progress of the arts retarded."²⁰⁴

As our society moves gradually away from a manufacturing base and increasingly becomes a service society, information becomes its most vital and valuable commodity. Fair dealing has consequently become a hotly debated section of copyright legislation. Judge Learned Hand stated in his 1939 opinion in *Dellar v. Samuel Goldwyn, Inc.* that fair use issues are "the most troublesome in the whole law of copyright."²⁰⁵

Fair dealing was originally a judicial doctrine concerning the abridgement of a work rather than the statutory exemption (or defense against infringement) it is today. In 1740, Lord Chancellor Hardwicke, in his decision on a bill for an injunction to stay the printing of a legal treatise, remarked that, "abridgements may with great propriety be called a new book, because . . .the invention, learning, and judgement of the author is shewn in them, and in many cases are extremely

²⁰³For an excellent discussion on the economic motivations behind these two opposing views see Leon Seltzer, Exemptions and Fair Use in Copyright (Cambridge: Harvard University Press, 1978).

²⁰⁴*Sayre v. Moore*, 1 East 361 n. 102, Eng. Rep. 139 n. 16-18 (K.B. 1785), in Seltzer, 13.

²⁰⁵*Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939), in Patry, The Fair Use Privilege), 7.

useful. . . "206 In this case, Chancellor Hardwicke found for the defendant on the grounds that the abridgement contained enough new comment and criticism as to be considered a work in its own right. The defendant did not merely colourably shorten the original work so as to avoid infringement.

This came to be known as the 'doctrine of fair abridgement' and we can see in it the early conceptualization of the defendant's purpose and intent as an acceptable defense to the infringement of the copyrighted work: if the author intends to use part of a copyrighted work in the creation of his own original work, the courts would look upon this more favorably than if he copied the work simply to resell it without the addition of his own thoughts or labors. There was also a concern that the knowledge to be gained from abridgements which added "invention, learning and judgement" would be lost if these works were simply, as an entire class, considered to be infringements.

In 1752, Lord Hardwicke strengthened his earlier opinion by stating that the abridger must make a productive use of the work, not simply a passive reproduction of it with a small amount of his own work simply attached at the end - despite any arguments made by the defendant of public utility or public benefit to be derived from the abridgement. He presented one specific case in which "the notes were colourably abridged or taken from [the original work], and only twenty-eight added by [the defendant]."207

²⁰⁶2 Atk. 141, 143 (1740) (No. 130). Accord: *Bell v. Walker*, 1 Bro. C.C. 452 (1785); *Butterworth v. Robinson*, 5 Ves. Jun. 709 (1801), in Patry, *The Fair Use Privilege*, 8.

²⁰⁷*Tonson v. Walker*, 3 Swans. (App.) 672, 679 (1752) in Patry, *The Fair Use Privilege*, 7.

In the 1761 case of *Dodsley v. Kinnersley*, which dealt with a work that was copied for the purpose of reproduction in an abridged form, we can see the roots of the defense of fair use for the purpose of criticism and review and the court's initial concern for the infringing work interfering with the sale of the original. The defendant claimed that "it was useful to print extracts of new books in magazines, &c., without asking leave of the authors." The court found for the defendant on the grounds that the work had previously been published by the plaintiff in abridged form and therefore the defendant's work could not harm the economic return of the original which had been sold prior to the abridgement created by the defendant. The judge stated that "what I materially rely upon is, that it [the defendant's abridgement] could not prejudice the plaintiffs, when they had before published an abstract of the work in the London Chronicle."²⁰⁸ As will be discussed later, this concern for the economic return due to the author of the original work has recently developed into a broader consideration of all possible future and potential works the author might wish to produce.

In the 1770 case *Macklin v. Richardson*, the acceptability of copying for the purpose of review was enlarged upon. The defendant had transcribed and then published in its entirety a play which was being performed at the time but had yet to be published by the author. In his judgement, Lord Commissioner Smythe wrote: "this is not an abridgement but the work itself."²⁰⁹ The court's decision reveals the budding concept that a work will be found as an infringement if it supplants the market for the original copyrighted work, even though it may be written and published in the guise of a review or for the purpose of criticism.

²⁰⁸In Patry, *The Fair Use Privilege*, 9

²⁰⁹*Ibid.*

This case also deals with the unlicensed use of unpublished material. The work had been performed but was not technically considered to be 'published'. Lord Commissioner Bathurst found "great injury" in the printing of the work before the author had an opportunity to publish it himself. This consideration of the nature of the copyrighted work, either published or unpublished, has become a very important factor in present day fair use cases. The nature of the copyrighted work is of primary interest to the courts and may, in isolation of other factors, determine whether or not a work is seen as infringing.

Fair use (or the absence of *animus furandi*) supplants the notion of 'fair abridgement' in the 1803 case, *Cary v. Kearsley*. In this case, the defendant had taken the primarily factual work of the plaintiff, The Book of Roads, added to it, and made some corrections. In his judgement, Lord Ellenborough wrote:

"That part of the work of one author is found in another, is not itself piracy or sufficient of support an action; a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? . . while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science."²¹⁰

Lord Ellenborough closely examined the purpose and use of the allegedly infringing work. Because the work was largely factual and its correction, enlargement, re-arrangement and re-issue was very beneficial to the general

²¹⁰*Ibid.*, 10

public, Ellenborough directed the jury to consider whether the work was "fairly done with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter,-- or taken colourably, merely with a view to steal the copyright of the plaintiff?"²¹¹ The plaintiff later withdrew his suit.

Science and the Arts are disciplines which build upon themselves. A sweeping prohibition against the use of earlier copyrighted works might greatly impede the flow of knowledge. This is exactly what copyright attempts not to do. While protection of the author's economic investment in the creation of the work is of great importance so is the widest possible dissemination of information to the general public.

However, the good intention behind the use of copyrighted works (to further science and the arts) is not superior to the effect the use may have upon the original work. As Lord Ellenborough later wrote, "the intention to pirate is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced."²¹²

Herein we can see the development of the concept of fair use. If a work is not merely copied but is used in the creation of a second work which is itself a further development of knowledge and culture (although it may rest upon the discoveries obtained in the original), the second work, if it does not supplant the market of the original, has traditionally not been found to be an infringement.

²¹¹Ibid.

²¹²Ibid., 12.

An additional aspect which has become crucial in the determination of whether or not a work is infringing the copyright is the amount and quality of what is taken from the original work. The first notions of this are found in the 1836 case *Bramwell v. Halcomb*, where the Lord Chancellor wrote:

"When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity."²¹³

This case reveals what has since become one of the fundamental aspects of fair use. Quantity is not of primary importance. The quality or value of what is taken is far more important than the precise amount. This concept has figured large in modern day litigation and the statutory definition of fair use.

In 1843, Justice Story stated that some uses are "justifiable use" in cases of "fair abridgement" or "fair and reasonable" criticism. He wrote that, when considering cases of infringement, one must consider "the nature and object of the selections, the quantity and value of materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work."²¹⁴

Thus, we can see the early development of four important elements of the fair use doctrine: the purpose and intent of the use (was it productive and furthered the

²¹³Ibid., 15.

²¹⁴Shelton, 10.

growth of knowledge, or was it simply meant to supplant the original); the effect of the use upon the market of the original; the nature of the original (published or unpublished); and the value or quality of the portion which is taken.

Despite over two hundred years of judicial opinions and hundreds of reports, reviews and papers on the subject, fair dealing has yet to be conclusively defined by statute in Canada, the United States or England. In fact there has been a great deal of reticence on the part of the legislative bodies to create a statutory definition of fair dealing. The United States Senate committee on copyright stated that:

"There is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."²¹⁵

As noted by the committee, one of the crucial stumbling blocks towards any cohesive definition of fair use has been the recent rapid emergence of new copying technology.²¹⁶ Copying a work entirely by hand for private use in the nineteenth century is a very different activity in comparison to the accurate, copious, voluminous and rapid reproduction that can be effected today.

Section 107 of the United States 1976 Copyright Act, the section on fair use, is intended to "restate the present judicial doctrine of Fair Use not to change, narrow,

²¹⁵U.S. Congress, House, General Revision of the Copyright Law, 94th Cong., 2nd sess., 1976, House Report no. 94-1276, in Arthur J. Greenbaum, "Fair Use: Educational and Library Photocopying," Current Developments in Copyright Law 1977, 140.

²¹⁶Seltzer, 21.

or enlarge it in any way."²¹⁷ It states that copying for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. This section then lists the following factors to be used as guidelines by the courts in determining fair use cases:

- "1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work."²¹⁸

As demonstrated above, these guidelines are not creations of the technologically advanced twentieth century. They have been developing in judicial opinions for well over two centuries.

Leon Seltzer criticizes the Copyright Act of 1976 for not offering a more definitive treatment of fair use. He believes a simple list of the guidelines to be too vague. The statute, he feels, should prioritize the guidelines as to which is the most important factor to be considered in cases of alleged infringement; without this, the Act is open to a wide variation of interpretation. He suggests the following definition of fair use:

²¹⁷U.S. Congress, House, General Revision of the Copyright Law, 139.

²¹⁸*Ibid.*

"Fair use is use that is necessary for the furtherance of knowledge, literature, and the arts AND does not deprive the creator of the work of an appropriately expected economic reward."²¹⁹

This is historically the fundamental rationale behind copyright legislation: the protection of an author's economic investment in his work through the creation of a limited monopoly called copyright. The limitations on copyright are imposed by the need for society through Science and the Arts to progress, develop and grow. These limitations are expressed through a limited term for copyright protection (generally life of the author plus fifty years) and the doctrine of fair use, whereby a work can be copied so long as the use does not infringe upon the author's expected economic return (either real or potential).

The recent cases on fair use exhibit exactly this line of reasoning. In *Sony v. Universal City*, a case involving off-air taping, the United States Supreme Court prioritized the four elements listed in Section 107, placing the fourth, the economic subversion of the original, at the top of the list. The Court stated that "It is undoubtedly the single most important factor" in the determination of fair use. Because the taping in question was done entirely for non-profit purposes, the Court found a lack of evidence of damages (either real or potential) incurred by the plaintiff. The Court stated that "with respect to non-commercial use the copyright owner must show some meaningful likelihood of future harm to the potential market for his work from a non-profit defendant's use."²²⁰ This places the burden of proof of harm to potential markets upon the plaintiff in all cases in

²¹⁹Seltzer, 31.

²²⁰William Patry, "Fair Use after Sony and Harper and Row," Current Developments in Copyright Law 1986, 818.

which the use made by the defendant is non-commercial, although, as we will see in *Salinger v. Random House*, the plaintiff only has to show the possibility of harm to potential markets.

In *Sony v. Universal City*, the Court decided in favor of the defendant, finding that home taping for the purpose of viewing programs at an alternative time served the public interest by increasing access to the programs, and was consistent with the "first amendment policy of providing the fullest possible access to information through the public air waves".²²¹

However, the Court was very clear in its condemnation of for-profit use of copyright works. It stated that "every commercial use of copyrighted material is not fair use and that every such use presumptively results in harm to the potential market for the original."²²² This creates a clear distinction between for-profit use, which is always an infringement, and non-profit use which is not necessarily an infringement. Notwithstanding this, in the later case of *Harper and Row v. The Nation*, the Court stated that "*Sony* should not be construed to indicate that non-profit uses are presumptively fair."²²³ This is particularly relevant for archivists, as a large percentage of archival material is used for non-profit endeavors; student papers, scholarly papers, exhibits, display, newsletters, etc.. In cases where the use is non-commercial, the burden of proof of damage to any potential market for the work in question lies with the person initiating the action.

²²¹Ibid., 817.

²²²Ibid., 818.

²²³Ibid., 827.

This restrictive interpretation of the fair use exemption for commercial purposes was applauded by many copyright experts. However, some felt that the interpretation given by the United States Supreme Court for non-profit uses was not strict enough. William Patry stated that "fair use was not intended to provide a back door through which the non-profit privileges formerly enjoyed by users under the 1909 Act could be resurrected."²²⁴ Patry believes that the argument that a use is non-commercial is not, by itself, a sufficient justification for the fair use exemption to apply.

In the 1985 case of *Pacific and Southern v. Duncan*, the distinction between profit versus non-profit use was reaffirmed. This case involved the taping and subsequent sale of news broadcasts. The Court put special emphasis on the purpose of the allegedly infringing use and stated that "the purpose and character of the [defendant's] use of the [plaintiff's] work heavily influences our decision in the case. This commercial nature of the use militates quite strongly against a finding of fair use . . . a commercial purpose makes copying . . . presumptively unfair."²²⁵

The fact that the use involved news reporting did not sway the Court in favor of the defendant. "[The defendant] denies that its activities have a commercial purpose; instead it says its purpose is private news reporting. . . The fact that [the defendant] focuses on the giving [of the news] rather than the taking [of money] cannot hide the fact that profit is the primary motive for making the

²²⁴Ibid., 819.

²²⁵Ibid., 820.

exchange."²²⁶ Thus, although one of the purposes of the use was for the greater distribution of news reports, the fact that it was done for commercial purposes overshadowed the possible benefit which might accrue to society due to the greater dissemination of knowledge. This again affirmed the basic tenet of copyright: protection for the person who takes the financial risk in bringing the work to the market.

The Court also seriously considered the unpublished nature of the work, thus strengthening the common law tradition of the protection of unpublished works against a claim of fair use, as seen in the earlier case of *Macklin v. Richardson* discussed above. The Court stated that "copyright protects owners who immediately market a work no more stringently than owners who delay before entering the market."

Although *Sony* expressed the belief that the burden of proof should fall upon the plaintiff in cases of non-profit use, it is interesting to note that "no evidence was introduced showing that the plaintiff had lost as much as a single actual or potential sale; nor did the Court require the plaintiff to demonstrate such losses." The Court stated that "the defendant's commercial purpose, standing alone, creates under *Sony*, a presumption of harm to potential markets for the original."²²⁷ As a result of *Pacific and Southern v. Duncan*, the burden placed on the plaintiff by the decision in *Sony* appears to be greatly decreased. The plaintiff need only show that the use made by the defendant is a commercial use: harm to any potential market for the original work can be assumed.

²²⁶Ibid., 820.

²²⁷Ibid., 821.

These two cases dramatically shaped the future of copyright infringement cases in which fair use was claimed as a defense. "It seemed after *Duncan* that mere invocation of the public interest by a commercial user would be insufficient to support a claim of fair use."²²⁸ The nature of the use-- particularly whether or not there was any exchange of money for the work-- became crucial to all fair use arguments.

Harper and Row v. the Nation reinforced both the prohibition against the commercial use of copyrighted works and the need to protect an author's right to first publication of his unpublished works. Harper and Row were planning to publish excerpts from President Ford's memoirs. The Nation attempted to preempt their publication in book form and released several articles containing the same excerpts. As in *Pacific and Southern v. Duncan*, the Court "rejected that news reporting was presumptively fair. The fact that an article is news and therefore a productive use is simply one factor in a fair use analysis."²²⁹ The argument that the public would benefit from the increased dissemination of news events did not overrule the fact that the work was used for profit by the defendant. The Court stated that: "the crux of the profit/non- profit distinction is not whether the sole motive of use is monetary gain but whether the user stands to profit from exploitation of the copyright material without paying the customary price."²³⁰ This is almost an exact duplication of eighteenth century notions regarding

²²⁸*Ibid.*, 822.

²²⁹*Ibid.*, 829.

²³⁰*Ibid.*, 829.

copyright: primary concern is for the person who invested time, money, and labor in the creation of the work and its subsequent dissemination.

The fact that the use in *Harper and Row v. The Nation* was for profit and that the material taken was unpublished weighed heavily in favor of the plaintiff. The Court, restating the now two hundred year old notions regarding undissemminated works, felt there were dramatic differences between the nature of published and unpublished works and how they should be treated by copyright protection. The Court felt that first publication was one of the most important rights a copyright owner could hold, since it naturally can occur only once, and may severely effect the economic return due to the author for his labours.²³¹ The Court stated that:

"The right to first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other section 106 rights in that only one person can be the first publisher; . . . the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced 'sharing' of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts."²³²

The Court also recognized prepublication rights and the importance attributed the marketing and future sales of a work which is yet to be published. Clearly, the Court was strongly in favor of restricting the exemption of fair use to published material only.

²³¹The tradition of not applying fair use to unpublished works has a lengthy history. See Patry, Fair Use Privilege, 436-449.

²³²Patry, "Fair Use after Sony and Harper and Row," 830.

"The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing. . . Under ordinary circumstances, the author's right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use."²³³

The Court also emphasized the importance of harm to the market of derivative works and the cumulative harm which would result from isolated instances of minor infringements. From this decision we can see that the common law is moving away from the situation where harm had to be immediate and provable rather than potential and in the indeterminate future. The common law is moving towards a much more restrictive interpretation of fair use-- particularly when a use is commercial in nature. This is a result of the increasing reliance of our society upon intellectual property as a commodity.

One of the first modern cases involving unpublished works was *British Oxygen v. Liquid Air* in 1925. In this case, the defendant published an excerpt from an unpublished letter written by the plaintiff. The British Court held that, since the copyright owner of the letter had never intended the work to be published, the defendant's use of it was clearly an infringement of the author's right to first publication and therefore fair use did not apply. Unpublished works were considered by the Court to be fundamentally different from published works in that, in theory, they were never intended for publication by their author.

²³³*Ibid.*, 831.

"It would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary. Any such dealing with an unpublished literary work would not, therefore, in my opinion, be a 'fair dealing' with the work."²³⁴

This case brought the old common law tradition of fair use as an unacceptable defense for the copying of unpublished works into the twentieth century.

The special nature of unpublished works was re-affirmed in the 1988 case *Salinger v. Random House*, in which a biographer paraphrased and directly quoted letters written by Salinger which were held by various archives in the United States. The Court upheld the earlier decisions regarding the special nature of unpublished material. "Among the exclusive rights of a copyright owner are the rights to reproduce the work and prepare derivative works."²³⁵

The Court found that the many closely paraphrased sections contained in the book were also infringements of Salinger's letters. In this decision, the Court cited Judge Learned Hand's statement that, "it is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."²³⁶ The Court also ruled against the use of paraphrasing because of the overall quality of the book and the value added to it by the paraphrased letters. "The taking is significant not only from a quantitative but from a qualitative [point of view] as well. The copied passages

²³⁴In Patry, *Fair Use Privilege*, 438.

²³⁵R. Zissu, "Fair Use and the 'Unfair' Reading of *Salinger v. Random House*-- The Case for Judge Newman," in *Current Developments in Copyright Law 1988*, 404.

²³⁶*Ibid.*

are an important ingredient of the book . . . to a large extent they make the book worth reading."²³⁷

Following the 1976 statutory guidelines, the Court stated that rather than measuring the precise amount of what had been copied it was far more important to consider "the amount and substantiality of the copyrighted expression that has been used, not the factual content of the material. However, that protected expression has been used, whether it has been quoted verbatim or only paraphrased."²³⁸

This was one of first modern cases to specifically address paraphrasing: most other cases relied on the percentage of exact quotations in determining fair use cases. This has become an extremely important ruling for archives and their users. *Salinger v. Random House* prohibits biographers from paraphrasing too much or too closely and from making their works simply a patchwork compilation of their subject's letters and ideas.

In *Salinger v. Random House*, we can see the early notions of fair abridgement as discussed in the eighteenth century cases cited above, where an abridgement was considered fair provided that it contained enough original thought and arrangement of ideas to be considered a work in its own right. The Supreme Court has taken this a step further in *Salinger v. Random House*, and defined the precise situations in which paraphrasing as well as direct quotation is an infringement.

²³⁷J. Salinger v. Random House, Inc., 811 F. 2d 90 (2nd Cir. 1987), in Current Developments in Copyright Law 1988, 417-18.

²³⁸*Ibid.*, 416.

The defense, in this case, argued that biography was a productive use and should be allowed as it increases public awareness and the general knowledge of the world around us. It was further argued that biographers, in order to retain accurate and vivid descriptions of their subjects should be allowed to copy parts of their subject's works. The Court, following *Sony*, and *Harper and Row*, found that:

"The biographer had no inherent right to copy the accuracy or vividness of a letter writer's description. Indeed vividness of description is precisely an attribute of the author's expression that he is entitled to protect. . . The copier is not at liberty to avoid pedestrian reportage by appropriating his subject's literary devices."²³⁹

The Court took this line of reasoning further and stated that "the purpose of the use does not entitle him to any special consideration."²⁴⁰ This is clearly a movement away from the earlier cases, such as *Sony*, wherein the purpose of the use was considered of prime importance after the lack of economic harm had been determined. The Court appeared to be affected by two main considerations: the fact that the letters were unpublished, and the severe harm done to the potential future market of the works:

"The effect on the market is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime. . . Salinger has the right to change his mind. He is entitled to protect his opportunity to sell his letters."²⁴¹

The Court asserted that, in prohibiting the use of the unpublished letters it was not thwarting scholarly activity or the dissemination of information. "To deny a

²³⁹Ibid., 415-16.

²⁴⁰Ibid.

²⁴¹Ibid., 418.

biographer the opportunity to copy . . . is not . . . to interfere in any significant way with the process of enhancing public knowledge. . . the facts may be reported."²⁴² It is the author's unique expression of facts (the 'accuracy and vividness of description') which copyright seeks to protect.²⁴³

The 1968 case of *Hemingway v. Random House* is an exception to the injunction against use of unpublished works. In this case, a long time friend of Hemingway's, A. Hotchner, published a book which contained passages of conversations Hemingway had had with him and others, which Hotchner had either taped or taken down in note form. The works or speeches were considered by the Court to be subject to copyright protection as an unpublished work. "The public delivery of an address or lecture or the performance of a play is not deemed a 'publication' and accordingly does not deprive the author of his common law copyright in its contents."²⁴⁴

Under ordinary circumstances, this use would probably have been found to be an infringement. However, the Court did not consider the publication to be an infringement on the grounds that Hemingway had given implied consent by allowing Hotchner to publish numerous articles during his lifetime which contained lengthy passages from Hemingway's taped conversations. The Court

²⁴²*Ibid.*, 419.

²⁴³This judgement is somewhat contradictory to the reasons for judgement given in the 1966 case, *Rosemont Enterprises v. Random House*. Random House had published a biography of Howard Hughes which, in part, drew upon a series of articles which had been previously published by Rosemont. The court found for the defendant, stating, "This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution," A. Blaustein and R. Gorman, *Intellectual Property: Cases and Materials 1960-1970*, (n.p., 1971), 131. However, it is important to note that the case involved published, not unpublished works, and the court did not find any possibility of economic harm to the plaintiff.

²⁴⁴Blaustein and Gorman, 52.

stated: "it is enough to observe that Hemingway's words and conduct far from making any such reservation left no doubt of his willingness to permit Hotchner to draw freely on their conversation."²⁴⁵

Another exception to the use of unpublished works had already been established in *Time Inc. v. Bernard Geis Associates*, a case which involved photographs depicting the assassination of President Kennedy in 1963. Abraham Zapruder, a Dallas resident, had fortuitously taken videos of the assassination as it unfolded before him. These videos were then bought by Time Life Inc. and were subsequently published in their magazine. After the publication by Time Life, the photos were copied by hand as sketches and included in a book by the defendant which outlined his theory regarding the identity of President Kennedy's assassin.

After determining that the photographs were indeed copyrightable, the Court decided that given the nature of the subject of the copyrighted works-- the assassination of the President of the United States-- the public good was overwhelmingly in favor of the increased dissemination of information regarding the assassination, and publication was not considered an infringement.

The Court wrote that "there is public interest in having the fullest information available on the murder of President Kennedy. [The defendant] did serious work on the subject and has a theory entitled to public consideration. . . The book is not bought because it contained the Zapruder pictures; the book is bought because of

²⁴⁵*Ibid.*, 54.

the theory of [the defendant] and its explanation, supported by Zapruder pictures."²⁴⁶

Contrary to what may at first be assumed, these two cases do not establish a general precedence of allowing the defense of fair use to be applied to unpublished works (*Hemingway*) or as a defense for the commercial use of published works (*Time*). Although these cases are exceptions to the established doctrine of fair use, there were extenuating circumstances in each situation: prior implied consent to publish, and the public's overwhelming need for information regarding the assassination of President Kennedy. The established doctrine of fair use was not radically changed by the two unique situations involved in *Hemingway v. Random House* and *Time v. Bernard Geis Associates*.

As evident from all of the cases cited above, fair use has developed from a common law, judicial doctrine into a careful and meticulous discussion of the four statutory guidelines listed in the 1976 statute, which were themselves taken from prior judicial opinion. Primary amongst the four guidelines is the injunction against copying which infringes upon the future or potential market of the original copyrighted work. The nature or purpose of the use has been consistently downplayed in recent years (particularly in *Random House v. The Nation* and *Salinger*), and the author's right to first publication of unpublished works has been re-affirmed as superior to any defense of fair use, thus echoing the early cases of the eighteenth century.

²⁴⁶Melville Nimmer, Cases and Materials on Copyright (St. Paul, MN: West Publishing Co., 1979), 431.

In Canada, Keyes and Brunet, following the proposals made by the Isley Commission of 1956, suggested that "only published works can be so dealt with" under fair dealing.²⁴⁷ The White Paper, which in its recommendations on fair dealing closely parallels the 1976 United States Act reversed the proposal of Keyes and Brunet and suggested that unpublished works should be included in a completely new section termed fair use.

"This new Fair Use doctrine will apply to all copyright subject matter that has generally been made available to the public, regardless of whether such material has been published in the traditional matter."²⁴⁸

However, the most recent report, A Charter of Rights for Creators has returned to the traditional proposal of excluding unpublished works from fair dealing.²⁴⁹ Given the current situation in the United States and the long standing common law tradition of the exemption of unpublished works from the defense of fair dealing, this is a wise decision. Including unpublished works under the defense of fair dealing would be a radical change in the legal history of Anglo-Saxon countries. It has long been accepted in England and the United States that an author's right to first publication is one of the most important rights protected by copyright. First publication by its very definition can only happen once in the life of a work and may severely effect any future market for the work or any derivative works.

For archivists, one of the most important aspects of the doctrine of fair use has to do with its applicability to unpublished material. As was discussed above, the

²⁴⁷Keyes and Brunet, 148.

²⁴⁸The White Paper, 40.

²⁴⁹A Charter of Rights for Creators, 12.

courts have considered the nature of unpublished material sufficient to warrant special protective treatment at common law-- fair use does not apply to unpublished works. Archivists cannot, therefore, allow users to make copies of any kind or of any length of unpublished works, even though the user may be engaged in private study, research, criticism or review. Fair dealing is simply not an acceptable defense to the use of unpublished works.

There has been a great deal of insistence on the part of the library and archival community to extend fair dealing to unpublished material on the grounds that its absence will render the holdings of archives and libraries useless.²⁵⁰ Firstly, this is somewhat of an exaggeration. Scholars will be able to use unpublished material and report the facts they find therein. They will simply not be able to copy or closely paraphrase the works until the term of protection is over. Secondly, the claim that fair use should be extended to streamline the management of archives and libraries is not a sufficient reason for such a radical diversion from the law. Copyright does not exist to make the work of archivists any easier just as it does not exist to strengthen the bargaining position of any particular section of the labor force. An author's right to first publication is a strong one and should not be denied by the gathering of unpublished material under the umbrella of fair dealing.

Although archivists are justified in their concern over the inability of fair dealing to be used as a defense for the use of unpublished works given the current statutory term of perpetual protection, it is preferable to provide a more reasonable term of protection for unpublished works (fifty years from the death of the author

²⁵⁰See also, Barry Torno, Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision, (Ottawa: Consumer and Corporate Affairs, 1981), 31-42. Torno states that some unpublished works, primarily those which are performed in public, should be subject to fair dealing.

or one hundred from the date of creation if the author is unknown) rather than to extend fair dealing to them and thereby possibly destroy an author's right to first publication.

CHAPTER FOUR

TOWARDS A NEW ACT: SOME CONSIDERATIONS

Canadian copyright legislation needs to be revised in light of the special nature of archival material which derives from the circumstances of its creation. Archival documents present several problems for copyright legislation due to the fact that they are generally unpublished, unique, and have unknown or unlocateable copyright owners. The current legislation focuses on published material for which the author or copyright owner is usually both known and locatable, and for which many hundreds if not thousands of copies of the work have been disseminated.

The United Kingdom and the United States have both reduced the term of protection for unpublished material to a limited amount of time, and included special exemptions for archival material in their recent statutory revisions. As information increasingly becomes a commodity in its own right, the demand for copyright legislation which is up-to-date, practical, equitable, and technologically current becomes a matter of increasing importance.

In the last Chapter, suggestions were made to revise the present Copyright Act in order that it might respond to the problems encountered by archivists who, on a daily basis, must attempt to navigate the often stormy sea of competing rights held by authors and users. While revising the Act is a necessary and worthwhile activity, another possible solution to the present situation is to simply create a

separate section that deals specifically with archival material exempting most of it from copyright protection.²⁵¹

Archival documents, which are "created or received by a physical or juridical person in the course of a practical activity," ²⁵² are inherently different from those works which are traditionally considered to be protected by copyright, such as paintings, novels, poems, photographs-- those entities that in layman's terms are called 'artistic or literary works'. This fundamental difference has been eloquently described by Hogson in his book on archival administration.

"Archives are unselfconscious by-products of human activity, they have the objective formlessness of raw material, compared with the subjective roundness of literary artefacts like books, whether printed or manuscript."²⁵³

The 'subjective roundness' of artifacts as described by Hogson is a result of the author's conscious intent to create a work which is complete and full of meaning in its own right (one can imagine a sculptor smoothing the sides, changing the natural form of a block of clay into the shape he intends: each movement is made with the final product in mind). Archives are the direct opposite of this, unconscious, formless by-products of the daily conduct of affairs. The creator of archival material does not shape or mold the work to conform to some preconceived idea. His/her work is simply the residue of an action or transaction--

²⁵¹ Adding a section to the present act is preferable to creating a new act in that the creation of a new act would obviate the use of all previous case law which has been built up under the present statute.

²⁵² Duranti, "Diplomatics Part I," 15-16.

²⁵³ J. H. Hogson, The Administration of Archives (Oxford: Pergamon Press, 1972), 4.

such as a check which is written to buy something or minutes which provide evidence of a committee meeting.

The observer of a painting or sculpture, or the reader of a novel does not need to see any of the preparatory material behind the work in order to understand it: the preliminary sketches and drafts, the letters to the patron asking for more money, the letters to the gallery or publisher negotiating the exhibit or publication of the work, the bills for the paper, ribbon, paint or clay. The painting, sculpture, or novel is, from its inception, intended to be fully meaningful without the presence of these other documents. In fact, it would be rather absurd to think that the bills for the paint, or letters to and from the gallery negotiating the lighting or color of the background wall would have to accompany the exhibit of any painting in order for a gallery patron to understand the meaning of the painting. The artist never considers these documents in the creation of the painting, nor does the user in his observance of it. The artist's attention is directed towards the work itself as the fulfillment of his will or desire to express something. Anything else produced as a result of this creative effort is generally considered meaningless clutter. Once the value of the bills and letters as evidence of the transactions of buying the supplies and negotiating with the gallery owner is extinct, the documents have no other commercial, or legal value. It is exactly these documents-- archival documents-- which require special treatment under copyright legislation.²⁵⁴

In direct contrast to a painting or novel, archival material (such as the bills and letters described above) is never created as an end product, independent

²⁵⁴Marcel Caya made the same suggestion to the House of Commons Subcommittee on the Revision of Copyright in his 1985 address. See House of Commons, Standing Committee on Communications and Culture, Subcommittee on the Revision of Copyright, Minutes of Proceedings and Evidence, Issue no. 10, 1985.

and full of all the elements necessary to render it meaningful to a user.

Every item within the fonds²⁵⁵ both lends and gains meaning to and from each of the other items.

As described over fifty years ago by the Italian archivist Giorgio Cencetti, "archives are something more than and different from the arithmetical sum of single components."²⁵⁶ The single components, when viewed in isolation, are quite meaningless. In fact, "autonomy is a principle alien to archives."²⁵⁷ This is due to the way in which archives are created. Because archives are the result of the actions and transactions of everyday life (paying bills, attending meetings writing letters) they build up much the same way as sediment deposits itself in a river bed, each layer related to and dependent upon the next. Only when the layers are viewed together as a whole and each one is analyzed in context with its neighbor, does the entire story of the river (or creating body) reveal itself.

"Archives are not collected. . . They came together, and reached their final arrangement, by a natural process; are a growth, almost, as you might say an organism as a tree or animal. They have consequently a structure, an articulation, and a natural relationship between parts."²⁵⁸

²⁵⁵A fonds is a group of archival material defined as, "The whole of the records, regardless of form or medium, automatically and organically created and/or used by a particular individual, family, or corporate body in the course of that creator's activities or functions." See Rules for Archival Description, D-3.

²⁵⁶Giorgio Cencetti, "Il fondamento teorico della dottrina archivistica," Archivi, 1 (1939): 7-13. Abstract in The American Archivist 3 (July 1940): 279.

²⁵⁷Blinkhorn, 22.

²⁵⁸Hilary Jenkinson, "The English Archivist: A New Profession," in Selected Writings of Sir Hilary Jenkinson, ed. Roger Willis and Peter Walne (Gloucester: Alan Sutton, 1980), 238-239.

Each item in a file is related to all the other items in the file, each file is related to every other file in the fonds and only when the files are viewed in their entirety do they tell the whole story of either a person, a committee or company.

Thus, archival material such as an inter-office memo or directive has very little in common with a novel, poem, song or sculpture.²⁵⁹ The memo or directive is created in order to carry out a transaction, for example, to set up an appointment or instate a new staff procedure. The novel or poem is created as a product in its own right and is subject to a great deal of personal freedom as to its form, length and content, whereas a memo or directive is subject to fairly strict regulations regarding form, length and content. Archival documents are involuntary products of the actions and transactions which occur as a result of the daily conduct of business and personal affairs. Creative works are voluntary products and are the result of an artistic impulse which has as its primary goal the creation of that specific object. Archival records, such as checks, committee minutes and budgets are not the primary goal of the impulse behind their creation. They are simply the means used towards obtaining some end result.²⁶⁰ The goal of the author is the result created by the transaction not the tool (i.e. the archival document) used to carry out the transaction.

²⁵⁹This is something which I think we all intuitively understand. The common (not the statutory) definition of 'artistic work' includes all those works which were created as end products, and excludes archival material, that is material which is the result of transactions. These are two natural groups which have been joined together by the statute in a clumsy attempt to extend copyright protection to published and unpublished material.

²⁶⁰It is precisely because of this that archival records are valued primarily for their evidential merit. Archival records provide an unbiased account of the transactions that were carried out.

The courts, in an attempt to distinguish between archival material and end products, focused on the unpublished nature of archives rather than on the motivation behind their creation. By relying upon the published/unpublished distinction, the courts gave a very broad and, I submit, incorrect definition of artistic and literary works, a statutory category for which there is no requirement of creative impulse and which encompasses both works which are the result of a motivation to produce an object which has meaning in isolation from the creator's other works (a final product) and those works which are simply the 'sediment' that accumulates through the daily actions and transactions of affairs-- works which have no meaning in isolation from the rest of the fonds. This broad definition of literary and artistic works has resulted in transferring the burden of explanation of copyright protection to the somewhat artificial distinction between published and unpublished.²⁶¹

As noted by Hogson, the truly significant difference between published and unpublished works is not the actual state of their publication. The distinction is more fundamental than that and lies in the reasons behind their publication status. The fact that some works are published while others remain unpublished is not just due to the whims of fortune. It is usually a direct result of the process and motivation behind their creation. Archival documents, which are "the result of a practical administrative activity"²⁶² are, in the majority of cases, unpublished, quite simply because they are unpublishable. They were never intended to be end products, capable of being understood in isolation from the rest of the fonds.

²⁶¹The common definition of artistic or literary works far better defines this natural category-- those works which were created as products, meaningful in their own right. In extending this term to cover both archives and works created as end products the statute produced a highly unnatural class with few common characteristics.

²⁶²Duranti, "Diplomatics Part I," 16.

Due to the circumstances of their creation, archival documents are therefore non-commercial by their very nature. They are "res extra commercium" and were not created to be marketed. Hence, there is usually very little to be gained from their reproduction.²⁶³ Protecting archival documents is actually a misapplication of the Copyright Act-- an act which was created to protect those persons who had taken the greatest risk in bringing a work to market. Therefore, the majority of archival documents should not be protected by copyright. Moreover, while copyright protects the unique form of expression of ideas, archival documents are not in themselves embodiments of ideas and thoughts, but of actions and transactions. They are evidence of the activities, processes and procedures of their creating body, and therefore should be exempted from the Copyright Act. Their value as administrative, legal, financial or historical research tools does not correspond with any notion of market value. The original British Act of 1709 and the subsequent acts were not written with the intention of protecting archival material. They were written to protect material created expressly for either moral or monetary benefit.

However, while most archival material does not need to be protected by copyright legislation, there are some archival documents which do require protection from copying-- those records which express emotions or ideas (personal correspondence, diaries, sketches, notes) or are drafts or originals of end products, such as reports, drafts of poems, novels, that is, those records which are not means for carrying out transactions.

²⁶³Cencetti, "Sull'Archivio," 50.

A transaction is defined by diplomatics as "a declaration of will directed towards obtaining effects recognized and guaranteed by the juridical system," in which "a person administrates his/her own interests with other persons."²⁶⁴ The effect caused by the creation of the archival document must therefore be one which creates, modifies, maintains, or extinguishes relationships between or among persons within the juridical system. It must also be the intent of the author to produce that effect. While administrative correspondence may be a means used to obtain an effect of a juridical nature, personal correspondence may be simply a method or form used for expressing ideas and thoughts. Expression of those ideas and thoughts should be protected, the transaction should not be. Similarly, a personal diary which is used for recording thoughts and feelings does not produce any effect which is intended by the author to be recognized by the juridical system, whereas a ship's log does. The diary is much more similar to a novel and should be protected from mass reproduction. The author of a diary should have the first right to publication of his ideas the same as the author of a novel does. However, there is no tangibly creative idea expressed in the ship's log and therefore it should not be eligible for copyright protection (in fact, there are prohibitions against the creative or imaginative production of most archival documents).

Documents within a fonds which either express ideas or emotions or are end products (reports, drafts of novels, poems) are very similar to artistic or literary works. They are not the automatic, involuntary residue of a transaction, but require some kind of creative process on the part of the author. These documents

²⁶⁴Duranti, "Diplomatics Part II," 7. In this article a juridical system is defined as a "collectivity organised on the basis of a system of rules" such as a legal system.

should, therefore, be protected by copyright under the same provisions accorded to published literary and artistic works.

The distinction between those works which are the result of transactions and consequently do not need to be protected by copyright, and those which are the result of a creative impulse and do need to be protected by copyright can be determined by provenance²⁶⁵. There are three main categories of provenance which are relevant to copyright legislation; the government and Crown corporations, all other non-government institutions or agencies, and private individuals or families.

Copyright protection of these three categories should extend from complete protection (private papers) through partial protection (non government agencies) to complete exemption (government records). As discussed in Chapter Three, government records should be entirely exempt from copyright protection. The records of non-government agencies and institutions should be protected by copyright only if they are meant for dissemination and commercial gain, thus exempting all records which are the organic residue of transactions. Individuals' and families' records, the majority of which contain expressions of ideas and emotions, should be covered by copyright protection just as other literary and artistic works are.

The records of the Canadian government should be completely free from copyright protection.²⁶⁶ These records are the result of actions carried out for the

²⁶⁵Provenance refers to the creator of archival material.

²⁶⁶In the United States all records produced by the government are exempt from copyright protection and can be freely copied by anyone.

citizens of Canada, in their name; they belong to the people and make the government accountable to the people. Their reproduction for the broadest dissemination possible should be permitted, within the necessary restrictions of other legislation such as the Freedom of Information Act and the Privacy Act and the Trade Secrets Act.

Nor should copyright extend any special protection to documents contained in the fonds of corporations entirely financed with public money. Again, these institutions are funded by the general populace, therefore the documents they create should be open to the widest possible dissemination, subject to other applicable legislation. While charging a fee for the reproduction of such documents may in some instances help to recoup some of the funds which were expended in the creation of the documents, it seems unlikely that a reprography fee could ever approach the department or committee budgets (usually in the hundreds of thousands if not millions of dollars) required to fund these projects.

The current system of providing the Crown and Crown corporations with copyright protection in order that they may charge a fee for the dissemination of any work they create is against the spirit of democracy.

The records of all other non-government agencies such as voluntary organizations, professional associations, churches and corporations should be given only very limited protection. The majority of records created by these bodies are the residue of transactions: minutes, ledgers, budgets, directives, reports, registers, contracts, correspondence, etc. The intent behind their creation is clearly administrative. The only works within these fonds which may need to be protected by copyright are reports or other final products. The Trade Secrets Act, patent law, trademark

law and privacy legislation would protect those documents which the creator might not want disseminated.²⁶⁷

The records of private individuals and families do require complete copyright protection because they very often contain works which can be considered to be of an artistic or literary character and should be subject to a limited term of protection such as that which has been established for published works. Although some personal fonds might contain very few, if any, creative works, the entire category of personal fonds would have to be covered by the legislation in order to prevent the time consuming determination of copyright protection on a case by case basis.

It is the responsibility of the professional archivist to determine which provenance category a fonds belongs to.²⁶⁸ This is already a routine decision which must be made for all fonds or record groups prior to their arrangement and description. In the majority of cases it is quite evident which category a fonds belongs to and the decision is usually made before the records ever arrive at the archives.

The current term of perpetual copyright protection for unpublished works must also be abolished. A term equal to that for published works, life of the author plus fifty years, is much more reasonable. It would entitle the author and his/her

²⁶⁷However, copyright does not grant any right of access to records held by government or private corporations, only the right to copy records already available in a public institution.

²⁶⁸For an exhaustive discussion on the definition of private versus public records see Trevor Livelton "Public Records" (Master of Archival Studies thesis, University of British Columbia, 1990).

immediate heirs to any economic benefit which might derive from the work while allowing the public free use after this period.²⁶⁹

In addition to categorizing archival work by provenance the proposed section of the statute on archival material should also abandon the strict media divisions found in the current act, as discussed in Chapter Three.

The term 'author' should be defined for all media (both archival and non-archival) as the person, real or juridical, whose will caused the work to be created.²⁷⁰

There are far too many categories and conflicting definitions in the present statute. The most practical definition is one which is broad enough to encompass all works, yet is simple and straightforward. The legislation cannot be written only for today, it must look to the future and attempt to encompass whatever new works and means of dissemination may be developed. Revision is a time consuming and expensive procedure. It is important that the statute should not become outdated too soon. David Magnusson and Victor Nabhan note that legislation which is too detailed and enumerative usually fails because it does not provide the required degree of certainty for the users and is impractical to administer.²⁷¹ What we need are broad yet meaningful categories and definitions. Theoretical definitions will best accomplish this task. The science of diplomatics has been used to analyze documents for well over two hundred years from quill and parchment to

²⁶⁹Marcel Caya, in private conversation, has suggested a term of fifty years from the date of deposit in the archives as a more natural parallel to the section on published works.

²⁷⁰As discussed in Chapter Three this would collapse the categories of work made for hire and commissioned works into one definition of first owner of rights.

²⁷¹David Magnusson and Victor Nabhan, Exemptions Under the Canadian Copyright Act (Ottawa: Consumer and Corporate Affairs, 1982), 64.

machine readable records. It has proved to be a viable method of investigation for all types of documents.²⁷²

There is no conceptual difference, even from the point of view of copyright, between a photograph and a letter: they both convey information, both can be used as evidence of acts that took place. The distinction between categories of documents should not be based on the type of medium-- the only distinctive difference lies in the circumstances of their creation. A photograph created by a government agency to document an oil spill should not be covered by copyright protection, while a photograph created by a portrait artist or commercial photographer should be. The government photograph is archival, and as such is an integral part of a transaction. It was created as part of a file generated by a specific government activity, the investigation of an oil spill. The second photograph was created specifically in order to produce an economic return to its author. Therefore, copyright legislation should reflect the intentional differences in the creation of these two photographs rather than simply accord them blanket treatment as photographs.²⁷³

The same is true for textual works. The intent behind a letter to the editor of a newspaper, with respect to duplication and dissemination, is very different from the intent evidenced in the creation of a letter of application for citizenship which is directed to Internal Affairs. The letter to the editor, which was created by the

²⁷²Janet Turner, "Experimenting with New Tools: Special Diplomats and the Study of Authority in the United Church of Canada," *Archivaria* 30 (Summer 1990).

²⁷³While the definition of author as first owner of copyright should be uniform for all types of media the term of protection may need to be different for photographs (eg. creation plus fifty) due to the fact that the author is usually unknown when they are donated to the archives. It is preferable to sacrifice some uniformity for the sake of practical administration of the legislation. A perfectly uniform statute is not very worthwhile if it is cumbersome and impractical to administer.

author with the express intent of distribution and dissemination should be covered by copyright protection. The letter to Internal Affairs should not be (access, however, would be protected by the Privacy Act). The government photograph of the oil spill and the letter to Internal Affairs have much more in common with respect to their creation and subsequent nature than either the two photographs or the two letters.

The distinctions between archival and non-archival material and the intent behind creation are the entities on which legislators must focus; not media or state of publication. A researcher who uses thoughts and ideas expressed in published correspondence may derive only moral benefit from the use, and one who makes use of thoughts and ideas expressed in unpublished, government correspondence may indeed derive economic benefit, but the fact remains that the first case should be considered infringement, the second should not. Archival material, which accumulates naturally as the result of the regular transaction of affairs carried out by a physical or juridical person does not need to be protected by copyright legislation, because it was not created for the economic or moral gain which may derive from the unique form of expression of its contents.

The modern term intellectual property is in fact a much better description of what copyright legislation should protect. Rather than a simple 'right to copy,' the statute should protect only those works which are truly intellectual creations. Material which is the residue of transactions, and hence, not really intellectual property, should not be subject to copyright legislation.

APPENDIX ONE

ARCHIVISTS: WHAT DO WE DO NOW?

While waiting for either a new section of the Copyright Act to be written or revisions to the old Act to be passed, archivists must nevertheless operate their institutions based on the present outdated legislation. This appendix discusses those areas of most concern to archival institutions: reference and acquisition, users, donors, oral histories, computer programs, and photographs.

Reference and Acquisition

All of the archival or library staff who deal with donors and users should be well informed about the statute and should be aware of the potential problems surrounding copyright. Not only will this help to make transactions with the public smoother and better coordinated; it will help protect the archival institution against any potential lawsuits. There should be a section in the staff policy manual which outlines how staff members are to deal with user requests regarding copying, publishing, displaying, etc., of copyrighted material. This will aid an institution if the unfortunate situation occurs where a copyright owner sues for infringement, because aiding someone to use or make copies of a copyrighted work is considered an infringement of the law. It is possible for an archivist to be held personally liable in an infringement suit simply by helping or aiding a user in any way to copy a work. Recent copyright suits have tended to name as many co-defendants as possible-- including the archivist responsible for the use.²⁷⁴

Donors

²⁷⁴In *Salinger v. Random House* all three archives which provided material to the defendant were named in the suit.

It is the prerogative of each individual institution to decide whether or not to obtain copyright for the material donated to them. Some repositories which acquire primarily literary works may not wish to become involved in the voluminous legal paper work required to administer the copyright and therefore may not wish to obtain it upon physical transfer of the material.

Other repositories may wish to obtain copyright in works which have little apparent commercial value (the majority of archival holdings) in order to simplify the use of the records by researchers who wish to publish archival material. Permission to publish can then be granted by the archives.

If the repository wishes to obtain the rights, transferal of copyright should be a standard clause on every donor form. The archivist must explain the nature of copyright to donors (what the rights entail, who the owner is, the term of the rights and the nature of moral rights, which cannot be transferred but only extinguished). The donor must then sign a copyright transferal form as copyright can be transferred or extinguished only by means of a written instrument. It is imperative that the archivist is satisfied that the donor understands what he or she is signing. A contract which has been signed under duress or false pretenses can be easily found invalid.

Upon obtaining written transferal of the copyright, the archives will then have the authority to grant a user the right to publish, copy or use the material, subject to any access restrictions.

It would also be appropriate to prepare a brochure outlining the nature of copyright, what the rights entail, who the owner is, the term of protection etc., so that it can be given to donors and users alike who have questions regarding

copyright issues. This may also be of some benefit if the institution is involved in any kind of litigation wherein the accusation might be made that the archives was negligent in properly informing both the donors and the users of their rights and the limitations on those rights. Oral conversations are all too easily forgotten or mis-remembered.

Suggested Clauses For Release Forms:

These forms are typically called 'gifts of deed' or 'instruments of donation' and should contain clauses which clearly state the transferal of the copyright. For example:

"I assign and convey legal title and all literary property rights which I may have to the above described material to the Archives of ____." ²⁷⁵

"I hereby make a gift of and assign to the ____ for the use of ____ this collection. I relinquish any literary rights which I possess to the contents as well as to the contents of any of my letters or writings in other collections at the ____." ²⁷⁶

"Any copyrights such as the donor may possess in this property or in any other property in the custody of the ____ Archives are hereby dedicated to the public." ²⁷⁷

Users

²⁷⁵The Church of Jesus Christ of Latter-Day Saints, as printed in Society of American Archivists Manual of Forms (Chicago: Society of American Archivists, 1982), 42.

²⁷⁶University of Michigan Historical Collections, as printed in Society of American Archivists Manual of Forms, 43.

²⁷⁷Ohio Historical Society Deed of Gift, as printed in Society of American Archivists Manual of Forms, 44.

If there are any self-serve copy machines on the premises, there should be a notice warning the user of copyright infringement. Institutions are not generally considered liable for copying that is done on self serve machines, provided that there is a well located, easily readable notice of what constitutes copyright infringement placed on every machine in the building.

Users should be required to sign a form which indemnifies the institution against any litigation should the patron use the material in an unscrupulous manner. This form should be signed every time material is copied for or by the user-- this includes copying passages by hand.

The archives cannot grant or imply permission to copy any work in its custody for which it does not own the rights. This restriction includes photographs, films, videos, computer programs, and any incoming correspondence within a fonds. Proper acknowledgement of the copyright owner in the user's publication is not a sufficient defense for the use of copyrighted material, nor is the fact that the use may be for non-profit purposes.

It may also be appropriate to warn researchers, before they begin a lengthy research project, that the archives does not own copyright in the material they are requesting and that, in order to publish, perform, display, broadcast, or copy the material or any significant portion thereof, they will have to seek permission of the copyright holder. This can help to prevent a situation from developing where users learn only after starting a project that they cannot publish the material they have been using.

It is also extremely important to keep accurate donor files-- including full name and address. The user will have the responsibility of contacting the owner of the

copyright (often the donor or author) in order to seek permission to use the material. It can be very frustrating for a user to be told that not only can the archives not grant permission to use the material, but also the archivist doesn't know who can or where this person might be located.

Again a brochure explaining the nature of copyright can be helpful in providing the user with information. The brochure should carefully explain fair dealing, since many scholars may assume that their use automatically falls under this defense.

Suggested Clauses For Release Forms:

"Permission to examine materials is not an authorization to publish. Separate written application to permission to publish must be made to the ____ Archives. Researchers who plan eventual publication of their work should make inquiry concerning overall restrictions on publication before beginning their research. . . . However, in granting permission to publish ____ does not surrender its own right thereafter to publish any of the materials from its collection or grant permission to others to publish them. . . ____ does not assume any responsibility for infringement of copyright in the material held by others."²⁷⁸

"Permission to publish from unpublished manuscripts or published works under copyright must first be obtained from the holder of the copyright. It is the researcher's responsibility to secure that permission. For original manuscript materials, the permission of ____ as owner of the originals should also be obtained. In most instances, the Department does not hold this copyright."²⁷⁹

²⁷⁸Massachusetts Institute of Technology Institute Archives, "Application for Use of Manuscript Material," as printed in Society of American Archivists Manual of Forms, 71.

²⁷⁹Emory University, Special Collections Department, as printed in Society of American Archivists Manual of Forms, 74.

"I have read and agree to abide by the ___ Reading Room Rules as printed on the reverse side of this form. I realize that I am responsible for conforming to copyright, right-to-privacy, libel, slander, and any other applicable statutes. I agree to indemnify and hold harmless the University, its officers, employees, and agents from any and all claims resulting from the use of materials in the University archives. . . I understand that failure to comply with these rules may result in the denial of access to the collections."²⁸⁰

Oral Histories

Oral histories are not immune to copyright problems. In Canada, the person who owns the original tape is the owner of the copyright in that recording.

"The term for which copyright shall subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced shall be fifty years from the making of the original plate . . . and the person who was the owner of the original plate at the time when the plate was made shall be deemed to be the author of the contrivance."²⁸¹

However, in the United States, the interviewer and the interviewee each hold rights in their own unique expression. The fact that the situation is quite different depending on where the tape is made can lead to confusion as to the ownership of copyright in oral histories. The best solution is to systematically provide a release form for each interviewee to sign, transferring all rights to the interviewer or the institution which will receive the tapes as a permanent deposit.²⁸²

²⁸⁰Michigan State University Archives and Historical Collections, "Researcher Application," as printed in Society of American Archivists Manual of Forms, 75.

²⁸¹Copyright Act 1921, s.10.

²⁸²For a very thorough discussion of the methodology used in conducting oral histories see Voices: A Guide to Oral History, Derek Reimer, ed. (Victoria: Ministry of Provincial Secretary and Government Services, Provincial Archives of British Columbia, Sound and Moving Image Division, 1984).

Computer Programs

Computer programs cannot be copied under the current act for preservation purposes. The transfer of material from one medium to another is also prohibited (scanning textual material for input into a computer database is an infringement) as is the transfer of a program from one language into another.

Photographs

Under the current statute the person who paid for the photograph to be created is the person who owns the copyright. It is extremely unlikely that any revision would be retroactive. It is difficult for parliament to take away rights which have previously been granted. Therefore, most of the photographic material currently held in archival institutions will fall under this section. In the case of studio photographers, the individual clients who paid for the photographic portraits are the copyright owners.

In the case of commissioned works, the majority of photographs in a commercial photographer's fonds, the copyright is owned by the person, either physical or juridical, who paid for the creation of the photograph. The photographer may not necessarily be aware of this. Quite often physical ownership of the negative is confused with copyright ownership.

The current term of protection for photographs is fifty years from the making of the original negative.²⁸³ While the creation of the negative might be somewhat difficult to determine, this should not create too many problems for the archivist. It is much easier to determine the approximate date of creation of the photograph,

²⁸³Copyright Act 1921 s. 10

the negative necessarily being created prior to the print, than it is to determine who took the photograph and what their date of death is (this has been one of the suggestions for copyright revision.)

In order for a photograph which is less than fifty years old to be copied, permission must be received from the copyright owner. This puts added emphasis on the archivist to acquire the entire fonds of the photographer-- not just the images themselves. Without textual information which describes who commissioned the works it will be extremely difficult, if not impossible, for the archivist to obtain permission to reproduce the images until they are older than fifty years.

Fair Dealing

This section has been widely misunderstood by most archivists and users. It does not mean that if the user acts with good intentions or in some 'fair' way the copying will be allowed. A major emphasis of the common law tradition in copyright has been to consider whether or not the user obtains any economic return from the use of the copyrighted work. It is extremely unlikely that any use which results in an economic return-- either direct or indirect (e.g., the hanging of historic photographs in restaurants and pubs)-- would be considered fair dealing.

The exemption which pertains to education has been interpreted as applying to primary and secondary education only-- not college or university level. There is a further restriction contained in the American legislation that the use must be spontaneous, such that the user cannot reasonably obtain permission from the copyright owner before the work is to be used. However, this is a one- time exemption. If a teacher plans to use a work a second time, permission must be obtained prior to that use. While this is not part of the Canadian legislation, it is

likely that Canadian courts would take these findings into consideration when deciding Fair Dealing cases in Canada.

In conclusion, the best procedure to follow is for all of the staff members who deal with donors and users to be well versed in copyright legislation. The staff manual should also contain an explanation of copyright and a description of the procedures a staff member is to use when explaining copyright, and the various release forms for donors and researchers. This will help to assure that all donors and users receive the same thorough and systematic explanation as a routine function of the institution. Ignorance is never an acceptable defense to an allegation of infringement.

APPENDIX TWO

CURRENT DEVELOPMENTS

In the summer of 1991 the ACA Public Awareness and Advocacy Committee was formed. Because of its wide variety of roles, it was recommended that the committee be divided into two standing committees, one on public awareness and the other on advocacy. The subcommittee on Copyright was placed under the Standing Committee on Advocacy. The mandate of the committee is twofold, to represent the interests of archivists to the government and to educate and update the profession about copyright.

In an attempt to further strengthen its voice in negotiations with the government regarding copyright revision, the ACA joined the Canadian Society of Copyright Users late in 1990. The society was formed to lobby the government on behalf of those who use copyright works. The membership is largely music oriented, many radio stations are members, as well as the Canadian Library Association, and other provincial library associations.²⁸⁴ The creators of copyright works have a variety of long-standing and very vocal lobby groups as can be seen in the Proceedings of the 1986 Committee on the Revision of Copyright, whereas archivists and their various patrons have in the past tended to be somewhat subdued and unobtrusive when it comes to representing their needs to the government. Hopefully, the actions taken by the Canadian Society of Copyright Users will result in a better balance between users and creators of copyright works.

²⁸⁴Conversation with Greg Brown, Dec. 9, 1991.

In the fall of 1991 the ACA subcommittee on Copyright drafted a response to the Minister of Communications concerning the proposed exceptions for archival material included in the 1986 Government Response to the Report of the Subcommittee on the Revision of Copyright. In order to present a more coordinated, forceful and hopefully more effective representation, the Canadian Council of Archives (which has only institutional members as opposed to the ACA which has individual members) was asked to support the ACA response.²⁸⁵

The ACA position paper provides a detailed analysis of the concerns of the archival community and outlines the archival exemptions requested by the ACA. It includes many of the revisions contained in earlier proposals, most importantly the restriction of protection of unpublished works to either fifty years from the date of death of the author, if known, or seventy-five years from the date of fixation for unidentifiable authors. While providing many detailed exemptions for the many different types of archival material, its basic point is that archival material is different from other copyrighted works and deserves to be treated differently by copyright legislation-- making it exempt from many of the protective clauses of the legislation.²⁸⁶

In July 1991, Corrado Santoro, chair of the ACA Advocacy Committee, met with officials from the Department of Communications in order to answer any questions they might have concerning the ACA paper. The government is said to be in the process of drafting new legislation, although, given the current problems in the economy, the state of national unity, and the impending national election, it

²⁸⁵Conversation with Shirley Spragge, Dec. 4, 1991.

²⁸⁶Blais, 10.

is uncertain whether copyright will be given priority by the government at this time.

Another archives association which is very active in the area of copyright issues is the Group des Archivistes de la Region du Montreal (GARM). In the fall of 1990 as a result of an outcry on the part of the members at the close of a two day seminar on copyright, GARM wrote a letter to the Minister of Culture outlining the concerns archivists had regarding copyright revision and the urgently needed exceptions for archival material.

Nancy Marrelli, president of GARM, has recommended that a special section on liability should be added to the legislation restricting damages which may be recovered from the user or agent of the user to not exceed the standard fee charged for the commercial use of a photograph-- usually fifty or seventy-five dollars.²⁸⁷ She also stressed the need for archivists to educate themselves about copyright and to lobby the government by preparing papers and letters which represent the special needs of archives in copyright revision.

The Association des Archivistes du Quebec has also been active in the process of copyright revision. In 1986, Marcel Caya presented a brief to the Sub-Committee on the Revision of Copyright outlining the special nature of archives and suggesting that, because the majority of archival material was never created for a commercial purpose, it should be exempt from copyright protection. Due to time restraints and some difficulty in communication between the two associations, the ACA and the AAQ generally present separate briefs.

²⁸⁷Conversation with Nancy Marrelli, Dec. 4, 1991.

The briefs, papers, and letters have been sent, the question sessions are over. All of the associations and societies have presented their requests to the government and are now awaiting new legislation. However, rather than assuming complacency, archivists must continue to monitor the copyright situation and stress the special needs of archives in any revision process. The various professional associations should continue to provide education to the government on the special requirements of archives and to archivists on the application of copyright to archival material.

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