

Brief from the Canadian Council of Archives (CCA) To The Legislative Committee on Bill C-32 (CC32)

The Canadian Council of Archives (CCA) was established in 1985, as a result of federal-provincial efforts to encourage and facilitate the evolution of an archival system in Canada. It is a national non-profit organization dedicated to nurturing and sustaining the nationwide efforts of over 800 archives across Canada. CCA's membership includes provincial and territorial councils from across Canada, the Bureau of Canadian Archivists, the Association des archivistes du Québec, the Association of Canadian Archivists, and the Council of Provincial and Territorial Archivists.

Bill C-32 includes important elements that have wide implications for the Canadian archival community and we believe it is essential that archivists present our views and answer any questions of the Legislative Committee on these matters that have great significance for the functioning of the Canadian archival network, the enduring source of Canada's documentary heritage.

The major concern with recent copyright reform bills (2006 and 2008) for archivists has been those provisions dealing with photographs. However, there are other matters of special concern for archivists in Bill C-32: technological protection measures (TPMs), tools and devices, remedies and rights management information. Many of these issues highlight the importance for archives of the need for orphan works legislation.

There are also a number of additional issues in Bill C-32 that negatively affect archival researchers. Past practice has left these issues to be addressed by the research community itself. Although many archivists are concerned about these issues, CCA's limited resources and its volunteer base make it necessary for the CCA to focus at this time on matters of direct concern to archival institutions.

Unpublished Photographs and Other Unpublished Works

Archival institutions under the current law cannot provide researchers with a copy of a photograph or other types of *unpublished* works, for research and private study purposes. Bill C-32 will solve this longstanding problem. The amended section 30.21 in Bill C-32 changes the obligation from an archive having to be "satisfied," to an obligation to "inform," the person receiving the copy that it can only be used for the purposes of research and private study and that use for a different purpose may require the authorization of the copyright owner. This amendment helps solve the problems archives experience with making copies for researchers of unpublished works whose term and ownership cannot be determined. The amendment applies to all unpublished works including

photographs. As long as a work is unpublished, a single copy can be provided for research and private study. Under the amended section 30.21, it will not be necessary to know who the copyright owner is or whether the unpublished work is protected by copyright or is in the public domain.

Other conditions in the existing section 30.21 remain. The archive may only copy the work if the person who deposited the work, if a copyright owner, does not at the time the work is deposited prohibit copying and copying has not been prohibited by any other owner of copyright. Once passed into law, this amendment will permit archival institutions to make a copy of an unpublished work in our holdings, for research or private study, subject to conditions that can be practically met.

Photographs

The most important matter in Bill C-32 for archival institutions is the proposed changes dealing with photographs. Many photographs in archival holdings are orphan works – works for which the copyright owners cannot be located. These works are called "orphan works" because they lack a "parent" who can authorize use. The current copyright law relating to orphan photographs is difficult, and even impossible in some cases, for archivists to apply. This already difficult situation would be made even worse if the provisions on photographs in Bill C-32 are enacted. Bill C-32 would make the term of copyright protection for photographs longer and make determining the copyright owner even more complex and difficult. Determining ownership and the term of copyright are necessary where an archive performs activities such as posting material in its holdings on its web site.

Amending the law so the photographer is uniformly the copyright owner, as proposed in Bill C-32, would make it even more difficult to determine the copyright owner for some photographs in archival holdings. Professional photographers usually clearly identify their work but photographs by anyone other than professionals only rarely have an identifiable creator by the time they arrive at an archive many, many years after they are taken. There are millions of photographs in Canadian archives that are the work of amateur photographers. Finally, the proposal in Bill C-32 permitting "private use" of photographs is of no use to archivists who are not engaged in "private" activities related to their holdings.

The changes in Bill C-32 regarding the term and ownership of copyright in photographs demonstrate the urgent need to address the orphan works problem.

Orphan Works

Under the proposed amendment to section 30.21 archival holdings will be accessible for research and private study – but in the digital environment that is not where the vast majority of Canadians search for information. Canadians seek information about themselves, their families, their institutions and their society on the Internet, in multi-media works and in specialized electronic and print publications. These essential modes of modern communication are not available for the dissemination of archival holdings, even with the changes to Section 30.21.

Archives have expended scarce resources to acquire, preserve and make our holdings accessible, but cannot use modern electronic communications means such as web sites and the Internet to make them available to the Canadian public. Often this occurs because the copyright owners in many archival holdings cannot be located – they are "orphan works". These orphan works fall by the wayside on the Information Highway of the 21st Century. Important chunks of the Canadian experience fall into a black hole where access is severely limited. Researchers have to travel to an archival institution, often far way in another city or province, to use the material on-site. Furthermore, without information about who is the creator and his/her date of death, the term of copyright protection is unknown, and the black hole extends into the future with no definite expiry date.

Archivists urgently need a solution to the orphan works problem because more than any other copyright stakeholder, we are faced daily with limiting the use of significant parts of our holdings – for the sole reason that they are “orphans” and there is no way to clear the rights for use of the material.

Technological Protection Measures (TPMs)

Bill C-32 prohibits the circumvention of TPMs for legal purposes such as preservation activities used by archivists to protect the documentary heritage of Canada. This is completely unacceptable and is a matter of very grave concern to the Canadian archives community in the digital environment where obsolescence is both rapid and disastrous for long-term access. The CCA recommends that Bill C-32 be amended to provide that circumvention of TPMs is prohibited only when the circumvention is for the purpose of infringing copyright and that circumvention tools and services should be available for non-infringing uses.

Bill C-32 provides that the only remedy that can be awarded against a library, archive, museum or educational institution that engages in a prohibited act of

circumventing a TPM is an injunction, if a court is satisfied that the defendant was not aware, and had no reasonable grounds to believe, that the defendant's circumvention was prohibited. The CCA believes that this section is drafted too narrowly. Its legislative intent should be extended to include activities related to preservation, management and maintenance of archival holdings. Adding these activities would meet one of the objectives set out in the Preamble to Bill C-32: encouraging the use of digital technologies for research. To prevent permanent loss of historically significant material, Canadian history in digital form must be preserved. Archives should be able to harness the benefits of digital technology to fulfill their preservation mandate. If this requires circumvention of access control TPMs, then the interests of archival preservation for the public good should take precedence. The CCA believes that only an injunction should be available against an archive that circumvents a TPM and has reasonable grounds to believe that their circumvention was not prohibited.

Rights Management Information

The CCA has a number of amendments to suggest with regard to the provisions in Bill C-32 dealing with rights management information.

- The removal or alteration of rights management information should not be subject to remedies where the information interferes unreasonably with an authorized display or reproduction.
- The fact that rights management information may not be legally binding in Canada should be recognized in the *Copyright Act*. Protecting rights management information should not be construed as confirming the legal validity of the information.
- The definition of rights management information should include only information provided by the copyright owner or the holder of any right under copyright.
- The copyright owner or the holder of any right under copyright should be made subject to the same remedies (injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law) for knowingly making false or misleading statements in electronic form.

Internet Service Provider (ISP) Liability

The CCA agrees with the general approach in Bill C-32 to ISP liability and the obligations regarding notice of alleged infringement in Bill C-32. A service provider should be under no obligation to monitor content provided by, and stored at, the request of a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity. Many archives provide Internet connections to their researchers. It is impossible, in practice, to monitor or screen the activities of researchers using these network services. On that basis, archives

acting as service providers need legal protection similar to that already given under the law to “common carriers,” such as telephone companies, for infringements committed by their subscribers.

Conclusion

Copyright concerns of the archival community have a very significant impact on making the documentary heritage of Canada available to Canadians and to researchers worldwide. The archival community welcomes the opportunity to present these concerns and discuss positive approaches to finding solutions that will ensure we are able to carry out our mandate as the enduring source of Canada’s documentary heritage.

January 31, 2011