2009 Copyright Consultation Submission

By Tracey Arial

Executive Summary

Today's Copyright Act meets the needs of corporate and institutional copyright owners and users very well but does very little to protect individual creators and subjects from exploitation. Writers have been particularly disadvantaged by this situation, as have photographers.

To rectify the situation, creators need to be given rights over and above those of users and publisher/distributers.

Two concepts need to remain within the law, as they are today:

- Canada needs to keep the current clauses that ensure that copyright exists in works as soon as they are created; and
- Copyright needs to last for a creator's lifetime plus 50 years after his or her death.

Many things need to be changed:

- A distinction should be made between creator copyright, which should last a lifetime plus fifty, and the commercial or public licensing of a particular use of that work, which only needs to last for ten or twenty years. This would put work back into the hands of creators faster and would enable all work to eventually enter the public domain.
- Exceptions need to be eliminated and be replaced with voluntary mechanisms that allow creators to choose whether they benefit economically from their work or donate it to the public domain.
- Organizations seen to benefit from creators' work to an unusual extent should be forced to pay additional fees to creators (best-seller clause).
- Copyright registration should be eligible only for people, not organizations.

- Copyright transfers should be written, of limited duration and limited to existing circumstances and technology so that creators can benefit as circumstances change.
- The automatic right of organizations to own the copyright of their employees needs to be eliminated.
- Photographers should hold copyright in their work.
- The fixation clause should be limited so that children can't be exploited.
- Works with unidentified creators should automatically fall into the public domain 175 years after they appeared publicly.

I argued that the copyright act should give creators rights over and above those of users and publishers/distributers during the Montreal Town Hall Consultation. A summary outline of the event can be found at:

http://copyright.michaelgeist.ca/montreal-copyright-town-hall-summary-review

A transcript can be found at:

http://www.ic.gc.ca/eic/site/008.nsf/eng/00682.html

Introduction

My name is Tracey Arial. I've been working as an independent writer since 1993. I'm also the mother of two children and an avid reader.

- I am the author of seven books, four of which have been published so far, and a contributor to eight others.
- I've written hundreds of articles, speeches, newsletters, and documents for many clients. Most of these projects were collaborations in which I wrote the text while others drew or took pictures or programmed computer code.
- I volunteer in both of my children's schools and for several non-profit organizations.
- I adore libraries, archives and the internet and have spent many hours researching from sources in many locations.
- I operate a bilingual website and am investigating other on-line publishing opportunities.

How do Canada's copyright laws affect me?

Opportunities for me to build my career have changed drastically since I began freelance writing in 1993, and they were tough enough when I began. At the time, the pay rates for newspapers and magazines hadn't increased in twenty years, but at least publishers then accepted terms described in the Copyright Act and only demanded the right to publish once within their regions. In comparison, institutional writing paid more and the work was more plentiful too, especially for technical manuals and training videos, but it was still worth devoting time to public works. Doing a book usually required partnering with a publisher in Canada or an agent in the United States, and it took some time to put together such deals. Writers who self-published their books faced less competition in exchange for a higher income, but it was difficult for them to attain wide distribution for their work.

Since then, the opportunities in publishing have increased exponentially and self-publishing has become a necessity, but pay rates have dropped significantly and in

many cases, writers get paid nothing. Most of the newspapers and magazines in Canada are owned by two players and both of them offer few freelance jobs under onerous contracts. Thanks to the Internet, distribution of work is easy and fame is closer at hand, but jobs that pay well are few. The difference between working for publishers and working for academic, business or government institutions has never been higher. As result, there are very few independent people publishing in Canada and often, corporate or institutional biases are not identified by authors.

My highest paying clients are corporations, governments and organizations that pay a premium to own the copyright on my work. These organizations use my work when they need it and then set it aside never to be touched again. In one case, I prepared three book manuscripts that were never published. Yet I can't publish them myself because I no longer hold the copyright.

My university, media and book publisher clients pay me much less initially, but they tend to keep my work in circulation longer. Also, several of them pay royalties to allow me to share in their commercial ventures over time. This system enables them to produce publications that may otherwise be commercially risky, while providing me with a fair share of the income from the work. I make a very small annual salary now, so I'm counting on such royalties to form the bulk of my retirement income.

Thanks to copyright, I am also able to spend some time producing work with an unsure immediate commercial value as part of my inventory. This work takes an extraordinary long time to develop because there is initially no guarantee of an income. One project took eight years from conception to book, but since then it has added to my income every year since 2001.

I've had to stop working for several clients that I used to work for, particularly newspaper companies. When I first started freelancing, I thought I'd have a good career in travel writing. At that time, I could submit a story to the Montreal Gazette and get paid about $350 for it. At that time, there were no contracts, so I licensed the paper for one-time print rights in their region. That way, I could send the same story to newspapers across the country as a sort of syndication and get paid similar amounts each time it was published. The possibility of a decent fee made it worth taking enough time to prepare a story properly.

Newspaper writing never formed a big part of my business, but I took most of the newspapers in Canada off my list of potential clients after they introduced exploitive contracts with terms that include automatic syndication around the world for little or no additional fees, terms of "perpetuity" in "all media now known or hereafter devised. Another sneaky clause meant that if someone sues the newspaper over a story, the freelancer would have to pay the costs of the lawsuit, whether it was due to a freelancer's mistake or not. In one contract I have, the sneaky clause appears under another clause that gives the newspaper the right to add or change stories in any way they want without getting permission from the original author.

Even though I haven't worked much for newspapers in a long time, I still spend time thinking about newspaper contracts as part of each class in the Heather Robertson and Electronic Rights Defence Committee class action lawsuits.

Since I began my freelancing career, I've attended every public consultation on copyright reform possible. There's been at least one such discussion every year or two since 1995. Most of these conversations included at least one person who suggested that copyright shouldn't exist at all. They didn't seem to care that giving legal value to texts, code, art, photographs and performances so that they can be treated like property provides people with income. They didn't seem to understand that without the incentive, some creators wouldn't create at all, while the best artists would hide their work within private collections.

Conversations with people in the technology sector have always been much easier. Many of them create software, so we agree on the need for strong, fair copyright law. Like them, I have faced difficulties transferring interviews that the Copyright Act says I own from my Sony digital tape recorder. For a long time, I had to take time to play them manually through the speaker on my computer, which was a colossal waste of time. Thanks to Digital Rights Management, I've had to pay for music I already own. I've even had to pay for a copy of one of my own stories. Those arguing against such practices seem very open to finding different ways to pay creators. It would be nice to see if together, creators and technology-prone activists could come up with solutions that would take some of the control out of corporate hands.

The most difficult of my copyright-oriented conversations were with archivists, education administrators, teachers and librarians who argued in favour of copyright exceptions for schools, including those conducted electronically. I agree with the need for a strong, vibrant public domain that's open to everyone, but their suggestions always take money out of my hands in order to put it into theirs. And while all of them struggle to make small budgets go further, I still see them in a much better position than I. They were all being paid salaries to attend the meetings, while I attended on my personal time. As a researcher, I have to pay to use their libraries and their technology, but they don't want me to be paid for the works I contribute to their collections. Even though both of my children attend "free" public schools, I have to pay for many of the materials used. If I ever want to take a course myself, I'll have to pay for it. These conversations were like arguing with your best friend.

In some cases, educators' concerns seemed outlandish. At one meeting, a group of people from a school outside of Quebec brought in a student's work that was nothing more than a collection of texts and photos all pulled directly from the Internet. It was formatted quite nicely, I admit, but it contained no original content. The educators used the project as an example of how Canada's Copyright Act makes honest student work illegal. As a parent, I was horrified. Schools should be teaching children creativity, not the ability to use computers to gather together other people's work and claim it as their own. If the Copyright Act eliminates these kinds of projects from schools, it's doing what it should.

In another conversation, I heard about a self-published writer whose entire book was photocopied multiple times for use in a classroom. Instead of purchasing copies of the book from her, the school purchased only one copy and paid for the paper and ink instead. Not only did she lose some income, but her reputation was damaged because the copies were less legible than they should have been and they had her name on them. Students had no way of knowing that her books were of a higher quality than those they used in school. During that conversation, I realized then that all creators face similar risks. I want my work to be used in schools if it fits in the curriculum, but I'd like to be paid something for the use and I'd like to have some control over how suitable the use is. Teachers don't like to hear about schools being considered markets, but no one denies their right to a salary. No one asks the snow clearing companies, the furniture manufacturers, the garbage can

companies, the paper companies or even the computer companies to donate their products. Educators argue that using my work in their classrooms doesn't take anything away from me, but if I can't earn anything from the use of my book, I can't house, feed or clothe myself.

Copyright law in Canada also protects students' work from exploitation by educators because copyright here exists in work as soon as it's created. Not only does that save me registration fees for the work I produce for my business, but it also protects the work of my children and ensures that their test answers, essays and drawings can't be widely distributed without their knowledge. I've faced several situations in which I had to help my children decide how their drawings, songs, and texts should be used both in school and on the internet and am relieved that their right to control how their work should be used is protected in law. I was once horrified to see a book by a former teacher that included the work of many of her previous students without any mention of whether or not they agreed to have it included. I trust that such a thing couldn't happen in Canada

I do have some concerns over the fact that copyright belongs to the person who originally "fixes" something, except in the case of photographs, in which the person who pays for the film holds copyright in the work. This clause is crucial to my work as a journalist in that subjects could change their mind about making comments to me, but I'm not so clear about whether it should apply in the case of my children. I've had to decide whether to use or allow the use of my children as subjects several times. Should they be interviewed by the local radio station? Should pictures of them appear in the local newspaper? Should their photographs be used on an Internet site? Should I include them in stories that I write? I wonder whether the law should specify that some subjects have approval over the use of their images or words in some cases.

How should existing laws be modernized?

A modern Copyright Act should enhance creation by separating the needs of people from that of organizations, whether public or private. Such a law would be straight forward and technologically neutral.

Copyright law in Canada has been described as a balance between users and creators. This idea simplifies the case. Copyright law actually has to balance the

needs of at least four direct players—creators, users, publishers/distributors and subjects (the person or people interviewed, filmed or photographed) while clarifying the non-creator role of directors, editors and other people who influence creation.

None of the other people can hold their roles without an original creator, so creator needs should take precedence.

With the right balance within copyright law, creators could spend their lives creating without being exploited or exploiting anyone else. They could produce work for a fee and employ others, or they could place work in the public domain. After they die, they could leave a strong legacy for their heirs and know that their work will remain in the public domain. We wouldn't have any cases of companies or organizations getting paid when the original creator got nothing. Musicians wouldn't be sued for sounding like themselves.

A modern bill would do well to address the following issues.

- A distinction should be made between creator copyright, which should last a lifetime plus fifty, and the commercial or public licensing of a particular use of that work, which only needs to last for ten or twenty years. This would put work back into the hands of creators faster and would enable all work to eventually enter the public domain.
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