1997

The Copyright Amendments of 1997

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The Copyright Amendments of 1997: An Overview

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This paper discusses the amendments to the Copyright Act of Canada introduced in 1997, some of which are yet to be proclaimed. The extent of the new neighbouring rights, introduced to enable Canada to comply with the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961, is discussed, as is the proposed new blank tape levy. The paper also discusses the new exemptions relating to educational institutions, libraries, archives and museums, and other miscellaneous reforms introduced by the Act.

1. INTRODUCTION

An Act to amend the Copyright Act (“the 1997 Act”) was enacted as S.C. 1997, c. 24, on April 25, 1997, exactly a year after Bill C-32 was introduced into the House of Commons. It was quite a year. Discussion of the bill produced in Parliament the usual passionate, if irresolute, speeches about globalization, culture and level playing fields; bewildered parliamentary committees were treated to a parade of witnesses wringing their hands and bearing all the trappings of Chicken Little bar the plumage; scores of conferences were convened, their object being to find out how the proposed legislation would affect some group or another. Meanwhile, the man or woman on the Yonge St. omnibus found a hundred more pressing things to ponder.

Order-in-Councils were quietly passed, making much of the Act effective as from September 1, 1997. Other portions await the passage of regulations before they will be proclaimed, while still others have not been proclaimed because the government may be having second thoughts about them.

The public apathy was perfectly understandable. Few people identify with copyright. Even Jack McClelland, who should have known better, is reported as having once said that copyright law was “the most boring subject known to man”, and promptly passed it to his lawyers to deal with. The media do little to educate; what they do say is more designed to soothe than to inform, for they are hardly disinterested parties on the subject of copyright.

Yet copyright deserves more of the public’s attention if only because, like the environment, it is everywhere whether as a sweet wafting smell or pollutant depends on one’s point of scent. The building in which a conference on copyright is held; the pamphlets advertising the conference; the notes participants scrawl about what later speakers say; all may be protected by copyright law. Some have even claimed that conversations may fall under copyright. Last year, Glenn Gould’s estate tried to claim copyright in the words he spoke to an interviewer in the 1950s, at a time when Gould still gave interviews. The claim failed, but that very year Parliament created a new copyright for improvisational performances, thus raising the issue of whether there is any legal distinction between Gould’s grunts during his assaults on the piano and his grunts during his assaults on an interviewer’s ears.
Why, then, all this copyright in the 1997 Act? Not because Canada was under any international obligation, although the government can now adhere to the latest (1971) version of the Berne Convention for the Protection of Literary and Artistic Works and the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. Rather, those whose job is to develop official copyright policy feel that more copyright will bolster Canadian culture, create jobs, and promote "fairness" (as the news release accompanying Bill C-32 claimed). This is not the time to debate whether these assertions have any substance or result simply from superficial analysis and self-delusion, fuelled by the constant propaganda generated by the copyright industries and their satraps. One may simply note that today's "creators" see nothing inconsistent in demanding tolls for activities from which they freely profited in the past in the course of making their own productions. The Golden Rule is hardly the metewand of the Me Generation.

The 1997 Act has continued the process of making copyright more ubiquitous. The final Act reflects the original Bill C-32 of April 25, 1996, although some significant amendments were made by the Standing Committee on Canadian Heritage and later by the House of Commons on third reading. Copyright holders get more rights and more money. In particular, record companies and performers will get money whenever records are played in public, on the radio or on television; book wholesalers with exclusive distribution agreements get powers very like those of copyright holders; some public institutions and deserving causes get some relief from copyright's intrusion, though often only at a price payable to copyright holders or their collecting societies; and copyrights generally are made more pervasive and marketable.

These features particularly the greater centrality of the role of collecting societies in the scheme of copyright became more prominent as the Bill progressed to final reading. The Bill originally gave some exemptions to the non-profit educational sector and to non-profit libraries, archives and museums, to recognize long-standing copying practices. Many of these exemptions are now gone if a collecting society is around to sell a licence. The Act also eventually gave broadcasters a break to make temporary copies of performances and records to facilitate transmission, but this was no free lunch. Broadcasters do not have to chase up individual copyright holders; but if there is a collecting society around that can license the activity for a fee, the broadcaster has to pay up or risk infringing copyright. 2

These broadcaster provisions are not yet proclaimed.

*56 The only exemptions added to Bill C-32 after its introduction that did not specifically refer to collecting societies relate to non-profit archives (yet to be proclaimed) and perceptually disabled people. In the case of non-profit archives, this seems understandable. Depositors already got tax breaks when they put their papers in an archive (Pierre Trudeau reportedly received a $1 million credit on depositing his personal papers in 1993 with the National Archives); they can bar copying anyway simply by telling the archive; no collective society currently administers unpublished works, and there seems little reason to encourage one to form. In the case of deaf and blind people, the collecting societies presumably withdrew for strategic reasons. Having consolidated their potential revenue streams in the educational and broadcasting sector as Bill C-32 came out of committee, copyright owners could show a little magnanimity by not insisting on full control over all forms of alternative formats that they themselves had no interest in producing. Still, the alternative format exemption is hedged around: the copyright turnstile keeps on turning with only the occasional interruption.

2 RECORD PRODUCERS & PERFORMERS: PARTY TIME!

Record producers and (maybe) performers will now get more money, since they can now charge for (a) broadcasts and public performances, and (b) (after these provisions are proclaimed) blank audiotapes made in or imported into Canada ("neighbouring rights").

(a) Charges for broadcasts & public performances
Music publishers, composers and lyricists get money when their output is broadcast or publicly performed; so too now will record producers and performers. So when a record is played at a ski run, the ski operator will now pay an extra fee to a collecting society, to be split 50:50 between the record company and the performer/s. When a record is played on radio or television, the record company and performer will also get a cut of the station's advertising revenue.

3 Act, ss. 19(1) & (3). SOCAN royalties will not go down: s. 90.

The benefits go not only to Canadian performers and Canadian-based record companies, but also to those based in Rome member states. Records made by Canadian subsidiaries of U.S. companies and first released simultaneously in both countries also qualify. U.S. performers and U.S.-based record companies do not benefit directly, since the U.S. does not belong to the Rome Convention and does not itself provide comparable benefits. Canada can include the U.S. or any other non-Rome member that grants Canadian companies and performers reciprocal treatment, but this technicality has not stopped the U.S. from threatening retaliation for this perceived slight to its entertainment industry.

4 Act, ss. 2.11, 15(2), 18(2) & (3), 20.

5 Act, s. 22. The Minister can, if requested by a NAFTA country, extend the right to US or Mexican performers and record companies for "dramatic or literary works": Act, s. 20(3).

So music producers are big winners here. In their incarnation as music publishers, they receive half the SOCAN royalty for broadcasts and public performances, and dubbing and synchronization fees whenever a record is copied for any reason. Now, on top of this, in their incarnation as record companies, they will get a further half share of the new broadcast and performance royalties. If history is any judge, some may even try to get hold of the performer's share as well, by slipping some fancy language into the recording contract. Contracts written before April 25, 1996, may be made immune from this ploy because of a transitional provision added in committee, but those written since may not. Presumably performers' representatives on the collecting societies that enter the field will try to ensure that the 50:50 split the Act mandates will override any different terms in recording contracts.

6 Act, s. 25; Amendment Act, s. 58.1 (not yet proclaimed).

The broadcast fee will be set by the Copyright Board and will presumably be comparable with the current SOCAN rate for authors and publishers. There are two important exceptions. First, small broadcasters are protected by a provision that sets a fee of only $100 payable on the first $1.25 million of annual advertising revenues (down from $1.5 million in the original bill). Second, fees beyond this are phased in over three years (down from five years in the original bill).

7 Act, s. 68.1.

Don't expect record companies and performers to rest content with these new revenue streams. The immediate future will no doubt see them pushing for the same benefits as authors have or, more realistically, the same benefits as the distributors that derive their rights from authors. The flat 50-year term the Act now gives record companies and performers may eventually turn into the life-plus-50-year term for ordinary copyright. Performers and record companies may also push for a similar cut from the retransmission royalties that cable companies pay music publishers and authors something the present Act denies them.

8 Act, ss. 23(1) (4).

9 Act, s. 19(1), closing words.
(b) Charges for blank audiotape

It has become customary within the music industry to blame declines of record sales, not on shifting tastes in consumption or poor management within the industry, but instead on unauthorized copying by people who would otherwise have bought the record. Thus, European and other countries have been persuaded to establish a levy on blank audiotapes to compensate for unauthorized copying.

Canada has now followed suit. Copying commercially recorded music, at least for private use, will not now infringe copyright. Makers and importers of any blank “audio recording medium” mainly audio-cassettes, reel-to-reel tape, and presumably also some compact disks must pay a collecting society a levy on every unit sold or, on default, risk being penalized to pay up to five times this sum. The Copyright Board will fix the amount and distribution of the levy. The money is to go to collectives representing eligible composers, lyricists, performers, and record companies, but it will be up to the Board to fix the shares for these groups if they do not reach an agreement among themselves.

In the original bill, the Board had to look at comparable rates abroad and consider the nature of the recording business in North America in deciding whether any proposed tariff was “just and equitable”. This requirement was modified in committee and the Act now simply requires the Board to consider whether the proposal is “fair and equitable”, having regard to any criteria prescribed by regulation. Whether any criteria will be prescribed is as yet unknown. Meanwhile, the Board will presumably not spend much time ruminating on whether a proposal can be “fair”, yet not “just”, or whether a fair or just proposal can still not be “equitable”. Why it was thought necessary to rummage through a thesaurus to tell the Board that it must do what it would have done anyway reach the fairest solution available remains a mystery.

The beneficiaries of the levy are carefully targeted. All Canadian composers, lyricists, performers and record companies qualify, but so do virtually all non-Canadian composers and lyricists: they are “authors” and, if they come from a Berne or World Trade Organization (WTO) state, must be treated equally with Canadians. Beyond that, only performers and record companies from states that grant corresponding benefits to their Canadian counterparts can qualify; the Minister of Industry will designate qualifying states and contour the benefits to achieve reciprocity.

Some troubling incongruities remain. Those who record music are well protected, but nobody else is. So people who tape drama, comedy or recitation off records for private use risk infringing, even though they indirectly pay a levy that is distributed among those associated with the music industry. And the contours of what is and is not exempted from the levy are quite arbitrary. Computer disks, which can also be used to record and play back music, are exempt, presumably because they are more often used for other purposes such as recording data generated by the user himself. Blanks sold to associations representing people with perceptual disabilities, e.g., blind institutes, are not subject to the levy, presumably because the tapes will usually be used for exempt activities such as making talking books. But this idea is carried out only imperfectly. Thus, the individual who buys tape to make a “talking book” for himself, or the friend who buys tape to make the tape for him, has to pay the levy. So does anyone who wants to record her own original music,
private performance or entertainment, or an exempted fair dealing. So does the radio station or newspaper which buys tape for its reporters; so does the researcher who uses the tape to conduct oral interviews.

16 Act, s. 79, where “audio recording medium” is confined to media “of a kind ordinarily used by individual consumers for the purpose of reproducing sound recordings (to be proclaimed).

17 Act, s. 86 (to be proclaimed).

The underlying principle for the levy is supposedly “user pays”, but the mismatch between who pays and who gets the payment raises the question of whether the levy is a forced royalty or a disguised tax. In Australia, the distinction proved critical when tape manufacturers *60 attacked a very similar levy on constitutional grounds. Under the Australian constitution, taxation measures have to be introduced in a separate bill and cannot be mixed up with non-tax measures. A majority of the Australian high court decided that the blank tape levy really was a tax and was therefore invalid because it was included in a bill that dealt with copyright matters. 8 The result put the copyright part of the Act that dealt with matters other than blank tapes under a cloud of invalidity as well, forcing the Australian parliament to re-enact them. 9 Another attempt to enact a blank tape levy, this time in a separate bill, is under way in Australia. The Canadian constitution is different from the Australian one in this respect, so a constitutional challenge here on similar grounds is less plausible. But other dangers lurk for a measure that loses its copyright connection: e.g., it may have to pass muster under the general non-copyright obligations of international agreements like the World Trade Organization Agreement or the proposed Multilateral Agreement on Investment. This may include an obligation to provide national treatment, something the blank tape levy scheme currently lacks.

18 *Australian Tape Manufacturers Assn Ltd. v. Australia* (1993), 25 I.P.R. 1 (4:3 majority). The minority relied, inter alia, on Canadian jurisprudence to support the levy as constitutional, claiming that only levies raised as government revenue qualified as taxes.


3. BROADCASTERS

Broadcasters now have copyright in in-house originated programming and in schedules listed in television and radio guides (“compilations of literary work”). Until recently, they were thought to have no copyright in their schedules as broadcast (the “broadcast day”). However, in 1996 the Copyright Board decided that a NAFTA amendment to the Act reversed this position and that broadcasters could now claim copyright in the sequence of their programming as a form of compilation. This decision allows broadcasters a modest share in the retransmission royalties cable companies have to pay copyright owners. 20


The Act overlays these author’s-life-plus-50-year copyrights by giving broadcasters located in Canada or a WTO or *Rome Convention* *61* state a further 50-year copyright over unauthorized recording and reproduction of their transmissions originating from that state. They can also control the viewing of television programming in places where the public has to pay an entrance fee to view. 2

21 Act, ss. 21 and 22.

This moderately good news for broadcasters is tempered by the new liabilities noted earlier: broadcasters now will have to compensate record companies and performers for airing sound recordings. Broadcasters took this opportunity to plead
the case for greater freedom to copy records for technical reasons. They felt put upon by a Supreme Court decision in 1990 that held that they could not make recordings, even where they had copyright clearance to air the material and they needed to record only temporarily for technical reasons to facilitate the broadcast. If the broadcaster's initial authority did not clearly include an additional right to record, the Court said the broadcaster had to buy a further licence from the copyright owner. 22


Bill C-32 gave broadcasters some relief in this respect. Thus the fair dealing defence was broadened beyond a “newspaper summary” exception to “news reporting”, 23 encompassing all non-print media. Broadcasters may not need as many clearances as they now take. For example, the comparable U.K. provision allows the taping of highlights from broadcast sporting events, over which a rival broadcaster may have exclusive rights, and the free exhibition of short clips from them in sports news programs shown during the 24-hour period following the initial telecast. 24

23  Act, s. 29.2.


Other exemptions in Bill C-32 were more modest. They allowed a building to be freely filmed and copyright material to be incidentally and non-deliberately included in other material; 25 so broadcasters could, when filming a live parade, include buildings and the advertisements that lined the route in the film as if any advertiser would not have died to get this additional free publicity anyway. But this right to broadcast the parade did not necessarily entitle the broadcaster to make a simultaneous film (e.g., for a delayed broadcast in another time-zone) or to record any material for technical reasons in other circumstances. So the Act went some way to help broadcasters out in these respects by 62 adding two new exemptions (yet to be proclaimed). The first, introduced in committee, allows a temporary recording of a live performance, including any accompanying sound recording, to be made to facilitate later transmission by the broadcaster or its network, where the broadcaster already has the authority to broadcast. 26 The second exemption, introduced at third reading, allows sound recordings owned by the broadcaster to be temporarily copied to more appropriate formats for broadcasting. 27

25  Act, ss. 30.7 and 32.2(1)(b).

26  Act, s. 30.8 (to be proclaimed).

27  Act, s. 30.9 (to be proclaimed).

These are modest exemptions. They do not allow recordings to be synchronized with other material or routinely archived; the temporary recordings have to be deleted within 30 days; and neither exemption applies where a collective society can license the exempted activities. The practical result seems to be some savings in transaction costs. Broadcasters may not have to negotiate or include another line of text in some exhibition agreements to make temporary recordings. Nor will they have to chase multiple copyright owners for clearances to make temporary recordings: if there is a collective society around, they will have to deal with it alone; if there is no collective around, they pay nothing and simply rely on the statutory exemption.

4. EXCLUSIVE BOOK DISTRIBUTORS 28

The Act gives book distributors with an exclusive distribution agreement the right to stem parallel imports and unauthorized distribution of books that would otherwise undercut their sales. Eligible distributors must have a written
contract from the holder of the Canadian copyright to distribute the book exclusively in any part of Canada or for a particular market sector (e.g., to schools). They can enlist the aid of Customs to halt imports at the border but, to get the usual injunction and damages remedies against an unauthorized importer or distributor, they must first notify it of the exclusive agreement in a time and manner to be prescribed by regulation.  

29 Act, ss. 27.1, 44.2 and 2 (def. “exclusive distributor”) (yet to be proclaimed). The new statutory damages remedy is, however, not available: s. 38.1(6)(c) (yet to be proclaimed).

Regulations setting out performance standards for exclusive distributors are supposed to be made before distributors can resort to the new provisions. Presumably, dilatory or high mark-up distributors will be stopped from relying on the new rights. Meanwhile, a transitional anti-stockpiling provision allows any exclusive distributor dilatory, high-priced, or not to take action against unauthorized imports (other than used textbooks) made after June 29, 1996 and still in the importer’s or distributor’s inventory on April 25, 1997. The importer or distributor must, however, have been notified earlier of the exclusive distributorship and of the new ban on parallel imports.

30 Act, s. 2, def. “exclusive distributor (para. (b)); s. 2.6 (to be proclaimed). The standards do not apply to imports made between June 30, 1996 and June 24, 1997: Amendment Act, s. 62(2).

31 Amendment Act, ss. 62 and 63.

Some imports can legally slip through the net without objection from the exclusive distributor: one copy for use by a non-profit library, archive, museum or educational institution; two copies for a person’s own use; any number of copies for use by a government department; and any number of used books. An amendment made in committee, however, took scientific, technical or scholarly textbooks for use in a course of instruction within an educational institution off the exempt list. Since “educational institution” as used in the Act means only a non-profit institution, it seems that for-profit schools can import used textbooks without objection. Whether this is intentional policy or a mere slip is unclear.

32 Act, s. 45(1) (to be proclaimed).

33 Act, s. 2 (def. “educational institution”).

5. NEW OR IMPROVED EXCEPTIONS

Some minor changes are made to the current exemptions, which are also rewritten to extend to the newly protected matter (records, performances, and broadcasts). The major new exemptions are designed mainly to benefit public sector institutions. As the bill progressed, some exemptions (particularly relating to the educational and library sector to be proclaimed) were tightened; some were added (archives and broadcasters to be proclaimed); and some were relaxed (perceptual disabilities). It was hard enough to discern any guiding principle in the original bill’s exemptions; even less emerges from the changes made by third reading. At times the process resembled an auction where everyone bids for a product whose identity is known only to the the auctioneer. Suddenly, the auctioneer calls a halt and announces, amid some cheers but mostly groans, what the goods are and who the successful bidder was. Kafka would have thoroughly approved.

(a) Classroom activities

The Act allows non-profit educational institutions (schools, school boards, universities, colleges), teachers and students to use material for tests and exams, copy work on to blackboards or for overhead projection, perform works live and play the radio, television or records in class. They may also tape news programs or commentaries (but not documentaries)
off-air for classroom use within the year, and tape other programs off-air for 30-days' evaluation. Tapes kept beyond these periods would be subject to a royalty set by the Copyright Board.\footnote{Act, ss. 29.3 to 29.9; ss. 29.6, 29.7 and 29.9 are not yet proclaimed.}

Some obvious difficulties in these exemptions were overcome at the committee stage of the bill, but the exemptions still hardly capture the wide range of educational strategies presently practised in Canada. The exemptions do not cover much distant learning and so disadvantage students in remoter locations.\footnote{Most exemptions are limited to activities occurring “on the premises of an educational institution: see, e.g., ss. 29.4(1), s. 29.5 and s. 2 (def. “premises”).} They make no special provision for the Internet and so leave to argument the question of whether students and faculty who access websites from the classroom or library infringe copyright.\footnote{Act, s. 29.5(e), which appears promising does not clearly cover any incidental ephemeral reproduction of a website in the course of browsing.} The exemptions appear unaware of the different examination techniques used in education and clearly exempt only a narrow range. For example, students who precis a play in response to an examination question may infringe copyright: the relevant exemption covers only “reproduction” and, on a strict reading of the Act, a precis qualifies more as an adaptation (the conversion of a dramatic work into a non-dramatic work) than a reproduction.\footnote{See Act, ss. 29.4(2)(a) and 3(1)(b); D. Vaver, Intellectual Property Law; Copyright, Patents, Trade marks (Irwin Law, Concord, Ont.: 1997), pp. 68 and 73.}

\textbf{(b) Library photocopying of articles}\footnote{Act, s. 30.2(1) (to be proclaimed).}

Libraries, archives and museums can now make single photocopies of articles from newspapers and periodicals for patrons in certain cases without infringing. First, the institution has the benefit of any fair dealing defence the patron has\footnote{Act, s. 30.2(2) (to be proclaimed).} which is often the case now where the institution carries out the task as the patron's agent. More importantly, the institution can photocopy defined classes of work for persons doing genuine research or private study without making the impossible judgment of whether the amount requested is fair or not. The allowable class is a single copy of

- any article published in a scholarly, scientific or technical periodical;
- any article published in any other periodical or a newspaper that was over a year old; but this excludes works of fiction, poetry, and dramatic or musical works.\footnote{It is not yet clear whether any further regulations will clarify these terms. The borderline between a “scholarly, scientific or technical periodical” and the rest seems particularly blurry. Perhaps one can adopt a rule of thumb: the more polysyllables, the less glossy the paper, the fewer the pictures, and the more quickly the periodical cures insomnia, the more likely it will fall in the scholarly, scientific or technical camp. Perhaps a “glazed eye quotient” based on a formula applying such criteria could be developed by regulation. Inter-library loans are permissible if both libraries are non-profit and based in Canada, but it is not clear whether the copy has to be mailed or hand-delivered or whether it can be faxed or sent electronically. The Act does say that the patron cannot be given a copy in “digital form”, which might suggest that the sending library can send such a form to the receiving library.}
requesting library; but the Act nowhere clearly authorizes the making of a faxed or digital copy from the reprographic reproduction that alone is authorized, any more than it authorizes a library to download articles off an electronic database. The institution cannot charge a fee beyond covering its costs, including overhead.  

41 Act, ss. 30.2 (to be proclaimed) and 29.3.

(c) Library collections

Another set of exemptions allows non-profit libraries, archives and museums to copy material to maintain and manage their collections.  

42 In the original Bill, this activity often could not occur if a suitable copy was easily obtainable for a reasonable price. This restriction was narrowed further in committee. Even if no hard copy is available on the market, the institution has to try and locate a collective willing to license copying at a reasonable fee. 44 These requirements do not apply to copies made for “internal record-keeping and cataloguing”, “for insurance purposes or police investigations”, and “if necessary for restoration”. 45 This last phrase will obviously require interpretation: presumably it would not allow a library whose inventory was destroyed by fire to replace it by photocopies ordered from other libraries. And one may query why the exemption for copying for insurance purposes or police investigations applies only to non-profit institutions. Is it plausible to believe that a for-profit library or anyone else who makes a copy of a copyright work at the insistence of an investigating officer must first contact a collective society, and potentially compromise the investigation, just to avoid being a copyright infringer?

43 Act, s. 30.1. (to be proclaimed)

44 Act, s. 2 def. “commercially available”; s. 30.1(2) (to be proclaimed).

45 Act, s. 30.1(1)(d) (f) (to be proclaimed).

(d) Self-serve photocopying

Collective societies appeared again in the Act after the bill went through committee. Originally, non-profit educational institutions, libraries, archives and museums were exonerated from liability for infringement, for having photocopying machines available on their premises for the use of patrons, so long as a notice warning off copyright infringers was posted. The Act now limits automatic exoneration to institutions that have or are negotiating a licensing arrangement with a reprographic collective. 47 Non-licensed institutions are left with the uncertain prior law, which the Act does not attempt to clarify. The current law is probably that merely providing a photocopier for patrons to use does not make the institution an infringer just because some patron chooses to infringe, any more than a dealer who sells a gun authorizes the buyer to commit mayhem. But there is Australian caselaw that interprets authorization more broadly: to require institutions to post accurate and effective warning notes and to patrol photocopiers to keep users in line if the institution wants to avoid liability. 48 Collectives will of course bank on the expectation that risk-averse institutions prefer to buy a cheap licence at a certain fee, rather than a lawsuit with its usual open-ended price tag.

47 Act, s. 30.3(2), (3) (to be proclaimed).


(e) Archives

A special exemption for non-profit archives was first introduced in committee and slightly amended at third reading. It allows archives to make a single copy of any sort of unpublished work for someone doing research or private study. 49
The archive has to notify depositors that such copying may occur and, to let them then decide whether or not to prohibit copying at least if they own copyright in the deposited work. If the depositor/copyright holder then decides to restrict copying, the archive must comply until copyright expires. Other copyright holders may also later bar copying of their work.

50 Act, s. 30.21 (to be proclaimed). The archive cannot seek to profit beyond cost recovery: s. 29.3.

Transitional provisions cover already archived works. For works where the author died after 1947, the archive must try and locate the copyright holder to get consent to a copying; only if its attempts to locate are unsuccessful, may it then copy for a patron. The archive can copy works where the author died earlier without making searches, if the depositor/copyright holder did not bar copying on deposit or another copyright holder has not objected. This applies until the copyright for such works expires at the end of 2003.

The following points are of interest:

● Corporate archives, such as those kept by Bell Telephone or the Hudson Bay Co., may be outside the exemption because they probably cannot claim to be non-profit. 5

51 Act, s. 2, def. “library, archive or museum”.

● Broadcasts, sound recordings or performances are not exempted. Researchers may view or listen to them in private, or may copy them personally under the fair dealing exception if the archive permits them access. Oddly, no record of copying need be kept unless the archive itself copies for the researcher, acting as the latter's agent under the fair dealing exception; 52 and a non-profit archive need keep no records at all.

52 Act, ss. 30.5 (to be proclaimed) and 29.1.

*68 ● Archives could have an interesting time deciding who owns copyright. Suppose a deposit of material includes a set of letters passing between the depositor and various people. The depositor or the depositor's estate or a beneficiary, or the depositor's employer should have copyright in the letters the depositors sends; the senders of letters to the depositors or their estate or beneficiaries, or their employers will have copyright in those letters; while the copyright of any included photographs could be owned by virtually anybody: the sender, the sender's employer, someone else who owned the original negative, a freelancer who shot the film on commission, etc. In practice, archives will often have to guess and hope for the best.

● On top of that, archives and researchers must still comply with the general law. For example, someone depositing private letters may owe an obligation to his correspondents to maintain the contents secret. Just depositing the letters in an archive and revealing the contents to the archivist may break that obligation. Archivists and researchers may then become liable to the correspondents by disclosing or using material that they knew or should have known was confidential.

(f) Perceptual Disabilities

The original exceptions in Bill C-32 under this head were narrow. 53 They covered people who could not see or comprehend material well, but not those with hearing disabilities. A single alternative format copy or sound recording could be made where such a format could not be bought on the Canadian market, but further copies would have to be paid for.

53 Compare ss. 32 and 2 (def. “perceptual disability”) in Bill C 32 (1st rdg) and (3rd rdg).
The Copyright Amendments of 1997: An Overview, 12 I.P.J. 53

The exception was widened in committee to include deaf as well as blind folk. Multiple copies or sound recordings can now be made, including (as before) copies in digital form. A signed version of a work may also be produced and performed in public. There are, however, anomalies:

- No large print books can be made without permission, even where such a version is unavailable anywhere in the world. Of course, a talking version may be made, but this is not much help to a person who has both poor hearing and poor eyesight.  

54 Act, s. 32(2).

- No sound recording, broadcast or cinematographic work may be copied without permission.

- At first blush, it seems that anyone in the world can make the exempted copies, other than the person with the disability. The Act exempts organizations acting for persons with a perceptual disability or others who act “at the request of” such a person. The Act thus apparently discriminates against a class of the very people it is claiming to help: those who wish to rely on themselves, not others.

55 Act, s. 32(1). Compare Bill C 32 (1st rdg), where “any person” may make the alternative format copy.

- How far different alternative formats can be made where one alternative version is already on the market is unclear. Suppose a person with bad eyesight prefers to listen to tapes instead of reading large print books; and a large print book, but no talking version, is available on the market. Can the person request a talking version to be made? Literally, no: the Act speaks of works specially designed for a person’s “needs”, not preferences. The question is presumably one of degree: at some point, a preference will be held strongly enough for it to be classified as a need.

Some of these anomalies may be resolved by interpreting the Act consistently with the principles of equality mandated by the Canadian Charter of Rights and Freedoms and federal and provincial human rights codes. For example, would a court really interpret the Act to say that a person with bad eyesight infringes copyright if she makes her own private taped version of a book, but not if she asks a business enterprise or the Canadian National Institute for the Blind to make one for her? And one wonders how the carve-out of sound recordings, extemporary performances and cinematographic works might survive a full-scale Charter challenge on the ground that the Act arbitrarily discriminates against a class of persons with special perceptual needs.

5. REMEDY REFORM

Some reform of copyright infringement remedies was long overdue. For example, one old remedy allowed copyright owners to seize and sell infringing copies, and to recover almost the entire market price of the infringer's sold inventory. The way courts had interpreted the provision suggested that, if an artwork was painted without authority onto the side of a supertanker, the copyright owner could seize and operate the tanker for his own benefit, or sell it and pocket all the proceeds.  


The new Act abolishes this remedy, but vestiges remain. The supertanker could still be seized, but its owner can now ask a judge to release the ship and think up a more appropriate remedy such as painting over the infringing art. But policy makers still thought they needed to show how tough they could be on copyright infringers a group of deviants who apparently rival the operators of trucks with loose tires in the scale of evil. So a U.S. remedy called “statutory
"damages" was found. This lets a copyright owner get anywhere between $500 and $20,000 “as the court considers just” for any one set of infringements, and up to $100,000 if the infringement was wilful. 58

57 Act, s. 38.

58 Copyright Act 1976, § 504(c).

The Canadian Act contains a similar remedy (to be proclaimed), with some interesting variations. Although the U.S. automatic escalator to $100,000 is absent, the Act allows the imposition of punitive damages on particularly nasty infringers. 59 This is more severe than the U.S. rule, because in Canada there is no theoretical ceiling on punitive damages. The standard range, it is true, is typically $5,000 to $50,000, but an award of $15,000,000 was made a few years ago in a patent infringement case (although the judgment was later reversed on procedural grounds). 60 In the result, if I clip and fax a copy of an interesting newspaper article to a friend, I owe the copyright owner (typically the newspaper or freelancer who wrote the article) a minimum of $500. This can go up if I treat the copyright owner with contumely, but can drop to as low as $200 if I was “not aware and had no reasonable grounds to believe [I] had infringed copyright”. 6

59 Act, s. 38.1(1) (to be proclaimed).

60 Vaver, op. cit., p. 263.

61 Act, s. 38.1(2) (to be proclaimed).

Collective societies also have a new made-in-Canada debt collection remedy: they can with a few exceptions recover 3 to 10 times the amount of any royalty a licensee has omitted to pay. Bad bookkeeping may mean a treble penalty; bad manners may mean a tenfold one. 62

62 Act, s. 38.1(4) to (6) (to be proclaimed).

We may therefore be in for a new era of extravagant copyright demands and litigation where previously checks were turned because no provable loss had been suffered. The only realistic check on abuse other than self-restraint by copyright owners is the slight prospect that a court may deprive an over-reaching successful plaintiff of his right to recover costs from the defendant.

6. PHOTOGRAPHS 63

Bill C-32 as reported out of committee contained a new provision changing the rule that the first copyright in a commissioned photograph, engraving or portrait made “for valuable consideration” prima facie belonged to the customer, not the author. This position will now apply only where “the consideration was paid”. 64 The author therefore will be the first copyright owner of a commissioned work until he is paid; but on payment, the customer becomes the first owner. This creates obvious problems, quite apart from the oddity of declaring two people to be first owners when one chronologically comes second. For example, if before payment the copyright is sold by the author, by his trustee in bankruptcy or by a sheriff who has seized it to satisfy a judgment debt, does a payment by the original customer vest copyright in the latter or has the intermediate buyer a clear title? The location of copyright is not elsewhere in the Act tied to the time when a debt is paid. Whether jettisoning that policy in this case was wise may be doubted.

64 Act, s. 13(2) (to be proclaimed).
The duration of copyright for photographs has also been complicated by amendments made at third reading. The 50-year term will be retrospectively increased in some cases to the author's life plus 50 years, namely, where the author is a flesh-and-blood person. But who qualifies as the author remains the same: not the person responsible for the composition of the photograph, but the person who owned the physical negative or photograph at the time it was made. So a corporation can still be an author, and where it is, the term remains at 50 years from the making of the initial negative unless the author owns the majority of the shares in the corporation, in which case the term is again the author's life plus 50 years. This scheme has to be treated as an awkward first step toward a more rational scheme of protection for photographs yet to be devised in Canada.

65 Act, s. 10 (to be proclaimed); Amendment Act, s. 54.1.

*72 7. TECHNICAL REFORMS

The Act clarifies some technical problems that have been around since 1921 or that have developed since. The amendments either make copyrights more marketable or increase the power of copyright holders. For example:

- Copyright in unpublished works will be cut down from lasting potentially forever to the standard term of life of the author plus 50 years that applies to published works. 66

66 Act, s. 7 (to be proclaimed).

- Exclusive licensees and exclusive sub-licensees holding under a written appointment are, as well as copyright owners, able to sue for infringement. 67

67 Ibid., ss. 2(7) and 13(7). They must join the copyright owner in the action, except in interlocutory proceedings, proceedings to block imports at the border, and wherever the court thinks the owner need not be present: s. 36(2).

- Copyright transfers can now include the right to sue for past infringements if the parties so intended. 68

68 Act, s. 13(6), aligning the common law with the civil law: cf. Union Carbide Can. Ltd v. Trans Canadian Feeds Ltd (1967), 32 Fox P.C. 17, 33 4 (Ex.) (patents).

- Copyrights can now be divided more finely, and the results can be separately sold or licensed. 69

69 Act, s. 13(4).

- The 3-year bar on bringing infringement proceedings now clearly runs from when the copyright holder discovered or should have discovered the wrong, rather than when the wrong actually occurred. 70 There is no ultimate cap: someone could sue today for an infringement that occurred even in 1930.

70 Act. s. 41. The 6 month limitation for bringing summary criminal proceedings would be extended to 2 years. The discoverability rule just noted for civil cases would not apply: s. 42(4).

- Infringement proceedings may be brought by application, instead of action, to speed things up. The court may, however, switch to an action if this seems more appropriate. 7
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71 Act, s. 34(3) (7) (to be proclaimed).

*73 8. CONCLUSION

The 1997 Act comprises about 100 pages of dense text, to add to the remains of the Copyright Act of 1924 and its amendments. It starts off clearly enough. The first line says: “An Act to amend the Copyright Act ...” From there, it is all downhill. Those who have had to look at the Act—an activity that springs more from obligation than volition—know what I mean. *Finnegan's Wake* looks a breeze by comparison. The Act’s language is not user-friendly and is often infuriatingly vague. One object of the Phase 2 exercise, to “modernize” the Act, was not pursued to the extent it involved improving the comprehensibility of the Act’s language.

Even when the old Act was amended, there was no thoroughgoing attempt to remove obscurities or infelicities in the old language: a new coat of paint over the rusted bodywork was often thought enough. As an example, consider the new section 32.3(3):

No religious organization or institution, educational institution and no charitable or fraternal organization shall be held liable to pay any compensation for doing any of the following acts in furtherance of a religious, educational or charitable object: ...

The acts mentioned are performing a musical work, playing a record of it, or playing a broadcast of it.

This exemption mirrors the wording of the one it replaced, in force since the 1930s. That also stated that no named institution “shall be held liable to pay any compensation.” Other exemptions say more directly that “it is not an infringement of copyright” to do the named act. From this, one might infer that an institution doing the stated act does not have to pay money, but that the copyright owner can nevertheless, if it wants, stop the institution doing the act in the first place by getting an injunction against it. The owner could argue that the institution still infringes copyright by doing the act but that only one remedy—the right to obtain compensation—is taken away by the wording of the section. The argument is wrong, but some obscure caselaw must be excavated to prove this. 72 An avoidable obscurity has been perpetuated.


Sometimes the new Act creates a new obscurity. Occasionally its resolution may be helped by looking at the French version of the Act and comparing it with the English. Looking at the *Berne or Rome Conventions* may also help, although these are no longer appended to the Act, as the older versions of Berne were. Ultimately, however, the 1997 Act was the result of a juggling act to balance owner and user interests. The wisdom of a Solomon and the writing ability of a Hemingway were required. Unfortunately, neither person was around and the task fell on their spiritual surrogates in the government and in Parliament. Unsurprisingly, their efforts seem on occasion to fall short. The Act will need sensitive, sometimes heroic, interpretation to settle the ground rules that are going to be around for a while, probably till the next parliamentary review scheduled for 2000. Until then, it will take goodwill and a willingness all round to reach practical accommodations to make the system work with a minimum of friction. One hopes the bugs will be worked out by practice or amending legislation before Phase 3 comes to deal with the digital agenda.

Footnotes

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