

Copyright Law in The United States, Canada and the United Kingdom

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The United States and Canada owe much of the substance of their copyright law to the United Kingdom, although the policies of the three countries have diverged somewhat in the past 100 years. Significant legislation has affected copyright laws in all three countries over the past 40 years, due to technological advances and an increase in globalization. These changes have had a major impact on archives, particularly in the areas of fair use, unpublished works and professional training.

Significant Copyright Legislation of the Past 40 Years

Copyright law in the United States, the United Kingdom, and Canada share common origins and was relatively stable until the past 40 years. With the advent of the photocopier came new copyright laws as well as collective licensing mechanism and technological protection measures (Rimmer, 2004, p. 193). Changes made in the last 40 years have created divergences between the copyright policies in these three countries.

United States

The Copyright Act of 1909 was adequate to address copyright issues for the first 75 years of the twentieth century. Authors' rights were to "print, reprint, publish, copy, and vend" (MegaLaw, n.d., 1909 Copyright Act, § 1(a) Exclusive rights as to copyright works section). Libraries, archives, and museums relied upon the common law doctrine of fair use for permission to make copies. Two forces would bring about the need for a change: technological changes and a growing awareness of the international community. Several major pieces of legislation included the Copyright Act of 1976, the Digital Millennium Copyright Act (DMCA) of 1998, and the Copyright Term Extension Act (CTEA) of 1998, as well as many other amendments. Internationally, the US became a Berne signatory in 1988, establishing copyright relations with

24 countries. The US signed the Uruguay Round Agreements Act in 1994, implementing the General Agreement on Tariffs and Trade (GATT), which included Trade-Related Aspects of Intellectual Property (TRIPS).

The 1976 Revision of the U.S. Copyright Act, 17 U.S.C., made major changes to many areas of the 1909 Copyright Act, including copyright term, scope and subject matter of covered works, inclusion of fair use and exclusive rights, notice, registration, infringement, and defenses and remedies. For the first time, federal copyright law applied to unpublished works, and libraries and archives were given explicit reproduction rights. The law codified fair use and established four factors to determine fair use. The factors were the purpose of the use, the nature of the copyrighted material, the amount of the copied material related to the size of the work and the effect of the use on the potential market for the work (Association of Research Libraries, 2002, p. 4).

The Copyright Act of 1976 included exceptions for preservation and replacement, patron research, newscasts and orphan works in the last 20 years of term as well as limitations of liability and clarification on fair use and contracts.

The Copyright Act of 1976 provides exceptions for libraries and archives to the exclusive rights of authors to copy publish or recopy under certain circumstances and conditions (17 U.S.C. Ch.1 § 108). Subsection 108(a) outlines four conditions for permissible copying. Only one copy of a work can be made, unless otherwise specified. Copies must not be made for commercial advantage, direct or indirect. Collections must be accessible to the public or to other researchers in a specialized field as well as researchers affiliated with the particular library or archives. All copies must have a copyright notice that is identical to the one in the work being

copied, or, if there is no such notice, carry a statement that the work may be protected by copyright (this latter provision was part of the 1998 DCMA amendment).

Libraries and archives are permitted to make up to three copies of unpublished works, for the sole purpose of preservation, security or deposit for research use in another library or archives if the work is currently in the collection and if the copy is not distributed or made available to the public outside the premises of the library or archives. This provision was designed specifically for archival collections, in that many items in such collections are unpublished and require considerable preservation (Rasenberger & Weston, 2005, p. 25). Initially this provision applied only to a single copy but this was later extended to three copies as amended by the Digital Millennium Copyright Act of 1998 (DMCA). Conditions for this are that the work must already be part of the library or archive's collection and that the distribution rights are limited to the physical premises of the institution doing the copying. Replacement rights are for works that are "damaged, deteriorating, lost, stolen or in an obsolete format (17 U.S.C. § 108(c)). First, however, the library must determine that an unused copy at a fair price is not available from either trade sources or the copyright owner. Digital reproductions cannot be made available outside the premises. This provision would ensure that works in the collection could be preserved in a usable form despite environmental changes beyond the control of the library or archive (Rasenberger & Weston, 2005, p. 27). Reproductions made under this provision would carry the same rights of distribution of the copy as to the original, and allow one library to make copies of works for another library. DMCA added a provision to permit making a copy to replace an obsolete copy.

Provisions permit the making of one copy of a single article or a small part of a larger work for a patron if the work is in the collection, and the copy is for research purposes, among

other restrictions. Libraries are permitted to copy and distribute a limited number of copies and excerpts of news programs, meaning daily news broadcasts from national television networks (17 U.S.C. § 108 (f)(3)).

Several provisions in The Copyright Act of 1976 limit the liability of libraries and archives. Nothing in §108 affects a library's fair use rights or its contractual obligations (Rasenberger & Weston, 2005, p. 31).

In 1998, the Copyright Term Extension Act (CTEA) extended the copyright term from the life of the author plus fifty years to the life of the author plus 70 years. An amendment to § 108 was made to address the problem of an increase in the number of older works that would be removed from the public domain, even if they were not available for purchase. This amendment provided that: a published work in its last 20 years of protection could be reproduced, distributed, displayed, or performed by a library or archives if the library or archives could determine that the work was not subject to normal commercial exploitation, a new or used copy was not available at a reasonable price, and that the rights holder had not notified the Copyright Office that the work was available or was subject to commercial exploitation (17 U.S.C., § 108(h)).

Also in 1998, the DMCA was signed into law. This law implemented World Intellectual Property Organization (WIPO) treaties signed in 1996 at the Geneva Convention. Provisions covered liability of online service providers and nonprofit institutions of higher education serving as internet service providers for infringement by users, criminalizes the circumvention of anti-piracy measures, and exemptions from anti-circumvention for non-profit libraries, museums and educational institutions, requires web casters to pay licensing fees to record companies (Biegel, 2001, p. 1).

Canada

The Canadian copyright statute, known as the Copyright Act (R.S., c. C-30, S.1), came into force in 1924 and was largely unchanged until 1988 when a series of amendments began the modernization process. Initial updates provided protections for computer programs, enhanced moral rights, exhibition rights for artistic works, increased penalties for violations and the creation of a new Copyright Board (Copyright Policy Branch, 2004).

A number of Statutory Orders and Regulations (SOR), and Parliamentary Bills has amended the Copyright Act in the years from 1989 to 2004. In 1997, Bill C-32 made extensive changes and in 2005, Bill C-60, was introduced to the House of Commons to make additional changes.

The Copyright Board (2004) lists 18 regulations on its Web site. Several regulations address issues concerning retransmission of broadcast signals. In 1989, two regulations (SOR/89-254 & 255) defined exceptions concerning the retransmission of broadcast signals, establishing royalty payments and defining small transmission systems. SOR/91-690 in 1991 established criteria for setting retransmission tariffs, while SOR/94-754 in 1994 provided for a preferential rate for small transmission systems. The term “broadcasting” was expanded to include all types of telecommunication. The Canada-US Free Trade Agreement that was signed in 1989 inspired these changes for compliance.

In 1993, Parliament passed Bill C-88, clarifying that the term musical work applied to both the graphic and acoustic forms of music and ensuring that all transmitters of musical works were liable for royalties (Copyright Policy Branch, 2004, History of Copyright Revision section, ¶ 3).

International agreements prompted several changes. In 1994, passage of the North American Free Trade Implementation Act required amendments to provide for rental rights for sound recordings and computer programs, permitting copyright owners to control the rental of their works, and increased protection against the importation of pirated works (Copyright Policy Branch, 2004, History of Copyright Revision section, ¶ 4). In 1996, the World Trade Organization Implementation Act, extended copyright protection to all WTO countries and gave performers increased protection against unauthorized uses of their works.

Canada's other international commitments include the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, known as the Rome Convention (signed in 1997), two World Intellectual Property Organization (WIPO) treaties (signed in 1997), and the Berne Convention (signed in 1998). The Rome Convention permits Canadian sound recording performers and producers to collect royalties for foreign broadcasts of their works. The two WIPO treaties cover issues of copyright in the digital environment (Copyright Policy Branch, 2004, WIPO Treaties section, ¶ 1, 2, International Context section, ¶ 3, 4).

In 1997, the House of Commons passed Bill-C32, which brought Canadian law into compliance with the Rome Convention and provided a number of exceptions of benefit to libraries, archives and museums, as well as to "persons with perceptual disabilities" (Library of Parliament, 1997, Summary, ¶ 2). The bill modernized the copyright registration system and provided booksellers with remedies against imports (Library of Parliament, 1997).

In 1999, a regulation providing guidelines for the Exception for Educational Institutions, Libraries, Archives, and Museums Regulation (Copyright Board of Canada, 2004, SOR/99-325) was enacted. The exceptions in this regulation allowed nonprofit libraries, archives and museums

to make copies for patrons who requested them for the purpose of private study or research (Copyright Board of Canada, SOR/99-325). This regulation defined the terms “newspaper” and “periodical” and set forth reporting requirements, which were later repealed. In addition, the regulation specified that copyright warning notices were required near photocopiers, (which, along with an agreement with a copyright collective that collect royalties for copyright owners) relieves the institutions of liability for patron infringement, stamping of copied works. These exceptions also apply to interlibrary loans. The regulation gives nonprofit archives the right to make a copy of an unpublished work deposited in the archive, as long as the copyright holder has not prohibited copying and that the copy’s use is for research or private study.

In June 2005, the Minister of Canadian Heritage introduced a new bill (C-60) to amend the Copyright Act to the House of Commons. The purpose of the new amendment is to “address digital issues surrounding copyright (Library of Parliament, 2005, Legislative Summary section, ¶ 1). “Digital technologies have permitted widespread copyright infringement on the Internet” (Library of Parliament, 2005, Background section, ¶ 3). Provisions in the bill will also bring Canada’s copyright laws into compliance with minimum standards established by two World Intellectual Property Organization (WIPO) treaties. The amendments would give authors’ and sound recording makers and performers control over making their content available on Internet. Additionally, attempts to circumvent “technological measures designed to protect copyright works” (Harris, 2005, p. 32) will be an infringement, as will removing rights management information in an attempt to conceal, or further infringement. Performers will gain full reproduction rights in sound recordings as well as moral rights in fixed and live performances. Internet Service Providers (ISPs) are exempted from liability when acting solely as intermediaries, although certain reporting requirements are specified. Some provisions on

education and research are included, among them, a provision that would permit the electronic delivery of academic articles (Harris).

United Kingdom

Major changes to copyright legislation in the United Kingdom (UK) in the past forty years begin with the Copyright, Designs, and Patents Act 1988 (CDPA-88) that overhauled and updated the Copyright Act of 1956. The law governing copyrights in the UK is in Part 1 of the CDPA-88 (Her Majesty's Stationary Office [HMSO], 1988). Important legislation that has since amended the law includes the Broadcasting Acts of 1990 and 1996, two Copyright Acts of 2002, and a Copyright Act of 2003. In addition, various Statutory Instruments (SI) implementing European Union (EU) directives have been enacted, covering computer programs, databases, cable and satellite broadcasting, rights in performances and duration of copyright term.

The portion of the Broadcasting Act of 1990 which amends the CDPA-88 concerns collective licensing for the inclusion of sound recordings in broadcasts and cable programs and criminalizes the use of unauthorized decoders for encrypted services (WIPO, 1990, Broadcasting Act of 1990 section, ¶ 1). The copyright related portion of the Broadcasting Act of 1996 include licensing provisions, additional penalties for unauthorized decoders and avoidance of terms seek to prohibit or restrict visual images used for news reporting permitted under fair dealing (HMSO, 1996, Broadcasting Act 1996, Ch. 55, Part VII § 137 et seq.).

The Copyright (Visually Impaired Persons) Act 2002 permits copying a literary, dramatic, musical, or artistic work in a format that is useable by the visually impaired person. The law permits copying a work in its entirety and applies to both published and unpublished works, which makes this provision applicable to archives as well as to libraries (Cornish, 2004, p. 15).

The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 amends criminal provisions in laws related to copyright, rights in performance and the use of unauthorized decoders to provide criminal as well as civil remedies for infringements (HMSO, 2002, chap. 25, Explanatory Notes: Summary section, ¶ 3)

In January 1996, the copyright term was extended to the life of the author plus 70 years by the implementation of the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297) to harmonize with a European Union Council Directive. This provision was controversial because it removed some works from the public domain since the previous term under the 1988 Copyright Law was life of the author plus 50 years (United Kingdom Patent Office, 1995).

The Copyright and Rights in Databases Regulations 1997 implemented EU provisions on the legal protection of databases, including them within the definition of literary work. The Act also introduces a “database right” that prevents extraction and reutilization of database contents, and providing copyright term of 15 years from the year in which the database was made, with substantial changes to the database giving rise to additional terms of protection (United Kingdom Patent Office, 1997).

The provisions of the Copyright and Related Rights Regulations 2003 (S.I. 2003/2498) relevant to museums, libraries and archives concern copying by librarians and archivists, fair dealing, temporary copies, educational copying, technological measures, sound recordings, broadcasts, and playing sound recordings in clubs (United Kingdom Patent Office, 2003).

This Act restricts copying by librarians and archivists to non-commercial purposes, both for published and unpublished materials. Fair dealing for research purposes is now restricted to non-commercial purposes. This provision has serious repercussions for any such institution

providing self-service copy facilities to its patrons. The new regulations will require a licensing scheme, or third party arrangements in order to permit copying for commercial research (Cornish, 2004, p. 8).

Fair dealing for criticism or review is additionally restricted to works that have been made available to the public, which could have implications for archives unless the act of storing a work in an archive is considered to be making it available to the public. The Act is not specific in its definition of this term (Cornish, 2004, p. 9).

The Act allows copying with a view to publication, provided that the work is kept in an archive, museum, or library open to the public, the author has been dead for at least 50 years, or the work is at least 100 years old. This does not apply to formats other than literary, dramatic, or musical works, thereby excluding films and sound recordings. Recordings of folksongs, which are by definition anonymously composed and performed, would require obtaining permission from the copyright owner where none exists (Cornish, 2004, p. 12).

The Act also modifies regulations for the amounts libraries and archives charge to perform copying for interlibrary loan and replacement copies.

Sound recordings have a copyright term of 50 years from the year in which they are made, or published or played or communicated in public. This has serious implications for archives that contain unpublished sound recordings less than 50 years old. If the recording were to be used in a performance or broadcast, the copyright would then be automatically extended for another 50 years (Cornish, 2004, p. 6).

Several other provisions concern broadcasts, temporary copies, and technological measures. A redefinition of the term “broadcast” excludes Internet transmission, unless it is transmitted by both broadcast and Internet. Temporary or transient copies made in the course of

normal electronic processes are permitted. The Law makes it an offence to tamper with any technological measure designed to protect copyrighted works, a provision that could interfere with users' rights under library privilege and fair dealing (Cornish, 2004).

Comparison of Copyright Laws

All three countries can trace their copyright history back to The Statute of Anne, but the three have diverged in several areas as their laws evolved from 1710. Perhaps most fundamentally, the three countries differ in their definition of what constitutes a copyrightable work. Rimmer (2004) characterizes the English standard for originality as “sweat of the brow” in contrast to the United States’ “creative spark” and says that Canada’s standard falls in between the two with originality requiring a “level of skill and judgment” (p. 193).

The three differ in several major areas, including fair use/fair dealing, copyright term, copyright of government documents (Crown Copyright), and moral rights.

Fair Use/ Fair Dealing

In the US, duplication and other instances of libraries’ use of copyrighted works were handled under the common law doctrine of fair use. The 1976 Copyright Act, § 107, set out the terms of the exception under this doctrine. Use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright” (Copyright Act (1976), 17 U.S.C. §107, ¶ 1). Although the “purpose and character” of the use include whether the use is for commercial or non-profit educational purposes, commercial use is not expressly forbidden. “This factor gives presumptive (but not conclusive) advantage toward fair use when the copyrights work is used for educational purposes instead of commercial purposes” (Dames, 2005, p. 40). The effect of the use on the potential market for the work is considered in determining fair use,

along with the nature of the work itself and the extent of the copied portion in relation to the whole work (§ 107, ¶ 1(1)-(4)). Subsequent amendments have “increasingly challenged and weakened” the fair use doctrine in the US, such as the DMCA. Critics called the anti-circumvention provisions of the DMCA “overreaching beyond the technologies needed to restrict piracy” and feared they would be used to restrict access to resources (Pike, 2002, Digital Millennium Copyright Act section, ¶ 1). Court rulings held that fair use could be satisfied in ways other than copying in the format of the original, that “the preference of a specific format by the user was not a significant element of fair use. Fair use, it seems, only meant some possible use” (Pike, 2002, Fair Use on Occasion section, ¶ 2)

Court decisions have emphasized the criterion of “private use”, such as the decision in the case of *Sony v. Universal Studio*, which involved recording a broadcast for later viewing -- time shifting). The Sony case created a “presumption against all commercial use” (Oakley, 1990, Section G (1), ¶ 8).

The economic analysis in determining fair use has become the most important, as technologies developed that would permit making copies available without compensation, such as electronic delivery from a database over a network. Fair use of unpublished materials is particularly important to archives. Court rulings have upheld the “old doctrine that gives the author the right of first publication” (Oakley, 1990, Section G (1), ¶ 10). In a case concerning a biographer’s quoting from the unpublished letters of J. D. Salinger, the court ruled that this was not fair use. Critics viewed the ruling as “presenting a major roadblock to the use of unpublished scholarly material, particularly manuscript collections” (Oakley, Section G (1), ¶ 10).

British copyright law has a more narrow definition than American law, particularly since the amendment to the law in 2003 that prohibited copying for commercial purposes whereas

formerly fair dealing covered research or private study (Cornish, 2004, p. 8). Any library, archive, or museum faces the choice of whether to supply documents to both commercial and non-commercial users. Users who are able to sign a copyright declaration testifying to the non-commercial nature of their research request can continue to be supplied under library privilege, or, in the case of self-service, under fair dealing. Commercial use would require the payment of a clearance fee, usually set up through a document delivery license, such as those provided by the Copyright Licensing Agency (CLA) a non-profit organization owned by the Authors' Licensing and Collecting Society and the Publishers' Licensing Society (Stratton, 2003, p. 2). A further stipulation is that copies made under fair dealing for research must carry "sufficient acknowledgement" of the source (Cornish, 2004, p. 8). Fair dealing for research or private study in the UK does not extend to sound recordings, films, or broadcasts (Cornish, p. 8). Fair dealing for criticism or review requires that the work has been "made available to the public" (Cornish, p. 9). Fair dealing for news reporting excludes photographs and requires acknowledgement of sources, unless such acknowledgement is impossible for "reasons of practicality or otherwise" (Cornish, p. 9).

Under Canadian law, the owner of a copyright has the "sole right to produce or reproduce a protected work or any substantial part thereof" (Ladd, 1983, p. 282) with exceptions as provided under the fair dealing clause in section 17(2) of the law. The Supreme Court of Canada stated that the fair dealing exception is a "user's right" and "must not be interpreted restrictively" (McLachlin, in Rimmer, 2004, Part 3, ¶ 5). This is in contrast to the US where "fair use is not a right; instead it is an affirmative defense" (Dames, 2005, p. 39). The Canadian Supreme Court has emphasized that fair dealing is for the purposes of research or private study with the term

research being broadly defined (Rimmer, Part 3, and ¶ 7). Fair dealing is “not limited to non-commercial or private contexts” (Rimmer, Part 3, ¶ 9).

Copyright Term

In 1993, the EU standardized the copyright term to life of author plus 70 years to accommodate the longer life spans of modern times, thus ensuring that “two generations of the author’s heirs would benefit from royalties” (Newman & Koehler, 2004, Duration of Copyright section, ¶ 2). The UK followed suit in 1995 (coming into force in 1996) with the Duration of Copyright and Rights in Performances Regulations 1995 (S.I. 1992 No. 3233). The US extended copyright term in 1998, further providing coverage for works made for hire, anonymous and pseudonymous works for the shorter of 95 years from date of first publication or 120 years from creation (United States Copyright Office, 2000, How Long Copyright Protection Endures: Works originally created on or after January 1, 1978 section, ¶ 1)

In contrast, Canada’s copyright term remains unchanged -- the life of the author plus 50 years. Term extension in Canada is being hotly challenged “on the basis that the protection accorded (life plus 70) far exceeds the intent of assuring the creator fair remuneration and, in doing so, unduly restricts the public domain” (Whitney, 2002, p. 270).

Crown Copyright

In Canada, government documents are those “created for or published by the Crown” (Canadian Intellectual Property Office [CIPO], 2005, Duration: Works of Crown Copyright section, ¶ 1) and are eligible for protection under copyright law. Copyright for unpublished work is perpetual in Canada until publication, after which it is 50 years following the year of publication. Anyone may reproduce many government publications without charge or permission

as long as he exercises due diligence as to accuracy and does not represent the reproduction as official (CIPO, ¶ 1).

An additional, broader right prevails in Canada, as well as in the UK: the right of royal prerogative, which stems from the 16th century. Royal prerogative gave the crown exclusive right to print “books of all kinds” (Sterling, 1995, Section 1, ¶ 1). Later copyright legislation has preserved those rights, although defining the relevant works has been difficult (Sterling, 1995; Vaver, 1995). The right is perpetual and does not require use or assertion to remain in force.

Canada’s Crown Copyright law has attracted much criticism, with critics calling it a “legislative monstrosity” (Vaver, 1995, ¶ 5). In one case, the government claimed ownership of a painting created by a prisoner because the prisoner painted it while he was technically an employee of the government, which pays prisoners a daily salary of \$6.

In the UK, Crown statutory rights cover “a work made by Her Majesty or by an office or servant of the Crown in the course of his duties” and subsist for 125 years from the end of the year in which the work was made. Commercial publication of a work 75 years after creation entitles protection for an additional 50 after publication (Sterling, 1995, Section II (2A), ¶ 1). Crown Copyright also applies to Acts of Parliament, the duration of which is 50 years from the year in which it receives Royal Assent (Sterling, 1995, Section II (B), ¶ 2). Additionally, Her Majesty may acquire copyright ownership through various “ordinary” means, such as by assignment or operation of law. Copyright acquired through these means is subject to the rules of “ordinary” copyright (Sterling, 1995, Section II (B), ¶ 1).

In the US, “works by the U.S. government are not eligible for copyright protection” (United States Copyright Office, 2000, Notice of Copyright: Publications Incorporating U.S. Government Works section, ¶ 1). The Copyright Act of 1976 defines work of the U.S.

Government as “work prepared by an officer or employee of the U.S. Government as part of that person’s official duties” (17 U.S.C. §101). The U.S. Government is permitted to hold copyrights transferred by “assignment, bequest, or otherwise” (17 U.S.C. §105).

Similarities between the Canadian and U.S. laws include Canadian provincial and municipal governments and U.S. state and municipal governments can claim copyright, since U.S. § 105 applies only to U.S. government works. Government contractors in both countries can acquire copyrights. Both governments can own copyrights abroad, and government employees engaged in non-official work can acquire copyright to those works (Vaver, 1995).

Arguments in favor of government copyrights are that controlling the copyright can insure accuracy inhibit inappropriate use of material, generate income, and control disclosure (Vaver, 1995). Arguments in favor of not copyrighting government materials are that incentive to produce is not needed, as the works will be produced anyway, the works of the government belong to the people, who have paid for them with taxes, prevent the government from exercising censorship, or withholding information (Vaver).

Moral Rights

Moral rights are the rights of creators of copyrighted works that include the right of attribution (“the right to claim authorship”), the right to the integrity of the work (to prevent destruction, distortion or mutilation) and the right to publish a work anonymously or under a pseudonym. “These two rights – the rights to claim authorship and the right to object to derogatory changes to a work – are known respectively as the rights of paternity and integrity” (Newman & Koehler, 2004, The Moral Right of the Author section, ¶ 3). These rights are distinct from economic rights, and the creator maintains moral rights of the work even if he should assign the economic rights

Canada and the UK explicitly recognize these rights, while in the US, moral rights pertain only to works of visual art, granted under the Visual Artists Rights Act (VARA) of 1990. This Act gave the author of a work of visual arts the right to claim authorship, or, in the case of a mutilation or distortion of the work that would harm his or her reputation, to deny authorship. The author also has the right to prevent the distortion or mutilation or the destruction of the work, copyright holders have control over modification to their works (U.S.C 17, § 106(a)).

Although the Berne Convention has a provision for moral rights, and the US is a signatory, the US considers that remedies are available in common law to protect these rights, and further legislation is not required (Newman & Koehler, 2004, Moral Rights in English Law section, ¶ 2). The Copyright Act of 1976 “specified that the Berne Convention was not self-executing and that our obligation to Berne can only be performed under explicit US law” (Hartnick, 2004, ¶ 5)

Effects of Copyright Law on Archives

The purpose of copyright law is to “Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings” (U.S. Const. Art. 1, § 8, cl. 8, in Rasenberger & Weston, 2005, p. 1).

The purpose of archives is to “select, preserve, and make available historical and documentary records of enduring value” for the fundamental purpose of promoting the use of the records (Society of American Archivists [SAA], 2005, § II, IV).

The two purposes are frequently at odds. Libraries and archives place a premium on providing access to their patrons, while authors and publishers place an emphasis on incentives and compensation. For the best outcome, “the core values of dissemination to the public and incentives to create should reinforce one another, not work at cross-purposes” (Rasenberger &

Weston, 2005, p. 1). “Intellectual property laws inevitably dictate limits on what can be done to make archival material accessible for users” (Maher, 2001, p. 63).

The Copyright Act of 1976, which extended federal copyright to unpublished works, “has had a pervasive effect on how archival work can be done” (Maher, 2001, Abstract, ¶ 7).

Archivists must balance the rights of authors and creators with the needs of users, and frequently must serve as a go-between between the two competing interests: informing users of the limits on use, and respecting the “limited monopoly rights” of authors as well as securing ownership rights from donors (Maher, 2001, ¶ 11).

This Act extended federal copyright to unpublished material, a provision that had particular impact on archives, which typically contain much unpublished material. This legislation, in conjunction with the rapid technological changes in document reproduction, made copyright a central issue for archivists. Before this act, unpublished material was subject to state copyright law that existed in perpetuity. As Maher (2001) observed, “the 1976 establishment of a statutory nature of copyright privileges and limitations was a major step forward for archivists” (p. 64).

The fair use/fair dealing exclusions have had perhaps the greatest impact on archives and their patrons. Archivists must be trained to understand the provisions and be able to communicate the information to the patrons to assure compliance. Record keeping and licensing requirements are also necessary.

Some of the most complex effects on archivists are related to the issue of permissible copying on behalf of or by patrons. Archivists in the UK must determine that copying done on behalf of a patron is not for commercial purposes (2003 changes in the law require that copying be for “non-commercial” purposes), and must provide and retain declaration forms filled out by

the patron that testify to this purpose. Archives must provide licensing schemes or other arrangements for patrons who have copying requirements that are for direct or indirect commercial purposes.

All three countries have special provisions for archives and libraries, and archivists must be knowledgeable about those provisions. Copyright law establishes clear limits on preservation copying, as well as limits on the types of works that can be copied. For example, in the US the provision does not apply to musical works, motion pictures, graphic works, or other audiovisual works except for news-related works. This limits the ability for archives to serve remote users by limiting their ability to provide reference copies to “conventional manuscripts” (Maher, 2001, Special Provisions for Libraries and Archives section, ¶ 7). “Archives provide the public with access to unique documents and manuscript collections” (SAA, 1997, Copyright Issues from an Archival Perspective: Fair Use section, ¶ 4), access that is limited if digital transmission is not permitted, a limitation that affects distance learning as well.

Term extensions directly affect the digitization efforts of libraries and archives, limiting the material that is available for digitization. Lengthening copyright term makes content unavailable for digitization even after that material has ceased to possess commercial value (Whitney, 2002, p. 270). “Given the difficulty that archivists and users have faced in trying to locate rights holders as they seek to publish the results of their research, we would all be better served by allowing copyrights in unpublished material to expire at an early date” (Maher, 2001, The Challenges Ahead section, ¶ 3)

The “sweeping effects” of copyright legislation on the abilities of archives to disseminate information has had a profound effect on the archive profession. The legal complexities require that archivist receive professional training on copyright law and issues, as well as participating in

public policy decisions on copyright issues. Archivists must serve as the public's advocate for a "free information society" (Maher, 2001, ¶ 12) against the commercial interests of the entertainment and information industries. "There is real danger that the short-term financial interests of media conglomerates will irreparably damage what balance currently exists among the interests of users and creators and content providers" (Whitney, 2002, p. 270).

Conclusion

While the copyright laws between nations might currently vary in regards to detail, the move towards globalization has led to greater standardization. The UK, US, and Canada all share the same roots in copyright law. Although they have developed somewhat differing policies, in order to adhere to international treaties such as the Berne Convention and the WIPO treaties, these laws are reaching convergence.

Changes in information technology and an increasingly global economy will require continuing changes in copyright legislation, as countries try to achieve a balance between the rights of authors and content creators and freedom of information. Archivists and librarians must remain active in the political advocacy on behalf of their user communities (Maher, 2001). The SAA (1997), in a position paper on Copyright and the Digital Environment, noted that the National Information Infrastructure (NII) was created with the same intent that motivated the creation of copyright – namely to "promote the progress of science and the useful arts" and should, therefore, remain a "freely accessible way to communicate information" (SAA, Position of the Society section, ¶ 2).

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