

Protecting and Enhancing Canada's Public Domain

A brief to the Legislative Committee on Bill C-32 by Mark Akrigg, founder of *Project Gutenberg Canada*, (<http://gutenberg.ca/>) a website distributing free digital editions of books in the Canadian Public Domain.

Executive Summary

Canada's Public Domain is at risk, and needs the active protection of the Parliament of Canada. The author of this brief, Dr. Mark Akrigg, makes two major recommendations:

1. A "Safe Harbour" provision for works more than 75 years old where the life dates of the authors are not known. This has long been needed, and will be absolutely essential if copyright terms for photographs are extended, as currently proposed in Bill C-32.
2. No extensions of copyright durations.

Specific language is proposed for related amendments to Bill C-32. These amendments are intended to be concise, straightforward, and uncontroversial.

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Background to this Brief

I am the founder of Project Gutenberg Canada, which was launched on Canada Day 2007, with the mission of providing free high-quality digital editions of books in the Public Domain. We give a place of honour in our collection to Canadian history and literature, in English and French.

The site has been very successful, and our volunteers have now produced more than 700 ebooks, which can be viewed at and downloaded from <http://gutenberg.ca/>. We offer our books at no charge, in HTML and plain Text formats. We use these open, public formats, with no digital rights management software, to ensure that our readers will never have to use proprietary software, and that these ebooks will never become obsolete. In particular, our Text versions are designed to be displayable on any computer with a display device, now or centuries from now.

Public Domain Versus Private Copyright: A Question of Balance

All original works start their life as the property of their creator, and many years later pass into the Public Domain. In the vast majority of cases, by the time these works reach the Public Domain their economic value is negligible, and the chief concern of public policy is to ensure that these works become available as part of Canada's Public Domain, so that anyone can use these works, or make them available to Canadians.

With the advent of the Internet, making works in the Public Domain available to the citizens of Canada has become far simpler than formerly. At Project Gutenberg Canada, we have made hundreds of works available once more that have been unavailable for many years.

The commercial value of copyrights is exhausted far more quickly than most people realize. The vast majority of books go out of print shortly after their original appearance, and are never reprinted. Very long copyright periods are dangerous to Canada's cultural heritage, because many original works are in essence gone forever by the time they enter the Public Domain. They have been forgotten, because they have been unavailable for such a long time.

Recommendation 1: A "Safe Harbour" Provision for Works More Than 75 Years Old Where the Life Dates of the Authors Are Not Known

This recommendation should be considered in connection with the proposed copyright extension for photographs in sections 6 and 60 of Bill C-32. This extension, if enacted, will cause gigantic problems, since it is extremely difficult to establish the life dates of the creators of most photographs.

A huge defect in the copyright law of Canada and most other countries is the basing of copyright duration on the year in which the author died. The problem with this is the assumption that the date of death is known for everyone. *This is very far from being the case.*

As anyone will see who visits our site, looks at our catalogue, and looks at the header of one of our ebooks, we take extreme care to ensure that our ebooks are in the Public Domain. Our documentation puts many university and national libraries to shame. This documentation includes not just the main text of the book, but also any preface, illustration, or photograph included in the book.

If I have an illustration for which I have the creator's name, but whose life dates are unknown, because of current copyright law I cannot use the illustration if it is less than 140 years old. I make the reasonable assumption that the author did not create the illustration before age 20. But I am also compelled to make the completely unreasonable assumption that the creator may have lived to 110 years of age. And to this I have to add the 50 years after the presumed year of death.

Barring the Public from Using the Public Domain

Here is a typical example of the damage caused by this situation. At the start of our digital edition of W. B. Munro's excellent book "The Seigneurs of Old Canada", we were compelled to our great regret to include the following note: *"A painting 'The Habitant' by [John H.] Macnaughton (fl. 1876-1899) has been omitted...it originally appeared facing page 96. The year of Macnaughton's passing is not documented. Canadian copyright law unfortunately makes no provision for orphaned works such as this which are almost certainly in the Public Domain, but for which definitive documentation of the author's lifespan cannot be found. Such works must regrettably be treated as still being under copyright."*

It is not just illustrations, but entire books that are affected. I actually had to turn down an ebook from Quebec that was published around 1880. Obviously there is statistically speaking no real possibility that this ebook is still under copyright. But Canada has statutory damages for copyright infringement, so I cannot take even the slightest risk in such situations, even when a work dates back to the middle of the reign of Victoria: our ebooks are free, we have no revenue, and consequently no resources for hiring lawyers or for paying damages. Statutory damages have little practical effect in discouraging infringement of private copyright. But in combination with increasingly complex rules about what is under copyright, **they are stunningly effective at denying the people of Canada access to their own property**: older works which are not fully documented. This denial of our rights is in effect a type of copyright infringement — we the public, who elect Parliament, are denied by Parliament the use of the Public Domain, which is our property.

The Copyright Act handles anonymous works admirably: they enter the Public Domain 75 years after their creation, or 50 years after their publication, whichever comes first.

Let me strongly suggest a similar provision for works by authors whose dates are not known. These works should enter the Public Domain 75 years after their creation.

This figure of 75 years is not chosen at random. When the U.S. joined the Berne Convention, they chose date of publication + 75 years as being equivalent to Life + 50, for use during their transition period. The intent of my suggestion is not to extend the Public Domain, but to reclaim that part of the Public Domain which has been fenced off from its rightful owner, the Canadian people.

I strongly suggest that statutory damages be abolished outright in non-commercial settings. Certainly they should not exist for works older than 75 years where there is no evidence of wilful copyright

violation. They hugely increase "copyright chill". Most countries' copyright laws do not have statutory damages: there is good reason for this.

Specific language for covering works older than 75 years where authors' life dates are not known

Early in 2009 the Globe and Mail and the Dominion Institute sponsored a copyright bill forum in which participants were invited to create a model copyright bill, to which I contributed a section handling this issue. Using this earlier work, I now propose a similar provision to the Committee:

Section 6 of the Copyright Act is amended by adding the following two subsections:

Works where the year of the author's death is unknown

6.3 Except as provided in section 6.4, where an author's identity is known, but the year of the author's death is unknown, copyright in the work shall subsist for a term consisting of the remainder of the calendar year of the making of the work, and a period of seventy-five years following the end of that calendar year, but where, during that term, the year of the author's death becomes commonly known, the term provided in section 6 applies.

Works of joint authorship where the year of death of one or more of the authors is unknown

6.4 Where the year of death of all the authors of a work of joint authorship is unknown, copyright in the work shall subsist for a term consisting of the remainder of the calendar year of the making of the work, and a period of seventy-five years following the end of that calendar year but where, before or during that term, the year of death of one or more (but not all) of the authors becomes commonly known, copyright shall subsist for whichever of the following terms ends later:

(a) the life of whichever of those authors dies last, the remainder of the calendar year in which that author dies, and a period of fifty years following the end of that calendar year, and

(b) the remainder of the calendar year of the making of the work, and a period of seventy-five years following the end of that calendar year.

Where, during that term, the year of death for all of the authors becomes commonly known, the term provided in section 6 applies.

Recommendation 2: No Extensions of Copyright Durations

The objective of copyright law is to encourage the creation of original works by ensuring that the original authors benefit from these works. Canada's copyright durations are more than long enough to ensure that this is the case.

It is worth noting that until very recently copyrights in the United States lasted only twenty-eight years, with a single extension of twenty-eight years being available if copyright renewal was applied for. Clearly these rules did not discourage American novelists from writing their novels, the Hollywood studios from making their films, or American musicians from creating their music.

In the summer of 2009 the Government made the admirable decision to hold a Copyright Consultation with the public. According to figures published by Professor Michael Geist in his website's blog entry of 9 April 2010 (<http://www.michaelgeist.ca/content/view/4946/125/>), there were an astounding 5,520 submissions in favour of shorter copyright terms or against extending copyright terms, and 5 submissions that favoured extending copyright terms, or were opposed to shortening them.

Parliament has no mandate whatsoever for any copyright extensions. If any changes in copyright terms are to be proposed, it appears that *by a margin of 1000 to 1*, the Canadian people would prefer to see terms shortened rather than lengthened. A very good start on this would be to abolish Crown copyright, so that documents paid for by the public would immediately form part of the public domain, as has always been the case in the United States.

Bill C-32 currently includes two unfortunate extensions of copyright, one involving photographs, and the other involving audio recordings.

Copyright for Photographs

Bill C-32 proposes extending the copyright for photographs owned by corporations to the life of the author plus 50 years: currently the copyright duration is 50 years from the time the photograph was taken. But this would do nothing to encourage the creation of new photographs, and instead would damage Canada's cultural heritage by making it even harder to determine when a photograph enters the Public Domain. And it would not benefit the original photographer.

By way of contrast, until 1997, all photographs entered the Public Domain fifty years after they were taken. It was easy to determine whether a photograph was in the Public Domain, and the fifty years ensured that the original author received the full financial benefit of creating the photograph. It is difficult to exaggerate how beneficial this simple and straightforward system was to the Canadian people, by ensuring that our visual heritage was not put at risk.

It is unfortunate that this system was changed, so that many photographs now have a longer copyright depending on how long the photographer lived — particularly since it is in most cases impossible to determine when the photographer died.

But at least the government can leave the current law unchanged, so that photographs owned by corporations have fifty years of copyright, still an ample length of time, and so that the copyright status of these photographs is not in doubt.

The current crisis of Canada's archives: the Saskatchewan Archives Board as a case study

But leaving the current situation unchanged would not be an ideal outcome. In an eloquent submission to the 2009 Copyright Consultation (<http://www.ic.gc.ca/eic/site/008.nsf/eng/01676.html>), the Saskatchewan Archives Board made it clear that the botched 1997 Copyright Act revisions have created a crisis for Canada's archives. Their submission is of such critical importance that I need to quote it at length, emphasizing the most important portions:

“Copyright and Photography

“Without exception the biggest copyright issues at the Saskatchewan Archives Board revolves around the use of photographs. It is the one medium that researchers want to copy and reproduce in websites, publications, presentations, etc.

“Under the current copyright law, photographs have a different term of copyright protection depending on who is the author of the photograph. If the author is a corporation, the term is 50 years from creation. If the author is the photographer the term is the life of the photographer plus 50 years. The most problematic aspect of applying the current copyright legislation (regardless of the material) is that Archives Reference Staff typically do not know who owns the copyright to photographs in our

holdings. Again this problem is most obvious with photographs because we may not know who owned the photograph, who took the picture, or sometimes even when the photo was taken (making it nearly impossible to determine copyright). This has resulted in **staff functioning around the "pre-1948 public domain" rule, which means that rather than trying to work out and deal with the problems around copyright, more often than not, researchers will find a pre-1948 photograph to use in their research because they do not want the difficulties associated with trying to find the copyright holder for a later image. The inability to provide copyright information has meant that many wonderful post-1948 images are languishing in Archives and cannot be used by researchers.**

"The Saskatchewan Archives Board advocates for a fixed term of copyright protection for photographs. The term of fifty years from the creation that was used in the copyright law previously is preferable from an archival perspective. A fixed term makes it easier to determine the term of protection because the only information needed to make the determination is the date the photograph was created. As already stated, it is usually impossible to determine the creator of many photographs held in archival collections."

Historians are creators, but are being denied access to Canada's visual heritage. If this heritage is locked away from Canada's citizens Parliament can hardly make the claim that it is in any sense protecting our country's creators. Instead, it is hindering their creative work.

The Committee should recognize the completely avoidable crisis that has enveloped Canada's archives, and take action. At a minimum, the safe harbour provision for works older than 75 years is desperately needed.

Revisions to the Copyright Act should never involve attacks on the public domain. The damage done in 1997 needs to be repaired.

Specific language for photographs

Sections 6 and 60 of Bill C-32 should be deleted in their entirety.

Copyright for Sound Recordings

The current copyright duration for an audio recording of (for example) a Beethoven symphony is fifty years from the date of recording. The musical composition is itself already in the Public Domain, but a recorded performance carries a separate copyright of fifty years.

The very complex section 17 of Bill C-32 proposes that the copyright be not fifty years from the date of recording, but fifty years from the date of the recording's release.

This provision would encourage the hoarding of unreleased recordings. For each year a recording remained unreleased, another year would be added to its copyright! This is precisely opposite to the objective of copyright law, which is to encourage the creation *and dissemination* of works.

This change would also make it *far more difficult to determine when a recording enters the Public Domain*. Often it is difficult to determine the release date of a recording. But it is usually not difficult to determine the life dates of at least one of the musicians. Using these life dates, it is easy to determine the latest possible date for a recording session, add fifty years, and determine a date when the recording is safely in the Public Domain.

Specific language for audio recordings

Section 17 in its entirety should be deleted from Bill C-32.

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In the case of private copyright, experience suggests that copyright holders are forceful in advancing their case. But for the Public Domain, the duty falls largely to Canada's Parliament to ensure that this priceless part of Canada's heritage is safeguarded and made fully accessible to Canadians. I am confident that the Committee will take this responsibility to heart while considering Bill C-32.

I would very much to thank the members of the Committee for inviting comments from the public on Bill C-32. I hope that these comments and suggestions are helpful. I look forward to a strengthened Public Domain.

Sincerely yours,

Dr. Mark Akrigg
Founder, Project Gutenberg Canada

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