Consumer and Corporate Affairs Canada

Consommation et Corporations Canada

# Term of Copyright Protection in Canada: Present and Proposed

Barry Torno

Copyright Revision Studies

En français : Durée de la protection en matière de droit d'auteur au Canada : situation actuelle et propositions de réforme

Disponible au : Service des communications
Consommation et Corporations Canada
Ottawa (Ontario)
K1A 0C9

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Research & International Affairs Branch
Bureau of Corporate Affairs
Consumer & Corporate Affairs Canada

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Published

Copyright Obligations for Cable Television: Pros and Cons by S.J. Liebowitz, 1980.

The Mechanical Reproduction of Musical Works in Canada by M. Berthiaume and J. Keon, 1980.

A Performing Right for Sound Recordings: An Analysis by Jim Keon, 1981.

Term of Copyright Protection in Canada: Present and Proposed by Barry Torno, 1981.

Available in both official languages from:

Communications Branch
Consumer and Corporate Affairs Canada
Ottawa, Ontario
K1A 0C9

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Cat. No. RG44-1/4F
ISBN 0-662-90937-2

# FOREWORD

This series of studies concerning aspects of copyright law was initiated to provide a better understanding of some important problems and issues involved in the revision of the Canadian Copyright Act. The present Act is now more than fifty years old. The wide breadth of legal, economic and technological developments since it was proclaimed underlie the significance of the revision process. The creation and dissemination of information is becoming an increasingly important resource of our society. In addition, the copyright community, including authors, publishers, the film and video industries, broadcasters, the recording industry, educators, librarians and users, contributes hundreds of millions of dollars to the economy. For these reasons the Research and International Affairs Branch of the Bureau of Corporate Affairs felt it necessary to undertake in-depth economic and legal research into the cultural, economic and legal implications of the most important of the copyright issues.

With respect to the appropriateness of the economic studies of this series the following passage from the 1971 study of the Economic Council of Canada entitled Report on Intellectual and Industrial Property is perhaps the most perceptive and eloquent:

> It is sometimes implied that where cultural goals are important, economic analysis, with its base associations of the market place, should take a back seat. But this involves a serious misconception of the proper and useful role of economic analysis. It may well be true that in the final analysis, economics is much more concerned with means than with ends, and that the really fundamental "achievement goals" of a society are largely, if not wholly, non-economic in nature. It is also true, however, that, in practice, means can have an enormous influence on ends, whether for good or ill, and that as a result, the systematic analysis of economic means is indispensable both in the specification of social goals and the planning of how to achieve them. In the case of cultural goals, among others, economic analysis can be of great help in bringing about a clearer identification of the goals in the first place, and then in planning for their attainment by the shortest, least costly and most perseverance-inducing route.

> It is particularly important that the relevance of cultural goals in a policy-planning situation should not be used as a smoke screen behind which material interests are allowed to shelter unexamined. In an increasingly service-oriented and knowledge-based society, cultural matters in the broadest sense are to a growing extent what economic life is all about. They must not fail to be studied in their economic as well as their other aspects. (pp. 139-140)

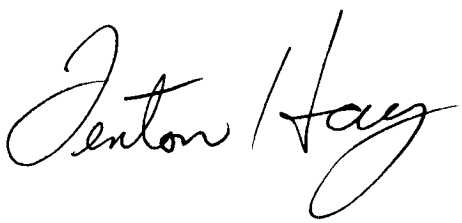
It is within this spirit that the economic studies completed for the Branch have been commissioned and carried out.

In addition to internal studies, the Branch has contracted with research academics from the Canadian university community who have a special interest in copyright. The external funding of research provides the Branch with new insights and perceptions from some of the most highly skilled academics in Canada with respect to the many complex issues inherent in the revision of the Copyright Act. Additionally, it serves to foster an interest and involvement in these important policy issues amongst others within the academic community. Such involvement and input can only lead to a better understanding and a consequent improvement in the copyright policy formation process.

This study by Barry Torno of the Department of Justice constitutes a thorough and thought-provoking examination of those questions which must be addressed when considering the establishment of appropriate terms of copyright protection; questions such as how long should copyright protection last? and from what point in time should the period of protection begin to run? The study highlights the fact that there is not a single term of copyright protection in Canada, but rather a number of periods of protection with respect to the various categories of works established by the Copyright Act.

Both the present Copyright Act and Canada's international obligations under the Berne and Universal Copyright Conventions, as they touch upon issues of duration of protection, are examined. Finally, recommendations are offered with respect to the most appropriate periods of protection for the various categories of works discussed.

It should be noted that the results and recommendations contained in this study are those of the author and do not necessarily imply acceptance of same by Consumer and Corporate Affairs Canada and the Department of Justice. We believe that this approach is optimal for the purpose of encouraging the researchers to employ the widest scope in both the creation and presentation of their views.



Dr. Fenton Hay
Director
Research & International
Affairs Branch

# EXECUTIVE SUMMARY

## (A) Prologue

The paper is divided into three principal sections. The first examines the provisions of the present Copyright Act which pertain to duration of copyright protection. Two classes of works are discussed -- anonymous and pseudonymous works -- for which it appears that the Act fails to contain any provisions.

The second section addresses Canada's obligations with respect to the establishment of terms of copyright protection which arise by virtue of Canadian membership in the two principle multilateral copyright treaties: the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention.

The final section offers recommendations on the most appropriate terms of copyright protection for the various categories of works discussed.

## (B) Present Law

This paper reveals that, contrary to common belief, there is not one term of copyright protection but a plurality of terms. The term of protection with which most people are familiar is "the life of the author plus 50 years." Subject to certain exceptions, this term applies to the aggregate of pecuniary rights protecting original literary, dramatic, musical and artistic works. A copyright owner's pecuniary rights, such as the rights to reproduce, to adapt, to perform in public and to record, are distinguished under copyright law from an author's moral rights, the right to claim authorship of his work and the right to restrain distortion, mutilation or other modification of a work that would be prejudicial to his honour or reputation. The term of protection for an author's moral rights is presently indeterminate as the Act fails to stipulate the period of protection for these rights.

The term of protection for sound recordings (i.e., captured renditions of musical, literary and dramatic works, whether on discs or tapes) is 50 years from the making of the original plate from which the sound recording is derived.

The paper points out that the treatment of films under the present Act is convoluted and most unsatisfactory. Those cinematographic productions where the arrangement or acting form or the combination of incidents represented give the work an original character are protected for the life of the author of the film plus 50 years, (giving rise to the question, "Who is the author of a film?"). Where such original character is absent (examples generally cited being nature study films), the production is protected as a series of photographs and the term of protection is that accorded to photographs, 50 years from the making of the original negative from which the photograph is derived.

Works prepared or published by or under the direction or control of "Her Majesty or any government department" are protected from creation until the date of first publication and for 50 years thereafter. However, the term of protection for certain Crown works, such as Acts of Parliament, Orders in Council and Regulations, in respect of which the Crown holds a proprietary right to publish by virtue of Crown prerogative, remains uncertain and may well be perpetual.

Copyright in a work of joint authorship endures for a term equal to the life of the author who dies last plus 50 years after his death.

Where any literary, dramatic or musical work or an engraving is unpublished at the time of the author's death, copyright protection runs until first publication (or, if a dramatic or musical work, until performed in public or if a lecture until delivered in public) and for 50 years thereafter.

Section 12(5) of the Act provides that, in certain circumstances, a party who has acquired the copyright in a work ceases to own the copyright beyond the twenty-fifth year after the death of the author of the work, notwithstanding that the assignment of copyright was for the full term of protection. The section is applicable only where: (a) the author is the first owner of copyright; (b) the assignment of copyright is not in respect of a collective work nor is the licence to publish the work or part of the work as part of a collective work; (c) the assignment or grant of an interest in copyright is otherwise than by will; and (d) the first grant of rights is made by the author/first owner himself.

## (C) International Obligations

As an adherent to the Rome Text of the Berne Convention, Canada is presently free to adopt a general term of protection other than life plus 50. If, however, Canada

reduces the term of protection, other member states are required to reduce the period of protection offered to Canadian works to the same degree (the "rule of the shorter term"). As well, Canada is free to protect moral rights for any period of time, regardless of the terms established for pecuniary rights.

The Universal Copyright Convention (UCC) provides that the minimum term of protection for works protected under the Convention is to be the life of the author and 25 years after his death. The Convention also provides, however, that where a member country computes the term of protection for certain classes of works from the date of first publication (as Canada does in the case of posthumously published works and Crown works), the country may maintain these exceptions and may extend similar exceptions to other classes of works, provided that the term may not be less than 25 years from the date of first publication, save for photographs and works of applied art for which the minimum term is ten years.

The UCC also contains a "rule of the shorter term" similar in effect to that under the Berne Convention.

## Proposed Law

### (i) General term for literary, artistic, musical and dramatic works

The paper proposes that the present term of life plus 50 be retained since: (a) the growth in communications media has substantially lengthened the commercial life of a great many works; (b) the public doesn't benefit from a shorter term but user groups derive a windfall since prices for a work often remain the same after the work enters the public domain; and (c) a majority of the world's countries have a term of life plus 50. To adopt the same term expedites international commerce in literary properties.

### (ii) Sound recordings and films

The special nature of these two classes of works (i.e., the fact that they usually result from the collaborative efforts of many under the catalytic influence of a producer, often a corporation), renders inappropriate a term of protection based upon the life of the author. A more appropriate approach is the provision of a fixed term of protection.

A problem common to both sound recordings and films is that of having portions of a single work fall into the public domain at different times ("seriatum divestiture"). In order to overcome the resulting difficulty in establishing the point of departure for a fixed term of protection where works are created over a period of time, a rather elaborate formulation was required. The proposed solution (which establishes the same period of protection for all films) is to offer as a term of protection the first of either of the following two periods to expire:

(a) the period from first publication until the end of the year in which first publication takes place and 50 years thereafter; or

(b) the period from creation until the end of the year in which creation takes place ("fixation year 1") and 75 years thereafter, subject to the following qualification. Where in the year subsequent to fixation year 1 any work(s) created in fixation year 1 are combined with a further work or works created in the subsequent year, and if, in like manner, combined with any work(s) created in any of the subsequent three years (representing a possible maximum of four additional years subsequent to fixation year 1), with the intention that all such works be merged into inseparable or interdependent parts of a unitary whole, the term of protection for each of such works so combined shall be from creation until the end of the final such year in which all such works are so combined, and a period of 75 years thereafter.

(iii) Photographs

It is recommended that the present discriminatory treatment accorded photographs vis-à-vis term of protection be abolished and that the term of protection for photographs be the same as that for all other artistic works (i.e., the life of the author plus 50 years).

(iv) Works of joint authorship

It is proposed that the present term of protection should be retained.

(v) Posthumous works

Analysis of the present provisions failed to establish any compelling reason to derogate from the general term of protection and unnecessarily complicate a revised Copyright Act. Therefore, it is recommended that the present provisions with respect to posthumous works be abolished.

(vi) Anonymous and pseudonymous works

As the identity of the author may not be known, using the life of the author as part of the measurement of the period of protection is inappropriate. A fixed term is called for, and therefore it is proposed that the term of protection should be the same as that proposed for sound recordings and films. This provision should be subject to an appropriate qualification that where the identity of one or more of the authors is revealed, the term is to be based on the life of the author(s) whose identity has been revealed (i.e., life plus 50).

(vii) Moral rights

As moral rights accrue to the author with the creation of his work and their purpose is to protect his honour and reputation, these rights should expire upon the death of the author. Therefore, it is recommended that the term of protection for moral rights should be equal to the life of the author.

(viii) Reversionary interest

Not only are the reversionary interest provisions subject to many limiting qualifications but, when applicable, they are of limited value. Further, these provisions reflect an unacceptably paternalistic approach to the treatment of authors. They also constitute an inequitable intrusion into the ability of parties to agree to expiration terms of their own choice, unrestricted by artificial limitations which may not be in an author's best interest as they may serve to reduce the consideration paid for the copyright. It is therefore recommended that the reversionary interest provisions should be repealed.

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# INTRODUCTION

In a paper prepared by Bruce McDonald which addressed the question of the appropriate term of copyright protection, the author commenced his enquiry by characterizing the issue to be discussed in the following manner:

> How long should a copyright owner enjoy protection with respect to a particular work? More particularly, what should be the measure in years, and from what point in time should that period begin to run? (McDonald, 1971, p. 1)

These questions encapsulate the fundamental issues which must be addressed when considering the establishment of appropriate terms of copyright protection and will serve as the focus for this study.

In the course of reviewing such questions, the effect of Canada's international obligations upon domestic latitude to provide terms of protection other than those established by our present Copyright Act will be examined.

# CHAPTER I

# CURRENT CANADIAN LAW

## General Term for Literary, Artistic, Musical and Dramatic Works

Section 5 of the Canadian Copyright Act, R.S.C. 1970, c. C-30 (the "Copyright Act") provides that:

> 5. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death. (emphasis added)

This "general term of protection" is applicable with respect to the compendium of "pecuniary rights" protecting the majority of "original literary, dramatic, musical and artistic work(s)." "Pecuniary" is a term used to characterize the bundle of exclusive rights granted to owners of copyright in literary, scientific and artistic works, such as the rights to reproduce, to adapt, to perform in public and to record, which provide owners of copyright with the opportunity to exploit their works in the marketplace.

The exceptions referred to in s. 5 of the Act have arisen generally in respect of situations where: (1) the creator of a work or the party "deemed" to be the creator of a work is not usually an individual but rather a corporation or a collection of individuals (e.g., sound recordings, films, and joint works); or (2) the author chooses to remain anonymous or to adopt a "penname" (pseudonymous works); or (3) the author has died prior to publication of his work (posthumous works); or (4) anomolous situations with special historical roots have arisen (e.g., photographs, Crown works).

In addition, certain European countries and other Berne Convention countries (such as Canada) have long recognized rights which are personal to authors and, as such, are independent of the author's pecuniary rights and maintainable by authors even subsequent to the assignment in whole or in part of some or all of these rights. Such rights are known as "moral rights" and, under the present Act, consist of the right to claim authorship of a work (the right of "paternity") and the right to restrain any distortion, mutilation or other modification of a work that would be prejudicial to an author's honour or reputation -- the right of "integrity" (Copyright Act, s. 12(7)).

## Sound Recordings

The term "sound recording" is not to be found within the present Canadian Copyright Act. It is, however, a term which is achieving increasing acceptance for the purposes of describing collectively what, under the Act, are referred to as "records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced." The Act provides that copyright is to subsist in such contrivances "in like manner as if such contrivances were musical, literary or dramatic works" (Copyright Act, s. 4(3)).

Thus, under our present Canadian copyright law, musical, literary and dramatic works are protected and particular renditions of such works as captured on records and magnetic tape are also protected by copyright. The protection granted to "mechanical contrivances" thus extends in essence to "works which result from the fixation of a series of musical, spoken or other sounds...regardless of the nature of the material objects...in which they are embodied" (U.S.A. Copyright Act, 1976, 17 U.S.C., s. 101) and not to the material objects (i.e., that which the new American Copyright Act of 1976 terms "phonorecords").

Section 10 of the Act provides that the term of protection for sound recordings is 50 years from the making of the original plate from which the sound recording was directly or indirectly derived.

## Cinematographic Works

The protection afforded to film productions and, arguably, to productions recorded on video tape,[1] under the present Act is provided indirectly through an assimilation of such productions to either dramatic works or photographs, the latter being a species of artistic works.

Section 2 of the Act defines "dramatic work" as including: "...any cinematographic production where the arrangement or acting form or the combination of incidents represented give the work an original character." The Act also provides in s. 3(1)(e) that in the absence of such original character: "...the cinematographic production shall be protected as a photograph."

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1. For purposes of this discussion productions captured on video tape will be treated as "cinematographic works" and the term "film" will be used generically to denote all such works.

A filmed version of an underlying literary work would certainly be classified as a dramatic work, whereas a film recording the feeding habits of wild animals would probably be classified as a series of photographs and, accordingly, as a series of artistic works. This bifurcated structure is most significant vis-à-vis the term of protection. Those films which constitute dramatic works are protected, as are all other dramatic works, for a term equal to the life of the author plus 50 years (Copyright Act, s. 5). By contrast, those films which constitute a series of photographs are protected, as are all other photographs, for a term of 50 years from the making of the original negative from which the photograph was directly or indirectly derived (Copyright Act, s. 9).

While arguments may be presented on both sides of the issue as to whether the method by which video tape captures both dramatic and non-dramatic productions is a "process analogous to cinematography," it is clear that the technique by which images are created on video tape does not, like film, give rise to original "negatives" from which either sequential or non-sequential positive images are derived.

This latter point is of little consequence vis-à-vis the term of protection for dramatic video tape productions where the term would be equal to the life of the author plus 50 years. However, where a video tape production is non-dramatic, as noted, protection would be afforded on the basis of assimilation to a series of photographs in respect of which the term of protection is a fixed period of 50 years measured from the date of the making of the original negatives from which the photographs are derived. Given that the use of video tape does not give rise to "original negatives," it appears that, under the present Act, there is no established point of departure for measuring the fixed 50-year term for non-dramatic productions captured on video tape.

Crown Works

Section 11 of the Copyright Act provides:

> 11. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in such case shall continue for a period of fifty years from the date of the first publication of the work.

The phrase "without prejudice to any rights or privileges of the Crown" would appear to recognize the independent existence of the Crown's proprietary right by way of copyright to publish works such as Acts of Parliament or Orders In Council, Regulations and State Papers generally. This right subsists by virtue of Crown prerogative and is in no way dependent upon s. 11 of the Act.

One commentary has suggested that to the extent that protection of works within the ambit of the Crown's prerogative is independent of the Act, the term of protection for such works may well be perpetual; at the very least, the term of protection for such works remains uncertain (Keyes and Brunet, 1977).

With respect to those Crown works apparently beyond the ambit of Crown prerogative, i.e., those "works prepared or published by or under the direction or control of Her Majesty or any government department," the term of protection runs from the date of creation until publication and for a period of 50 years thereafter. It would appear that if a work falling into the above class is never published, i.e., "the issue of copies of the work to the public," the term of protection may well be perpetual (Copyright Act, s. 3(2)).

Photographs

A photograph is defined in s. 2 of the Act as including a "photolithograph and any work produced by any process analogous to photography."

Further, photographs are considered a species of the broader class of "artistic work," which includes "works of painting, drawing, sculpture and artistic craftsmanship and architectural works of art and engravings" (Copyright Act, s. 2).

While all other artistic works (save for engravings, unpublished at the date of death of their creator) are protected by copyright for a term equal to the life of the author plus 50 years (whether published or unpublished at the time of the author's death), the Copyright Act provides protection for photographs for a term of "fifty years from the making of the original negative from which the photograph was directly or indirectly derived" (Copyright Act, s. 9).

Works of Joint Authorship

Colloquially referred to as "joint works," a work of joint authorship is defined in the Act as "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors" (Copyright Act, s. 2).

Section 8(1) of the Act provides that copyright in a work of joint authorship is to last for a term equal to the life of the author who dies last plus 50 years after his death. With respect to joint works by foreign nationals entitled to protection in Canada, the Act provides that where the domestic copyright legislation of such foreign nationals grants a term of protection for joint works less than that described above, such nationals are not entitled to claim a longer term of protection in Canada (Copyright Act, s. 8(2)).

The inclusion of this latter provision is a reflection of Canada's obligation under the Berne Copyright Convention to ensure that the term of protection for works of foreign nationals "must not exceed the term fixed in the country of origin of the work."[2]

Posthumous Works

The term of protection for certain species of works otherwise applicable is subject to variation where the work has not been published[3] at the time of the death of the author.

Section 6 of the Act provides that:

> 6. In the case of a literary, dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but

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2. The Rome Copyright Convention, 1928, R.S.C. 1970, c. 30, Sch. III, International Convention for the protection of literary and artistic works, art. 7(2)(bis).

3. The term "published" is used in its broadest sense rather than in the restricted context of s. 3(2) of the Act, i.e., "the issue of copies of the work to the public." "Published" is used in this paper in respect of dramatic and musical works to refer to their performance in public and in respect of lectures to refer to their delivery in public.

> which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public whichever may first happen, and for a term of fifty years thereafter....

Thus, save for engravings, the term of protection for artistic works, unlike literary, dramatic and musical works is never dependent upon whether they have been published either during or subsequent to their creator's lifetime. Protection for all artistic works other than photographs and engravings always prevails for the life of the author plus 50 years while the term of protection for photographs always remains 50 years from the making of the original negative from which the photograph was derived.

"Engravings" are defined in s. 2 of the Act as including "etchings, lithographs, woodcuts, prints and other similar works, not being photographs." As in the case of photographs, engravings are one species of the broader class of artistic works.

The following passage from an Old English case highlights the nature of the engraver's art and places it in a copyright context:

> The engraver, although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies; -- means, which require great labour and talent. The engraver produces his effects by the management of light and shade....
>
> The first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says, take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture, and have executed the engraving. (Newton v. Cowie et al. (1827), 4 Bing 234, pp. 246-7, 130 E.R. 759)

Thus, where any literary, dramatic or musical work or an engraving is unpublished at the time of the author's death, protection could be perpetual provided the work is never published nor, if a dramatic or musical work, performed in public, nor, if a lecture, delivered in public.

Anonymous and Pseudonymous Works

These terms are not defined in the Act, nor are they reflected in the Act in the context of term of protection. Under s. 101 of the new American Copyright Act, however, an anonymous work is a work on the copies or phonorecords of which no natural person is identified as author while a "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

Although they are not specifically defined in the Australian Copyright Act of 1968 (Copyright Act, 1968-1976 (Com.)), one commentator has suggested that the following is an appropriate constructive definition of the terms "anonymous" and "pseudonymous" based on the wording of s. 34(2) of the Act:

> An anonymous or pseudonymous work is a work, the identity of the author of which is not generally known or cannot be ascertained by reasonable inquiry at any time before the expiration of the 50 years after the expiration of the calendar year of the first publication. (Lahore, 1977, pp. 122-123)

As Melville Nimmer has appropriately commented: "the life of the author cannot very well serve as a measure of duration of copyright in an anonymous or pseudonymous work, since by definition, the identity of the author may not be known" (Nimmer, 1979, pp. 9-10).

Keyes and Brunet, authors of Copyright in Canada: Proposals for a Revision of the Law, were of the view that: "although the Canadian Act makes no specific provisions with respect to anonymous or pseudonymous works, it would appear that the publisher is deemed the owner and that copyright subsists for his lifetime plus fifty years" (Keyes and Brunet, 1977, p. 66). The report cites s. 20(3)(d) of the Act in support of this proposition. With respect to the suggestion that the term of protection for these works appears to be equal to the life of the publisher plus 50 years, Keyes and Brunet have apparently confused ownership with authorship and, in so doing, have drawn a conclusion which is not supported by the language of the Act.

Section 20(3)(d) states specifically that the purported publisher or other proprietor whose name appears on copies of a work is deemed to be the owner of copyright for one specified purpose only; i.e., status to commence or defend an infringement suit. The section does not provide that the purported publisher or proprietor is deemed to be the owner of copyright for all purposes and thus, for example, an assignment of the

copyright in whole or in part would be beyond the scope of the publisher's "rights of ownership."

Secondly and more importantly, the section provides that the person whose name appears on copies of a work is deemed to be the owner of copyright in the work, not the author of the work. As the preceding discussions of both the general term of protection and commissioned works and works made in the course of employment reveal, authors are not always the first owners of copyright in their works, but wherever term is calculated on the basis of the "life of an individual plus fifty years," the individual in question is always the author of the work, never the owner of copyright in the work.

It would appear that a better view of the present Act would hold that the Act simply does not address the question of the term of protection for anonymous or pseudonymous works; their term of protection is indeterminate.

Finally, a discussion of the term of protection for anonymous and pseudonymous works would be incomplete without reference to a case decided by the Supreme Court of Canada in 1940.[4] Chief Justice Duff expressed the following view without referring to any provisions of the Act or citing any previous Court decisions upon which his opinion was predicated:

> As to the duration of the copyright when that comes in question, if the owner of it cannot identify the author, the duration of it must be restricted to the period of 50 years from the date when the copyright...came into existence.

It is difficult to assess the merit of this opinion, given the absence of any reference to the basis upon which it is offered.

Moral Rights

Section 12(7) of the Act provides that, independently of the author's copyright and even after the assignment of the copyright, the author has the right to claim authorship of the work as well as the right to restrain any distortion, mutilation or other modification of his work which could be prejudicial to his honour or reputation.

As noted earlier, these moral rights are distinct from an author's pecuniary rights, i.e., the bundle of rights which the Act indicates constitute "copyright" for the purposes of the Act (Copyright Act, s. 3(1)).

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4. Massie & Renwick Ltd. v. Underwriters' Survey Bureau Ltd. et al. (1940), 3 C.P.R. 184 at pp. 207-8, [1940] 1 D.L.R. 625 [1940] S.C.R. 218 at p. 245.

While the language of the Act thus seems to suggest that moral rights are to be viewed as distinct from copyright, this characterization is the result of the incorporation into the Act of the language of the Rome Text of the Berne Convention (Rome Text, art. 6 (bis)). This language of the Convention has been amended subsequently to reflect the view that moral rights may be distinguished from pecuniary or economic rights which, together, may be considered as comprising integral facets of copyright.[5]

An amended Copyright Act should ensure that the terms "moral rights," "economic rights" and "copyright" are not used in a confused manner.

While ss. 5 through 12 of the Act contain numerous provisions with respect to the terms of protection for the bundle of economic rights pertaining to each of the species of works enumerated, with respect to the duration of the authors' moral rights the Act is eloquently silent. As in the case of pecuniary rights protecting anonymous and pseudonymous works, it appears that the term of protection for an author's moral rights is presently indeterminate.

In two circumstances, the Act gives rise to situations where the author (not merely the first owner) of the subject work may be a corporate body; these are the provisions pertaining to sound recordings under s. 10 and to photographs under s. 9 of the Act.

The person[6] owning the original plate from which a sound recording is made, at the time of its making, is deemed to be the author of the sound recording. In the same vein the person owning the original negative from which a photograph is made, at the time of its making, is deemed to be the author. It will be recalled that films failing to qualify as dramatic works are protected as a series of photographs and thus, fall within the purview of the preceding section (Copyright Act, s. 3(1)(e)).

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5. The language of art. 6(bis) of the Rome Text, i.e., "Independently of the author's copyright," was changed in the Stockholm Text so as to read "independently of the author's economic rights."

6. Under the Act the term "person" is used to denote both "natural" persons, i.e., individuals, and "juristic" persons, i.e., corporations.

Had the Act provided that the owners of these materials were deemed to be the first owners of copyright rather than the authors of the work, the same result would have prevailed save that the individual(s) who actually created the works in question would have been able to assert his moral rights.

In the majority of cases, the first owners of photographic negatives (in the case of films) and sound recording plates, and thus the deemed authors of the resultant works, are corporations. Section 12(7) of the Act provides simply that all authors have the right to claim authorship and to restrain distortion of their works (i.e., "moral rights"). Is it to be understood that this provision applies equally to corporate authors?

The late Dr. Harold Fox expressed the view that the reversionary interest provisions of s. 12(5) probably do not apply to photographs and sound recordings, notwithstanding the fact that the deemed authors of these works are the first owners of copyright (as the section requires), because the term of copyright for such works (50 years) bears no relation to the life of the author (Fox, 1967, p. 293). By analogy, the moral rights provisions of s. 12(7) are probably not available to corporate authors insofar as these provisions are designed to protect an author's "personality." Further, given the possibility of the indefinite "life" of corporate authors, the computation of a term of protection for such rights based on the "life" of the author is rendered impossible.

Reversionary Interest

Section 12(5) of the Act provides that, in certain prescribed circumstances, a party who has acquired one or more of the rights comprising the copyright protecting a work ceases to own such rights beyond the 25th year after the death of the author of the work, notwithstanding the fact that the party was granted such rights for the full term of protection, i.e., the life of the author plus 50 years.

The section provides that the legal representatives of the estate of the author become the beneficiaries of the final 25 years of the term of protection. This section is applicable however, only in the following circumstances:

(a) The author is the first owner of copyright.

Thus, it will not usually affect a party who has acquired the copyright protecting any of the following works: (i) a work made by an employee in the course of his employment (Copyright Act, s. 12(3)); (ii) a commissioned engraving, photograph or portrait (Copyright Act, s. 12(2)); (iii) a Crown

work (Copyright Act, s. 11). In all of the above cases, in the absence of an agreement to the contrary, the author is not the first owner of copyright. Where, however, the author has under contract retained the copyright protecting a commissioned photograph, for example, the reversionary interest provisions will be applicable. Further, considerable doubt has been expressed as to whether the reversionary interest would arise in the case of an assignment of copyright protecting sound recordings and photographs. As indicated earlier, the view has been expressed that insofar as the term of copyright for such works (50 years) bears no relation to the life of the author, s. 12(5) does not apply. It is possible, however, that notwithstanding that the term of protection for sound recordings and photographs is a straight 50 years, the reversionary interest provisions could apply where the author of such works dies prior to the expiration of the above 50 years. The Act simply states that any rights with respect to the copyright beyond the expiration of 25 years from the death of an author devolve on his personal representative. On balance, it would appear, however, that the better view is that which holds that there is no reversionary provision applicable with respect to the assignment of the rights protecting sound recordings and photographs.

(b) The assignment of copyright is not in respect of a collective work, nor is the licence to publish a work or part of a work as part of a collective work.

Dr. Fox has suggested that the above proviso is to be understood in the following terms:

> The author who is the first owner of the copyright may therefore make, for the full period of protection, an assignment of the copyright of a complete collective work or a licence to publish the collective work or part of a work as a collective work, but not an assignment of a part of a work, as for example his own contribution. Such assignment is limited to his own life plus twenty-five years thereafter. (Fox, 1967, p. 293)

The passage with respect to granting of a licence refers to the "granting of a licence to publish a work or part of a work as part of a collective work." Dr. Fox has suggested that the word "work," underlined above, is to be understood as a collective work. If this is an appropriate construction, then the following "part of a work" should equally be interpreted to refer to a part of a collective work. The difference between the language of the section and the construction suggested by Dr. Fox is not without importance.

In the view of Dr. Fox, as qualified above, apparently only the assignment of a complete collective work or a part of a collective work for inclusion in a further collective work will escape the application of the reversionary provision. The language of s. 12(5) could also be understood to mean that a licence to publish: (a) either a collective work or a single work; or (b) either a part of a collective work or a part of a single work; as long as it is for inclusion in a separate collective work, will escape the application of the reversionary provision.

The former view places a greater emphasis on the nature of the work to be included in a collective work, while the latter view emphasizes only the importance of licensing for inclusion within a collective work.

(c) The assignment or grant of an interest in copyright is otherwise than by will.

Thus, in order for an assignment or grant of interest by an author/first owner to be subject to the reversionary provision, it must take place during his lifetime. If, in his will, an author/first owner bequeaths the copyright protecting a work for the full duration of the copyright term, ownership of the copyright by the beneficiary will not be truncated 25 years after the death of the author.

(d) The original (i.e., first) grant of rights is made by the author/first owner himself.

If an author/first owner dies intestate, i.e., without leaving a will, and the ownership of copyright passes to his heirs under the intestacy laws applicable to the author, an assignment of the copyright by the heirs to a third party will not be subject to reversion.

## CHAPTER II

## INTERNATIONAL OBLIGATIONS

Canada is presently a member of the two major international copyright conventions: the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. The Berne Convention has been revised five times since its establishment in 1886. Canada is an adherent to the substantive provisions of the Rome Text of 1928 and the administrative provisions only of the Stockholm Text of 1967, which came into effect in 1970.

The Universal Copyright Convention has been revised only once since its creation in 1952 in Geneva -- at Paris in 1971. Canada adhered to the Geneva Text in 1962 and has not, to date, adhered to the Paris Text.

### Berne Convention

Paragraph 1 of the Rome Text provides that: "the term of protection granted by the present Convention shall be the life of the author and fifty years after his death." However, paragraph 2 of article 7 provides that, notwithstanding the provisions of paragraph 1, to the extent that the term of "life plus fifty years" is not adopted by all the countries of the Union, term of protection may be regulated by the law of the country where protection is claimed.

Thus, subject only to the Convention minima of the Universal Copyright Convention with respect to term, and to the extent that the 11 members of the Union presently bound by the Rome Text have not adopted a term of "life plus fifty," Canada is at liberty, under Berne, to diminish its present term of protection of "life plus fifty."

However, it must be noted that the Rome Text contains an important qualification affecting the doctrine of "national treatment" as it touches upon the question of term. Paragraph 2 of article 7 imposes a comparison of terms and requires that

no foreign work receive longer protection than it receives in its "country of origin."[1]

Thus, were Canada to reduce the term of protection it offers generally to literary and artistic works from a term equal to the life of the author plus 50 years, all countries with whom Canada's copyright relations are governed by the Rome and Brussels Texts of the Berne Convention would be obliged to reduce the term of protection offered to Canadian works in the respective countries to the same extent.

The first two paragraphs of article 7 of the Rome Text, i.e., those discussed above, pertain to term of copyright for "literary and artistic works" (as defined in article 2). However, the copyright legislation of many countries also provides certain specific terms of protection for works encompassed within this broad class of "literary and artistic works" on the basis of either: (a) technology (e.g., photographic works and works produced by processes analogous to photography); or (b) attributes of the author (e.g., posthumous, anonymous and pseudonymous works and works by joint authors).

With respect to such categories of works, the Rome Text provides that, save for works by joint authors, the term of protection is to be regulated by the law of the country where protection is claimed, subject to the "rule of the shorter term." The term of copyright protection belonging in common to joint authors of a work must be calculated according to the death of the last surviving author. The rule of the shorter term is applicable once again, subject however to the stipulation that "In no case may the term of protection expire before the death of the author who dies last" (Rome Text, Berne Convention, art. 7 (bis)(3)).

While subsequent texts have dealt specifically with the

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1. Article 4(3) of the Rome Text defines "country of origin": in the case of unpublished works, as the country to which the author belongs; in the case of published works, as the country of first publication; in the case of works published simultaneously in several countries of the Union, as the country, the laws of which grant the shortest term of protection. In the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin.

term of protection for authors' moral rights,[2] the Rome Text is silent in this regard. Article 6(bis) states simply that:

> (1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

Presumably, then, Canada is free to protect moral rights for any period of time, whether it be less than, equal to or greater than the term of protection prevailing for pecuniary rights.

Universal Copyright Convention

Paragraph 2 of article IV of the Universal Copyright Convention provides that the minimum term of protection for works protected under the Convention is to be the life of the author and 25 years after his death.

The application of this general proviso to Canada is subject to certain of the qualifications contained in the subsequent provisions of paragraph 2. Where a country generally computes term of copyright based on the life of the author, but where the term of protection for certain classes of works is computed from the date of first publication (both of which are the case in Canada), such a country may maintain these exceptions to the minimum term requirement and may extend them to the other classes of works.

As McDonald has pointed out:

> Under Canadian law the term for both posthumously published works (S. 6) and Crown copyright (S. 11) is computed from the date of first publication. Each of Sections 6 and 11 defines a "class of work" within Article IV (see Bogsch, The Law of Copyright Under the UCC, pp. 47-48, 188), so arguably we can, within the UCC, restrict our term to twenty-five

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2. Article 6(bis) of the Brussels Text provided that the moral rights of authors were to endure for at least the lifetime of the author. Article 6(bis)(2) of the Paris Text provides that moral rights are to endure "at least until the expiry of the economic rights."

years from the date of first publication.
(McDonald, 1971, p. 5)

However, for all of these classes, the term of protection may not be less than 25 years from the date of first publication, save for photographs and works of applied art in respect of which the minimum term must not be less than ten years.

Thus, for works for which the term of protection is a function of the life of the author, the minimum term allowed by the Universal Copyright Convention is life plus 25 years. For works, the term of protection for which is a function of the date of publication, generally, the minimum allowable term is 25 years after publication.

It appears that where a country (e.g., Canada) maintains a mixed system of protection as of the effective date of the Universal Copyright Convention, it is at liberty to protect any class of works whether presently protected on the basis of "life plus fifty" or newly created, on the basis of "date of first publication plus...."[3]

Paragraph 4 of article V establishes the application of the "rule of the shorter term" under the Universal Copyright Convention. No contracting state is obliged to grant protection to a work for a period longer than that fixed for the class of works to which such work belongs: (a) in the case of unpublished works, by the law of the contracting state of which the author is a national; and (b) in the case of published works, by the law of the contracting state in which the work was first published. Paragraphs 5 and 6 add further refinements to this general principle. Firstly, the work of a national of a contracting state, first published in a non-contracting state is to be treated as though it was first published in the contracting state of which the author is a national. Secondly, in the case of simultaneous publication in two or more contracting states, the work is to be treated as though first published in the state which affords the shortest protection. Finally, any work published in two or more contracting states within 30 days of its first publication is to be considered as having been published simultaneously in the contracting states.

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3. "If, at the said date, a country follows the method of computation from first publication for certain classes of works, such country is entitled not only to maintain this method in respect to such classes but may also 'extend' the same method to other classes of works." There is no limit to this extension, and it would probably not be contrary to the Convention to extend the method in question to all classes of works (Bogsch, 1968, p. 46).

The following observation with respect to the application of the rule of the shorter term, by the Rapporteur-Général of the Geneva Conference, is of major importance vis-à-vis the guiding principle of the Convention, i.e., national treatment.

> If the class to which a work belongs was not protected in the country of origin, so that the period of protection there was zero, other contracting States need not protect the work. (Report of the Rapporteur-Général, 1952, p. 9)

Bogsch, in analyzing article IV points out that in the circumstances described above, other contracting states need not protect such works "even if under the laws (of these states), works of the class to which the particular work belongs enjoy protection" (Bogsch, 1968, p. 5).

Further, Bogsch is of the view that where a state provides different terms of protection for the different rights protecting the same work (i.e., the reproduction right and the translation right), other contracting states may differentiate between the different rights when applying the rule of the shorter term.

Presently, under the Copyright Act, the rule of the shorter term applies only to works of joint authorship and therefore all other works are protected in Canada until the expiration of the terms offered works of such kind in Canada, even if in their respective countries of origin such works fall into the public domain at an earlier date. While the application of the rule of the shorter term is permissive under the Universal Copyright Convention, under Berne, as noted, for countries such as Canada bound by the Rome Text, the rule is obligatory. Thus, it would appear that the present Canadian Copyright Act does not comply with our Berne Convention responsibility to ensure that the rule of the shorter term will be applied where appropriate.

# CHAPTER III

# PROPOSED TERMS OF COPYRIGHT PROTECTION

## General Considerations

> The basic question is sometimes phrased in terms of how long a period of protection is necessary in order to encourage writers to engage in creative work. Presumably if protection is extended beyond that point, it will deprive mankind of benefits to which it is entitled. It has been argued that in the interest of literature and for the public good the term should be long; and it has been argued that in the interest of literature and for the public good the term should be short. (Cohen, 1976-77, pp. 1180-1)

So begins one commentator's effort to address the basic question: how long should copyright protection last? The question is as ancient as copyright legislation itself and will be debated for as long as copyright prevails.

In 1785 Lord Mansfield, C.J., highlighted the societal interests touched by this matter and the need to seek an equitable balancing of these interests:

> ...we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. (Sayre et al. v. Moore, 102 E.R. 139, p. 140 (K.B. 1785))

Cohen was of the view that there are two major unstated assumptions inherent in this basic question, no matter how it is phrased. Indeed, a review of the literature pertaining to duration supports this view.[1] These two assumptions are,

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1. See, for example, "Duration and Renewal" in Omnibus Copyright Revision: Comparative Analysis of the Issues, 1973; Guinan, 1963; and Ringer, 1963.

first, that the amount and quality of any writer's output has some significant correlation with the period of copyright; second, that the public benefits when a work is in the public domain and no longer protected by copyright.

Cohen's views, with respect to these assumptions are both wonderfully lucid in their recognition of the "grayness" of this matter (as in so many questions involving social policy, "black and white" proves to be an inappropriate colour scheme) and refreshingly free of partisan rhetoric:

> It is respectfully suggested that whether an author's work receives copyright protection for twenty-eight years or fifty-six years or the period of his life plus twenty-five years or the period of his life plus seventy-five years has no bearing whatever on the quantity or quality of his output. Does any writer write less, or worse, because of the length of the copyright term? I think the answer is obvious.
>
> It is further suggested that while the absence of copyright protection may make for some competition among publishers and the availability of works at a lower price...it is at least equally likely that there are works worth being kept in print that would not be published if the publisher could not be assured that his edition would be the only one available to capture such markets as might exist. Why invest in printing and advertising if another publisher with a low overhead can reproduce an earlier edition by photocopying and sell it for substantially less? (Cohen, 1976-77, p. 1181)

Rather than ask how long copyright protection should endure, Cohen suggests the issue is better addressed in the context of a series of questions not unlike those posed by Bruce McDonald and quoted at the commencement of this paper.

Should the period of duration be longer or shorter than the existing term (whatever that may be)? Should it be a specified number of years after creation, publication, dissemination or some other event or should it be based on the life of the author plus a specified number of years? If the preferred term is one to be measured from creation, publication, dissemination or some other event, should it be a split term with a renewal (or recapture or termination) provision?

If one were inclined to lengthen the term of protection presently prevailing, the need to wrestle with the question of

"how much longer" could be avoided by simply suggesting that copyright protection be perpetual. While it does not appear that there are any constitutional restraints in Canada in this regard, as there are in the United States,[2] there are several fundamental reasons why it would be inappropriate to establish copyright protection in perpetuity.

There are those who argue that literary or intellectual property should be treated as equal to and considered the same as other forms of property, particularly personal property. The right to the ownership of personal property, it is similarly argued, is not, like copyright, terminated by the state after a given number of years.

Of course, the fact is, as Cohen importunes:

> The Declaration of Independence and Fourth of July rhetoric notwithstanding,...all rights arise from the law. The rights of landowners have not been always or everywhere the same. The ability of the owner of securities to deal with his property is hedged in every direction by laws and regulations. (Cohen, 1976-77, p. 1182)

Somewhat closer to home, the following views have been expressed by Canadians:

> In everyday conversation we usually speak of "property" rather than "property rights," but the contraction is misleading if it tends to make us think of property as <u>things</u> rather than as <u>rights</u>, or of ownership as outright rather than circumscribed. The concepts of property and ownership are created by, defined by, and therefore limited by, a society's system of law. When you own a car, you own a set of legally defined rights to use the vehicle in certain ways and not in others; you may not use it as a personal weapon, for example, nor may you leave it unattended beside a fire hydrant. (Dales, 1968, pp. 58-59)

> Few writings on the subject of intellectual property expose the circular and issue-begging

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2. Article I, s. 8 of the United States Constitution provides that Congress may extend copyright protection only for "limited times."

> use constantly made of the word "property." "Property," of course, means little more than legal protection for a claim made by a person. It usually refers to the guarantee of an entitlement to exclude. The reasons for finding such an entitlement necessitate, in intellectual property law as in all other areas of law, an enquiry as to whether the conditions of protection are met....It is meaningless, for example, to claim protection on the ground that one has "natural property rights" in something. Land and moveable goods are commonly called "property" because they are typical subjects over which exclusive rights are recognized by law, but whenever the existence or extent of a right to exclude is challenged no assistance is gained by stating that one's interest is "property." (McDonald, 1969, p. 145)

While all property rights are, indeed, defined and limited by society, the special nature of intellectual property rights specifically calls for limitations.

Mr. Justice Oliver Wendell Holmes expressed the view that, in copyright, property had reached a more abstract expression than in personal or real property. He wrote in one of his decisions:

> The right to exclude is not directed to an object in possession or owned but is in vacuo, so to speak....It is a prohibition of conduct remote from the persons or tangibles of the party having the right....It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing it is one which hardly can be conceived except as a product of statute, as the authorities now agree. (White Smith Music Publishing Co. v. Appollo Co., 209 U.S. 1 (1908), p. 19)

Augustine Birrell noted:

> What the bookseller pays for is in respect of an anticipated sale in the next decade or two -- not in the next century. Who knows what the world is going to read a hundred years hence. This is in truth the consideration that knocks the bottom out of the author's case for perpetual copyright. (Birrell, 1899, pp. 23-24)

Finally, Cohen offers the following for consideration:

> Because copyright ownership is thus disembodied, [from the ownership of physical goods in which the works protected by copyright are embodied] and because exclusive ownership of the various rights under a copyright is possible, the task of tracing ownership many years after an author's death certainly presents both practical and theoretical problems not present with ordinary real or personal property. (Cohen, 1976-77, p. 1185)

Provided that a perpetual term of protection is undesirable the question to be addressed becomes, should the period of duration be longer or shorter than the existing term? Cohen advances the argument that longer terms of copyright do not necessarily overly burden the public, nor, however (and perhaps more importantly), do they necessarily stimulate productivity on the part of authors.

The arguments advanced for the first part of the proposition are threefold:

(a) Generally, works in the public domain cannot in this day and age be bought by the public more cheaply than a work protected by copyright.

    A copy of The Scarlet Letter is not less expensive than a copy of Death Comes for the Archbishop. A Shakespeare play cannot be viewed more cheaply than a Tennessee Williams play. A theater admission ticket for a motion picture based on a Trollope novel costs no less than a ticket based on a recent book club selection (Cohen, 1976-77, p. 1186).

(b) While a work which has fallen into the public domain may be published in a garbled or bowdlerized version, the possibility is just as great of a surviving relative who holds copyright making the work unavailable or causing it to be so expurgated as to become an inaccurate version of the author's work.

(c) The exclusivity established by copyright protects forms of expression only, not underlying ideas.

The arguments advanced for the second half of the proposition are twofold:

(a) Firstly, while an author's concern for his wife and children may be a motivating factor, it is most doubtful that any benefits which may fall to more distant relatives play any part whatever in encouraging authorship.

(b) Secondly, the merit of any moral claims by relatives more distant than a spouse and minor children to participate in possible future revenues is highly tenuous.

The conclusion arrived at by Cohen is most apt:

> In a nutshell, neither preserving financial benefits for other than the author and his immediate family nor denying financial reward to the author makes sense. The question is, as it often is in law: Where do we draw the line? I would say someplace after the author's death. (Cohen, 1976-77, p. 1190)

As the discussion on international obligations revealed, subject to certain minimum term requirements, there are no present bars to Canada's adoption of a system based on a fixed term of protection running from the date of first publication, rather than the present system which is predominantly rooted in a term of "life of the author plus fifty years."

Prior to the adoption of the new Copyright Act in the United States, copyright protection in that country consisted of a fixed term of 28 years from the date of publication, coupled with a further fixed renewal term of 28 more years. The new American Act abandoned the fixed term provisions and adopted the same system presently prevailing in Canada -- i.e., "life plus fifty years" (U.S. Act, s. 302(a)).

The majority of the reasons assigned by the House Committee Report (House Committee Report on the Copyright Act of 1976, pp. 134-135) for the change to a "life plus fifty" regime similarly present a strong argument for retention of such a system in Canada. These reasons have been summarized as follows:

> (1) The fifty-six-year term under the 1909 Act was not long enough to assure an author and his dependents a fair economic return, given the substantial increase in life expectancy.
>
> (2) The growth in communications media has substantially lengthened the commercial life of a great many works, particularly serious works which may not initially be recognized by the public.
>
> (3) The public does not benefit from a shorter term, but rather the user groups derive a windfall since the prices the public pays for a work often remain the same after the work enters the public domain.

> (4) A system based on the life of the author avoids confusion and uncertainty since the date of death is clearer and more definite than the date of publication, and it means that all of a given author's works will enter the public domain at the same time, instead of seriatum as under a term based upon publication.
>
> (5) A majority of the world's countries have a term of life plus fifty. To adopt the same term expedites international commerce in literary properties....(Nimmer, 1979, p. 9-7)

General Term for Literary, Artistic, Musical and Dramatic Works

For all of the reasons cited in the preceding section, it is recommended that the present general term of protection in Canada in respect of that part of copyright comprising an author's pecuniary rights be generally retained, modified only to provide that the term of protection should be the life of the author plus the period from the date of the author's death until the end of the year of the author's death and 50 years thereafter.

Sound Recordings

As noted earlier in the case of both sound recordings and films, the term of copyright presently prevailing is not based on the life of the author plus 50 years, but rather is a fixed term of 50 years from, in essence, the creation of the work. The principle reason for establishing this exception to the general term in the case of sound recordings and films arises from the nature of the dynamic process of creativity which gives birth to these works.

The following passage from Nimmer on Copyright reveals the special nature of these works and the appropriateness of providing a fixed term of protection rather than one based on the life of an individual author:

> The determination of who in fact has made original contributions to a given work is a much more complex question in the case of motion pictures and sound recordings than it is in the case of a literary work. There is usually only one author of a literary work. Even if the work is one of collaboration, the contributions of the several joint authors do not vary in kind, even if there may be great variation in quantity and quality. Hence, with such works it is necessary to merely state that the author

> or his assignee shall be the copyright owner. The problem with respect to motion pictures and sound recordings is that it is not always easy to determine who should be regarded as the authors since such works virtually always represent the combined contributions of a number of different people, performing various functions. (Nimmer, 1979, p. 2-149)

See also the discussion by Fox of sound recordings (Fox, 1967, p. 190). Indeed, the French Copyright Act[3] provides that the following persons are deemed to be "co-authors of a cinematographic work": (1) the author of the script; (2) the author of the adaptation; (3) the author of the dialogue; (4) the author of the musical compositions, with or without words, especially composed for the work; and (5) the director. Nimmer questions whether one could then properly include the cameraman, the set designer, the costumer, etc.

The Keyes-Brunet report recommended that the point of departure for the term of protection for sound recordings should be "the end of the calendar year in which the recording was first made" (Keyes and Brunet, 1977, p. 89) -- not, at first glance, appreciably different from the present point of departure, the date of "the making of the original plate from which the contrivance was...derived" (Copyright Act, s. 10).

However, to the extent that the proposed term of copyright protection would not commence until the end of the year in which a sound recording is made, adoption of the Keyes-Brunet recommendation would give rise to:

(a) an indeterminate period ranging from one to eleven months within which sound recordings would be without copyright protection (i.e., that period between the "creation" of the sound recording and the end of the year in which creation took place); and

(b) a departure from the basic premise of the present Act, a premise recognized elsewhere by the Keyes-Brunet report that "copyright arises without formalities, automatically, when a work is created..." (Keyes and Brunet, 1977, p. 3).

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3. French Copyright Statute, Law No. 57-296 on Literary & Artistic Property, March 11, 1957, effective as of March 11, 1958, Art. 14.

Further, the authors of the Keyes-Brunet report failed to address the apparently arcane but nonetheless real problem inherent in establishing the point of departure for a fixed term of protection for certain classes of works where the works are created over an extended period of time, viz., the problem of having portions of a single work fall into the public domain seriatum, i.e., at different times. This problem does not, of course, arise where the term of protection for a work is based on the life of the author.

For example, the creation of a master record of a sound recording, from which all phonorecords are pressed, often represents the final distillation of individual sound tracks initially recorded on magnetic tape over a period of weeks, perhaps months. If, for any reason, all of the tracks were not "mixed" so as to give rise to a master, could it be said that each of the individual sound tracks failed to qualify as protectable works in their own right? Indeed, it could not. They are each capable of reflecting the requisite degree of originality required by the Act; they have each been "fixed" and they each constitute separate examples of a protected class of works, i.e., sound recordings.

The same principles are applicable in respect of a motion picture which comes into existence over a period of months as successive feet of film are shot each day.

If protection for sound recordings and films is not to prevail until the final version representing the totality of all subsumed works is mixed or edited the result is:

(a) the ostensible absence of protection for all tracks (in the case of sound recordings) and all footage (in the case of film) prior to the final mix;

(b) the conundrum of the status of such tracks and footage vis-à-vis copyright protection should the final mix be delayed for a protracted period or, indeed, never come to pass; and

(c) derogation from the principle that copyright arises automatically upon creation.

On the other hand, if protection for that portion of a work fixed at any particular time was to commence as of the time of fixation and to run for 50 years thereafter, it is possible that the final work incorporating each of the individual tracks or sections of footage would fall into the public domain one day at a time for successive weeks, months, or possibly years, some 50 years later. Indeed, the conclusion of a film might well fall into the public domain prior to its commence-

ment if the former were shot earlier in time. The uncertainty as to when the entire work was no longer protected by copyright would simply be unacceptable.

The American Copyright Act provides that a work is "created" when it is fixed in a copy or phonorecord for the first time and that further:

> ...where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. (U.S. Act, s. 101)

The above definition thus remains true to the principle that copyright protection arises upon creation and fixation.

The United States Act does not contain special terms of protection for sound recordings or films but rather provides a special term of protection for works "made for hire,"[4] which in most, though not all, cases will reflect the status of films and sound recordings. The term for works made for hire is 75 years from publication[5] or 100 years from creation, whichever period expires first. Thus, if a work is first published within 25 years of creation, the problems previously discussed do not arise, as all the elements synthesize into the published work as of publication and the term then runs for a fixed 75 years. Where, however, a work remains unpublished, all of these same issues become revitalized. The American Act partially ameliorates the problem of works with fixed terms of protection falling into the public domain in different stages (a condition which, in the absence of any present designation, could be appropriately called "seriatum divestiture") by providing that: "All terms of copyright run to the end of the calendar year in which they would otherwise expire" (U.S. Act, s. 305). This solution works well if a film or sound

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4. Generally, a work made for hire is: (a) a work made by an employee in the course of employment, or (b) a work specially ordered or commissioned for specified purposes (U.S. Act, s. 101).

5. "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. A public performance or display of a work does not of itself constitute publication (U.S. Act, s. 101).

recording is created entirely within one calendar year; what, however, of the situation where, for example, recording starts in December of one year and is completed in February of the following year? Seriatum divestiture will arise once again. The following proposal seeks to offset the occurrence of seriatum divestiture both where a work is completed within a single year and where the "creation of a work spans two or more successive years, to a maximum of five years."[6]

The term of protection for sound recordings should be the first to expire of either of the following two periods:

(a) The period from first publication until the end of the year in which the first publication takes place and 50 years thereafter; and

(b) the period from creation until the end of the year in which creation takes place ("fixation year 1") and 75 years thereafter; subject, however, to the following qualification:

Where in the year subsequent to fixation year 1 any work(s) created in fixation year 1 are combined with a further work or works created in the subsequent year, and if, in like manner, combined with any work(s) created in any of the subsequent three years (representing a possible maximum of four additional years subsequent to fixation year 1), with the intention that all such works be merged into inseparable or interdependent parts of a unitary whole, the term of protection for each of such works so combined shall be from creation until the end of the final such year in which all such works are so combined, and a period of 75 years thereafter.

Adoption of the above provisions accomplishes the following:

(a) In all cases, copyright protection arises automatically upon creation and fixation.

(b) The period of protection for all published works will always terminate at the end of a calendar year (determination of the year of publication will always remain far easier than determination of the exact date of publication).

(c) The problem of seriatum divestiture is obviated in respect of all sound records which are first published (i.e.,

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6. It is suggested that the percentage of films or sound recordings requiring more than a minimum of 13 months and maximum of five years to complete will remain miniscule.

distributed to the public) any time within 25 years of creation (viz., virtually all commercial recordings).

(d) In addition, seriatum divestiture is also avoided in respect of all those sound recordings which are both: (a) "created" over a period of time up to five consecutive years; and (b) never published or published for the first time only after 25 years have elapsed subsequent to creation.

(e) Lastly, only those sound recordings which both: (a) are never published or are published for the first time only after 25 years have elapsed subsequent to creation; and (b) embody the final synthesis of earlier works created over a continuing period of more than five years, will fall into the public domain seriatum. It is submitted that the number of sound recordings which will fall into this final category will always remain so small that no significant social impact will result.

Under the Rome Text of the Berne Convention, subject only to the provisions with respect to works of joint authorship, Canada has absolute freedom to establish whatever terms of protection it desires and the bases upon which they are to be calculated. The Universal Copyright Convention, however, provides that, generally, the minimum term of protection is life of the author plus 25 years save for, in certain circumstances, works in respect of which the term is calculated from the date of first publication. In these cases the minimum term is 25 years from publication. Presently, the point of departure for films and sound recordings is neither the author's birth nor the date of first publication, but, in essence, the date of creation. This would also be the case, in certain circumstances, under the above proposals.[7]

7. Section 101 of the new American Act provides that:

> A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.
>
> . . . . . .
>
> and that:
> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The Convention does not prohibit the maintaining of such a starting point. "But, in no case except for photographs and applied arts and works protected on the basis of the date of publication, can protection end before 25 years from the author's death" (Bogsch, 1968, p. 47).

Thus, insofar as the terms for film and sound recordings do not run from the date of first publication, protection cannot end prior to 25 years after the author's death. Who, then, is "the author" of a film or a sound recording? All of the reasons for establishing a fixed term in the first place appear to rest at odds with the Universal Copyright Convention requirements. Bogsch, in his incisive work the Law of Copyright Under the Universal Copyright Convention, advises:

> The reality is that the Convention neglects to take into account that there are many countries of the world which -- although computing the term for certain works on the basis of the author's life -- for others do not compute the term from first publication. It could not have been the Conference's intention not to establish minima for such works...it would be unrealistic to hope that all countries which have such other starting points in their laws will abandon them for the sake of adopting either life or first publication as the starting point. The more realistic solution would be to modify the Convention and establish a 25 year minimum also from starting points other than the author's life or first publication. (Bogsch, 1968, p. 47)

Cinematographic Works

It is beyond the scope of this paper to examine the nature of the present "split" treatment accorded to motion pictures under the Act and the arguments in favour of protecting films as a separate and unitary class of works. However, for all of the reasons cited in the preceding section on sound recordings, it is recommended that the term of protection for all cinematographic works should be the same term as that proposed for sound recordings.

Crown Works

It is beyond the ambit of this paper to examine the larger question of whether the Crown's prerogative right by way of copyright to publish certain works should be abolished or

alternatively specifically delineated. While different views exist with respect to the origins of the right, it has been suggested that "the true basis of the right may be, as Lord Lyndhurst stated in Manners v. Blair, the duty imposed upon the chief executive officer of the Government to superintend the publication of the Acts of Parliament and other Acts of State ..." (Lahore, 1977, p. 12). It has been further suggested that this right is a proprietary right of the government with no analogy to the rights of private authors, and thus is not in actuality a form of copyright.

A recommendation with respect to the establishment of a specific term of copyright protection for works within the ambit of the Crown prerogative would be premature, pending further analysis with respect to the "nature" of the prerogative right and, therefore, no recommendation is put forward at this time.

However, it is submitted that while there may be certain social policy considerations which merit retention of the special provisions with respect to government ownership of "works which have been prepared or published by or under the direction or control of Her Majesty or any government department," there are no such considerations which merit the special term accorded such works (i.e., until publication and for 50 years thereafter).

Certain arguments have been presented that many government works are collaborative efforts involving the contributions of many individuals and that therefore these works should be treated comparably to sound recordings and films.

It is submitted that where the works are literary, dramatic, artistic or musical in nature, establishing authorship is no more difficult in a government milieu than in the private sector. Therefore, it is recommended that the term of protection for these works should be the general term of protection, "life plus fifty."

In respect of sound recordings and films made for the government, it is recommended that the terms of protection should be the same as those afforded to all other films and sound recordings.

Photographs

There appear to be no overriding policy considerations, nor have any persuasive arguments on any other grounds been presented, to merit retention of the present discriminatory treatment accorded to photographs with respect to term of pro-

tection. It is recommended, therefore, that the term of protection for photographs should be the same as that for all other artistic works, i.e., the life of the author plus 50 years.

Works of Joint Authorship

The present provisions of the Act are both consistent with the other recommendations with respect to term of protection and precisely reflect Canada's international obligations under the Berne Convention. Accordingly, it is recommended that the present term of protection for works of joint authorship should be retained.

Posthumous Works

The Keyes-Brunet report noted that "there is a strong public interest in gaining access to manuscripts, and making available the information they contain" (Keyes and Brunet, 1977, p. 64). The report also noted that, on the other hand, there is an equally strong need to protect authors and copyright owners from unwarranted derogations of their private rights.

The question which must be addressed then is twofold: firstly, is the need to protect heirs and assignees any greater when works are not published during the author's lifetime than when the author's work is published during his lifetime?; secondly, does the general term of "life plus fifty" fail to provide an adequate measure of protection from "unwarranted derogations of their private rights?"

It is respectfully submitted that the answer in both cases is an unequivocal "no." Whether the work was published or not during the author's lifetime, the owner of copyright has the same protection and the same opportunities to exploit the work in the marketplace.

In the absence of a compelling reason to derogate from the general term of protection and thus further complicate a revised Copyright Act, it is recommended that the present provisions of the Act with respect to posthumous works be abolished.

Anonymous and Pseudonymous Works

As noted previously, the life of the author cannot very well serve as a measure of duration with respect to these works

since, by definition, the identity of the author may not be known. The situation thus calls for a computation of term based on some other scheme; the lesser of a period from creation or a period from publication, being the most appropriate.

The exercise then becomes one of determining the periods of time after creation and after publication which should prevail. In the United Kingdom and Australia, the period is measured from publication only and is 50 years, while in the United States the period is the lesser of 75 years from publication or 100 years from creation.

On balance, given that the period of protection proposed for sound recordings and films is, in essence, the lesser of 75 years from creation and 50 years from first publication, it is recommended that a revised Act explicitly provide that the term of protection for anonymous and pseudonymous works should be the same as that proposed for sound recordings and films. This provision should be subject to an appropriate qualification that wheresoever the identity of one or more of the authors is revealed,[8] the term is to be based on the life of the author(s) whose identity has been revealed (i.e., "life plus 50").

Moral Rights

The present Act appears to have failed to address the question of the term of protection for moral rights; arguably it is perpetual.

The Keyes-Brunet report, while arguing strongly in favour of a strengthening of the protection afforded authors in the nature of moral rights, recognized that perpetual protection was undesirable and advocated a term equal to that in respect of pecuniary rights. The report further advocated that a revised Act should provide explicitly that moral rights be attached to the person of an author but that they could be transmitted on the death of the author to his heirs or, through testamentary disposition, to a third party (but not presumably during the author's lifetime).

It is not within the scope of this paper to address the subject of the alienability of moral rights during the author's lifetime. To the extent, however, that alienation on death touches on the question of term it must be addressed.

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8. Careful consideration will have to be given to the questions of what is to constitute an appropriate divulgation of the author's name and to whom it may be made.

In the Brussels Text of the Berne Convention the author was vouchsafed his moral rights during his lifetime only; thus such a concept is not without widespread recognition. The following passage from one of the studies on copyright written in 1959 in preparation of the revision of the American Copyright Act is illuminating:

> The question of duration of the moral right is also controversial. Under the German law, present and proposed, the moral right terminates with the copyright, i.e. fifty years after the death of the author. In French jurisprudence and the French copyright law of 1957, the moral right is independent of copyright term, and lasts forever. Under the laws of Great Britain and Switzerland personal rights of the author terminate with his death. The Berne Convention (Brussels Text) provides for the protection of the author's moral right during his lifetime; after his death, according to paragraph (2) of the Article 6(bis), protection of the moral right may exist "insofar as the legislation of the Countries of the Union permits." (Strauss, 1963, pp. 963, 990)

As moral rights accrue to the author with the creation of his work and their purpose is the protection of his honour and reputation, it is suggested that the rights should expire on the death of the author. Indeed, even amongst those text-writers who favour transmission of these rights it is acknowledged that:

> Not all components of the moral rights pass to the author's heirs: the "positive" components die with the author; only the "negative" ones pass to the heirs. The right to create a work, to publish it, to change it, to withdraw it from circulation, and to destroy it, are said to be innate positive components. On the other hand, the right to prevent others from making changes or from committing acts detrimental to the author's reputation are considered negative components.... (Strauss, 1963, p. 975)

It is therefore recommended that the term of protection for moral rights should be equal to the life of the author.

Reversionary Interest

The language of s. 12(5) is taken directly from a proviso to s. 5(2) of the Copyright Act, 1911 (U.K.), c. 46. The latter provision was deleted in its entirety from the revised Copyright Act, 1956 (U.K.), c. 74, subject to a "grandfather clause" which provided for the continued applicability of the provisions of s. 5(2) to pre-1957 works (unless a further assignment of the copyright is made subsequent to the commencement of the 1956 Act).

In the course of a discussion of the proviso to s. 5(2), Copinger and Skone James on Copyright described the "illusory nature of the benefits enforced by the proviso":

> The proviso to Section 5(2) of the Act of 1911 was, of course, inserted in the interest of an author's family, to prevent, if possible, a successful author from making improvident contracts to the detriment of his dependents. In practice the benefits to the author's family or dependents have been found to be somewhat illusory. The proviso rendered null and void any attempt by a living author to dispose of the reversionary interest in his copyright, and declared that this reversionary interest should "on the death of the author," devolve on his legal personal representatives "as part of his estate." This reversionary interest, unassignable during the author's lifetime, therefore became an asset of the author's estate and assignable immediately upon his death. It was consequently liable to be sold by his executors for the payment of his debts, and, even if not required for that purpose, it was frequently the duty of the executors to realize the interest for the purpose of winding up the author's estate. Supposing the author made a specific bequest of his reversionary interest in his copyright, the specific legatee would probably be ready to sell that interest forthwith, rather than wait for a chance of income twenty-five years later. The only possible purchaser, at any rate in the case of a literary work, would, save in exceptional cases, be the author's publisher, and the amount which he would be prepared to give for a reversionary interest in a copyright falling into possession twenty-five years later would not be likely to be very large, particularly having regard to

> the fact that he would, even if he declined to purchase the reversion, be entitled to continue to publish the work, if he thought it worthwhile to do so, upon payment of a royalty to the owner of the copyright, and that, if he did purchase he could not acquire an exclusive copyright. (Skone James, 1971, p. 163)

Thus as demonstrated earlier, not only is the reversionary interest provision subject to a multitude of qualifications which limit its application, when applicable it appears to be of limited value. Finally, and perhaps most importantly s. 12(5) reflects an unacceptably paternalistic approach to the treatment of authors on the part of a benevolently disposed legislature. Such provisions perpetuate the stereotypical image of the author as the gifted but "congenitally irresponsible" artist who cannot be expected to assume full responsibility for the consequences of his actions and must be guarded against himself (Fisher Music Co. v. Witmark, 318 U.S. 643 (1943)). It is submitted that such a perception: (a) constitutes an insult and a disservice to authors; (b) is not in keeping with the societal value placed on treating each citizen as responsible for his own acts; and (c) constitutes an inequitable intrusion into the ability of the parties to agree to expiration terms of their own choosing, unrestricted by artificial limitations which may, in fact, not be in an author's best interest insofar as they may serve to reduce the consideration paid for the copyright.

It is therefore recommended that the reversionary interest provisions of s. 12(5) should be repealed.

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