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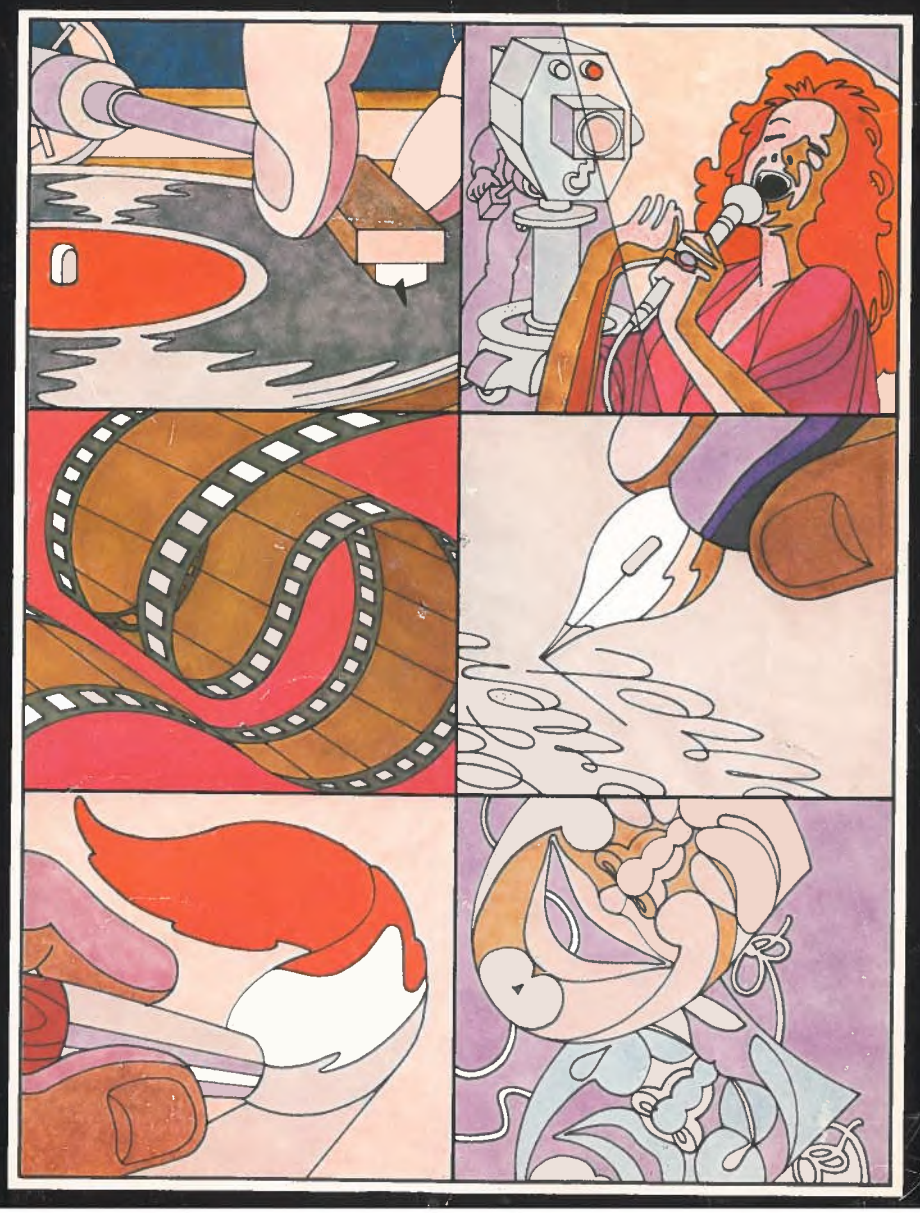
Crown Copyright in Canada: a Legacy of Confusion

Barry Torno



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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 50 years old. The wide breadth of legal, economic and technological developments since the Act 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 will 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 and conflicts between private and social 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)

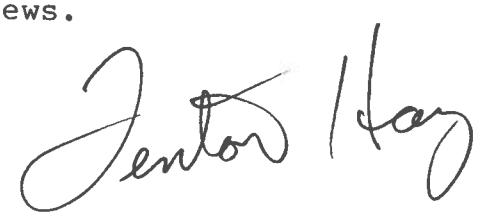
It is within this spirit that the economic studies completed for the Branch have been commissioned and carried out.

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 consequent improvement in the copyright policy formation process.

This study by Barry Torno of the Department of Justice explores the historical roots of what are commonly known as the Crown copyright provisions of the present Copyright Act. This detailed and valuable exploration serves to highlight the extent of the many complex questions arising from the special privileges and immunities of the Crown as they affect copyright law in Canada today.

The study proposes a series of recommendations designed to harmonize the special needs of government, both federal and provincial, as owners and users of protected works, and the interests of copyright owners and users in the private sector.

It should be noted that the results and recommendations contained in this study are those of the author and do not necessarily imply acceptance by Consumer and Corporate Affairs Canada or 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
Bureau of Corporate Affairs

SUMMARY

This study, by Barry Torno, of the Department of Justice, seeks to furnish the reader with an understanding of the "Crown copyright" provisions of the Copyright Act by providing, first, an historical perspective on their origins and, thereafter, an analysis of their present status and impact upon both owners of copyright and users of protected works alike.

Section 11 of the Copyright Act stipulates that, in addition to the specific provisions of that section regarding ownership and term of protection for works "prepared or published by or under the direction or control of Her Majesty or any Government department" ("statutory Crown works"), the rights and privileges of the Crown arising from the common law (the "royal prerogatives") are preserved. Prior to exploring the two prerogatives relevant to copyright law today and the portion of section 11 which provides for the ownership and term of protection for statutory Crown works, the paper examines the meaning of the terms "the Crown" and "Her Majesty" as they apply presently to the federal and provincial governments. The paper highlights the fact that the Crown is comprised of many entities -- the monarch, ministers, government departments and civil service, the armed forces, the governor general and lieutenant governors -- and that the prerogatives of the Crown enure to each of the governments, both national and intra-national, which govern in the name of the queen or the Crown, unless affected by statute or constitutional considerations.

The Prerogatives

The two powers of continuing importance to copyright are: (a) the presumption of Crown immunity from the application of statutory law, unless expressly indicated or by necessary implication; and (b) the exclusive right of the Crown to publish "a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive," such as statutes, orders-in-council, judicial decisions (and in the United Kingdom, the King James Version of the bible).

(a) Immunity

The presumption of immunity is no longer a facet of royal prerogative, having been incorporated into statutory law in all of the provinces and by the federal government in their respective interpretation acts, save for British Columbia, where the presumption has been statutorily re-

versed. More importantly, the federal Interpretation Act has been held to abolish the "necessary implication" aspect of the presumption; therefore, unless a statute specifically provides that the Crown is bound, the Crown will be presumed not to be bound.

The paper reveals that the subject of governmental immunity vis-à-vis the Copyright Act has several facets. The Act does not specifically state that the Crown is bound by the Act, and therefore there is a presumption that the Crown is not bound. This gives rise to several questions:

> 1) Is the Crown free to use the works of third parties with impunity? (i.e., is there no liability for infringement?)

To the extent that copyright infringement in Canada constitutes a tort (a point of law which remains clouded), this ostensible Crown privilege has been abolished by the federal Crown Liability Act and the provincial proceedings against the Crown Act statutes. These statutes render the respective governments liable for torts committed by servants of the Crown. The paper recommends that a revised Copyright Act should specify that the Crown in right of both Canada and the provinces, and those federal Crown corporations and their provincial counterparts which qualify as "governmental corporations," or are specifically designated by order-in-council, should be bound by the Act vis-à-vis the use of the works of third parties, subject only to an extraordinary right allowing the Crown to use such works without prior consent: (a) in time of national emergency; or (b) where national security is of paramount importance; or (c) where the absence of such a right would substantially prejudice the effective enforcement or administration of the law. A governmental corporation, as distinct from a "governmental enterprise," is one which operates within the general government section of the economy; i.e., all departments and bodies which furnish but don't sell the common services which cannot otherwise conveniently and economically be provided and administer the economic and social policy of the community.

> 2) Are Crown works free of the "burdens" of the Copyright Act, such as compulsory licensing and fair dealing?

This prerogative is presently subject to a principle of law that whenever the Crown takes advantage of the benefits of a statute (such as would be the case were the Crown to sue a second party for infringement of copyright), the Crown is to be treated as having assumed the attendant burdens of the

statute. The paper recommends that this circumscribed Crown immunity should be abolished and that works of the Crown in right of Canada and the provinces should be subject to the provisions of the Act, save for any special provisions as to ownership and term.

(b) The power to publish

The paper notes that there have been several theories and views as to the basis for and the nature of this special right over the years. The principle rationale offered has been that the reigning monarch personally, then later the Crown, as guardian of the nation, has a duty to superintend the publication of acts of the legislature and similar works. This power is a proprietory right which is not copyright as it is known today (i.e., a form of recognition of, or protection for, the author's right) but is rather a commercial monopoly in respect of the printing and distribution of certain works.

It is pointed out that wherever the Crown would be the owner of the copyright in a work, whether owing to a master/servant relationship or as a result of the application of other ownership provisions of the Act (e.g., commissioned works, maker of a film, assignee), such copyright would provide the same exclusive right to publish and reproduce the work as that arising from the claim to the prerogative right to publish. The only significant difference between the two being that the statutory right would be limited in time, whereas the prerogative right would provide the counterpart of a perpetual term.

Advocating the desirability of subjecting the Crown to the provisions of the Copyright Act, and the value of providing ascertainable limited terms of protection, and recognizing that the objectives served by the prerogative right can be equally served by Crown ownership of the statutory right, the paper proposes that the prerogative right to publish should be abolished.

Statutory Crown Works

Section 11 of the Copyright Act has been labelled a "legislative monstrosity." The most troublesome element in the section is the core passage which provides: "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...." The paper notes the many problems which arise from this passage,

such as the uncertain effect of government publication on works already fallen into the public domain, and the uncertainty of the scope of the term "direction and control." In order to obviate these problems, and to provide for Crown ownership of certain works where the Crown would not be the owner of copyright under the ownership provisions of the Act in the absence of the assignment of copyright (i.e., judicial decisions and works authored by members of the legislature), the following recommendations are offered:

(i) The copyright in all pronouncements and decisions rendered by members of the Supreme Court of Canada, the federal court and by members of all federal administrative and quasi-judicial tribunals and similar bodies should reside in the Crown in right of Canada.

(ii) The copyright in all other pronouncements and decisions by the members of all other courts and comparable tribunals should reside in the appropriate Crown in right of the provinces.

(iii) Where a work is created by a member of a legislative body of either the federal or provincial governments, or by an agent or servant thereof, and where such work is first published by the Crown in right of either Canada or the relevant province, then, subject to any agreement with the author to the contrary, as of the date of first publication: (a) the copyright in the work should automatically vest in the relevant Crown; and (b) where the work is a literary work, the term of copyright protecting same should, in like manner, become the term applicable in respect of literary Crown works.

(iv) Crown ownership of copyright in all works, other than those referred to in the recommendations above, should arise only as a result of the application of the general ownership provisions of the Act (e.g., employer/employee, commissioning party, maker of films and sound recordings, assignment, etc.).

Term of Protection

The present term of protection for Crown works (other than prerogative works) is not based on the life of one or more authors, as is the general term under the Act, i.e., "life plus 50 years," but rather is a fixed term of 50 years measured from the date of first publication. The general rationale offered for this special term has been that the majority of Crown works are created by a multitude of Crown servants and it would not be feasible to maintain records of authorship.

The paper explores the strengths and weaknesses of this argument and concludes that it is meritorious only with respect to literary works and therefore proposes that:

(i) All Crown works, both in right of the federal and provincial governments other than literary works, should be provided with the general terms of copyright protection provided in the Act for works of the same class (i.e., sound recordings, films, artistic works, etc.).

(ii) Crown works, both in right of the federal and provincial governments, which are literary works should be provided with a term of protection comprised of 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 publication takes place and 50 years thereafter; and (b) the period from creation until the end of the year in which creation takes place and 75 years thereafter.

(iii) The recommendations in (i) and (ii) above should be equally applicable to both federal and provincial Crown corporations.

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INTRODUCTION

> 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 50 years from the date of first publication of the work. (Copyright Act, R.S.C. 1970, c.C-30, s. 11)

The preceding quotation of the Canadian Copyright Act, section 11, was adopted in its entirety from section 18 of the U.K. Imperial Copyright Act of 1911. The same provision was incorporated in the Australian Copyright Act of 1912 and may also be found in the copyright statutes of many other member nations of the British Commonwealth.[1] While application of the provision may vary between countries, it is of interest to note that subsequent revisions to both the U.K. Act in 1956 and the Australian Act in 1968 have retained this provision.[2]

Section 11 of the Copyright Act is generally referred to as the section that provides for Crown copyright. The term "Crown copyright" while, in the author's experience, seldom fully understood by those who use it, is most often referred to as denoting a single concept. A close reading of section 11 of the Act reveals, however, that in describing the subject matter of that section, the term "Crown copyright" encompasses not one concept but rather several distinct elements, each of which merits separate examination and discussion in order that the totality may be fully understood. Accordingly, the following discussion will center on a breakdown of section 11 into three parts reflecting each of these distinct elements. These are:

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1. See, for example, India Copyright Act of 1957 and New Zealand Copyright Act of 1962.

2. The counterpart of section 18 of the Imperial Act is contained in section 39 of the U.K. Act of 1956. The Australian Act of 1968 (i.e., the Copyright Act 1968-1976 (COM)) incorporates section 18 of the Imperial Act of 1911 in two places, section 8(2) and sections 176-183.

Part I without prejudice to any rights or privileges of the Crown,

Part II 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,

Part III and in such case shall continue for a period of 50 years from the date of first publication of the work.

PART I

WITHOUT PREJUDICE TO ANY RIGHTS OR PRIVILEGES OF THE CROWN

The Prerogative Powers in Perspective

The above introductory phrase advises that the rights of the Crown with respect to copyright, set forth in the balance of the section, do not in any way diminish or restrict the special rights and immunities of the Crown arising from the common law and antedating even the Statute of Anne (commonly regarded as the first enactment of copyright legislation), including the exclusive right to publish certain works such as acts of Parliament, orders-in-council, regulations and state papers generally.[3] This special right, often referred to as the royal prerogative or the prerogative power, in fact represents but one facet of the royal prerogative, i.e., only one of the "prerogative powers."

The royal prerogative, as it may now be exercised, arises in part from the seventeenth century constitutional settlement in England, which established that the powers of the Crown were subject to the law of the land and that there were no Crown powers that could not be taken away or controlled by statute, and in part from the subsequent growth of responsible government and the establishment of a constitutional monarchy, under which it became recognized that the prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Once this settlement had been attained, the courts accepted that the sovereign and the Crown still enjoyed certain powers, rights, immunities and privileges which were necessary to the maintenance of government and which were not shared with private citizens. The term "prerogative" is used as a collective description of these matters[4] and has been defined

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3. Refer to the discussion of Crown immunity and the Copyright Act at pp. 13-14.

4. That is, the compendium of rights, powers, immunities and privileges.

as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[5]

As indicated, the royal prerogative is now subservient to the wishes of Parliament. That is, Parliament may expressly abolish or restrict prerogative rights, whether or not this is coupled with a grant back to the Crown of statutory powers with respect to the same subject matter. Thus, insofar as successive parliaments in countries where government is carried on in the queen's name may have passed legislation affecting the royal prerogative, the scope of the prerogative powers will vary from one such country to another.[6] The following listing of the prerogative powers as they existed in the United Kingdom in 1977 (Wade and Philips, 1977, pp. 234-239) illustrates the main areas where the royal prerogative has traditionally survived (unless, as indicated, it has in some respect been adumbrated by Parliament). It should be noted, however, that "because of the diverse subjects covered by the prerogative, and because of the uncertainty of the law in many instances where ancient power has not been used in modern times, it is not possible to give a comprehensive catalogue of prerogative powers" (Wade and Philips, 1977, p. 234).

1) Powers Relating to the Legislature

By virtue of the prerogative the sovereign (or her representatives, i.e., the governor general or the lieutenant governor) summons, prorogues and dissolves Parliament.

2) Powers Relating to the Judicial System

Through the attorney general, the Crown exercises many functions in relation to criminal justice, and in civil matters the attorney general represents the Crown as "parens patriae" to enforce matters of public right.

3) Powers Relating to Foreign Affairs

These include the making of treaties, the declaration of war and the making of peace.

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5. Definition established by Dicey, pp. 24-25; judicial approval established in Attorney General v. De Keyser's Royal Hotel Ltd. (1920), A.C. 508.

6. Examples include Australia, Sri Lanka, Singapore, Fiji and New Zealand.

4) Powers Relating to the Armed Forces

Both by prerogative and by statute, the sovereign is commander-in-chief of the armed forces of the Crown.

5) Appointments and Honours

On the advice of the prime minister or other ministers, the sovereign appoints ministers, ambassadors, judges, governors general, lieutenant governors and certain holders of public office; the sovereign is the sole fountain of honour in the United Kingdom and alone can create peers and confer honours and declarations. Prior to the creation of the Order of Canada in 1967, the only honours and awards available to Canadian citizens were those of the United Kingdom.

6) Immunities and Privileges

The Crown benefits from the principle of interpretation that statutes do not bind the Crown unless by express statement or by necessary implication it is evident that Parliament intends this to be the case.

7) The Prerogative in Time of Emergency

The extent of the prerogative in times of grave emergency cannot be precisely stated.

> The mobilization of the industrial and financial resources of the country could not be done without the statutory emergency powers. The prerogative is really a relic of a past age, not lost by disuse but only available for a case not covered by statute. (Burmah Oil Co. v. Lord Advocate (1965), A.C. 75, 101)

8) Miscellaneous Prerogatives

The creation of corporations by royal charters; the erection and supervision of harbours; the guardianship of infants; the right to mine precious metals; the use of coinage; the grant of franchises; the right to treasure trove; *the sole right of printing or licensing others to print the authorized version of the Bible* (Universities of Oxford and Cambridge v. Eyre and Spottieswood Ltd. (1964), Ch. 736), *the Book of Common Prayer and State Papers*.

The Crown

Throughout the preceding sections, the terms "the Crown," "the sovereign" and "Her Majesty" have been used frequently and, depending on the source referred to, often interchangeably.

For the purposes of the discussion to follow, it is important that the concept of "the Crown" be more fully explored so that it may be better understood within the context of Canada's present government structure.[7]

The British North America Act provides that the government of Canada is to be carried on in the queen's name;[8] however, the queen (i.e., the reigning monarch) herself does not govern. The Crown thus denotes the executive branch (as distinct from the legislative and judicial branches) of Canada's government, the branch responsible for carrying out the law and performing the routine administration of the country.

Originally, the executive power in England was in the hands of the monarch personally, but constitutional evolution has resulted in the transfer of these powers to responsible officials who exercise them in the name of the sovereign. The sovereign, then, is but one component part of the Crown today. In a recent work on British constitutional law, the author suggests that "for convenience the component parts of the Crown or executive may be stated to be (1) the monarch, (2) the ministers, (3) the central government departments, staffed by the civil service and (4) the armed forces" (Yardley, 1974, p. 38). The situation is altered in Canada only to the extent that the governor general and the lieutenant governors may act in the queen's

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7. The federal Interpretation Act provides a somewhat stilted definition of the Crown which is of little help in understanding the term in its present-day context. "Her Majesty," "His Majesty," "the queen," "the king" or "the Crown" means the sovereign of the United Kingdom, Canada and her other Realms and Territories and Head of the Commonwealth (R.S.C. c. I-23, s. 28).

8. "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen" (British North America Act, 1867, s. 9).

stead[9] and, further, to the extent that Crown corporations may be viewed as constituting a further component part of the Crown.[10]

Indivisibility of the Crown

Both case law and commentary are replete with references to the indivisibility of the Crown.

> The Crown is one and indivisible throughout the Empire. (The Engineer's Case (1920), 28 O.L.R. 129, 152)
>
> The Crown is, in contemplation of law, one and indivisible and ubiquitous throughout the Dominions of the Crown; and rights of the Crown of whatever nature, which it has merely by virtue of being the Crown, exist throughout the Dominions of the Crown unless the nature of the particular right leads to the contrary conclusion.[11]

It has never been unequivocally stated what the practical consequences of such a construct might be. If the Crown were truly indivisible, then a claim against the Crown "in right of Canada" (i.e., against its Canadian manifestation), for example, would theoretically also be exigible against the Crown "in right of the Commonwealth of Austra-

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9. Vis-à-vis the role of the governor general, in 1947 the king issued letters patent conferring on the governor general "all powers and authorities lawfully belonging to us in respect of Canada." Legally, therefore, the governor general can exercise any of the powers of the queen in Canada. The converse is not true, however. The queen cannot exercise the powers of the governor general, insofar as they are conferred on him and not on the queen by the British North America Act.

10. See the discussion at p. 35.

11. Submission of Weston K.C. on behalf of informant in The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd. (1937-38), S.R. (N.S.W.); cited in support of the submission were, inter alia, the following cases: In Re: Oriental Bank Corporation 28 Ch. D. 643; Attorney General for Canada v. Attorney General for Ontario (1898), A.C. 247; and Attorney General for Ontario v. Attorney General for Canada (1912), A.C. 571.

lia," or the common law presumption (now statutorily enshrined in most jurisdictions) that the Crown is not bound by a statute unless the language of the statute specifies or necessarily implies that, would exempt each government that represents the Crown.

One can easily appreciate that this situation does not prevail today any more than at any time in the past. Both politically and administratively it would be untenable and unacceptable. Indeed, in a 1944 Australian case Chief Justice Latham concluded that, as a legal principle, the indivisibility of the Crown was merely "verbally impressive mysticism" (Minister for Works (W.A.) v. Gulson (1944), (69) C.L.R. 338, 350-351).

The merits of this view are reflected upon by Hogg in his work Liability of the Crown. While his references are to the Commonwealth of Australia and its member states, the analysis is equally applicable to the relationships between each of the countries that govern in the name of the queen and, where any such countries are federations, to relationships between their central governments and the governments of their respective member states or provinces. Hogg suggests that:

> The most cursory glance at the separate political and legal position of each federal unit shows what (the Chief Justice) meant. Each of the States and the Commonwealth can sue each other; they can enter into different contracts with each other; they have different Ministers advising different Governors (a Governor General in the case of the Commonwealth); they have separate legislatures and judiciaries; and separate treasuries which recognize and pay only their separate debts; each is affected by different legislation and has much greater legislative power to affect itself than to affect the others. To be sure, the action of States and Commonwealth is taken in the name of the same Crown, but this is pure formality; for the vast majority of purposes the law recognizes the existence of separate governments and separate legal persons. (Hogg, 1971, pp. 198-199)

Thus to the extent that the Crown is today comprised of a multitude of discreet national and intra-national political units, the ability to exercise the Crown prerogative lies within the capacity of each of these units. In 1892

the Privy Council held, affirming a judgement of the Supreme Court of Canada, that "the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain" (Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick (1892), A.C. 437, 441). The decision in this case affirmed that not only the Dominion (i.e., the federal government) was imbued with the Crown prerogative to the same extent as the government of Great Britain but so also were each of the provincial governments, according to their respective legislative jurisdictions.

> Their Lordships do not think it necessary to examine in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was not merely to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and authority. (Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick (1892), A.C. 437, 442)

This view received support in an Australian case which specifically addressed the issue of the Crown prerogative to publish statutes. In this instance, the statutes in question were those of the state of New South Wales. The court held that the prerogative right to publish those statutes created by the Parliament of New South Wales existed in that colony and was vested in the Crown in the right of the colony immediately prior to the formation of the Commonwealth of Australia. It further held that neither by Confederation, nor since Confederation, had such prerogative right been affected as there had been no exercise of any Commonwealth legislative powers under the applicable sections of the Australian constitution. Nor had the right been in any way abridged or curtailed by the Copyright Act

of 1912.[12] Therefore, the right remained vested in the Crown in the right of the state of New South Wales.

In view of the analysis and holding in this case, it is clear that in a similar manner in Canada, insofar as neither the Copyright Act nor any exercise of federal jurisdiction has usurped the prerogative power[13] in the right of the provinces to publish statutes, etc., both the federal government and each of the ten provincial governments have the capacity and the right to exercise the Crown prerogative to publish those works that have been judicially characterized as "a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive" (Rex v. Bellman (1938), 3 D.L.R. 548, 553 per Baxter C.J.).

Immunity of the Crown

While it is apparent that most of the royal prerogatives outlined above will neither affect nor be affected by copyright law, there is, in addition to the prerogative power to publish already touched on, one component of the prerogative that does interface with copyright: governmental immunity from statute. Subject always to legislative provisions abolishing or affecting (Crown Liability Act, R.S.C. 1970, c.C-38) this immunity,[14] it is enjoyed to the same extent by the Crown in the right of the provinces as it is by the Crown in the right of the federal government.

The general principle of this immunity under the prerogative right was that the Crown was not to be bound by a statute unless expressly named or included by necessary

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12. The Australian Copyright Act of 1912 incorporated that section of the Imperial Act which became section 11 of the Canadian Copyright Act of 1921.

13. However, see the discussion at p. 20 regarding possible interpretation of the effect of the Copyright Act on provincial prerogative.

14. See, for example, the British Columbia Interpretation Act, which provides that the Crown shall be presumed to be bound by statute unless specifically provided otherwise (S.B.C. 1974, C. 42, s. 13).

implication.[15] In the absence of particular extension to the Crown, it is sometimes said that an enactment will not affect such matters as the property, rights, title, prerogatives or interests of the Crown.[16] Colin McNairn, advises that:

> The rule has been described both as a feature of the royal prerogative and as a canon of construction for legislation creating a presumption in favour of the Crown. These characterizations carry a different emphasis but are not inherently inconsistent. Though the rule may be attributed to the prerogative it is important to keep in mind that unlike most other forms of the prerogative this particular privilege does not have to be positively asserted by the Crown. (McNairn, 1972, p. 1)

The subject of governmental (i.e., Crown) immunity with respect to the Copyright Act has several facets, one of which was alluded to by Keyes and Brunet in their 1977 study:

> Finally, it is uncertain whether the Crown is, in fact, bound by the Copyright Act. Section 16 of the [federal] Interpretation Act provides that the Crown is not bound unless an Act so provides; the Copyright Act does not so provide. This raises a secondary issue: to what extent may the Crown use copyright material of others if it is not bound by the Act? (Keyes and Brunet, 1977, p. 223)

A further facet was touched on by the Patent and Trademark Institute of Canada (PTIC) in its brief submitted in response to the Keyes-Brunet report:

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15. The wording of the predecessor version of the federal Interpretation Act was held to exclude the common law rule that Her Majesty could be affected by "necessary intendment" (Rankin v. R (1940), Ex. C.R. 105). The present version has been held, similarly, to exclude the doctrine of necessary intendment or necessary implication (Her Majesty in right of the Province of Alberta and Canadian Transport Commission, [1978] 1 R.C.S. 61).

16. See, for example, Minister for Works (W.A.) v. Gulson (1944), 69 C.L.R. 338, 363 and 366-7 per Williams J.

> The report has not dealt with the constitutional problem posed by the Ilsley Commission[17] as to whether the Parliament of Canada has a constitutional right to impose liabilities upon the Crown in the right of a province (i.e., the Commission's recommended statutory compensation for unauthorized Crown use of copyrighted work). (PTIC, 1978, p. 62)

I have used the words "alluded to" and "touched on" with respect to both the preceding references not without reason. A study of the two areas "touched on" reveals several further dimensions which merit further exposition.

The Keyes-Brunet report appears to limit its discussion of Crown copyright to the Crown in the right of the federal government. The report does not at any time indicate that there are also ten provincial Crowns. For example, the report refers only to the federal Interpretation Act and suggests that insofar as section 16 provides that the Crown is not bound unless an act so provides and insofar as the Copyright Act does not so provide, it is therefore uncertain whether the Crown is, in fact, bound by the Copyright Act.

In addition to the federal Interpretation Act there are interpretation acts enacted by each of the ten provincial legislatures and also separate interpretation acts for the Yukon and Northwest Territories (see Appendix I). While 11 of these provincial and territorial statutes generally reflect the principle set forth in the federal Interpretation Act, the Interpretation Act of British Columbia abolishes the presumption of governmental immunity by providing that "unless an enactment otherwise specifically provides, every Act and every enactment made thereunder is binding upon Her Majesty."

The following questions thus arise:

> (1) What is the effect of the federal and provincial interpretation acts upon that facet of the Crown prerogative comprising the Crown's presumption of immunity from the application of statutes?

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17. Royal Commission on Patents, Copyrights, Trademarks and Industrial Designs, Report on Copyright, 1957, p. 117.

(2) Does the expression "without prejudice to any rights or privileges of the Crown," vis-à-vis governmental immunity from statute, speak only to the rights and privileges of the Crown in the right of the federal government or to the rights and privileges of the Crown in the right of the provinces as well? In other words, can a piece of federal legislation purport to provide immunity from a federal statute to provincial governments, i.e., while the federal Crown is not bound by the Copyright Act? Is this true of the Crown in the right of the provinces?

(3) If federal legislation, whether the Copyright Act itself or the Interpretation Act, does not provide the Crown in right of the provinces with the benefit of a presumption of immunity from the application of the Copyright Act, does this presumption subsist as a result of the application of the respective provincial interpretation acts?

(4) Do the balance of the references in section 11 of the Copyright Act to "Her Majesty," after the words "without prejudice to any rights or privileges of the Crown," refer only to the Crown in right of the federal government or to the Crown in right of the provinces as well? That is, beyond recognition of any subsisting prerogative rights, does the Copyright Act purport to establish copyright for a term of "50 years from the date of first publication" for works "prepared or published by or under the direction or control of" the Crown in right of Canada only or also the Crown in right of the provinces?

(5) To what extent does the federal Crown Liability Act (R.S.C. 1970, c.C-38) first introduced in 1953, and its provincial counterparts, affect the presumption of immunity of the Crown (whether resulting from prerogative or statute) ostensibly recognized and maintained by the Copyright Act?

Question (1) Effect of the federal and provincial interpretation acts on Crown immunity

It has been previously noted that Parliament and the provincial legislatures may expressly abolish or restrict the prerogative right, whether or not it is coupled with a grant of statutory powers in the same area of government. It appears that Parliament and the legislatures often do not expressly abolish prerogative rights but merely create a statutory scheme dealing with the same subject matter. The question then arises whether the Crown must proceed under the statutory powers or may rely instead upon the prerogative.

In Attorney General v. the De Keyser's Royal Hotel Ltd. (1920), A.C. 508, the House of Lords held that, in the absence of an expressed intention on the part of the legislating jurisdiction, the prerogative should coexist to one degree or another with the statutory powers. The conferral of statutory powers upon the Crown prevents the Crown from using prerogative powers for the duration of the statutory powers. The federal Interpretation Act would appear to cover the same subject matter as that which comprises the immunity component of the royal prerogative. The Act does not indicate that the immunity under the prerogative is to remain coterminous with the statutorily established immunity. Therefore, it is suggested that the principle of "Crown immunity from Statute unless expressly included" is no longer a prerogative right vis-à-vis the federal Crown (nor the provincial Crowns, where their interpretation acts are similarly worded),[18] but rather a matter of statute law.

The significance of the above submission touches on the issue raised in Questions 2 and 4. To the extent that the immunity presumption doctrine has now been enshrined in the legislation of the federal government and the provinces, the issue of the scope of the presumption is rendered some-

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18. See, for example, Ontario Interpretation Act, R.S.O. 1970, c. 11.

what moot.[19] The focus must turn to the issue of the scope of the word "Crown" when used in both federal (i.e., the Copyright Act and the Interpretation Act) and provincial (i.e., the interpretation acts) legislation.

Before passing to this next issue, it might be appropriate to provide a succinct capsulization of the issue of scope with respect to the immunity presumption[20] so that the related questions may be kept in perspective:

> the presumption makes clear that general words in a Victorian statute will be interpreted as not applying to the Crown in right of Victoria...; the question to be considered here is whether the same words will be interpreted as applying to the Crown in right of the Commonwealth or New South Wales. In other words, does the presumption exempt only the Crown in right of the legislating government, or does it exempt it in right of other governments as well? (Hogg, 1971, p. 188)

Question (2) Is the Crown in right of the provinces bound by the Copyright Act?

Each of the interpretation acts provides that the presumption against (or, in the case of British Columbia,

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19. See, however, the Privy Council decision in the Canadian appeal of Re: Silver Brothers Ltd. (1932), A.C. 514 P.C., where the assumption was made that the reference to Her Majesty in the Interpretation Act provision (to the effect that Her Majesty may be bound only by statute expressly) was not limited to the Crown in right of the legislating government. The scope of the immunity presumption in an intergovernmental context appears to remain debatable when the presumption is part of the prerogative. Where the prerogative presumption of immunity has been replaced by a statutory presumption, however, the above decision is rendered somewhat anomalous in view of the principle enunciated in the Gauthier case, which has been applied repeatedly in subsequent cases and supported by two leading commentators (see the discussion under Question 2).

20. For differing views on the scope of immunity presumption issue see Hogg, 1971, pp. 190-195 and McNairn, 1972, pp. 23-29.

for) application of statutes to the Crown applies only in respect of the statutes enacted by the legislating jurisdiction. Thus, the presumption in the federal Interpretation Act applies only to federal statutes and, in like manner, the provincial interpretation acts apply only to provincial statutes.

Question 2, when first posed, focused on the scope of the Crown in the context of the introductory language of section 11 of the Copyright Act. The question may be broadened somewhat to address the same issue vis-à-vis the term "Crown" as it appears in all legislation. The questions: (a) does the expression "without prejudice to any rights or privileges of the Crown" speak only to the rights and privileges of the Crown in right of the federal government? and (b) do the federal and provincial interpretation acts exempt other jurisdictions in respect of the legislation that is subject to same? resolve themselves into the broader question of the scope (i.e., meaning) of the term "the Crown" when it appears in a statute.

> When a statute refers to "the Crown" (or "Her Majesty" or any other equivalent) does this mean the Crown in right of the legislating government only or does it include the Crown in right of other governments as well? (Hogg, 1971, p. 195)

As noted previously, the federal Interpretation Act's definition of the Crown provides no assistance in determining the answer to this question.[21] The provincial interpretation acts have, to a great degree, adopted the same definition.[22] Resort must thus be had to case law.

In 1918, the Supreme Court of Canada held that a provision applying the terms of a provincial act to His Majesty ought not to be taken as subjecting the Crown in right of the Dominion to the restrictions of that act. Mr. Justice Anglin expressed the view that "it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be the Crown in right of the province only, unless the statute, in expressed terms or by necessary intendment, makes it clear that the reference is to the Crown in some other sense" (Gauthier v. the King (1918), 40 D.L.R. 353 (S.C.C.) 365-366).

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21. See footnote 7.

22. E.g., the Interpretation Acts of Ontario and Manitoba.

Colin McNairn concludes:

> In deciding that the expression "the Crown" in a "Crown is bound" provision in a state or provincial statute is presumed to mean the state or provincial government, these judgements indicate, then, that to affect the Federal government, local legislation must be clear about its inclusion of the Federal authority. Presumably a similar requirement would have to be satisfied by Federal legislation if it is to affect state or provincial government. (McNairn, 1972, p. 33)

Section 11 of the Copyright Act refers only to the Crown and to Her Majesty. It does not state explicitly that these references are deemed to extend to the Crown in right of the provinces. In the absence of any other provisions of the Act that refer to the Crown, or specifically affect the Crown, it is at best questionable whether one could support a claim that anywhere on its face the Act purports to indicate that references to the Crown are meant to extend beyond the legislating, i.e., federal government. If the preceding premises and analysis are valid, the implications are as follows:

a) The references to the Crown and to Her Majesty in section 11 of the Copyright Act refer only to the Crown in right of the federal government.

b) The introductory phrase "without prejudice to any rights or privileges of the Crown" refers only to the special privileges and immunities (whether statutory or by prerogative) of the federal Crown. The special privileges and immunities of the Crown in right of the provinces are not, like those of the federal Crown, addressed in or touched by the Act and thus continue, unaffected by the Act.[23] Alternatively, it could be argued that insofar as section 11 in its entirety addresses only the Crown in right of Canada: (a) all works prepared by employees or agents of the Crown in right of the provinces are subject to all the ordinary provisions of the Act; and/or (b) so

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23. This argument appears weakened to the extent that its acceptance would result in the absence of any protection for provincial works other than that which the provincial Crown would retain vis-à-vis the prerogative right to publish statutes, etc., insofar as there is no common law copyright protection outside the ambit of the Copyright Act.

are those works that are presumed to fall under provincial Crown prerogative right to publish (i.e., the Copyright Act has effectively abolished the provincial prerogative power to publish statutes, etc.).

c) The balance of section 11, which establishes a special form of protection vis-à-vis ownership of and term of protection for works "prepared or published by or under the direction or control of Her Majesty or any government department," is applicable only to works so prepared or published by or under the direction of the Crown in right of Canada.

d) The failure of the Copyright Act to specifically provide that Crown works (whether achieving that status as a result of the prerogative right to publish them or by virtue of the application of the criteria in the balance of section 11) are subject to all the remaining provisions of the Act (save for "term") appears to suggest that these works are not subject to such provisions, in particular those provisions that create exceptions to the exclusive rights of copyright holders, i.e., fair dealing and compulsory licenses.[24]

However, there is a principle of law, which has its roots in early English authority[25] and which has been given recognition in recent Canadian jurisprudence,[26] that, by taking advantage of legislation, the Crown is to be treated as having assumed the attendant burdens, even where the legislation has not been made to bind the Crown expressly or by necessary implication. Thus, if a third party were to take portions of a work subject to Crown copyright, where this would otherwise amount to infringement or even permissible fair dealing, and the Crown sought to prevent this by availing itself of the remedies for infringement provided for by the Copyright Act, it could well be argued that in so doing

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24. The separate but related issue of the ability of the Crown to use the protected works of third parties with impunity insofar as the Crown may not be bound by the Act (i.e., the provisions with respect to infringement) is dealt with in the discussion of Question 5.

25. Crook's case (1691), 89 E.R. 540; R. v. Cruise (1852), 2 Ir. Ch. R. (N.S.) 65.

26. Attorney General of British Columbia v. Royal Bank and Island Amusement Company (1937), 1 W.W.R. 273.

the Crown had subjected itself to the burdens of the Copyright Act, e.g., fair dealing and compulsory licenses.[27]

Therefore, while the present Act may not subject Crown works to the burdens of the Act, and a revised Act could specifically so provide, it appears that attempts by the Crown to enforce any rights in respect of these works would effectively result in the abrogation of such special status and the subjugation of these works to the burdens of the Copyright Act.

In addition to the issue of the effective maintenance of a special status for Crown works, there is the question of the desirability, from a policy point of view, of providing Crown works with such status.[28] The Keyes-Brunet report recommended "that the Crown be subject to the Copyright Act" (Keyes and Brunet, 1977, p. 226). Such a proposal touches not only on the question of special status for Crown works, but also on the questions of: (a) the criteria used to define Crown works,[29] and (b) the special status of the Crown vis-à-vis the works of third parties.[30] However, this recommendation received widespread endorsement in a significant number of the briefs submitted in response to the Keyes-Brunet report. Overall agreement with their recommendation was evident in the briefs of one performing artist, two federal government departments (Agriculture Canada and Statistics Canada), three copyright associations

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27. Even where the Crown seeks redress under a statute other than the Copyright Act, this would not necessarily defeat the operation of this principle of law. McNairn advises:

> it is not essential, however, that the benefit and the restriction upon it occur in one and the same statute for the notion of Crown submission to operate. Rather, the crucial question is whether the two elements are sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction. (McNairn, 1972, p. 11)

28. This question touches on both works that are the subject of the prerogative right to publish and works that acquire Crown works status through operation of the statute.

29. See the discussion in Part II.

30. See the discussion under Question 5.

(including the Canadian Copyright Institute and the Patent and Trademark Institute of Canada), two writers, two archives and five library associations.[31]

In view of: (a) the apparent difficulty of maintaining special status for Crown works whenever the Crown would seek to protect them; (b) the overwhelming support in the briefs to render the Crown subject to the Copyright Act; and (c) the basic equity of the principle which gives rise to the difficulty referred to in (a) (that, generally, whenever the Crown enjoys the benefits of the Copyright Act, it should assume the burdens), it is recommended that a revised Copyright Act should specifically provide that Crown works are subject to the provisions of the Copyright Act.[32] Additional arguments in support of this recommendation will be provided in the discussion of those Crown works that are the subject of the prerogative right to publish.

Further, to the extent that it is desirable for the Copyright Act to extend to the federal government special forms of protection with respect to Crown works, in addition to those works subject to the prerogative right to publish (however such Crown works are defined), the underlying rationale for such treatment would appear to be equally applicable to provincial Crown works. It is therefore recommended that the status of such provincial Crown works be clarified in a revised Copyright Act by specifically according to those works the same treatment as that provided for their federal counterparts.

Question (3) Do provincial interpretation acts provide the Crown in right of the provinces with immunity from the Copyright Act?

Question (4) Does the balance of section 11 also refer to the Crown in right of the provinces?

These issues were addressed in the exploration of the issues alluded to in Question 2; i.e., "the dicta in other cases nearly all support the view that the prima facie meaning of 'the Crown' is the Crown in right of the legislating government only" (Hogg, 1971, p. 198).

Question (5) Effect of federal Crown Liability Act and its provincial counterparts on Crown immunity.

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31. Refer to Torno and MacLeod, 1979, p. 50.

32. Save, obviously, for any special provisions as to ownership and term, if established.

The Keyes-Brunet report, in its discussion of the liability of the Crown with respect to the use of the copyrighted works of third parties, expressed only the view that the extent to which the Crown may do so is "uncertain," "although an English case decided that the prerogative did not include a right to infringe a copyright" (Keyes and Brunet, 1977, p. 224).[33]

The report failed to raise and to address the significance of the federal Crown Liability Act and its provincial counterparts with respect to the question of the Crown's ability to infringe the copyright of third persons.

The federal Crown Liability Act of 1953 (R.S.C. 1970, c.C-38) provides:

> 3(1) The Crown is liable in tort for damages for which, if it were a private person of full age and capacity, it would be liable (a) in respect of a tort committed by a servant of the Crown....
>
> 3(2) In this Act..."tort," in respect of any matter arising in the Province of Quebec, means delict or quasi-delict.

Section 3(1) was adopted, with minor modifications, from the English Crown Proceedings Act of 1947 (10 & 11 Geo. VI, C.44). That Act also provided the model for the Crown proceedings statutes of the common law provinces abolishing Crown immunity in tort.[34] The Crown Liability Act specifically provides that the liability of the Crown established thereunder is the liability of the Crown in right of Canada only; section 2 defines "Crown" to mean "Her Majesty in Right of Canada." Comparable jurisdictional limitations may be found in the provincial statutes.

As previously noted, there is no section in the Copyright Act that states that the Crown is bound by the Act, nor is there a section establishing rates of compensation to be paid by the Crown in respect of the usages of the copyrighted works of third parties. Thus, an owner of copyright who alleged an infringement by the Crown in right of Canada

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33. As indicated earlier, the Keyes-Brunet report failed to draw any distinctions between the Crown in right of Canada and the Crown in right of the provinces.

34. Refer to Appendix I.

would have to seek redress pursuant to section 3(1) of the Crown Liability Act.[35] Reliance on the comparable provisions of a provincial statute would be necessary where the alleged infringement was carried out by servants of the Crown in right of a province.

It will be recalled that the Crown Liability Act establishes liability on the part of the government with respect to, inter alia, "a tort committed by a servant of the Crown." As tort is not defined in the federal Crown Liability Act, there would be an onus on the plaintiff to establish that infringement of copyright is a tort. In England, and indeed in Canada, there remains a degree of doubt as to whether an infringement of a copyright or a patent is a tort or a special category of civil wrong. It has been suggested that this was why there is a special section of the United Kingdom Crown Proceedings Act allowing the owner of copyright to recover compensation from the Crown for infringement (i.e., the Copyright Act was declared to bind the Crown).

Both textbook writers and the courts have attempted to define tort without reaching a completely satisfactory resolution of the question. A leading textbook, The Law of Torts, advises that "much ink has been spilt trying to define a tort and no attempt will here be made to succeed where so many others have failed" (Street, 1976, p. 3).

The leading English text on copyright advises that it has been held that infringement of each of the various rights conferred upon an author by the U.K. Copyright Act is a distinct and separate tort (Skone James, 1971, p. 257). However, the case referred to is Ash v. Hutchinson and Co. (Publishers), Ltd. (1936), Ch. 489. Although the Justices of the Court of Appeal were not asked to determine whether an infringement of copyright was a tort, each of the Justices so classified such an infringement. As the classification of copyright as a tort was "obiter" and was advanced without reasons in support, the case, while persuasive, cannot be considered conclusive. It is submitted, however, that in view of the pronouncements in the Ash case, the nature of and raison d'être for the Crown Liability Act, and the difficulty in precisely defining tort, Canadian courts would be predisposed to classify infringement of copyright as a tort. The Crown, in right of Canada or the

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35. Refer to McNairn, 1972, pp. 65-66 for a discussion of the possible uncertainty in applying the Act caused by the wording of section 20.

provinces, would thus be liable under the appropriate Crown liability statute.[36]

To the extent that the preceding analysis is correct, and insofar as there is legislation rendering the federal government and each of the provincial governments liable in tort, the immunity of the Crown from the application of the infringement sections of the Copyright Act vis-à-vis the works of third parties has been effectively abolished.

The 1957 Royal Commission on Patents, Copyright, Trademarks and Industrial Design, Report on Copyright, known as the Ilsley report, expressed the view that:

> We do not think there should be any liability of the Crown for infringement of copyright. We think, however, that if the Crown does any act in relation to any work in copyright or in relation to any record, film or broadcast in copyright which if done by any other person would be an infringement, the Crown should be liable to the copyright owner for payment of compensation, which, in the absence of agreement, should be fixed by a judge of the Exchequer Court. It will be noted that such payment would not be in the nature of damages for infringement -- there would be no infringement -- but would be statutory compensation. This recommendation to some extent assimilates the Crown's right to use works in copyright to the right given the Crown under the Patent Act to use patented inventions. (Ilsley report, 1957, p. 117)

However, the 1959 New Zealand Report of the Copyright Committee, the Dalglish report, expressed the view that:

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36. See, however, the 1959 New Zealand Report of the Copyright Committee at p. 50, where it was suggested that the failure of the New Zealand Crown Proceedings Act to specifically declare that the New Zealand Copyright Act bound the Crown resulted in the Crown retaining the ability to "infringe" the protected works of third parties. See also the statements of Estey J. at p. 13 in the recent Supreme Court decision in Compo Co. Ltd. v. Blue Crest Music Inc. et al. 45 C.P.R. (2d) 1.

> It might be argued that the failure in New Zealand to bring the Crown under the provisions of the Copyright Act 1913 is a technical breach of New Zealand's obligations under the Berne Convention. (Dalglish report, 1959, p. 50)[37]

The report went on to provide:

> Whether this is so or not we agree with the submissions made by the Department of Justice that objection cannot reasonably be made by other countries so long as the Crown does not use copyright material without the owner's consent and pays reasonable fees for the material arrived at after negotiations with the owner. So far as we are aware, apart from...(the photocopying on behalf of Government Departments of periodical articles of a scientific and professional nature), all Departments of the Crown conduct their operations with due regard to the rights of owners of copyright. (Dalglish report, 1959, p. 50)

It appears that in Canada not all departments of the federal Crown "conduct their operations with due regard to the rights of owners of copyright."[38] While Treasury Board Canada has issued fairly detailed guidelines with respect to the publishing of Crown works, including considerations of copyright protection for these works (Treasury Board Canada, 1978, Ch. S 335), there are no comparable guidelines with respect to Crown use of the copyrighted works of third parties.

The Canadian Institute for Scientific and Technical Information (CISTI), an arm of the National Research Council, photocopies approximately 400 periodical articles each week pursuant to user request and without the consent of the owner of copyright under its interlibrary loan program. This is approximately 20,000 articles per year at present and the volume is increasing. While CISTI has established its own guidelines which limit the number of

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37. Both Canada and New Zealand adhere to the 1928 Rome Text of the Berne Convention.

38. A study of the practices of provincial governments in this regard was not undertaken for the purposes of this paper.

copies of any one article to one per user request, and while undoubtedly most, if not all, such reproduction is for purposes of private study and research, it is highly questionable whether such practices constitute fair dealing under the present Copyright Act in view of the holding in the Zamacois case, that quotation of a work in its entirety is not fair dealing and mere acknowledgement of authorship and source does not afford a defence (Zamacois v. Douville et al. (1943), 2 D.L.R. 257).

The Bureau for Translations of the Department of Secretary of State is responsible for providing official translations of documents for all federal departments and also provides this service to certain Crown corporations. Subsection 3(1)(a) of the Copyright Act accords to authors the sole right to "produce, reproduce, perform or publish any translation of...(a) work." The Universal Copyright Convention (Articles IV and V) establishes only two Convention minima, i.e., rights that each member country must accord to the works of authors of all other member countries and to works first published in such countries. One of these rights pertains to term of protection; the other is the exclusive right of translation. The 1928 text of the Berne Convention, to which both New Zealand and Canada adhere, provides that "the countries of the Union shall be bound to make provision for the protection of...translations, adaptations and arrangements of music and other reproductions in any altered form of literary and artistic work(s)" (Berne Convention, Rome Text, article 2(2), (2)).

As a matter of practice, the Bureau for Translations does not restrict its translation activities to works authored by servants or agents of the Crown, nor even to the broader category of works "published by or under the direction or control of Her Majesty or any government department." Were its activities so restricted, the bureau would merely be exercising one of the rights of the Crown as holder of copyright in various works to have such works translated into other languages. In fact, it undertakes the translation of any work if requested to do so by any department of the federal government; indeed, if requested to do so by Parliament, the Privy Council or the federal court. The bureau has no ongoing procedures to ascertain whether the works that it translates are under Crown copyright or whether the copyright is held by private parties, Canadian or foreign. It operates on the premise that copyright clearance vis-à-vis non-Crown works is the responsibility of its clients. While a canvass of each department's procedures in this regard was not undertaken, conversations with a representative of the bureau, who is familiar with the practices of many of the bureau's clients, revealed that copy-

right considerations are at best of an ad hoc nature and most often simply do not arise.

The bureau does not maintain statistics on the volume of non-Crown works that it translates. Statistics reveal, however, that for the period April 1977 to March 1979 it translated approximately 445,820,000 words. If even a relatively small percentage of this volume is comprised of non-Crown works for which author consent was not obtained, the extent of infringement of copyright by the Crown, as a result of the activities of the Department of Secretary of State, is considerable.

The Dalglish report, in its examination of the question of Crown liability for copyright infringement, pointed out that:

> the Crown may need to be able to use particular copyright material in special circumstances without any consent at all, for instance, drawings of and documents relating to military equipment for defense purposes. (Dalglish report, 1959, p. 51)[39]

The report concluded its examination of this issue in the following manner:

> Having considered the submissions made to us, the activities and practices of the Government Departments as we know them, and the recommendations of the Gregory Committee and the Ilsley Commission, we have come to the conclusion and we recommend that the Crown should be bound by copyright legislation. Provision should, however, be expressly made so that for purposes of national security, or in connection with any emergency or for educational, medical, scientific or other technical purposes the Crown may lawfully do any act in relation to any work in copyright...which if done by any other person would be an infringement of copyright: provided that in any such case the Crown shall be liable to pay to the owner reasonable compensation in respect of any such act as aforesaid. (Dalglish report, 1959, p. 52)

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39. See also the 1952 U.K. Gregory Committee report (Report of the Copyright Committee), pp. 29-30.

The inclusion of the reference to "educational, medical, scientific or other technical purposes" was based on a recognition of certain of the photocopying activities of the Queen's Printer in New Zealand, activities of the kind carried out by CISTI in Canada. It is suggested that in striving to balance both the interests of copyright holders and the needs of the Crown, the Dalglish report ultimately favoured the Crown to an unwarranted degree. It is submitted that insofar as the Crown appears to be currently liable for copyright infringement throughout Canada, and recognizing that in a time of national emergency or where national security is of paramount importance, or where the effective enforcement or administration of the law would be substantially prejudiced, the Crown should not be faced with the possibility of injunctive proceedings in respect of the use of copyrighted material, a revised Copyright Act should specifically provide that the Crown, in right of both Canada and the provinces, is bound by the Copyright Act vis-à-vis the use of the works of third parties, subject only to an exception such as those described above.[40] The wholesale copying of literary works, even where they pertain to technical and scientific matters, should not constitute the basis for application of Crown immunity. Rather, the Crown should be in a situation similar to that of all other parties in the field of information dissemination and should find shelter for its activities under such provisions of the Copyright Act as exist with respect to reprography, fair dealing and the activities of libraries and archives.[41]

Finally, with respect to the issue of intergovernmental jurisdiction raised by the submission that the Copyright Act specifically impose liabilities upon both the Crown in right of Canada and in right of the provinces, the brief of the Patent and Trademark Institute of Canada commented that:

> the [Keyes-Brunet] Report has not dealt with the constitutional problem posed by the Ilsley Commission as to whether the Parliament of Canada has a constitutional right to impose liabilities upon the Crown in right of a province. (PTIC, 1978, p. 62)

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40. The provisions of the New Zealand Copyright Act of 1962 with respect to the Crown could be adopted, in modified form, to serve this purpose.

41. See the views of the Economic Council of Canada in this regard (Economic Council of Canada, 1971, pp. 174-175).

The problem highlighted by the Ilsley Commission and given apparent credence by the Patent and Trademark Institute in its brief, appears to have been something of a straw man erected by the Ilsley Commission. As Peter Hogg observes:

> the courts have shown no hesitation in holding that federal laws apply to the provincial Crown. Thus, federal customs legislation has been held applicable to the Crown in right of British Columbia as an importer of Scotch whiskey; federal railway legislation authorizing expropriation of "lands of the Crown" has been held applicable to the provincial Crown lands; federal provision as to litigation costs of "Her Majesty" has been held applicable to the costs of the provincial Crown; and federal railways regulation has been held applicable to the Crown in right of Ontario as operator of the "Go-Train" commuter service on C.N.R. tracks. These holdings appear to me to be sound. (Hogg, 1971, p. 180)[42]

Emanations of the Crown

Thus far this paper has examined, among other issues: (a) the nature of the Crown; (b) the degree to which Crown works are, or should be, subject to the Copyright Act; and (c) the degree to which the Crown is, or should be, free to use the works of third parties. Part II of the paper will explore the issues arising from the language of that part of section 11 of the Act which establishes the criteria for works (in addition to "prerogative right works") to qualify as Crown works (i.e., "prepared or published by or under the direction or control of Her Majesty or any Government department"). It will be appreciated that each of these topics potentially impacts upon the question of "Crown corporations," those creatures of special statute also commonly referred to as "emanations of the Crown," "organs of the Crown," "instrumentalities of the Crown" and "within the

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42. See also Colin McNairn, 1973, pp. 73-74.

shield of the Crown."[43] It will be recalled that the Ilsley Commission recommended that if the Crown in right of Canada were to do any act in relation to any work in copyright which if done by any other person would be an infringement, the Crown should be liable to the copyright owner for payment of statutory compensation. The Commission limited its recommendation to the Crown in right of Canada because it had been "advised" that the Parliament of Canada had no constitutional right to impose liabilities upon the Crown in right of a province; this advice, as earlier discussion revealed, failed to reflect a substantial body of well-established case law. The Commission went on to recommend that:

> The Crown in right of Canada should, however, be defined as including such crown corporations as by the statutes creating them are stated to be agents of the Crown in right of Canada and are specified by Order In Council. If, for instance, a corporation is stated in the statute creating it to be an agent of the Crown in right of Canada, the Canadian Government would have the right but would not be obliged to declare by Order In Council that the corporation has the same rights and is subject to the same liabilities as the Crown would be with regard to the use of works in copyright and the payment of compensation therefore. Such an Order In Council should not we think extend to such corporations as the CBC and the National Film Board. The general purpose should be to provide some means of placing crown corporations which to all intents and purposes are merely government departments in the same position as government departments but not other crown corporations. (Ilsley report, 1957, p. 118)

The above passage merits comment with respect to two issues. First, the Commission addressed only the status of Crown corporations vis-à-vis the protected works of third

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43. The federal Financial Administration Act defines a Crown corporation as "a corporation that is ultimately accountable, through a Minister to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B ('departmental' corporations), Schedule C ('agency' corporations) and Schedule D ('proprietary' corporations)" (F.A.A., S. 66(1), R.S.C. 1970, c.F-10).

parties; it did not address the separate but related question of whether the protection of works authored by employees or agents of Crown corporations (or first published by such corporations, if such a criterion is deemed appropriate) should be assimilated to the protection accorded to Crown works, or to that accorded to works of non-government authors. Second, had the Commission been of the view that it lay within the constitutional scope of the powers of the federal government to impose liabilities upon the provinces, its recommendations may well have extended to provincial Crown corporations or agencies as well. In view of the submission that such an imposition of liabilities upon the provinces is permissible, the following discussion is predicated on the notion that all recommendations with respect to Crown corporations should be equally applicable to Crown corporations in right of both Canada and the provinces, unless otherwise indicated.

The Keyes-Brunet report's only reference to the issues raised above was in the following terms:

> It follows that Crown copyright should continue to exist, apart from the operational requirements of agencies such as the National Film Board of Canada and the Canadian Broadcasting Corporation, whose requirements are those of any commercial organization. (Keyes and Brunet, 1977, p. 225)

It is not completely clear from this passage precisely what recommendations Keyes and Brunet were making with respect to Crown corporations. Presumably, the authors were suggesting that all Crown corporations, other than the CBC, the National Film Board (NFB) and similar organizations, should be treated the same as the Crown with respect both to Crown works and to the position of the Crown vis-à-vis the works of third parties, and further that the National Film Board, CBC, etc., should be treated the same as all private sector copyright proprietors and users.

For the moment let us put aside the question of the establishment, for the purposes of the Act, of two categories of Crown corporations (i.e., "class A corporations": NFB, CBC and similar organizations; and "class B corporations": all other Crown corporations), and focus, rather, on the question of the assimilation under the Act of the treatment provided the Crown to that provided those Crown corporations which, under the above scheme, would be class B corporations.

The suggestion that the treatment afforded the Crown should be assimilated to that afforded class B corporations, as opposed to the Ilsley Commission suggestion that the Crown in right of Canada should be defined as including certain specified Crown corporations, is not without significance. As one commentator, Peter Hogg, has observed:

> When...questions (such as whether a Crown corporation is liable to pay income tax, or whether the corporation is bound by statutes of limitation, or other statutes) arise, the issue is sometimes said to be whether the corportion is "within the shield of the Crown." It is perhaps too much to hope that such a graphic phrase will fall into disuse, but it does falsely suggest that the legal issue in each case is whether the corporation is the Crown or a part of the Crown. In fact, of course, this is never the issue. The corporation cannot be the Crown or a part of the Crown in any legally meaningful sense. The legal issue is whether the nature of the relationship between the corporation and the Crown entitles the corporation of the particular Crown attribute which is claimed. The only relationships to which the courts have been prepared to attribute any legal consequences are those familiar to the general law, such as master-servant, principal-agent, or trustee-beneficiary; and the kind of relationship which will suffice to confer a Crown attribute on a corporation in a particular case will vary according to the kind of attribute which is claimed. The majority of cases concern claims by public corporations to immunity from statutes which do not bind the Crown. Here the master-servant relationship is the one which is nearly always relied upon by the corporation and in most cases the result hinges on whether or not the relationship is established. (Hogg, 1971, pp. 204-205)

Of course where, under any given statute, the Crown is treated in virtually all respects in a manner similar to private citizens, the consequences of a claim by a Crown corporation to the benefit of any remaining special privileges and immunities enjoyed by the Crown will be considerably diminished.

A review of the recommendations made so far with respect to the Crown is of value in this context. It was recommended that works in respect of which the Crown held copyright should be subject to all those provisions of the Act that constitute derogations from the exclusive rights of copyright holders, e.g., fair dealing and compulsory licenses. It was also recommended that the Crown be subject to the same liabilities as private parties with respect to the use of the protected works of third parties, subject only to qualifications regarding use of such works by the Crown under certain exceptional circumstances. The upcoming discussion of the prerogative right to publish highlights the fact that publication of those works that are subject to the prerogative is seldom entrusted to Crown corporations. While this is not to suggest that responsibility for such an undertaking might never be bestowed upon a Crown corporation, implementation of the subsequent recommendations with respect to the abolition of the prerogative right to publish certain works and the corresponding subjugation of such works to statutory Crown copyright would effectively result in rendering a Crown corporation, and the works that it published, subject to the two recommendations noted above.

Later discussion with respect to those Crown works whose status as such arises from application of the criteria set forth in section 11 (i.e., "prepared or published by or under the direction or control of Her Majesty or any government department") will contain recommendations regarding both the criteria and the special term of protection for such works (also established in section 11). The recommendations regarding the criteria essentially call for their substitution for the general provisions contained in the Act with respect to the ownership of the copyright in works created by employees, save for a special provision with respect to enactments by Parliament and judicial decisions, neither of which would affect Crown corporations.

With the implementation of all of these recommendations, the only differences between the status of the Crown and that of private copyright holders and users under the Copyright Act would be:

> (a) The Crown would have the extraordinary right to use the works of third parties without authorization in times of national emergency, where national security was at issue, or where the effective enforcement or administration of the law would be substantially prejudiced in the absence of such a right, subject to a corresponding obligation to pay fair compensation for such use.

(b) The term of copyright protection for certain Crown works would be a fixed period of years, measured from an ascertainable point of departure and thus similar to the proposed term of copyright for sound recordings and films,[44] rather than the term of protection accorded most literary, artistic, dramatic and musical works, i.e., life of the author plus 50 years.

The preceding analysis serves to narrow the somewhat abstract and ostensibly imposing question of the assimilation of the treatment of class B corporations and their works to the treatment of the Crown and its works, to two specific and far less imposing questions:

(1) Should Crown corporations also have the extraordinary right to use the works of third parties without authorization in times of national emergency, where national security is at issue, or where the effective enforcement or administration of the law would be substantially prejudiced in the absence of such a right (subject, of course, to a corresponding obligation to pay fair compensation)? and

(2) Should the term of copyright protection for works of Crown corporations be the same as the term for Crown works?

Question (1) -- Right to works of third parties

As earlier noted, the Financial Administration Act distinguishes between three classes of Crown corporations: (a) "departmental" corporations, being "servants or agents of Her Majesty in right of Canada and...responsible for administrative, supervisory or regulatory services of a governmental nature" (Financial Administration Act, R.S.C. 1970, c.F-10, S. 66(3)(a)); (b) "agency" corporations, being "agents of Her Majesty in right of Canada and...responsible for the management of trading or service operations on a

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44. Refer to p. 53 for a discussion of the rationale for a special term. See also Torno, 1981, pp. 5-6, 34. The recommendations with respect to term of protection for literary, dramatic, musical and artistic Crown works at pp. 55 and 56 differ somewhat from those contained later in the present paper.

quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada" (FAA, S. 66(3)(b)); and (c) "proprietary" corporations, being corporations "responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and ordinarily required to conduct [their] operations without appropriations" (FAA, S. 66(3)(c)).

The federal government Authorities Manual, issued by Supply and Services Canada, reveals that as of July 1, 1978, the applicable schedules to the Financial Administration Act set out the names of 14 departmental corporations, 19 agency corporations and 21 proprietary corporations: a total of 54 corporations. (See Appendix II for a detailed listing.)

It should be noted that listings in the schedules do not include all Crown corporations. The Act indicates that the schedules in each case are exemplary only and not exhaustive. In this regard, in an article written in 1971, A.G. Irvine indicated that at that time there were 44 Crown corporations listed in the schedules to the Financial Administration Act and another 8 which were not listed (Irvine, 1971, pp. 556-557). The National Film Board, for instance, is not included in any of the schedules to the FAA setting out the names of Crown corporations. Rather, it is included in a schedule that sets out the names of divisions or branches of the public service designated by the governor in council as departments for the purposes of the Act. By comparison, the Ontario Crown Agency Act (R.S.O. 1970, C. 100, S. 1) does not set out the names of any Crown agencies, but simply provides that:

> In this Act, "Crown agency" means a board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario or under authority of the Legislature or the Lieutenant-Governor in Council.

Notwithstanding the definition provided in the Act, both the courts and administrative tribunals in Ontario have continued to apply the common law test of "control" (i.e., the extent of operational and financial control of the agency by the government) when determining whether an agency

is a Crown agency for the purposes of the application of various statutes.[45]

The essential features of and differences between the three types of federal Crown corporations were drawn by H.R. Balls. He suggested that departmental corporations are:

> regarded as ordinary departments of government performing essential departmental service that for one reason or another (usually for simplifying the processes of litigation) have been given corporate status. They are subject to the day-to-day direction and control of a Minister; they must look to cover their financial requirements; and except insofar as they may be exempted by the special provisions of the Act under which they are incorporated or under which they operate, they are bound by the general provisions of the Financial Administration Act...and other statutory constitutional rules or precepts that limit and regulate the activities of ordinary departments. (Balls, 1953, p. 130)

Balls further suggested that agency corporations, like departmental corporations, are subject to a considerable degree of ministerial control. He differentiated between the two, however, by drawing an analogy between departmental corporations and servants of the minister on the one hand and agency corporations and agents of the minister on the other in the sense that "a servant is one over whom the employer reserves the control and direction of the way in which the work is to be done and an agent is one who acts on behalf of a principal in the framework of broad directives" (Balls, 1953, p. 131).[46] On the other hand, as Balls advised, proprietary corporations are expected to operate without appropriations. Generally their operating budgets are not subject to ministerial scrutiny.

The value of the foregoing criteria for the purposes of ascertaining which, if any, Crown corporations should be entitled to the benefit of the extraordinary right to use the works of third parties under the circumstances described

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45. See Colin McNairn, 1973, pp. 5-7.

46. See also Privy Council Office, 1977 and Ashley and Smails, 1965.

earlier is somewhat questionable. For example, probably the best-known proprietary corporation, the CBC, is dependent to a great degree on parliamentary appropriations. Further, in the case of the CBC and many other Crown corporations, the statutes by which they are created often establish many conditions, beyond those set out in the Financial Administration Act, under which outside approval is necessary. The St. Lawrence Seaway Authority, another proprietary corporation, must have the approval of the governor in council for its bylaws, short-term loans, acquisition of lands, leasing of lands to others and regulations for the management of property.

A more appropriate scheme of classification for the purposes of the Copyright Act was established by A.G. Irvine, albeit for purposes other than application to the Copyright Act. This scheme would both incorporate the Keyes-Brunet recommendation vis-à-vis the establishment of two classes of Crown corporations and reflect an appropriate demarcation between those corporations that, it is submitted, should be able to avail themselves of the extraordinary right to use the works of third parties and those that should not. Irvine suggested that:

> A picture of the activities of most crown corporations can be obtained from the publications of the Dominion Bureau of Statistics (now Statistics Canada) and the annual Estimates presented to Parliament. The D.B.S., in "Federal Government Enterprise Finance," lists most of the crown corporations which are business enterprises. The majority of crown corporations which are not enterprises are classified according to their functions in "Estimates for the Fiscal Year," ending March 31, 1972. A complete picture can be obtained by adding the few corporations not listed in these two sources and classifying those operating business enterprises by industries according to the International Standard Industrial Classification. The results are shown in Tables I and II. In later sections of this paper, those in Table I will be described as "governmental enterprises" while those in Table II will be called "governmental corporations." (Irvine, 1971, p. 558)

Thus, the distinction is drawn between Crown corporations that are "governmental enterprises" and those that are "governmental corporations." The former have been defined by Statistics Canada as:

> agencies of a political decision-making body set up for the express purpose of producing goods or services which are sold at a price generally designed to cover costs. An essential feature of an enterprise, as distinguished from a general government operation, is that it charges a price for its services according to use. It is thereby enabled to meet most of its costs from proceeds of sales without recourse to general funds. (Dominion Bureau of Statistics, 1970, p. 18)

It is to these Crown corporations that the government delegates those functions required for the operation of enterprises. Functions delegated to governmental corporations, on the other hand, include the management of capital assets and of loan, research, subsidy, social security and welfare programs. Such programs could be performed by departments but have been delegated to Crown corporations principally because they can be performed without requiring day-to-day attention by ministers and the staffs of their departments. Thus governmental corporations operate within the general government sector of the economy, defined by the United Nations as:

> all departments, offices and other bodies which...furnish, but normally do not sell, to the community those common services which cannot otherwise be conveniently and economically provided, and administer the State and the economic and social policy of the community. (United Nations, 1968, pp. 74-482)

It is therefore recommended that those federal Crown corporations that qualify as governmental corporations and their provincial counterparts be accorded the extraordinary right to use the protected works of third parties without prior authorization under the circumstances and conditions set forth earlier. This privilege should not be extended to federal Crown corporations that qualify as enterprises, nor to their provincial counterparts.

It is recognized that this delineation may break down with respect to certain Crown corporations, the activities and powers of which may straddle both groupings. Therefore, it is recommended that if, upon closer examination, the proposed scheme appears unworkable, the members of the two groups should be established by and designated in the Copyright Act regulations.

In all cases where the Crown, or a Crown corporation, avails itself of this special right, there should arise a corresponding obligation to undertake reasonable efforts, within a reasonable period of time, to notify the owners of the copyrights in the works that have been taken that this has occurred. Further, an onus should rest on the Crown, and on Crown corporations where appropriate, to establish that the conditions precedent to the existence of the right prevailed at the time of the taking; in the case of Crown corporations, this would encompass inclusion of the corporation within the class of governmental corporations. It is submitted that the foregoing represents a fair and equitable balancing of the interests of copyright owners and the needs of the Crown.

Question (2) -- Term of Protection

Finally, we turn to the question of the term of protection for the works of Crown corporations. It is recommended later that only literary works that are deemed to be Crown works (under the criteria similarly discussed later) should be provided with a term of protection different from that provided for literary works that do not qualify as Crown works. It is proposed that all other forms of Crown works, i.e., artistic, dramatic, and musical, sound recordings and films, should be treated the same as non-Crown works with respect to term. The reasons provided in support of this recommendation are, to a great degree, equally applicable to Crown corporations. Therefore, it is recommended that the term of protection for literary works deemed to be Crown corporation works be the same as that for literary Crown works.

The Prerogative Power to Publish

Copinger and Skone James on Copyright advises that:

> printing, on its first introduction, was considered in England, as in other countries, to be a matter of State, and that the Crown claimed the right to authorize all species of publication whatsoever. When the Crown lost this prerogative, it still claimed the exclusive right to print certain works. The claim has been made in respect of the Authorized Version of the Bible, the Books of Common Prayer, Acts of Parliament,

> and other government publications, law books and even almanacks. (Skone James, 1971, p. 350)

This exclusive right to print certain works was exercised by the Crown by the granting of royal patents. The genesis of the concept of perpetual Crown copyright is to be found in these patents and in royal appointments to the King's Printer for the printing of such classes of works. While these royal privileges, and the prerogative right upon which they are founded, are often referred to as a form of special copyright, in fact they do not constitute copyright at all as it is understood today. These privileges were not granted in any way as a recognition of, or protection for, the author's right but rather as a commercial monopoly for the printing of certain works.

The rationale in support of this special right claimed by the Crown and its underlying character have been the subject of considerable comment and speculation in both early case law and subsequent treatments of the subject by text writers.[47]

The Report of the Company of Stationers and Parker contains the following reference to a statement made before the court:

> That printing is a thing of public use, is apparent, and matters of law and religion ought and always was under the King; for it is a conveyance by which men communicate their notions in the most public manner, and with the most lasting impression; and therefore if they are good, this is a means to spread them, and to give them a more diffuse

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47. See, for example, The Stationers v. The Patentees About the Printing of Roll's Abridgement (Atkin's case (1661) (1)), the first reported case on copyright; Roper v. Streater (1672), Bac. Abr. 5th ed. Vol. V, p. 595; The Company of Stationers v. Seymour (1678), 1 Mod. 256; Millar v. Taylor 4 Burr. 2303; Basket v. University of Cambridge (1743), 1 Wm. Bl. 150; Chitty on the Prerogatives of the Crown (1820 ed.); Blackstone's Commentaries, 17th ed. Vol. II, p. 404; Halsbury's Laws of England, 2nd ed. Vol VI, p. 587; The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd. (1938), 38 N.S.W.R.S. 195 (probably the most exhaustive discourse on the subject of the prerogative right to publish since Millar v. Taylor in 1969); Rex v. Bellman (1938), 3 D.L.R. 548.

> influence; and if they are bad notions, this is likewise a method to spread the mischief wider. (English Reports, 90, p. 109)

The Stationers v. The Patentees About the Printing of Roll's Abridgement held that:

> The King hath a particular prerogative over law books (i.e., the compiled reports of court decisions), and so he would have had, if the art of printing had never been known. The reasons are: (1) All the laws of England are the King's laws; because when he passeth a bill he saith, le Roy veult; or when it hath past both Houses, and the King will not pass it; he saith, le Roy avisera, (2) The salaries of the Judges are paid by the King; and reporters in all Courts at Westminster were paid by the King formerly. (English Reports, 124, p. 843)

With respect to both the rationale for this special right and its character, the following judicial pronouncements provide a measure of insight. In Millar v. Taylor, each member of the court held that the royal prerogative as to statutes existed, but the majority held that such right was based not on prerogative but on property. Simply to confuse the matter further, one member of the court expressed the view that the Crown's right was proprietary in nature but based it on prerogative.[48]

Lord Mansfield, speaking on behalf of the majority of the Court, discussing the case of Basket v. The University of Cambridge said:

> We had no idea of any prerogative in the Crown over the press....We rested upon property from the King's right of original publication of Acts of Parliament which are the works of the Legislative; and the publication of them has always belonged to the King, as the executive part, and as the head and Sovereign. (Millar v. Taylor, 4 Burr., p. 2404)

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48. The member of the court in question was Mr. Justice Yates, well known throughout the realm as a person prone to practical jokes and affectionately called by his colleagues, "that madman Yates."

Some 75 years later in the case of Manners v. Blair the right of the Crown to grant the exclusive right of printing Bibles in Scotland was upheld. In the course of his judgement, Lord Lyndhurst said:

> But although the power of the King and his prerogative in England has never been questioned, it has been rested by judges on different principles. Some judges have been of the opinion, that it is to be founded on the circumstance of the translation of the Bible, having been actually paid for by King James, and its having become the property of the Crown, and therefore it has been referred to as "a species of copyright." Other judges have referred it to the circumstances of the King of England being the supreme head of the Church of England, and that he is vested with the prerogative with reference to that character. Other judges have been of the opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the Government to superintend the publication, of the Acts of the Legislative, and Acts of State of that description, and also of those works upon which the established doctrines of our religion are founded -- that is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. I do not refer the prerogative to the circumstances of the King being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character -- to his being at the head of the church and state, and it being his duty to act as guardian and protector of both. (Manners v. Blair (1828), 3 Bli. N.S. 391)

Coincidentally, the year 1938 saw two cases in the High Courts, one in Canada and one in Australia, address the question of the prerogative right to publish. The Canadian case was Rex v. Bellman, which concerned an appeal to the Appellate Division of the Supreme Court of New Brunswick from the acquittal of the accused of charges under the Canada Customs Act. Chief Justice Baxter expressed the view (which, in the author's opinion, states the case somewhat too broadly vis-à-vis the continued existence of Crown prerogative generally) that:

> Constitutional changes have shattered the idea of prerogative but there remains in the Crown the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive. By the time of Lord Mansfield the idea of prerogative had pretty well disappeared and the King's exclusive right was put on the ground of property. (Rex v. Bellman (1938), 3 D.L.R. 553)

The Australian case, The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd., a case which Copinger and Skone James refer to as containing a "full and exhaustive" review of the authorities on this subject, involved an application by the attorney general for an injunction restraining the defendant from infringing His Majesty's copyright in the statutes of New South Wales by preparing a work consisting of the statutes, together with appropriate annotations and indices. It is important to note that the claim made by the attorney general was based both on the royal prerogative and on section 18 of the Imperial Copyright Act of 1911 (i.e., section 11 of the present Canadian Act).

Chief Justice Long Innes expressed the view that the prerogative right to publish the subject statutes did exist and was vested in the state of New South Wales "whether it be of the nature of an executive power or a proprietary right" (The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd. (1953), 38 N.S.W.S.R. 195, p. 245).

Having established that the attorney general was entitled to succeed on the ground of prerogative, the Chief Justice indicated that he thought it desirable that he should briefly express the conclusion to which he would have arrived had he been of the opinion that the Crown had, independently of the statute, no prerogative right of that nature as regards acts of Parliament. Chief Justice Long Innes concluded that, indeed, apart from prerogative, it was his view that section 18 of the Act would serve to establish copyright in the Crown with respect to acts of Parliament in a manner similar to that for all literary works. He stated:

> It was further argued that the exception "subject to any agreement with the author," confines the operation of the section to works of which there was an author or authors and that there is no author of a stat-

> ute. It has been said that there is no author of an Act of Parliament; this is probably true in the legal sense; just as it is true in a legal sense that a bastard has no father; every bastard, however, is the child of a natural father, and every Act of Parliament is a literary work, and every literary work is the production of some author or authors, although the ascertainment of the identity of the author or authors may be as difficult in cases of some Acts of Parliament as is the ascertainment of the paternity of some bastards, but, however, this may be, I see no reason why the operation of the section should be limited as is suggested, or why the proviso or exception should "not"[49] be construed as applicable only in cases in which the authorship of the work in question and the proprietary interest of the author in such work are legally recognized. (The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd., p. 259)

The thrust of the view expressed by the Chief Justice was that: (a) acts of Parliament and other works subject to the "prerogative/proprietary" right to publish are no less literary works and, as such, are capable of sustaining ordinary copyright protection under the statute; and (b) to the extent that the Crown has some relationship with the authors of such works (i.e., most often employer/employee), the Crown will be deemed, or will have the capacity to become, the first owner of the copyright in such works for the full term thereof. What should not be lost sight of is the fact that where the government is the owner of the copyright in a work (whether owing to a master/

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49. The Chief Justice apparently became somewhat confused in this paragraph-length sentence; the use of a double negative resulting from the appearance of the word "not," which has been set off in quotation marks by the author, serves to counteract his argument. It is suggested that the "not" should not have been included in the decision.

servant relationship with the author(s) of the work, or pursuant to a special provision providing for such ownership), the copyright provides the same exclusive right to publish and reproduce the work as that which arises from the claim to the prerogative right to publish. The only significant difference between the two is that the former statutory right is generally limited in time, whereas the prerogative right provides the counterpart of a perpetual term of copyright.

In view of the earlier discussions with respect to the desirability of subjecting the Crown generally to the Copyright Act and the value of providing ascertainable, limited terms of copyright protection, and in view of the fact that the objectives served by the prerogative right may equally be served by Crown ownership of statutory copyright, it is recommended that the prerogative right to publish that "somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive," be abolished.

The implementation of this recommendation would end the perpetual speculation about which works, beyond those constantly cited in the case law and commentaries (e.g., acts of Parliament and judicial decisions), are subject to the prerogative and hence its perpetual term of protection and which are subject to Crown copyright as a result of the application of statutory criteria and the corresponding limited term of protection. Further, the vast majority of governmental works which are the subject of the prerogative (i.e., legislative enactments, regulations and orders-in-council) will give rise to Crown ownership of the copyright as a result of the employer/employee relationship subsisting between the Crown and its servants. It is highly doubtful whether the prerogative right to publish the Bible and the Book of Common Prayer which prevails in England today has existed at any time in Canada. Thus, the possible charge that statutory copyright would not compensate for the loss of this right by invocation of employer/employee provisions is rendered moot. The decision in the case of Manners v. Blair, discussed earlier, makes it fairly clear that the House of Lords predicated its pronouncements regarding the king's duty to superintend the publication of these religious works upon the premise that there was an established church in both England and Scotland. The lord chancellor indicated that the king had a responsibility with respect to "those works upon which the established doctrines of our religion are founded." Further, references are made to the king being "at the head of the church and state" and it being his duty "to act as guardian and protector of both" and to take care that such works were published in a correct and authentic form.

The King James Version of the Bible is protected because it is the work upon which the established church in England is founded. There is no established church in Canada. Thus the Crown in Canada cannot be and, indeed is not, the guardian of any such church. Nor, accordingly, can there be any duty imposed upon the Crown to superintend the publication of any religious works. All religious denominations are on the same footing whether Christian or not, and there is no trust imposed upon the Crown to "promulgate to the people" any "religious ordinances."

Judicial decisions and certain other works (such as private members' bills and documents prepared by the staff of the House and the Senate other than civil servants) which may now be subject to the prerogative right to publish and which would not fall within the employer/employee class, vis-à-vis the Crown, may be provided for with revised criteria for the determination of the circumstances under which a work will constitute a Crown work.

Some may be of the view that acts of Parliament and judicial decisions should be subject to perpetual copyright. However, the example of the United States should be noted, where there is no copyright protection for government works. The U.S. Copyright Act specifically provides that "copyright protection under this title is not available for any work of the United States Government" (Pub. L. No. 94-553, Oct. 19, 1976, S. 105). A summary of the various rationales cited in support of this principle in various judicial decisions was presented in a recent article by Brian Price. The rationales presented were:

> (1) In a democracy where the widest possible public dissemination of materials of public interest is considered vital:
> a) expositions of the law (statutes, judicial opinions and legislative histories) cannot be copyrighted because everyone is presumed to know the law and no one can be given a monopoly on publishing their expositions;
> b) materials generated by government employees and initially printed should be given the widest, least expensive distribution, which is possible only if no one can monopolize the publication or republication of an item.
>
> (2) The Government should frankly recognize and openly appropriate the money to cover the costs of its public documents; and the

> public should not have to pay twice, once through appropriations and then again through royalties.
>
> (3) Employees cannot claim property in their work because it belongs to their employer, the public at large, and should therefore be in the public domain.
>
> (4) Government employees cannot be compensated twice for material produced in the scope of their official duties. Their only source of compensation can be their employer.
>
> (5) Government facilities may not be used for private gain; any such use will result in the forfeiture of the rights to any property so produced. (Price, 1976, p. 36)

It should be noted, however, that not only member nations of the Commonwealth provide copyright protection for some or all government publications. A study by Berger in 1959 listed 12 countries outside the Commonwealth that provided such protection. It may also be noted that, notwithstanding the arguments advanced in support of the principle that, in essence, the people and their representatives and servants are one and copyright should not separate them, Protocol 2, annexed to the Universal Copyright Convention, provides for copyright protection for "works published for the first time by the United Nations, by the Specialized Agencies in relation therewith, or by the Organization of American States."

Indeed, there are a number of countervailing rationales in support of the maintenance of some form of Crown copyright. A recent British Treasury circular which sets out the "practice to be followed with regard to Crown copyright" suggests, in essence, that Crown copyright provides the government with an opportunity to act as a trustee on behalf of the people to ensure that the public interest in the dissemination of the "peoples' works" is being served in the most appropriate fashion. The circular states that:

> For copyright purposes, Government publications may be divided into the following classes:
> (1) Bills and Acts of Parliament, Statutory Rules and Orders and Statutory Instruments;

(2) Other Parliamentary papers, including Reports of Select Committees of both Houses and Papers laid before Parliament by Statute and by Command;
(3) The official Report of the House of Lords and House of Commons Debates (Hansard);
(4) Non-Parliamentary publications, comprising all papers of Government Departments not contained in the first three classes;
(5) Charts and Ordnance Maps.

It is in the public interest that the information contained in publications falling in the first three classes should be diffused as widely as possible, and legal rights of the Crown in respect of copyright in them will not normally be enforced. But all Crown rights in them are reserved, and will be asserted in cases considered by the Controller of Her Majesty's Stationery Office as exceptional -- for example, in the case of reproduction of any part of any publication in these classes in undesirable contexts, or reproduction of the whole or a substantial part of any such publication, either as a separate document or as a major part of another work in such a way as to result in a significant loss to public funds. The fourth class comprises a wide range of Government publications, including many which explain the operation of Acts of Parliament, or make available the results of research, and other activities of departments. It is desirable that this information should be widely known; but official publication is the usual channel for this purpose, and My Lords see no reason why free reproduction should be allowed of this kind of material for commercial purposes. The exercise of Crown copyright is also necessary to protect official material from misuse by unfair or misleading selection, undignified associations, or undesirable use for advertising purposes. The rights of the Crown will therefore normally be enforced for publications in this class, which will bear an indication that Crown copyright is reserved. Acknowledgement of source and of permission of the Controller of Her Ma-

> jesty's Stationery Office should be required, and suitable fees imposed for reproduction. (British Treasury Circular, January 9, 1958, as amended)

It is submitted that the form of copyright protection for Crown works framed earlier, possibly complemented by similar statements of government policy, will serve the public interest as envisaged in the Treasury Circular in a balanced and equitable manner.

PART II

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.

The brief of the Patent and Trademark Institute of Canada (PTIC) in response to the Keyes-Brunet report expressed the view that the report did not deal adequately with the subject of Crown copyright, "particularly the problems posed by the atrocious drafting of section 11 of the present Act" (PTIC, 1978, p. 62). Indeed, in a case discussed in some detail earlier, Chief Justice Long Innes noted that:

> Considerable criticism has been directed against the draftsmanship of S. 18 of the Copyright Act of 1911, which Mr. Bonney characterized as a "legislative monstrosity" due, he says, to the fact that the section was not in the original Bill but was inserted by a Select Committee of the House of Commons to which it had been referred. (The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd., p. 258)

The PTIC brief stated further that, under section 11 of the Copyright Act a third party (as well as an employee of the Crown) who voluntarily or otherwise prepares a paper of interest to a government department, which is later published by the department, would be deprived of copyright. This view is supported by Fox (Fox, 1967). Notwithstanding the unqualified assertion of the PTIC, it must be remembered that transfer of copyright to the Crown as a result of first publication by the Crown is subject to any agreement to the contrary with the author. Fox suggests that subject to any such agreement, the wording of the section establishes that, first where a work is prepared under the "direction or control" of Her Majesty or any government department, the copyright in the work will belong to the Crown. Further, the use of the words "prepared or published" indicates that the section applies to unpublished works as well as to published. The copyright would immediately vest in the Crown and would prevail until publication and for 50 years thereafter. Second, where a work is prepared independently but

later published by or under the control of the Crown, the copyright will remain in the author until publication. It will then automatically pass to the Crown and there remain for an ensuing period of 50 years.

Several problems and issues arise directly from this wording, beyond the issue of its apparent unfairness to certain authors.

> (1) As discussed earlier, the language of the section would appear to include only works prepared or published by or under the direction or control of the Crown in right of Canada;
>
> (2) As noted in Copinger and Skone James on Copyright, "direction or control" is a much wider expression than "contract of service," and "works which have been commissioned by the Crown from authors who are not under a contract of service, may well vest in the Crown under this Section" (Skone James, 1971, p. 353).
>
> (3) A work originally prepared by an author, not under the direction or control of the Crown, will have a term of protection of "life plus 50." Where the work is published by the Crown, for example, 15 years after the death of the author: (a) the basis for calculation of the term will change in mid-stream, so to speak; and (b) the term will be extended beyond the 50-year period after the author's death (i.e., a new 50-year term will commence as of the date of publication). It is uncertain what effect government publication would have on a work that had already fallen into the public domain; i.e., would publication give rise to a fresh term of protection for a further 50 years?

It was stated earlier that this portion of section 11 establishing the criteria for statutory protection of Crown works would be the appropriate place to provide for Crown ownership of the copyright in judicial decisions and works prepared by members of Parliament or their "non-Crown" staff but first published by the Crown. Revised wording of this part of the section should, therefore, seek to address the issue raised by the PTIC, the further problems set out here, and additionally provide for the above two general classes of works.

With respect to judicial decisions, Fox expressed the view that:

> In Canada and Great Britain, judicial decisions may be regarded as falling within the purview of Crown copyright on the principle stated in Stationers v. Patentees about the Printing of Roll's Abridgement that judges are paid by the Crown and copyright in their official pronouncements resides in the Crown. It is obvious that judicial decisions are a proper subject matter of copyright. It is equally obvious that copyright in them should not reside in the judges who prepare them. The property inherent in them is governed by the same principles that apply to all literary compositions. A judge is obviously in the employment of the Crown under a contract of service (even though dignified by royal appointment) and the decisions are prepared in the course of his employment. On the express provisions of S. 12 of the Copyright Act the copyright resides in the employer, namely the government of which the Crown is the chief executive. Whether the title of the Crown to this form of copyright resides in prerogative or property is immaterial -- the title is clearly in the Crown. (Fox, 1967, pp. 269-270)

While one may agree with Dr. Fox on those principles which he states are obvious (i.e., judgements are literary works and judges should not own the copyright therein), there are other facets of this opinion which are not, in the author's opinion, quite as obvious. First, the decision in The Stationers case, to which Fox refers, specifically rests the king's ownership of law books on prerogative. Second, Dr. Fox fails to raise the possibility that the ownership of the copyright in certain judicial pronouncements may reside in the Crown in right of Canada, while the copyright in other decisions may reside in the Crown in right of the provinces. Third, it is questionable whether judges are, as Fox suggests, in the employment of some other person under a contract of service as provided for in subsection 12(3).

Elsewhere in his work, the late Dr. Fox stated: "In order that the copyright shall vest in the employer under (S. 12(3)), however, the employee must be under such a contract as will entitle the employer to direct the manner and

method of his work" (Fox, 1967, p. 257). While judges are named by the governor in council, they essentially hold office during good behaviour. They are not under the control of the government and do not take instructions from the Crown. Except in cases of removal for misbehaviour, they are not subject to any discipline by the Crown, and their employment cannot be terminated by the government prior to attainment of the statutory retirement age of 75 years.

It is submitted that Crown ownership of the copyright in judicial decisions rests not on a employer/employee relationship (i.e., not in any event a "contract of service" relationship as now required by the Act), but rather, on the basis of prerogative. As the early part of this paper indicated, prerogative rights are subservient to the wishes of Parliament and may be abolished, with or without the establishment of a comparable statutory right. It is therefore recommended that the ownership by the Crown of the copyright in judicial decisions, based on prerogative, should be abolished and replaced with a statutory provision to the same effect. It is further recommended that a revised statute specifically provide that the copyright in the decisions of the Supreme Court of Canada, the federal court, and all federal administrative and quasi-judicial tribunals reside in the Crown in right of Canada and the copyright in all other decisions and pronouncements by all other courts and tribunals reside in the appropriate Crown in right of the provinces.

PART III

AND IN SUCH CASE SHALL CONTINUE FOR A PERIOD OF 50 YEARS FROM THE DATE OF FIRST PUBLICATION OF THE WORK.

The general term of copyright protection for works under the present Copyright Act is "life of the author plus 50 years." Exceptions to this rule prevail in the case of sound recordings, cinematographic works, photographs, works of joint authorship, posthumous works and Crown works.[50]

The present term of protection for photographs is 50 years from the making of the original negative from which the photograph is derived. It has been recommended elsewhere by the author that there is no compelling reason for this derogation from the general term and that a revised Act should provide photographs with the general term of protection (Torno, 1981, pp. 34-35). Similarly, it has been proposed that the special provisions pertaining to posthumous works be abolished (Torno, 1981, p. 35). The exception with respect to works of joint authorship serves simply to reflect the fact that the term of "life plus 50" is to be a function of the life of the last of the joint authors to die.

The term of protection proposed for both sound recordings and films, like their present terms, is based not on the life of an individual author but rather comprises a fixed period of time measured from an ascertainable starting date. The principal reason for establishing these exceptions to the general term of protection 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 elucidates the special character 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

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50. See the following sections of the Copyright Act: 4(3); 5; 9; 9; 8(1); 6; 11; and Torno, 1981. For a general discussion of this topic see also Berger, pp. 29-30; Steifel, 1957, pp. 21-26; Smith, 1973, pp. 71-110.

> 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, 1980, pp. 2-149)

The present term of protection for Crown works (other than prerogative works) is similarly based not on the life of any one or more authors but rather is a fixed term of 50 years measured from the date of first publication (presumably, the date of first publication "under the direction or control of Her Majesty or any government department").

Neither the leading English text on copyright, Copinger and Skone James on Copyright, nor its Canadian counterpart by Fox assigns any specific reasons for the departure from a term of protection based on the life of an author in the case of Crown works in their respective discussions of Crown copyright. The Patent and Trademark Institute of Canada made the following observation in its brief with respect to the criteria employed to establish Crown works (which also is a fair statement of the rationale that has been used to justify the fixed term for Crown works). The brief suggests that:

> The original justification is said to be that, because of the large number of servants employed by the Crown, it would be impractical to keep track of individual authors. (PTIC, 1978, p. 62)

To the extent, then, that this reference to large numbers of servants may be understood to mean (indeed, vis-à-vis copyright, should only properly be understood to mean) large numbers of servants who have contributed to the creation of a work, it will be appreciated that this is the same rationale used in support of the special terms for films and sound recordings. While it is undoubtedly true that untold

numbers of "literary works" (i.e., all works expressed in print or writing whether their quality or style is high), ranging from interoffice directives to acts of Parliament, are the result of the joint efforts of a multitude of individuals, it is suggested that this is seldom the case in respect of other forms of works (save, obviously, for films and sound recordings).

While it may be argued by some that the question of multipartite authorship of Crown works is not as crucial a consideration as sheer volume of such works for the purposes of supporting a special term of protection for these works, it is submitted that:

> (a) The consideration of volume as the sole criterion to differentiate the treatment (e.g., special terms) or indeed, the classification (e.g., Crown versus non-Crown) of works of the same artistic class (e.g., literary or musical) is fundamentally unsound within the context of the law of copyright.
>
> (b) With respect to dramatic works, musical works and photographs, it is suggested that the issue of "multi-authorship" will seldom be so problematic as to merit special treatment.
>
> (c) While not in any way wishing to derogate from the position adopted in (a) above, it is worth observing that the volumes of musical and dramatic works produced by servants of any one government department in a given year are most likely to be miniscule, and the volume of artistic works, while likely to be larger than either of the foregoing classes, is never likely to approach that of literary works.

It is therefore recommended that there be no special term of protection for any Crown works other than literary works. This may give rise to a need on the part of departments to maintain certain records and to institute certain procedures and guidelines not presently maintained. It is suggested, however, that such an undertaking should prove to be no more onerous than the responsibilities in this regard assumed by many other large organizations.

With respect to the term of protection for literary Crown works, it is suggested that the present term of 50

years from date of first publication, applicable in respect of all Crown works, suffers one major drawback. That is, that the term of copyright for works that remain unpublished is perpetual. The proposed term of protection for all other Crown works would always be quantifiable irrespective of whether or not they were published, enabling the public to determine when works have fallen into the public domain and to benefit from this. Therefore, it is recommended that the term of protection for literary Crown works be a fixed term, but one which would have a determinable termination point similar to that proposed for sound recordings and films, i.e., 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 publication takes place and 50 years thereafter, or
>
> (b) the period from creation until the end of the year in which creation takes place and 75 years thereafter.

SUMMARY OF RECOMMENDATIONS

This paper has sought to provide the reader with a measure of insight into the historical origins of, and present issues arising from, the Crown copyright provisions of the Canadian Copyright Act. The recommendations made during the course of the paper have, as their general aim, a restructuring of these provisions so as to effect a reasoned and equitable balancing of: (a) the needs of the Crown, as constituted in Canada, as both an owner and user of copyrighted works; and (b) the rights of third-party owners and users of copyrighted material.

The recommendations made are:

(1) Works of the Crown in right of Canada should be subject to the provisions of the Act, save for any special provisions as to ownership and term. (p. 19)

(2) The status of works of the Crown in right of the provinces should be clarified by specifically according to these works the same treatment as that provided for their federal counterparts. (p. 19)

(3) The Crown in right of both Canada and the provinces should be bound by the Copyright Act vis-à-vis the use of the protected works of third parties, subject only to an extraordinary right allowing the Crown to use such works without prior consent: (a) in time of national emergency, (b) where national security is of paramount importance, or (c) where the absence of such a right would substantially prejudice the effective enforcement or administration of the law. (p. 27)

(4) Those federal Crown corporations and their provincial counterparts which qualify as "government corporations" or, alternatively, those which are specifically designated by regulation, should be accorded the extraordinary right to use the protected works of third parties without prior authorization under the circumstances set forth in recommendation (3). (p. 37)

(5) In all cases where the Crown, or a Crown corporation, avails itself of the extraordinary right referred to in recommendations (3) and (4):

(a) where such taking is challenged by the owner of copyright, an onus should rest upon the Crown (and upon the Crown corporation where appropriate) to establish to the reasonable satisfaction of the body to whom the question of compensation is referred, that the conditions precedent to the existence of the right prevailed at the time of the taking. (In the case of Crown corporations, this would include the situation where the corporation was within the class of "governmental corporations.")
(b) there should arise a corresponding obligation: (i) to undertake reasonable efforts within a reasonable period of time to notify the owner of the copyright in the work which has been taken of such taking; and (ii) to pay reasonable compensation for this. (p. 38)

(6) The Crown should establish and broadly disseminate a directive containing guidelines with respect to Crown use of the protected works of third parties which reflects the above recommendations (not specifically recommended in the paper, but rather a necessary adjunct to earlier recommendations which would be of value to effectively carry them out).

(7) All Crown works, in right of both the federal and the provincial governments, other than literary works should be provided with the general terms of copyright protection provided in the Act for works of the same class (i.e., sound recordings, films and artistic works). (p. 55)

(8) Crown works, in right of both the federal and the provincial governments, that are literary works should be provided with a term of protection comprised of 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 publication takes place and 50 years thereafter, or
(b) the period from creation until the end of the year in which creation takes place and 75 years thereafter. (pp. 55-56)

(9) Recommendations (7) and (8) should be equally applicable to federal and provincial Crown corporations. (p. 38)

(10) The prerogative right to publish "a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive," should be abolished. (p. 44)

(11) (a) The copyright in all pronouncements and decisions rendered by members of the Supreme Court of Canada, the federal court and by the members of all federal administrative and quasi-judicial tribunals and similar bodies, however designated, should reside in the Crown in right of Canada. (p. 52)
(b) The copyright in all other pronouncements and decisions by the members of all other courts and comparable tribunals should reside in the appropriate Crown in right of the province. (p. 52)

(12) Where a work is created by a member of a legislative body of either the federal or the provincial governments, or by an agent or servant thereof, and where that work is first published by the Crown in right of either Canada or the relevant province, then, subject to any agreement with the author to the contrary, as of the date of first publication:
(a) the copyright in the work should automatically vest in the relevant Crown; and
(b) where the work is a literary work, the term of coyright protecting it should, in like manner, become the term applicable in respect of literary Crown works (not specifically recommended in the text, but rather a formulation of certain objectives set out at p. 50.

(13) Crown ownership of copyright in all works, other than those referred to in recommendations (11) and (12), should arise only as a result of the application of the general ownership provisions of the Act (e.g., employer/employee, commissioning party, maker of films and sound recordings and assignment). (p. 50)

APPENDIX I

Provincial Interpretation Acts

Alberta (R.S.A. 1970, c. 189, s. 13)
British Columbia (S.B.C. 1974, c. 42, s. 13)
Manitoba (R.S.M. 1970, c. 180, s. 15)
Newfoundland (R.S. NFLD 1970, c. 182, s. 13)
New Brunswick (R.S.N.B. 1973, c. I-13, s. 32)
North West Territories (R.O.N.W.T. 1974, c. I-3, s. 13)
Nova Scotia (R.S.N.S. 1967, c. 151, s. 13)
Ontario (R.S.O. 1970, c. 255, s. 11)
Prince Edward Island (R.S.P.E.I. 1974, c. I-6, s. 10)
Quebec (R.S.Q. 1964, c. 1, s. 42)
Saskatchewan (R.S.S. 1965, c. 1, s. 7)
Yukon Territory (R.O.Y.T. 1971, c. I-1, s. 12(1)).

Provincial Counterparts to the Crown Liability Act

Alberta: Proceedings against the Crown Act, 1959 (Alta.), c. 63, now R.S.A. 1970, c. 285
British Columbia: Crown Proceedings Act, 1974 (B.C.), c. 24. This Act was preceded by a study of the B.C. Law Reform Commission and departs substantially from the model Act in various points of detail
Manitoba: Proceedings against the Crown Act, 1951 (Man.), c. 13, now R.S.M. 1970, c. P140
New Brunswick: Proceedings against the Crown Act, 1952 (N.B.), c. 10, now R.S.N.B. 1973, c. P-18
Newfoundland: Proceedings against the Crown Act, 1973 (Nfld.), c. 59
Nova Scotia: Proceedings against the Crown Act, 1951 (N.S.), c. 8, now R.S.N.S. 1967, c. 239
Ontario: Proceedings against the Crown Act, 1952 (Ont.), c. 78, was never proclaimed in force. It was replaced by Proceedings against the Crown Act, 1962-63 (Ont.), c. 109, now R.S.O. 1970, c. 365, as amended.
Prince Edward Island Crown Proceedings Act, 1973 (P.E.I.), c. 28, now R.S.P.E.I. 1974, c. C-31
Saskatchewan: Proceedings against the Crown Act, 1952 (Sask.), c. 35, now R.S.S. 1965, c. 87
Quebec: 1965 (Que.), c. 80, as am. by 1966 (Que.), c. 21, s. 5, repealing articles 1011-1024 of the Code of Civil Procedure and replacing them by articles 94-94k.

APPENDIX II

Crown Corporations Appearing in Schedules to the Financial Administration Act

Departmental Corporations: Agricultural Stabilization Board; Atomic Energy Control Board; Canada Employment and Immigration Commission; Director of Soldier Settlement; The Director, The Veterans' Land Act; Economic Council of Canada; Fisheries Prices Support Board; Medical Research Council; Municipal Development and Loan Board; National Museums of Canada; National Research Council of Canada; Natural Sciences and Engineering Research Council; Science Council of Canada; Social Sciences and Humanities Research Council.

Agency Corporations: Atomic Energy of Canada Limited; Canadian Arsenals Limited; Canadian Commercial Corporation; Canadian Dairy Commission; Canadian Film Development Corporation; Canadian Livestock Feed Board; Canadian National (West Indies) Steamships Limited; Canadian Patents and Development Limited; Canadian Saltfish Corporation; Centennial Commission; Crown Assets Disposal Corporation; Defence Construction (1951) Limited; Loto Canada Inc.; National Battlefields Commission; National Capital Commission; National Harbours Board; Northern Canada Power Commission; Royal Canadian Mint; Uranium Canada Limited.

Proprietary Corporations: Air Canada; Canada Deposit Insurance Corporation; Canadian Broadcasting Corporation; Cape Breton Development Corporation; Central Mortgage & Housing Corporation; Eldorado Aviation Limited; Eldorado Nuclear Limited; Export Development Corporation; Farm Credit Corporation; Federal Business Development Bank; Federal Mortgage Exchange Corporation; Freshwater Fish Marketing Corporation; National Railways as defined in CN-CP Act, R.S.C. 1925, chapter 29.; Northern Transportation Company Limited; Petro-Canada; Pilotage Authorities -- established by section 3 of the Pilotage Act, chapter 52, S.C. 1970-71, effective Feb. 1, 1972: Atlantic Pilotage Authority -- Laurentian Pilotage Authority -- Great Lakes Pilotage Authority -- Pacific Pilotage Authority; Polysar Limited; St. Lawrence Seaway Authority; The Seaway International Bridge Corporation Ltd.; Teleglobe Canada; VIA Rail Canada Inc.

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