

Copyright in Photographs in Canada since 2012

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Photographs perform a unique function because they capture moments in time and that capture is contemporaneous with the subject of the photo: “[a] writer doesn't necessarily have to be there to produce a story. A photographer, on the other hand, must be at the event when the event happens.”¹

In 2012, the *Copyright Modernization Act*² changed the *Copyright Act* in terms of application to photographs. This column will first discuss how copyright now applies to photographs in Canada (who owns copyright and how long it lasts) and then describe the new users' right now available in respect of commissioned photographs.

The history of photographs in Canadian copyright law is complicated. In the past, the *Copyright Act*³ gave “unique treatment to photographic works in three main areas: authorship, term of protection, and ownership.”⁴ Industry Canada has attributed that old Parliamentary attitude to copyright in photographs to the days “when photography was commonly regarded as an industrial operation rather than a potential art form and when

¹ Ron Poling, Chief of the Picture Service, Canadian Press, Standing Committee on Canadian Heritage, Evidence, April 21, 2004, Retrieved from

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1316290&Language=E&Mode=1>.

² SC 2012, c 20.

³ RSC 1985, c C-42

⁴ Alex Cameron, “Lights, Camera, ... Harmonize: Photography Issues in Copyright Reform” in *In the Public Interest: The Future of Canadian Copyright Law* ed Michael Geist (Toronto: Irwin Law, 2005) 408 [Cameron, “Lights”]

the inadequacy of early photographic equipment restricted a photographer from expressing ‘originality’ in his or her work.”⁵

As this column will fully explain, the result of the 2012 statutory amendments is that the treatment of photographs under the *Copyright Act* was changed so that there is now no difference between the treatment of a photograph and the treatment of any other work. These changes came into effect on November 7, 2012⁶ but they affect all photographs in existence in Canada as at that date. This does not mean that all photographs in existence in Canada are now in copyright: but it does mean, as fully explained in this column, that:

All photographs are in copyright in Canada if the photographers are still alive;⁷ and
All photographs are in copyright in Canada if their photographers have died within
the past 50 years.⁸

No photographs are in copyright in Canada, at the time of publication of this column, if their photographer died more than 50 years before December 31 of this year (2015). Moreover, as the column begins by explaining, all photographs in Canada are now owned by the photographer who took them, from the time of the taking of the photograph – unless that photographer took the photograph as an aspect of her or his employment, in which case, though the photographer remains the “author” of the photograph, the initial ownership of the copyright in the photograph will lie with the employer (even if that employer is a corporation rather than an individual).⁹ The ownership of the copyright in a photograph in Canada now has no relationship to the question of how long the copyright in that photograph lasts: even where a corporation has come to own copyright in a photograph (either because it was taken as part of the photographer’s employment or because the photographer later transferred the ownership of the copyright to a corporation), how long the copyright in that photograph remains a function of how long the photographer lives (and lasts for 50 years after that photographer’s lifetime).

These are dramatic changes and there is some confusion in the literature about them, as will be discussed. The result is that some photographs that have previously been in the “public domain” in Canada, unencumbered by copyright, are now no longer able to be used without permission of the copyright owner. The other result is that whereas people who commissioned photographs in Canada generally became the owners of copyright in those photographs, this is not the case now in Canada. However, as will be

⁵ Industry Canada. *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Government of Canada, 2002): 14 [*Supporting Culture and Innovation*].

⁶ Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force (SI/2012-85), (2012) C Gaz II, 1392 (*Copyright Modernization Act*).

⁷ This assertion does not apply if the photographs in question was prepared or published by or under the direction of Her Majesty or any provincial or a federal government department: in such cases, the copyright in the photograph will not only lie with her Majesty, but the period of protection will be only a “flat” 50 years: see *Copyright Act* s 12.

⁸ See note 7 above.

⁹ This assertion does not apply to photographs that are the subject of the crown copyright provision in the *Copyright Act*, see note 7 above.

explained at the end of this column, Parliament has now created a new, specific, users' right for those who have commissioned photographs.

Ownership of copyright in photographs:

The *Copyright Act* classifies photographs as belonging to the category of “artistic works.”¹⁰ The Act also defines a “photograph” as including “photo-lithograph and any work expressed by any process analogous to photography.”¹¹ Since 2012, the only provisions that apply to copyright ownership for photographs have been the general provisions in the *Copyright Act* governing ownership of all works (literary, artistic, musical and artistic): simply that “the author of a work shall be the first owner of the copyright”¹² except where those works have been created in the course of employment. In employment situations, the *Act* declares that the owner of works is the author's employer.¹³

This represents a big change: immediately prior to November 7, 2012,¹⁴ copyrights in photographs in Canada were completely differently owned than they are now. First, the law before the 2012 amendments created differences between photographs that were commissioned (s 13(2), now repealed)¹⁵ and those not taken on commission.¹⁶ For photographs not taken as a result of a commission, under s 10(2) (now repealed), the *Copyright Act* distinguished between photographs that were generated from negatives (s 10(2)(a), now repealed) and those that were not (s 10(2)(b), now¹⁷ repealed) – but said the owner of either the negative (if there was one) or photograph (if there was no negative) was to be considered the “author” of the photograph and also explicitly acknowledged that that person could be either an individual or a corporation (s 10(2), now repealed). Now, since 2012, the author of a photograph will be the individual photographer in all cases.

Under the law as it stood just prior to the 2012 changes, the *Copyright Act*, having created conditions for non-commissioned photographs under which corporations could be their authors, then created differences amongst such photographs between those where the author-owners were deemed by the *Copyright Act* to be (a) large corporations

¹⁰ *Copyright Act*, s 2 “artistic work” means ... photographs...” It may be noted that photographs are specifically excluded from the *Copyright Act*'s definition of “engravings” (see s 2, “engravings” includes etchings, lithographs [etc]..., not being photographs”).

¹¹ *Copyright Act*, s 2 ‘photograph’

¹² *Copyright Act*, s 13(1).

¹³ *Copyright Act*, s13(3). Note that this concept is different from the American concept of a “work made for hire.” In Canada, the photographer must be an employee, not just a contractor, in order to have the *Copyright Act* transfer the copyright away from her or him.

¹⁴ See note 6 above.

¹⁵ Specifically, where a photograph was commissioned and paid for, if there was no agreement to the contrary, the person commissioning would be the first owner of the copyright in the resulting photograph.

¹⁶

¹⁷ More will be said about commissioned photographs later in the column when we discuss users' rights vis-à-vis photographs.

(s 10 (1), now repealed), (b) corporations that were “smaller” (s 10 (1.1), now repealed),¹⁸ and (c) individuals (s 6¹⁹). None of these distinctions now remain in the *Copyright Act*: the *Copyright Modernization Act*, in 2012, changed the *Copyright Act* by removing them all.²⁰

Now, as mentioned above, those who commission photographs never thereby acquire ownership of the copyright in those photographs: it remains with the photographer.²¹ Now, not only will the ownership of photographs taken *after* the *Copyright Act* was changed in 2012 be determined under the new law, but so also will the ownership of photographs taken *before* November 7, 2012.²² Now, the ownership of copyright in photographs will be determined by looking to s 13(1) in a non-employment situation (the photographer, as author of the photograph, will own the copyright) or, where the photograph is taken as part of the photographer’s employment, by looking to s 13(3) (the employer will own the copyright although the photographer will still be held to be the author of the photograph²³). There is no more corporate *authorship* of copyright in any photographs in Canada:²⁴ although corporations may be the first *owners* of copyright in photographs because they employed the photographers (who remain the *authors* of the photographs). Corporations may certainly subsequently acquire copyright ownership interests in photographs from the initial owners of those copyright interests.

One reason that it is important for the user community to recognize that photographers are now always the authors of their photographs, so long as the photographs remain in copyright, is because, as authors, photographers now clearly always have moral rights in those photographs.²⁵ Unless a photographer waives her or his right,²⁶ the photographer has the right (a) to choose either to be associated with the photograph by

¹⁸ Specifically corporations in which the majority of voting shares were owned by a natural person who would have qualified as the author of the photograph if there had not been a corporation in place (see *Copyright Act*, s 10 (1.1) and s 10 (2)(b) [both now repealed]).

¹⁹ See discussion at note 36.

²⁰ S 10(2) of the *Copyright Act* was removed by s 7 of the *Copyright Modernization Act* and the whole of s 10 of the *Copyright Act* was removed by s 6 of the *Copyright Modernization Act*. These distinctions, in turn, created differences between photographs in terms of how long copyright lasted, as is discussed immediately below.

²¹ More will be said about commissioned photographs later in the column when we discuss the new users’ right respecting photographs that was added to the *Copyright Act* in 2012.

²² See *Copyright Modernization Act* s 59(2), one of the *Transitional Provisions* in the *Copyright Modernization Act* that is not now part of the *Copyright Act* itself.

²³ As further discussed below, the fact that the photographer remains the author of the photograph, even in cases of employment where she or he is not the owner of the copyright, becomes important to determining how long copyright in the photograph will last. As well, as point out below, it is important because of the moral rights held by authors and, therefore, photographers.

²⁴ As described above, the initial ownership of copyright in photographs will now fall into one of the same two categories as occurs in terms of the ownership of all other works: the photographer, as “author” of the photograph, will be the owner where there is no employment relationship in existence in respect of the taking of the photo -- or, where there is employment involved, because Parliament has so declared, the employer of the photographer will own the copyright while the photographer remains the author:.

²⁵ See *Copyright Act* s 14.2(1).

²⁶ See *Copyright Act* ss 14.1(2) and 14.1(4). Just buying the photograph, or getting permission for copyrighted use or uses of the photograph, does not mean the moral rights in the photograph have been waived (s 14.1(3)).

name or pseudonym or to remain anonymous;²⁷ (b) to have the work not distorted, mutilated or otherwise modified in ways that would prejudice the photographer's honour or reputation;²⁸ and (c) to have the work not used in association with a product, service, cause or institution where that use would prejudice the photographer's honour or reputation.²⁹

The period of copyright protection for photographs:

Originally, at its inception in 1921 the *Copyright Act* ("the Act") had unique provisions for the term of copyright in photographs.³⁰ In 1921, the then Parliament gave photographs copyright protection for 50 years³¹ as opposed to the general term for works (introduced to Canada in that statute) of "life of the author plus 50 years."³² More recent Parliaments made a number of amendments that ultimately affected the term of photograph protection.³³ In the first change, in 1993, s 10 was amended to deem some photographs to be "authored" by corporations but kept the term of protection at a "flat" 50 years whomever the author was.³⁴ Then, in 1997, s 10 was further altered: first, natural authors were removed from its special provisions³⁵ and thus photographers not in a corporate context were left to be treated in the same way as any other author under the *Copyright Act* (thus copyright in these photographs would last for the lifetime of the author and a further 50 years);³⁶ and second, individual-dominated small corporations were given protection for the life of the individual "at the heart" of the corporation and an additional 50 years (thus, effectively, the same period of protection as any other author under the *Copyright Act* enjoyed). Only large corporate owners of photographs had, after 1997, a shortened "flat" 50 year term of protection.

When the *Copyright Modernization Act* came into effect on November 7, 2012, s 10 of the Act was entirely repealed, thus doing away completely with its special provisions for photographs. As a result, the only provision in the current *Copyright Act* that can apply to the term of copyright in photographs is s 6 – which declares the term of copyright in

²⁷ s 14.1(1)

²⁸ See ss 14.1(1) and 28.2(1)(a). Note that this right does not extend to requiring that a photographer's photograph not be destroyed. Note also that evaluation of a photographer's honour or reputation will involve both objective evidence, not just the photographer's subjective evaluation: *Prise de Parole Inc c Gu erin*, Editeur Lt e, (1995) 104 FTR 104.

²⁹ See ss 14.1(1) and 28.2(1)(b). For a further discussion of the role of moral rights generally, see Margaret Ann Wilkinson and Natasha Gerolami, "The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright," (2009) 26 *Government Information Quarterly*, 321.

³⁰ Margaret Ann Wilkinson & Charles Painter, "Shifting the Balance of Copyright Control for Photographic Works in Canada" (1999) 13 *Intellectual Property Journal* 353 at 355, 371ff.

³¹ *Copyright Act*, SC 1921, c 24, s 7, later s 10 (see *Copyright Act*, RSC 1985, c C-42 as it was prior to 1993).

³² *Copyright Act*, SC 1921, c 24, s 5, now *Copyright Act*, RSC 1985, c C-42, s 6. Note that there are still special provisions for the term of copyright in works, including photographs, attributable to anonymous or pseudonymous authors (see ss 6.1 & 6.2). Beyond this note, anonymously or pseudonymously authored photographs will not be dealt with further in this column.

³³ SC 1993, c 44, s 60; SC 1994, c 47, s 69(F); SC 1997, c 24, s 7, SC 2012, c 20, s 6.

³⁴ SC 1993, c 44, s 60.

³⁵ SC 1997, c 24, s 7.

³⁶ See *Copyright Act*, s 6.

works to be the lifetime of the author plus 50 years.³⁷ It is therefore the view of these authors, supported by further authorities discussed below, that the question of the period of copyright protection for photographs is now no more complex than it is for any other work in Canada.³⁸

- all photographs are in copyright in Canada if the photographers are alive;
- all photographs are in copyright in Canada if the photographers have died within the past 50 years;
- no photographs are in copyright in Canada if the photographer died more than 50 years before December 31 of this year (2015), i.e. before December 31, 1965.

The logic of this conclusion, based on the legislative history of the *Copyright Act* just described, is further supported by a review of the ways in which Canadian courts interpret statutes. The only section of the *Copyright Act* that applies to the term of copyright for photographs is, as previously outlined, s 6 of the *Copyright Act*. This section states:

The term for which copyright shall **subsist** shall, **except as otherwise expressly provided by this Act**, be the life of the author... and a period of fifty years... [emphasis added].

There are four different ways in which courts' approaches to the current *Copyright Act* should bolster the conclusion that the period of copyright protection for all photographs in Canada is now that which is provided in s 6: exactly the same, without exception, as the protection afforded to any other kind of work, the life of the photographer plus 50 years.

When Parliament, first in 1997 and then again in 2012, passed transitional provisions which actually changed the wording of the *Copyright Act* and also passed provisions which did not change the wording of the *Copyright Act*, it is clear, on the basis of court decisions made in the past, that the latter provisions must not be interpreted to change the meaning of those provisions that appear in the *Copyright Act* itself. The *Act to Amend the Copyright Act* in 1997 included s 54.1, which was meant to aid in the transition from the pre-1997 law (under which all photographs had only 50 years of copyright protection) to the post-1997 position for photographs, but did not, itself, appear in the post-1997 *Copyright Act*. Similarly, in 2012, the *Copyright Modernization Act* contained s 59(1) which was meant to help complete the transition of the law respecting photographs to the present new law (under which all photographs enjoy the same period of protection as all other works), but, again, does not actually appear in the current *Copyright Act*. The Copyright Modernization Act s 59(1) states that [t]he repeal of s 10 of the *Copyright Act* by s 6 [of the *Copyright Modernization Act*, not s 6 of the *Copyright Act*] does not have the effect of reviving copyright in any photograph in which, on the coming into force of that s 6 [i.e., on November 7, 2012], copyright had expired.

³⁷ Strictly speaking, the term of protection is in s 6 as "the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year."

³⁸ Again, recall the caveat for photographs where crown copyright applies, see note 7 above.

As these authors have emphasized when earlier setting out s 6 of the *Copyright Act*, s 6 of the *Copyright Act* only permits another section of the *Copyright Act* itself (“this Act”) to modify the term of protection set out in it. Since s 59(1) of the *Copyright Modernization Act*, set out immediately above, did not become part of the *Copyright Act*, it must therefore be the case that the s 59(1) transitional provision of the *Copyright Modernization Act* simply ensures that no one interprets the change being made in 2012 as re-creating copyright in photographs beyond what s 6 of the current *Copyright Act* provides – that is, s 59(1) of the *Copyright Modernization Act* is meant to ensure that it is understood that there is no copyright created in photographs where the author has died more than fifty years ago (and thus no photographs are interpreted to enjoy more than the period of copyright protection to which photographs were fully transitioned by the *Copyright Modernization Act*). This interpretation of s 59(1) of the *Copyright Modernization Act* is consistent with the *Copyright Act* as it now stands and, under the rules of statutory interpretation, is the interpretation that the courts should prefer.³⁹

The second approach courts have made in the past that supports treating all photographs in Canada as having periods of protection mirroring the periods of protection in place for all other works lies in the meaning of the word “subsist”⁴⁰ in s 6 of the *Copyright Act*: the provision now covering photographs. Past court decisions have held that use of the word “subsist” as part of articulating the period of copyright protection in Canada makes previously legislated protections for limited numbers of years irrelevant. The word “subsist” has not always been part of any term of copyright protection in Canada: prior to 1921, the standard period of protection for works was a set term of 28 years.⁴¹ The 1921 *Act* introduced into Canada a new standard term of protection (of life plus 50 years) using the language of “subsist” – the same word “subsist” that appears in the current s 6.⁴² To “subsist” is to “have being or existence.”⁴³ Justice Dennistoun, speaking for the Manitoba Court of Appeal after the new 1921 language had become law, stated that any Canadian judge was now required “to revise one’s ideas of what copyright means and how it is secured... [Copyright] is a proprietary right which arises from authorship alone. It is sometimes called ‘automatic copyright,’ for without any act beyond the creation of a [...] work it is acquired by the author.”⁴⁴

The importance of the concept of subsistence to modern copyright in Canada has often been noted, including in Justice Linden’s 2002 majority judgment in the Federal Court of

³⁹ See *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 36 [*Rizzo*], where the *Employment Standards Act* involved gave rights to employees, just as the *Copyright Act* gives rights to photographers, and the Supreme Court held that the amending legislation should be interpreted to favour those employees: by analogy, courts should favour photographers, in looking at the current *Copyright Act* as amended in 2012, by giving protection for life plus 50 years in all their photographs to all photographers.

⁴⁰ Emphasized by these authors in the quotation from the *Copyright Act*, s 6, set out above.

⁴¹ *An Act Respecting Copyrights*, RSC 1906, c 70, s 4.

⁴² SC 1921, c 24, s 5.

⁴³ *The Oxford English Dictionary*, 2nd ed, *sub verbo* “subsist”. See also Bryan A Garner, *Garner’s Dictionary of Legal Usage*, 3rd ed (Oxford: Oxford University Press, 1995); *Webster’s New International Dictionary*, 2nd ed, *sub verbo* “subsist”.

⁴⁴ *Gribble v Manitoba Free Press Co*, [1931] 3 WWR 579 at para 38 (Man CA) Dennistoun JA [*Gribble*].

Appeal in *CCH Canadian Ltd v Law Society of Upper Canada*.⁴⁵ If the copyright in photographs arises “without any act beyond the creation of a [...] work” – and nowhere in the modern version of the *Copyright Act* itself does a contrary period of protection for any photographs appear⁴⁶ – then the period of protection, under the language of s 6, for all photographs as for all other works, must be for the life of the author plus 50 years.

The third reason courts’ approaches to the current *Copyright Act* can be expected to reflect the conclusion that the period of copyright protection for all photographs in Canada is now that which is provided in s 6 is that there is no evidence in the historical record that Parliament intended various photographs to have different periods of protection after the 2012 amendments were enacted – and strong evidence pointing to Parliament’s intention to give all photographs the same protections as exist for all other works. This evidence is very important because the Supreme Court of Canada has made it clear that “the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise.”⁴⁷

There is no record, in the official records of the processes leading up to the 2012 passage of the *Copyright Modernization Act*, of any submission directed to any question about “phasing in” the proposed revisions to the period of protection for photographs, although various submissions did address other aspects of proposed changes involving photographs.⁴⁸ To the contrary, the intent of Parliament itself vis-à-vis photographers, in enacting the *Copyright Modernization Act*, was clearly outlined in the official summary affixed to the Act which recites the fact that “this enactment amends the *Copyright Act* to ... (f) give photographers the same rights as other creators.”⁴⁹ Moreover, the Honourable James Moore (then Minister of Canadian Heritage and Official Languages) said, on introducing of Bill C-11, “Canadian photographers will benefit from the same authorship rights as creators. Currently, photographers are not considered authors of commissioned works. This legislation changes that.”⁵⁰ All of the subsequent references in the House of Commons and the Senate during the passage of the *Copyright Modernization Act* support the proposition that all photographers were to benefit from the term of protection of “life plus fifty years.”⁵¹

The fourth and final reason courts can be expected to hold that the period of copyright protection for the life of the photographer plus 50 years governs all photographs in

⁴⁵ Per Linden J (Rothstein J concurring), “some compilations may be comprised of elements that are copied ... in which copyright may or may not subsist” (2002 FCA 187 at para 55, rev’d 2004 SCC 13).

⁴⁶ Again, recall the caveat for photographs (and all other works) where crown copyright applies, see note 7 above.

⁴⁷ In *Rizzo* (note 39 above) at para 31, Iacobucci J, for the Court, continues that it is “one which has often been employed by this Court. (see e.g. *R v Vasil*, [1981] 1 s C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 s C.R. 621 (S.C.C.), at pp. 635, 653 and 660).”

⁴⁸ See, for example, the submission of Richard Bell, “Copyright Liaison for the Professional Photographers of Canada” House of Commons Debates, 35th Parl, 2nd Sess, Standing Committee on Canadian Heritage Evidence (7 November 1996).

⁴⁹ *Copyright Modernization Act*

⁵⁰ *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 31 (18 October 2011) at 2110 (Hon James Moore).

⁵¹ *Ibid*, No 75 (8 February 2012) at 5020 (Gordon Brown); *Debates of the Senate*, 41st Parl, 1st Sess, Vol 146, No 124 (20 June 2012) at 2217 (Stephen Greene).

Canada now is that Parliament explicitly included its intentions for the protection of photographs in the Preamble to the *Copyright Amendment Act* and, under the federal *Interpretation Act*,⁵² any court is bound to interpret legislative provisions in a way that is consistent with that Preamble. The *Interpretation Act* states specifically that “the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.”⁵³ The Preamble to the *Copyright Modernization Act* specifically states that “... copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms.” One of those internationally recognized norms in copyright law is the *WIPO Copyright Treaty*,⁵⁴ a treaty which Canada has now signed. Article 9 of that treaty states that there is to be no shortened term for copyright in photographs and this, in turn, leaves the term of copyright in photographs as governed under the general international provision for the term of copyright in works: life of the author plus 50 years.⁵⁵ Not only has Canada signed the *WIPO Copyright Treaty* and thus might be expected to have passed its domestic law in compliance with its treaty obligation, but also, in this specific case, Canada’s domestic law in the *Interpretation Act* requires that a court interpreting Parliament’s intention, as expressed in s 59(1) of the *Copyright Modernization Act*, was to have acted consistently with its own statement in the Preamble about international norms: to have legislated to be consistent with the *WIPO Copyright Treaty*, which states specifically that there are to be no shortened terms, no terms deviating from the standard life of the author plus 50 years in the *Berne Convention*, for any photographs.

Any reading of Canada’s current *Copyright Act* or *Copyright Modernization Act* that would shorten the period of protection for any photographs runs counter to our international obligations and international copyright norms and thus would move Canada away from “coordinated approaches” to copyright, contrary to the specific provisions of the *Copyright Modernization Act* Preamble. Indeed, there is further evidence of an international norm of copyright that supports reading s 6 of Canada’s *Copyright Act* as being properly interpreted to reinforce the concept of subsistence of copyright in all photographs in Canada for a period of the life of the photographer plus 50 years: the prevalence of the norm of the notion of subsistence in relation to copyright throughout international copyright law, both public international law and in international trade law, as evidenced by use of the word “subsist,” specifically in relation to protection of compilations of data or other materials, in the 1995 *Agreement on Trade Related Aspects of Intellectual Property Rights*.⁵⁶

If, as these authors have described, the current period of protection for photographs is actually no more complex than it is for any other work in Canada and, absent crown

⁵² RSC 1985, c I-21, s 13.

⁵³ RSC 1985, c I-21, s 13.

⁵⁴ *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 (entered into force 6 March 2002).

⁵⁵ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 UNTS 221 (last revised 24 July 1971 and amended 28 September 1979), Article 9.

⁵⁶ *Agreement on Trade Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, art 10 [TRIPS].

copyright,⁵⁷ all photographs are in copyright in Canada if the photographers are alive or the photographers have died within the past 50 years, then to behave as though photographs published prior to 1949 are not in copyright and are freely available for use as part of the public domain is to run the risk that an owner of copyright (or of the moral rights) in a photograph will bring an action for copyright (or moral rights) infringement.

Despite the current clear wording of s 6 of the *Copyright Act* (and lack of any section of the *Copyright Act* providing, specifically, for any other period of protection in any photograph otherwise than that provided in s 6) and the principles of statutory interpretation discussed in the four points raised above, there are, however, some authors who have recently written that there are some photographs in Canada in which, although their authors are either alive now or have died within the past 50 years, copyright no longer exists – that these photographs have “fallen” out of copyright.⁵⁸

The original source of the line of thinking appears to lie in pre-2012 writings of David Vaver⁵⁹ since the basis for current authors’ beliefs that some photographs, otherwise falling within copyright in 2012 under s 6, do not enjoy the “life plus 50” protection of s 6 appears to be based upon Vaver’s perception of the effect of a transitional provision found back in the 1997 statute which amended the *Copyright Act* at that time.⁶⁰

The 1997 amendments came into force on January 1, 1999. If those amendments had not come into force, the law pre-1997 then operated such that copyright protection in any photographs taken in the years before January 1, 1999 would have automatically expired as 50 years passed after each photograph was taken, with the final copyrights arising in photographs taken up until December 31, 1998 expiring December 31, 2048. For many photographs, that predictability ended with the passage of the 1997 amendments, though it continued (at that time) for photographs where the owners were large corporations. For all other photographs, the term of protection, as explained above, became tied to the life of the author, with the 50 year fixed period now following the variable period of the length of the life of the photographer. This latter change was accomplished by making reference in 1997, in s 10 (1.1) of the *Copyright Act*, the provision governing “small” corporations, to the term of protection in s 6 of the *Copyright*

⁵⁷ See again note 7.

⁵⁸ Normand Tamaro, Lesley Ellen Harris and archivist Jean Dryden appear to take this position in their post-2012 writing. See Normand Tamaro, *The 2006 Annotated Copyright Act* (Toronto: Thomson Carswell, 2005) at 320-321; Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed (Hoboken: Wiley, 2014), 128; Jean Dryden, *Demystifying Copyright*, 2nd ed (Ottawa: Canadian Library Association, 2014) at 23-24 [Dryden, “Demystifying Copyright”]. On the other hand, the majority of legal commentators make no argument that the current period of copyright for any photograph in Canada is anything other than the life of the author plus 50 years. See, for example: Halsbury’s Laws of Canada (online), *Term of Protection*, “General” (IV.1) at HCY-38 “Term of copyright” (Cum Supp) and Ysolde Gendreau, “Canada,” in Gendreau, Axel Nordemann & Rainer Oesch (eds) *Copyright and Photographs: An International Survey* (London: Kluwer Law International, 1999) at 109 [Gendreau, “Canada”].

⁵⁹ See David Vaver, *Intellectual Property Law: Copyrights, Patents, Trade-Marks*, 2nd ed (Toronto: Irwin Law, 2011) at 145-47 [Vaver, *Intellectual Property*] and David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at at 104-07 [Vaver, *Copyright*].

⁶⁰ *Act to Amend the Copyright Act*, SC 1997, c24.

Act (which, under the *Copyright Act* as amended in 1997, also governed photographs not owned by corporations).

On its face, after the 1997 amendments were made, the term of protection for photographs taken after where the author was alive or had died within the previous 50 years where the photograph had been taken on or before December 31, 1948 would have continued for the lifetime of the author and then for fifty years (because they were governed after January 1, 1998 by s 6 of the *Copyright Act*, with its use of the word “subsist” as discussed above) except in those cases where copyright was held by large corporations. The copyrights held by large corporations (because, in respect of them, s 6 of the *Copyright Act* did not come into play either before or after January 1, 1999) would have expired by December 31, 1948.

Just as the later 2012 *Copyright Modernization Act*, contained transitional provisions (some of which are discussed above), so too did the 1997 *Act to Amend the Copyright Act*.

The 1997 statute included s 54.1 (a section which, like the later 2012 s 59(1) of the *Copyright Modernization Act*, discussed above, did not appear in the *Copyright Act*): s 6 of the *Copyright Act* applies to a photograph in which copyright subsists on the date of the coming into force of this section, if the author is

- a) a natural person who is the author of the photograph referred to in subsection 10(2)... [if the photographer was a natural person]; or
- b) the natural person referred to in subsection 10(1.1) ... [if the natural person was central to a closely held corporation]

Vaver interpreted “in which copyright subsists on the date of the coming into force of this amendment” in this 1997 transitional s 54.1 as leading to a situation such that the 1997 amendments only applied to “photographs taken as from 1 January 1999 and also to pre-1999 photographs that were still in copyright at that date – those taken after 31 December, 1948.”⁶¹

If the approach taken by Vaver toward the 1997 amendments was correct, s 59(1) of the recent *Copyright Modernization Act* might, in turn, have been thought to mean that any photograph in which copyright protection had expired (because of the s 54.1 transitional provision passed as part of the 1997 amending statute to the *Copyright Act*) would not, on November 6, 2012 have had copyright protection – and, further, that under the *Copyright Act* as it stands after the amendments that came into effect November 7, 2012,⁶² such photographs are not protected. This would mean that photographs whose

⁶¹ Vaver, *Intellectual Property*, at 146; Vaver, at 105. Jean Dryden follows this line of interpretation, although she does not cite to David Vaver, in her 2008 doctoral dissertation (“Copyright in the Real World: Making Archival Material Available on the Internet,” University of Toronto, at 27) [Dryden, “Copyright in the Real World”].

⁶² The *Copyright Modernization Act* came into force on November 7, 2012: Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force (SI/2012-85), (2012) C Gaz II, 1392 (*Copyright Modernization Act*).

photographers are alive now or have died within the past 50 years would, if those photographs had been owned by large corporations before or after January 1, 1997, nonetheless now not be in copyright. Under this argument, copyright would now have expired in such photographs if the photograph was made prior to January 1, 1949.⁶³ The authors of this column reject this interpretation for two main reasons: first, they disagree with Vaver's pre-2012 interpretation of the effect of the 1997 amendments to the *Copyright Act* and, second, the authors point out that, even if Vaver was correct concerning the state of the law between 1997 and 2012, for all the reasons outlined earlier in this column, the 2012 *Copyright Modernization Act* has changed the *Copyright Act* such that all photographs are now in copyright if their author is still alive or has died within the past 50 years.

Turning to the first of these two points, the authors of this column would have interpreted that 1997 transitional provision in the same way as s 59(1) of the later 2012 *Copyright Modernization Act* provision has been interpreted above: that s 54.1 of the 1997 transitional statute should not have been interpreted to be inconsistent with the face of the *Copyright Act* in s 10 as it stood after January 1, 1998.⁶⁴ Thus these authors would interpret the law in Canada between January 1, 1998 and November 6, 2012 as, without exception, meaning that only photographs owned by large corporations after January 1, 1998 had any shorter period of protection than the life of the photographer plus fifty years. For photographs owned by individuals or "smaller" corporations, as set out above, the presence of the verb "subsist" in s 6 of the *Copyright Act* would have meant that copyright for both individual photograph owners and "smaller" corporate individual photograph owners was running for the lifetime of those individuals plus a further fifty years as long as, in or after January 1, 1998, that individual was either alive or had died within the past fifty years.

Turning to the second of the two arguments against the interpretation of the current law as excluding any photographs from copyright protection if the photographers are alive now or have died within the past 50 years, it is clear from the discussion above that, at the present time, given the amendments made to the *Copyright Act* by the *Copyright Modernization Act*, with its unique statutory history and specific *Preamble*, that s 6 of the *Copyright Act* governs and all photographs whose photographers are alive or have died within the past fifty years are in copyright now.

⁶³ See, for example, Bob Tarantino, "Canada's New Photography Copyright Regime: Clearance Challenges" (3 December 2012), *Entertainment & Media Law Signal* (blog), online: <<http://www.entertainmentmedialawsignal.com/canadas-new-photography-copyright-regime-clearance-challenges>>.

⁶⁴ See again the *Rizzo* decision, note 39 above.

The new “users’ right” created in respect of photographs under the 2012 Copyright Modernization Act:

Background to the new “users’ rights for commissioned photographs

A key objective of the various Parliaments which sought to amend the *Copyright Act* during the period leading up to the successful passage of the 2012 amendments was to give the photographers parity with other authors (often termed “creators”).^{65 66 67}

Indeed, it was recognized that the pre-2012 statute reflected archaic and discriminatory views of photography.⁶⁸ Ysolde Gendreau wrote in 1999, “When one takes into consideration both the authorship and the ownership rules, it quickly becomes apparent that there are many occasions when the photographer has no control over his work. This situation is quite anomalous in that it exists only for photographs.”⁶⁹

Specifically, in terms of ownership, prior to the 2012 amendments, s 13(2) of the *Copyright Act* gave commissioning parties, rather than photographers, ownership of copyright in photographs where they were commissioned.⁷⁰ “Commissioned [photographs] are produced under a ... commission arrangement where the [photographer] functions as an independent contractor in producing the work, as distinct from an employee relationship.”⁷¹ Wedding photographs are examples of photographs often taken under contracts commissioning them.

Gendreau pointed that, in doing so, the section actually used the language of “plate or other original,” language specific to older technologies and thus language which was “not technologically neutral and could [make the provision] inapplicable when no negative is actually made: unlike the authorship rule [in s 10, now repealed], no provision is made for photographs that are made without negatives.”⁷² Certainly, by the

⁶⁵ In the context of the 2005 Bill C-60, *An Act to Amend the Copyright Act*, 38th Parliament, 1st session, the Government described its objective as “to harmonize the treatment of photographers with other creators in terms of authorship and copyright ownership.” Canada, Industry Canada and Canadian Heritage, *Government Statement on Proposals for Copyright Reform* (29 March 2005).

⁶⁶ James Moore, Gordon Brown, and Corneliu Chisu are examples of Members of Parliament who mostly recently supported photographer harmonization. Their specific remarks can found in the Debates of the House of Commons (Hansard), 41st Parliament, 1st Session (2011-2012).

⁶⁷ “RECOMMENDATION 2: The Committee recommends that the Copyright Act be amended to grant photographers the same authorship right as other creators.” Standing Committee on Canadian Heritage (HERI), Report 1 - Interim Report on Copyright Reform, Sarmite D. Bulte, M.P. Chair, (May 2004), Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350628&Language=E&Mode=1&Parl=37&Ses=>

⁶⁸ “This deviation dates back to when photography was commonly regarded as an industrial ... Photographers argue that the deviation is no longer justifiable and seek an amendment to the Act. ” Industry Canada, *Supporting Culture and Innovation*.

⁶⁹ Gendreau, “Canada.”

⁷⁰ This section was “part of Canada's copyright law since the Act first came into force in 1924.” Cameron, “Lights,” at 414.

⁷¹ Jim Russell , “Copyright and Commissioned Works” , Canadian Artists Representation, “(May 1993), Retrieved from <http://www.carfac.sk.ca/assets/advisorynotes55.pdf>.

⁷² Gendreau, “Canada,” at 106.

end of the 20th century, section 13(2) had become controversial and divisive: photographers,⁷³ archivists,⁷⁴ advertisers,⁷⁵ media organizations,⁷⁶ and public interest groups⁷⁷ presented submissions to the Heritage and the Senate Committees related to commissioned photography.

In a 1984 White Paper, “From Gutenberg to Telidon,” the federal government stated that s 13(2) “centre[d] on the desire to provide assurance for the personal interest and privacy of the commissioning party.”⁷⁸ In response to that kind of thinking, photographers argued that privacy and tort law were the appropriate legal mechanisms to handle concerns with commissioned photographs.

The privacy rights of the individuals captured in photographs have clearly and strongly been protected by the Supreme Court of Canada decision, *Aubrey v. Éditions Vice-Versa Inc.* in 1998. In this decision the court held that the right to control the publication of a person's image was a fundamental component of the right of privacy. This right to control the publication of a person's own image exists no matter what subsection 13(2) of the *Copyright Act* says. The privacy acts in Quebec, Manitoba, Saskatchewan, British Columbia, and Newfoundland also expressly protect the right of persons depicted in commissioned photographs from having their likenesses used without permission. In addition, Canadian tort law, such as on appropriation of personality, defamation, and duty of confidentiality, adds an extra layer of protection for persons depicted in a commissioned photograph from unwanted commercial use of their likeness. Beyond the fact that photographs already enjoy privacy protection, several government studies also have clearly said that the *Copyright Act* is not an appropriate vehicle to protect privacy rights. For example, in 1984 the white paper, *From Gutenberg to Telidon*, said that legislation pertaining to copyright was not intended to protect privacy.⁷⁹

⁷³ André Cornellier, Canadian Photographers Coalition, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology: Issue 2 - Evidence, (October 28, 2004), Retrieved from <http://www.parl.gc.ca/Content/SEN/Committee/381/soci/02evb-e.htm?Language=E&Parl=38&Ses=1> [Cornellier]

⁷⁴ Nancy Marrelli, Chairperson, Bureau of Canadian Archivists' Copyright Committee, Standing Committee on Canadian Heritage: Evidence, (April 21, 2004) Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1316290&Language=E&Mode=2&Parl=37&Ses=3>

⁷⁵ Robert Reaume, Association of Canadian Advertisers, Re: Bill C_32. An Act to amend the Copyright Act, (January 11, 2011) Retrieved from http://www.parl.gc.ca/Content/HOC/Committee/411/CC11/WebDoc/WD5401532/403_C32_Copyright_Briefs/AssociationofCanadianAdvertisersE.pdf

⁷⁶ Ron Poling, Chief of the Picture Service, Canadian Press, Standing Committee on Canadian Heritage, Evidence, April 21, 2004, Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1316290&Language=E&Mode=1>.

⁷⁷ Alex Cameron, Canadian Internet Policy and Public Interest Clinic Proceedings of Standing Committee on Canadian Heritage: Evidence, (April 21, 2004) Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1316290&Language=E&Mode=1>. [Cameron, *Proceedings*]

⁷⁸ Judith A Erola, Francis Fox, Marcel Masse. *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act, Consumer and Corporate Affairs Communications*, 1984.

⁷⁹ Cornellier

Consumer advocates then presented various counterarguments to these points: privacy law would only protect a narrow category of commissioned photographs, photographs in which there was an identifiable person; commissioned photographs of family pets or houses, for example, would not be subject to privacy restraints; privacy rights are lost once a person dies which means that families would have no right to control use of commissioned photos of their relatives; statutory privacy torts vary between the provinces so the legal protection of the consumer is inconsistent across Canada.⁸⁰

Another concern raised regarding removal of the special provisions in s 13(2) for commissioned photographs was the possibility that photographers might exploit commissioned images for commercial purposes without the consent of the subjects. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) raised this issue during its testimony before the Standing Committee on Canadian Heritage:

The expectation that consumers have when they hire and pay a photographer..., is that the [photographer] is not going to go out and make use of the work. When the couple hires the photographer to take photos of their wedding ... they have an expectation that the photograph is not going to end up in one of those stock photograph books that are being commercially used. If the [section] was changed, as is proposed, or the [section] is simply repealed, that could happen because the copyright owner is the photographer and the photo could end up in one of those books.⁸¹

Despite opposition from various stakeholders, the old provision giving copyright ownership over commissioned photographs to those who commissioned them (s 13(2)) was swept away in the 2012 copyright reforms. However, apparently building from the reasons many stakeholders had advocated for retention of the old s 13(2) – but taking a completely new approach, a new users' right has arisen from the ashes of the old s 13(2), in s 32.2(1):

It is not an infringement of copyright (f) for an individual to use for private or non-commercial purposes, or permit the use of for those purposes, a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.⁸²

The exception (or users' right) is specifically only made available to "individuals": institutions and corporations who commission photographs cannot avail themselves of this exception – but it would seem that an individual may “permit the use of” a

⁸⁰ Cameron, “Lights”, at 424, 430.

⁸¹ Cameron, *Proceedings*.

⁸² In light of this development, it is interesting to note that earlier, in 2004, Cameron, “Lights,” had suggested that consumers should be entitled to the “affirmative right” to share these commemorative photos with their friends and family without requiring permission from the photographer.

commissioned photograph by any person, including institutions or corporations (as corporations are “persons” in law) – but only for the same uses for which the individual commissioning party is given the exception: for private or non-commercial purposes. The section may therefore be of interest to libraries or archives -- which could rely on permissions from commissioning parties of photographs for those uses specified in s 32.2(f). Under the provisions of the section, neither the commissioning individual nor anyone claiming permission through that individual can use the photograph for commercial purposes.

There have been no legal proceedings brought which have involved the new s 32.2(f)⁸³ and therefore there is no judicial or tribunal guidance available concerning the difference between commercial and non-commercial use in this context. The Canadian Association of Professional Image Creators (CAPIC) has created a short video based on its interpretation of the section⁸⁴ – however, given the fact that the organization is biased towards the interests of photographers, the guidance it provides should not be accepted as authoritative by the user community, including librarians and archivists.⁸⁵ It is, however, perhaps instructive to note that, in the same video, CAPIC advises its wedding and portrait photographers to “override” the s 32.2(1)(f) exception by having customers sign a contract that does not permit reproductions without the consent of the photographer: i.e., the individual commissioning the photographs from the wedding photographer would be required to sign, in the contract made to have the photographs taken in the first place, that she or he will not permit reproductions for any purpose without the photographer’s consent. Again, there are as yet no court decisions establishing whether that sort of attempt to override the statutory users’ right in s 32.2(1)(f) by contract would be subsequently enforceable against a commissioning party or someone who received permission through that commissioning party under s 32.2(1)(f).

Conclusion

As Nancy Marrelli, chairperson of the Bureau of Canadian Archivists Copyright Committee, described to the Standing Committee on Canadian Heritage in 2004:

The questions of ownership, authorship, and term of protection for photographs are very straightforward if you look at it from the point of view of a professional photographer ...The same questions are much more difficult and complex when examined from the point of view of an archivist responsible for providing access to millions of photographs for which there

⁸³ It is the role of lawyers and legal academics to provide interpretations of the legislation that they believe are consistent with the enactments and, based on their expertise, are their best predictions about the interpretations the courts will give should the same matters reach the courts. Stephen Waddams, *Introduction to the Study of Law* 7th ed (Toronto: Carswell, 2010), 101-102.

⁸⁴ The Canadian Association of Professional Image Creators (CAPIC), Copyright Law: First Amendment [Video], (n.d.) Retrieved from <http://capic.org/copyright-laws/>

⁸⁵ One illustrative scenario in the video is of an individual who commissions a personal portrait. In CAPIC's opinion, that individual can use the portrait on a personal Linked-in page but cannot post the same photo on a company website because the latter use would be by an organization, for marketing purposes.

is no information about who owns the copyright and who took the photo, let alone when that person died.⁸⁶

It is often difficult to identify the rightsholder for a work in copyright, let alone establish contact with a rightsholder once identified: works where the “parentage” of the work is unknown are often termed, in library and archival literature, to be “orphan” – without a ‘parent’ that can authorize use. Without knowing the “lineage” of an “orphan” work, it can be difficult to predict whether a work is out of copyright (in the public domain) and available for uses beyond statutory users’ rights without the need to obtain permissions from rightsholders.⁸⁷ The Council of Canadian Archives, in a 2009 submission to Industry Canada and Canadian Heritage, pointed out that there is a significantly higher percentage of orphan photographs in archives compared to other types of works.⁸⁸ The Council stated that that its preference was for a fixed term of protection for photographs, rather than calculating the term based on the life of the author plus 50 years⁸⁹ Nonetheless, although archivists preferred a fixed term of copyright protection for photographs, they recognized that ratifying the World Intellectual Property Organization’s (WIPO) Copyright Treaty would require Canada to provide a term of copyright protection for photographs that is the life of the author plus 50 years.⁹⁰ And, indeed, as described above, it is the term of protection for the life of the author plus 50 years that photographs in Canada now have.

While there are those who have argued that photographs created prior to 1949 are safe for libraries and archives to use without permissions or being protected under users’ rights provisions of the *Copyright Act*, these authors have demonstrated that taking such an approach involves more risk than treating all photographs as having copyright protection for the life of the photographer plus fifty years. Richard Dancy in “Managing Copyright in the Digital Repository: Beyond ‘Undue Diligence,’” proposes the following “basic principle” for archival records: “[t]he greater the potential commercial value, the

⁸⁶ Nancy Marrelli, Chairperson, Bureau of Canadian Archivists’ Copyright Committee, Standing Committee on Canadian Heritage: Evidence, (April 21, 2004) Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1316290&Language=E&Mode=2&Parl=37&Ses=3>

⁸⁷ See, for example, on this point, Brief from the Canadian Council of Archives (CCA) to the Legislative Committee on Bill C032 (CC32), 2010, Retrieved from http://www.cdnCouncilofArchives.ca/copyright/BillC-32Brief_Jan2010_CdnCouncilofArchives_EN.pdf, 2.

⁸⁸ Council of Canadian Archives (CCA), Submission to: Industry Canada and the Department of Canadian Heritage on 2009 Copyright Consultation, August 27, 2009, Retrieved from http://www.archivists.ca/sites/default/files/Attachments/Advocacy_attachments/2009-CCA-Copyright-Consultation-Submission.pdf, 4.

⁸⁹ “The term of fifty years from creation that was used in the copyright law previously is preferable from an archival perspective. A fixed term makes it much easier to determine the term of protection because the only information needed to make is the date the photograph was created.” Council of Canadian Archives (CCA), Submission to: Industry Canada and the Department of Canadian Heritage on 2009 Copyright Consultation, August 27, 2009, Retrieved from http://www.archivists.ca/sites/default/files/Attachments/Advocacy_attachments/2009-CCA-Copyright-Consultation-Submission.pdf, 3.

⁹⁰ Canadian Council of Archives, 2009, 4

greater the risk in disseminating the record without permission."⁹¹ However, assessing the potential value in photographs can be a challenging process, fraught with uncertainties and the unpredictable vicissitudes of fortune. While one archivist has expressed the following opinion:

The fact that a lot of archival material was never created with the thought of it being a commercial product. Even with family photos and so on, it seems a bit ridiculous if someone wants to use a photograph of Aunt Mabel making potato salad, it shouldn't have the same restrictions as a Karsh photograph,⁹²

The reality is, however, that photographs can have unexpected commercial value: hypothetically, an advertiser might look at that "Aunt Mabel" photograph and see its commercial potential in a nostalgia-based marketing campaign!

On the other hand, while simplifying the provisions of the *Copyright Act* governing copyright in photographs – and making them consistent with copyright interests in all other works – Parliament has introduced a brand new users' right that explicitly permits certain uses of commissioned photographs to those who commission them and those to whom the commissioning parties give permission. During the term of copyright in photographs, libraries and archives may find that this new users' right for commissioned photographs becomes a vehicle that can enable them to make needed uses of commissioned photographs.

⁹¹ Richard Dancy, "Managing Copyright in the Digital Repository: Beyond "Undue Diligence", Paper presented at the ACA Conference (June 2014), 13, Retrieved from <https://www.sfu.ca/content/dam/sfu/archives/DigitalPreservation/ManagingCopyrightintheDigitalRepository.pdf>

⁹² Quoted by Dryden, "Copyright in the Real World" at 112.