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Archival Community Response to “A Consultation on a Modern Copyright Framework for Online Intermediaries”

Presented by the Canadian Council of Archives
Endorsed by the Association of Canadian Archivists and
l’Association des archivistes du Québec



Canadian Council of Archives (CCA) Statutory Review Working Group
Email: Nancy.Marrelli@concordia.ca

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EXECUTIVE SUMMARY

We have carefully considered and commented on the options and other considerations presented in the consultation paper on a modern copyright framework for online intermediaries in Canada. The important public service mission of Archives for purposes of research, education, and culture, must be taken into careful consideration in implementation of any changes to the copyright framework for online intermediaries.

Recommendations

Our recommendations include:

- Retain the existing “Notice and Notice” regime.
- Define the term “online intermediaries” to exclude LAMs.
- Exclude unpublished archival holdings and orphan works, and Crown works, from compulsory collective licensing schemes.
- In all options, exclude LAMs from onerous obligations.
- In all options, exclude LAMs from measures that would compromise or inhibit their public interest activities.

INTRODUCTION

This submission is made on behalf of the Canadian Council of Archives in response to the Government of Canada's consultation paper on a Modern Copyright Framework for Online Intermediaries. The submission has been fully endorsed by l'Association des archivistes du Québec, and the Association of Canadian Archivists.

Copyright is of great importance to the archival community. We are pleased to participate in this consultation and we look forward to a further opportunity to comment on and respond to all related legislative initiatives.

Background

Archives are non-profit institutions with an important public service mission: to acquire, preserve, and provide access to our documentary and cultural heritage for researchers and users in Canada and world-wide for purposes of research, education, and culture.

The entire Library, Archives, and Museum (LAM) community shares a commitment to its public service mission for the sharing of library, archives, and museum holdings. LAMs make our holdings available for public access, as a public service, and not for commercial gain.

LAMs share a strong commitment to an Open Internet, net neutrality, and to Freedom of Expression. Archives are concerned about policies that would create an environment where, in the absence of clarity, LAMs will err on the side of caution, thereby affecting Freedom of Expression and an Open Internet.

LAMs understand that creators are experiencing a period of diminishing income from their creative work as a result of the changing conditions in the digital environment. Creators and LAMs are allies and our activities are synergistically linked. Creators write the books that are in our libraries, they deposit their papers in our archives, they create the works in our museums, and creators use the holdings of LAMs to create new work. For example, archival holdings are the source of information, inspiration and innovation for many creators as they develop new works in a variety of formats. LAMs promote Canadian creators' works through many public-facing programs. The loss of income for creators is real, but the Copyright Act is a blunt instrument to address the complex reasons for diminishing creator income. Rewarding creation through copyright legislation is not the only possible means of compensation for creators. We believe it is essential to diligently pursue all possible measures, including public policies, that can be used to remunerate creators in the digital environment.

The consultation paper repeatedly states that not-for-profit or small agencies could be excluded from the provisions of the proposed options. It is extremely important that all

provisions put into place under any of the options, or a combination of options, include appropriate exceptions to avoid unintended – and undesirable - consequences for LAMs.

The Archives community is strongly in favour of maintaining the current “Notice and Notice” regime. We supported it in discussions surrounding the examination of Bill C-11 and Bill C-32, as well as in the recent statutory review process. The CUSMA agreement provides for maintaining the current “Notice and Notice” system. We are therefore encouraged that the consultation paper states in section 4: “Significant changes to Canada’s basic model of intermediary liability (e.g., explicit liability for services provided primarily for the purpose of enabling infringement and appropriately limited safe harbour protections without ‘notice and stay-down’ or ‘notice and takedown’ obligations) are not presently being contemplated. Indeed, this model is a cornerstone of the Canadian framework that the Government has carefully maintained to date, including in its international commitments.” We agree it is a cornerstone of our Canadian copyright framework and take it as a given that it will be maintained. The experience of notice and takedown in American legislation has clearly demonstrated that such sweeping measures often result in improper takedown of non-infringing materials.

The consultation paper refers to “public content sharing agencies”, and the term includes LAMs, but it also includes many other organizations that do not have the kind of public service mission that is fundamental for LAMs. For the purpose of this consultation, it is important to make the distinction between “public content sharing agencies” and “public content sharing agencies with a not-for-profit public service mission”.

What is Special About Archives?

Archives are the materials created or received by a person, family or organization in the conduct of their affairs. They are preserved because of the enduring value of the information they contain or as evidence of the functions and responsibilities of their creator. The [Universal Declaration on Archives](#) clearly expresses the public interest role that Archives fulfill:

“Archives are a unique and irreplaceable heritage passed from one generation to another. ... They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life.”¹

¹ International Council on Archives, *Universal Declaration on Archives* (Paris, 2011), <https://www.ica.org/en/universal-declaration-archives>

It is useful to note that archives and archivists serve both the creator and the user stakeholder communities. Creators are our donors and we have both legal and ethical obligations to safeguard their materials and to uphold their intellectual property rights in all of our activities. We also serve the user community by acquiring, preserving, and making accessible, the documentary heritage of Canada.

The nature of archival material presents particular challenges from the perspective of copyright. The combination of vast numbers of works, the fact that most were not created for commercial purposes, the high proportion of orphan works, and the absence of licensing models means that solutions are not obvious. Archivists work with paper, film, audio, and digital records. Most archival materials are the accumulated records of governments, companies, charities, families and individuals. They consist of works like letters, diaries, emails, financial statements, minutes of meetings, reports, photographs, audio recordings, and home movies. Each letter, photo or report is a distinct work protected by copyright. Their extent is vast – it is not an exaggeration to say that Canada’s archives hold billions of works. This has implications for any diligent search and record keeping requirements.

While archival holdings include some published materials, they were not (for the most part) created for commercial purposes or for dissemination to the public, and thus are largely unpublished. The unpublished nature of the great majority of archival holdings has several consequences. Few have any commercial value; thus, rightsholders are unlikely to be interested in monetizing this intellectual property; in fact, many are unaware that they are copyright owners.

Furthermore, archival holdings contain a high proportion of orphan works,² that is, works for which the copyright owners cannot be identified or located. Copyright owners of these materials have little or no vested interest in being readily traceable to grant permission for use or to derive income from their creations. For example, the papers of a cabinet minister may contain thousands of letters and emails from citizens, bureaucrats, and other officials. An archive wishing to digitize these records and make them available online, would have to undertake a labor-intensive and costly (also possibly fruitless) process of contacting thousands of rightsholders.

² While there are no studies of the extent of orphan works in Canadian archives, studies in other countries have found that archives hold a disproportionate amount of Orphan Works. There is no reason to believe that the Canadian situation is any different. See Rebecca Giblin, “Reimagining copyright’s duration,” in Rebecca Giblin & Kim Weatherall, eds. *What If We Could Reimagine Copyright?* (Acton, Australia, 2017), pp. 189-90.

Moreover, for archival material, there are no effective licensing models. Given the minimal financial value of most archival materials and the difficulty in identifying and locating rightsholders, collective societies are not viable options.

Archival material serves as the raw material for countless new works in all formats. In order to achieve a satisfactory public policy resolution, any attempt to develop a modern copyright framework for online intermediaries must include consideration of the particular characteristics of archival material and how such a framework would impact the public mission of archives.

In this consultation response, our remarks are largely limited to matters relating to Archives and the LAM community. We leave it to other stakeholders to respond in detail to issues related to their mandate.

OPTIONS PRESENTED IN THE CONSULTATION PAPER

4.1

Clarify intermediaries' safe harbour protections against liability for copyright infringement, including how intermediaries' knowledge of infringement and content-related activities affect their liability as well as their attendant obligations

A "safe harbour" for archival online intermediaries

The consultation paper aims to address issues pertaining to "online intermediaries." The term is defined as "the entities that facilitate access to ... content online, including copyright-protected content."³ As noted in Section 3.1, the term potentially includes a vast range of intermediary services, including those that do not operate for profit. The paper suggests in various places that non-profit entities, such as archival institutions, should not be subject to additional regulation that may result from the consultation. For that reason, the term should be narrowed and defined along the lines of the EU Directive on Copyright in the Single Digital Market:

'online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject

³ A Consultation on a Modern Copyright Framework for Online Intermediaries (Ottawa, 2021), p. 5.

matter uploaded by its users, which it organises and promotes for profit-making purposes.⁴

Archival institutions (and the Libraries and Museums that preserve archival materials) serve the public interest -- their holdings are the raw material for all manner of new works and other subject matter. They do not operate for profit; they do not generate revenue, beyond cost recovery; they do not provide services to enable copyright infringement. They are already subject to the provisions of the Copyright Act. By excluding non-profit entities from the definition of online intermediaries, archival institutions can continue to fulfill their fundamental mandate to acquire, preserve and make available for research records of enduring value without needless additional obligations.

Archivists have embraced the internet as a means of making their holdings available online to a global audience. No longer do researchers have to visit the institution to conduct their research. Online content includes material in which archival institutions own the copyright, e.g., catalogues, finding aids, indexes, etc. that enable discovery and use of their holdings. Archives also make available online, digital copies of their holdings, in accordance with copyright laws and ethical professional practice. Further evidence of their professional practices is:

- In selecting what to digitize, Archives respect the rights of copyright owners, and make best efforts to obtain any necessary authorizations. This is not always possible, given the large proportion of orphan works in archival holdings. However, failure to implement all measures necessary to respect creators' rights would be disastrous for archival institutions. The resulting loss of credibility and public trust would mean that donors would be unwilling to deposit materials into our institutions.
- Rights holders who believe that their rights have been infringed are encouraged to contact the archives so any legitimate claims can be resolved. In fact, complaints are very few.
- When a complaint is received, access to the material in question is disabled, and discussions with the complainant promptly begin to verify the claim and provide appropriate redress.
- Archives are small enterprises. As noted, they do not generate revenue, and the average number of monthly unique visitors to even the largest Canadian Archives' website falls far below the number of visitors to social media or commercial sites.

In short, Archives merit a "safe harbour", which can be designated by means of an appropriate name for, and definition of, those entities that are the target of the consultation.

Recommendation: Define the term "online intermediaries" to exclude LAMs.

⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Article 2(6).

4.2

Compel remuneration of rights holders through collective licensing of their copyright-protected content on certain platforms

As noted above, there are no effective licensing models for archival material. The consultation paper presents two schemes, compulsory licensing and extended collective licensing, which have the potential to affect archives to varying degrees. Both present potential harm to the public interest if exceptions are not made for non-profit intermediaries.

The obligation to verify copyright compliance with absolute certainty for every item in a digital archive constitutes an unfair burden. As institutions whose primary mission in a digital context is access to material from our holdings that is either in the public domain, or for which we have the rights holder's permission, it is unreasonable to enforce prior agreement with collectives to police occasional and incidental inclusion of copyright protected works in digitized content. Any such cases of copyright infringement are easily dealt with on an individual basis whether in negotiation with rights holders or collectives.

In the interest of open access to government, Crown works should also be excluded from any categories of works considered for remuneration through collective licensing schemes.

The advantages to this option as listed in the consultation paper, only serve to further solidify Archives as outside the context of the "online intermediaries" discussed in this paper. These "advantages" take for granted that rights holders are concerned about fair remuneration for their content shared online, which is generally not the case for material found in digital archives, which is largely unpublished and rarely has commercial value. The discussion of advantages also assumes that there is a proliferation of copyright protected content being shared online that requires a streamlined process for managing. This is most certainly not the case with digital archives for which copyright complaints are extremely rare.

Of the two schemes presented, extended collective licensing (ECL) is the more potentially damaging option.⁵ ECL is a bad fit for Archives because of the nature of archival material, i.e., largely unpublished with a high proportion of orphan works.⁶ ECL schemes often exclude unpublished works, and it is highly unlikely that the collective societies that manage such schemes would make the effort to remunerate unlocatable rights holders.

Recommendation:

Exclude unpublished archival holdings and orphan works, and Crown works, from compulsory collective licensing schemes.

⁵ A Consultation on a Modern Copyright Framework for Online Intermediaries (Ottawa, 2021), p. 14-15.

⁶ Jean Dryden (2017) Extended Collective Licensing and Archives, *Journal of Archival Organization*, 14:1-2, 83-89, DOI: 10.1080/15332748.2018.1503015.

4.3 Increase Transparency in Remuneration Processes

All options considered must encourage transparency in both the use of rightsholder content facilitated by intermediaries and remuneration for that use. Who are “certain intermediaries”? In all options, because of their public service mission, Archives and other LAMs must be excluded from onerous obligations because they are non-profit, public service agencies. This is particularly significant in the archival community because so many of the 800 Canadian Archives are staffed by one or two employees and/or volunteers.

4.3.1 Greater Transparency from Intermediaries

In considering this option, it is important to underline that Archives can keep minimal statistics about use of online materials but they must be excluded from onerous, detailed record-keeping. In addition, it must be noted that it would be a breach of professional ethics for archivists to disclose the identity of users.

There should be greater transparency, and perhaps even reconsideration, of the remuneration paid to collective societies for the use of published orphan works, remuneration that is rarely paid to the actual rightsholders. Royalties should only be collected when they can be paid to a rightsholder.

Recommendation: In all options, exclude LAMs from onerous obligations.

4.4 Clarify or Strengthen Enforcement Tools Against Online Infringement

The intent of this option is clearly stated as targeting “primarily commercial-scale infringement”.

LAMs are definitely not involved in commercial-scale infringement. Our objectives fall into the category of not-for-profit public service by providing online content for public access of our holdings. The Copyright Act already limits the penalties for infringement that would apply to LAMs (ss 38.1(1), 38.1(6)(b), and 41.26(3)). We recommend these measures be maintained. It is essential that LAMs are specifically excluded from measures that would compromise or inhibit our public service activities.

Recommendation: For all options undertaken, exclude LAMs from measures that would compromise or inhibit their public interest activities.

CONCLUSION

The Archives community has examined the implications of potential changes to the Copyright Framework for Online Intermediaries from the archival perspective. Our major concern is to ensure that in efforts to regulate the “web giants”, there should be no unintended consequences that affect the public service mission of LAMs in our efforts to provide access to our holdings for purposes of research, education, and culture. It is essential that any initiatives to modernize the framework must include all the appropriate exceptions to permit LAMs to continue to carry out this public service mission.