September 12, 2001

Government of Canada,
c/o Intellectual Property Directorate,
Industry Canada,
235 Queen Street, 5th Floor West,
Ottawa, Ontario
K1A 0H5

RE: A FRAMEWORK FOR COPYRIGHT REFORM *AND* CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

Dear Sir or Madam,

On June 22, 2001, the Departments of Canadian Heritage and Industry Canada published two consultation papers: *A Framework For Copyright Reform* and *Consultation Paper On Digital Copyright Issues.* The public was invited to submit its comments on these papers by September 15, 2001. These comments are submitted by the Canadian Association of Research Libraries/Association des bibliothèques de recherche du Canada [hereafter "the Association"] in response to this invitation.

The Association was established in 1976 and comprises Canada's twenty-seven major academic libraries, the National Library of Canada/Bibliothèque nationale du Canada, and the Canada Institute of Scientific and Technical Information/Institut canadien de l'information scientifique et technique. Membership is institutional, and is open primarily to libraries of Canadian universities with doctoral graduates in both the arts and the sciences. The combined collections of member libraries form the largest and the most comprehensive library resource for study and research in Canada in all fields.

The Association is an active member of the Copyright Forum. As a member of this Forum, the Association submitted its recommendations on a wide variety of digital copyright issues to both departments in September, 2000. The recommendations are contained in the *Discussion Paper On Digital Copyright Issues* <http://www.carl-abrc.ca/projects/copyright/copyrightforum_e.pdf> [hereafter "the Forum Paper"]. Many of the recommendations in the Forum Paper are discussed in the consultation papers. However, there are some specific matters about which the Association wishes to make additional comments. These are set out below.

A FRAMEWORK FOR COPYRIGHT REFORM

THE NEED FOR BALANCE

In November 1999, the Association published its *Statement of Principles For the Management of Copyright In The Digital Environment* <http://www.carl-abrc.ca/projects/copyright/copyright_princ-e.htm>, which articulated nine principles to further the debate on copyright law reform in Canada. The Association is continuing to build consensus within the library and higher education communities on the critical need for Canadian intellectual property law to recognize and reflect a number of principles concerning the use of copyrighted works in a digital environment.

First among these principles is the need to maintain balance in the copyright law. The Association believes that the copyright law must balance the ownership interests of creators and rights holders with the public interest that is served by ready access to copyright works for the purposes of private study, education, teaching and research. The Association agrees with the two departments that smaller and more manageable legislative packages are a better approach to copyright reform than omnibus revision—but only if each discrete package is balanced.

What is included in each discrete package is critical to maintaining balance in the overall process of copyright reform. The issues the two departments have selected for inclusion in the two consultation papers are not balanced. Should these issues alone constitute the first legislative reform package, the result would clearly tip the legislative balance in favour of creators and rights owners.

The Association therefore requests the two departments to reconsider the issues that have been selected as the "first steps." Although the Association agrees that the issues selected for the first steps are important Internet issues, the Association also strongly believes that other important Internet issues must be considered simultaneously to achieve balanced reform. In particular, the use of standard form contracts in the digital environment and the educational use of the Internet exception are critical to the enactment of a balanced copyright law. The Association requests that the two departments add these two issues to the first copyright reform Bill tabled in the House of Commons. Parliament cannot deal with only some "important Internet issues" and legislate balanced digital copyright reform. The Association, together with other members of the Copyright Forum, firmly believes that balance must be maintained at each stage of the copyright reform process.

Use of Standard Form Contracts

The Association makes the following recommendation:
Amend the *Copyright Act* to provide that the terms of a standard form contract (a contract in which the terms have been unilaterally imposed by one party on the other) prohibiting the doing of an act in relation to a work or other subject-matter protected by copyright are of no effect in so far as they purport to prohibit what is permitted under the provisions of the *Copyright Act*.

The reasons for this recommendation are given in the Forum Paper in section 4.1 *[see Appendix A]*.

Exception for the Educational Use of the Internet

The Association makes the following recommendation:
Amend the *Copyright Act* to permit an educational institution or a person acting under its authority, including a student, to do the following acts in relation to all or part of a work or other subject-matter that has been made publicly available on a communication network, provided the act is done in a place where a student is participating in a programme of learning under the authority of an educational institution, is done for educational or training purposes, and is not for profit, and provided that the source is mentioned, and, if given in the source, the name of the author, performer, maker or broadcaster:

(a) use a computer for reproduction, including making multiple reproductions for use in the course for instruction;

(b) perform in public before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution, or any person who is directly responsible for setting curriculum for the educational institution; *and*,

(c) communicate to the public by telecommunication to or from a place where a person is participating in a programme of learning under the authority of an educational institution.

The term "publicly available" should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption, or similar techniques intended to limit access or distribution.

The exception should not apply if the educational institution or a person acting under its authority has knowledge that the work or other subject-matter has been made available to the public on a communication network without the consent of the copyright owner.

The reasons for these recommendations are given in the Forum Paper in section 4.3 *[see Appendix B]*.

ADDITIONAL ISSUES

The Definition of "publication"

A Framework for Copyright Reform contains an Annex listing thirteen issues that will need to be considered to complete reform of the copyright law. While the Association recognizes the need for consideration of all these issues, a significant omission from the list is consideration of the definition of "publication." The Association's recommendation is:

Amend the *Copyright Act* to make it clear that "electronic publication" (i.e., the making available

to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them) is the equivalent of "publication" for the purposes of the Act.

The reasons for this recommendation are given in the Forum Paper in section 5.1 *[see Appendix C]*.

With regard to the issues listed in the Annex, the Association has made detailed submissions to government on many of these issues in September 2000 as a member of the Copyright Forum. Although these other issues are not, from the Association's viewpoint as pressing as the standard form contract issue or the educational use of the Internet, these other issues are nevertheless important in the overall process of copyright reform. In the Association's view the issues discussed below do not need to be addressed in the first package of amendments, but do need to be addressed in a timely and balanced manner.

Exceptions for Libraries, Archives and Museums

The exceptions in the *Copyright Act* to facilitate research and private study in respect of print materials must be revised to allow their application in the digital environment. The Association therefore recommends:

Amend section 30.1 of the *Copyright Act* to permit the making of a copy in an alternative format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.

Amend section 30.2 of the *Copyright Act* to remove the restrictions that currently limit the exception to "printed matter" and "reprographic reproduction" so as to permit a library, archive or museum to make a copy of a legally obtained, digitally encoded original that forms part of its collection, and/or to provide a digital copy to a patron, provided the copy is used only for the purpose of research or private study. The exception would apply both in the case of a request made directly to the library, archive or museum and in the case of a request made through another library, archive or museum on behalf of one of its patrons.

Place the following safeguards on the making of a digital copy under the exception in sec. 30.2:

- **(a) all intermediate copies must be destroyed once the transaction is complete;**
- **(b) the library, archive or museum must employ reasonable technological measures to prevent unauthorized use of the digital copy that is provided to the patron;**
- **(c) the library, archive or museum must not circumvent any technological measures used by the copyright owner to protect the work, except where a specific limitation to the prohibition against circumvention has been provided for in the Act;**
- **(d) the library, archive or museum must not remove or alter rights management information accompanying the work, except in cases where the rights management information interferes unreasonably with the authorized display or reproduction of the work;**
- **(e) the library, archive or museum must warn patrons against infringement of copyright and**

provide them with ready access to information on the *Copyright Act* and any relevant tariffs, licences, etc.;

(f) the library, archive or museum must maintain records on digital copying done under the exceptions in subsections 30.2(2) and 30.2(5), as required by regulation.

The reasons for these recommendations are given in the Forum Paper, section 5.3 *[see Appendix D].*

Term of Protection

The Association believes that in the matter of copyright term, the life of the author plus fifty years is sufficient to reward creativity. No reasons—other than reference to the actions of other jurisdictions — for extending this term are suggested in the Framework document. The Association recommends as follows:

Maintain the existing term of copyright protection of the life of the author plus 50 years.

Amend the *Copyright Act* in order to treat Crown works the same as other works as far as term of protection is concerned.

The reasons for these recommendations are given in the Forum Paper, section 6.13 *[see Appendix E]*.

Crown Copyright

The Association identifies the need to clarify the status of Crown copyright in order to avoid the conflict in national public information policy that arises where citizens are unable to legally reproduce and/or use material that is being made available in the public interest. The Association therefore recommends:

Amend the *Copyright Act* to place legislative material and court decisions in the public domain.

Retain copyright protection on all other types of government documents until a more in-depth analysis of the issue of Crown copyright within a digital environment has been completed.

The reasons for these recommendations are given in the Forum Paper in section 6.2 *[see Appendix F]*.

Database Protection

Careful consideration needs to be given to the scope of protection that is afforded to databases to ensure that users have reasonable access to the content of a database. The Association recommends:

If the Government decides to enact legislation to strengthen the legal protection of databases, the increased protection should be achieved through minor amendments to the *Copyright Act* that will maintain an appropriate balance in our copyright laws and ensure that fair dealing and copyright law

exceptions will continue to apply to databases.

The reasons for this recommendation are given in the Forum Paper in section 6.4 *[see Appendix G]*.

CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

The Association offers comments on two issues in the *Consultation Paper on Digital Copyright Issues*: technological protection measures and rights management information.

TECHNOLOGICAL PROTECTION MEASURES

At the time the Copyright Forum made its recommendations to the two departments in September 2000, the laws in other countries on technological protection measures and rights management information were in their formative stages. Practical experience based on laws already in place was limited. Since September 2000, there has been legislation in other countries and enforcement experiences in the United States which lead the Association to the conclusion that the law in the United States on technological protection measures is not suitable for Canada. In the United States, recent enforcement actions by copyright owners demonstrate that it is a criminal offence to merely distribute information about a device that could be used to break technology protecting digital copyright.[1]

Since September, 2000, the Association has re-examined the matter of how best to provide effective legal remedies against circumventing technological protection measures based on the laws in other countries. The Association has also reviewed the enforcement experiences in other countries. Based on this review, the Association recommends that circumvention of technological protection measures should be permitted for specifically defined purposes. This provides balance because it permits circumvention where it is in the public interest and prevents it where it is not. This solution also provides greater flexibility.

A prohibition against any circumvention whatsoever is too extreme as has now been demonstrated in the United States. In addition, an absolute prohibition against circumvention of technological protection measures could result in possible invasions of privacy and restrict research and development in new technology. It could also upset the public policy balance between copyright owners and users. At the same time, a prohibition against circumvention for any non-infringing purpose may be too broad. It could permit engaging in circumvention practices which are not appropriate activities for Canadian students and researchers.

Permitting circumvention for specified purposes permits analysis of when circumvention will be permitted on

[1] The most recent case in this area is the arrest of a Russian programmer, Dimitry Sklyarov, visiting the United States who was charged with violation of the criminal provisions in the *Digital Millennium Copyright Act*. Mr. Sklyarov was held without bail and faced a maximum penalty of $500,000 fine and five years in jail. The alleged crime is that he authored software that breaks an encryption used by Adobe. Mr. Sklyarov was in the United States merely to present a paper on software used to protect Adobe's e-books. Although Adobe called for the release of Mr. Sklyarov after considerable public protest, the decision on whether to proceed with the criminal charges rests with law enforcement officials.

a purpose by purpose basis. The Association recommends that circumvention should be permitted for the following purposes:

- preservation copying pursuant to section 30.1 of the *Copyright Act*;
- copying of periodical articles pursuant to an extension of the existing exception in section 30.2, as recommended in the Forum Paper in section 5.3(b) *[see Appendix D, section (b)]*;
- the protection of the privacy of the user of the technology;
- the purpose of reproducing a computer program to make interoperable products, to correct errors and for security testing;
- activities covered by the exceptions for educational institutions in sections 29.4, 29.5, 29.6,29.7, and 30;
- fair dealing in section 29, 29.1 and 29.2;
- reproduction in an alternate format for persons with a perceptual disability in section 32.

Permitting circumvention of technological protection measures for permitted purposes has been legislated in at least two other countries. In Japan, as noted in the *Consultation Paper*, there are exclusions from the prohibitions against alteration and removal where certain recording or transmission technologies are involved and where these acts are necessary to lawfully use the copyrighted material. In Australia, the enforcement provisions regarding technological protection measures allow for the operation of some existing exceptions to the exclusive rights of copyright owners. These limited exceptions are referred to as "permitted purposes." The permitted purposes in the Australian law are the reproduction of computer programs to make interoperable products, to correct errors and for security testing, activities covered by libraries and archives exceptions, the use of copyright material for the Crown, and activities covered by the statutory licences for educational institutions and institutions assisting persons with a disability.

RIGHTS MANAGEMENT INFORMATION

The Association's recommendations with respect to rights management information are:

Legal restrictions on the removal or alteration of rights management information should apply only where the term of copyright protection of the attached work or other subject-matter is still in force.

The removal or alteration of rights management information should be permissible where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject-matter.

Any provision for the protection of rights management information added to the *Copyright Act* should be explicit about what is encompassed within the meaning of the term "rights management information".

The reasons for these recommendations are given in the Forum Paper in section 6.3 *[see Appendix H]*.

The *Consultation Paper on Digital Copyright* raises the question of what should be considered rights management information and what should not. Industry practices and rights management technology itself are evolving. As noted in the *Consultation Paper*, there are some indications that one simple identification code may eventually be all that is needed to serve the same purposes as a number of pieces of rights information. Such a development would render the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) definition of rights management information obsolete.

An additional problem identified is that some information included in the WCT and the WPPT as "rights management information" changes during the lifetime of the copyright. For example, the copyright owner can change many times over the lifetime of a copyright. Because of the evolving nature of this issue, the Association believes that flexibility is needed.

The Association recommends that **Option B**, as outlined in the *Consultation Paper,* be adopted and that the definition of "rights management information" be left to regulations, so that the definition can be changed more easily to accommodate evolving industry practice and technology.

Another reason Option B is preferred is because its proposed definition of rights management information excludes terms and conditions of use. A term and condition of use that is valid in one country may be invalid in another. Because of the international nature of electronic distribution of copyright material, terms and conditions of use should not be considered to be "rights management information."

The *Consultation Paper,* in question 3, asks the following question:

> *Given the fact that some technologies serve a dual purpose, i.e., reflect rights management information and protect a work against infringement, how should provisions concerning rights management information take into account provisions regarding technological measures?*

The Association believes that there are a number of common considerations that must to be taken into account when legislating with respect to technological protection measures and rights management. The additional issues to be taken into account are privacy protection, making legal activities illegal, and monitoring use of the Internet. Each of these is discussed briefly below.

Privacy Protection

Most personal computers have "cookie" files stored on their drives. Under Canadian law, anyone may take measures to protect their privacy. Users have the ability to block the automatic placement of a "cookie" file on a hard drive, or require notification that a "cookie" file is present so that it can be deleted. It would be possible to wrap cookie files in some form of technological measure or rights management tool. If all acts that circumvent technological measures or alter rights management information are illegal, then the public has lost the right to exercise personal choice to protect its privacy. Copyright reform must ensure that unintended

restrictions on computer users' privacy rights are not put in place.

Making Legal Activities Illegal

Circumvention of technological protection measures or alteration of rights management information for lawful uses of copyright material must remain legal. In other words, technological protection measures or rights management information should not be used to prevent the legal use of copyright material. The ability to circumvent technological measures or alter rights management information in specific circumstances should not be illegal. Digital technology can be easily and inexpensively used to apply technological measures and rights management tools to copyright works. If the copyright law prohibits circumvention of a technological protection measure or alteration of rights management information for any purpose, it would be illegal for educational institutions to use copyright material in circumstances that are legal today. For example, altering rights management information to state that a work has fallen into the public domain could become unlawful. Similarly, circumventing a technological protection measure to copy pages to repair a damaged book, which is permitted under the exception for the maintenance and management of collections in section 30.1, could become unlawful.

Monitoring Use of the Internet

Software programs are available to monitor online activities. A common application is to monitor online activities of students for inappropriate use. The software is used by parents, employers, libraries, educational institutions and others to identify sites visited and to block access to some sites. It should not be illegal to use software to monitor undesirable Internet use in educational institutions. But it could be illegal if monitoring software circumvents a technological protection measure or alters rights management information. Copyright reform must ensure that the ability to monitor online activities remains a legal activity.

We thank you for this opportunity to bring forward our views and comments on these issues. The Association looks forward to continuing to work with both departments in the course of copyright law revision.

Yours sincerely,

(signed)

Graham R. Hill, Chair,
CARL/ABRC Committee on Copyright.

Appendix A

4.1 Standard Form Contracts

<u>Recommendation</u>

Amend the *Copyright Act* to provide that the terms of a standard form contract (a contract in which the terms have been unilaterally imposed by one party on the other) prohibiting the doing of an act in relation to a work or other subject-matter protected by copyright are of no effect in so far as they purport to prohibit what is permitted under the provisions of the *Copyright Act*.

When a person or institution buys a digital product, the purchaser is usually obliged to enter into a contract with the digital product vendor. This type of contract, called a "standard form agreement", is drafted entirely by the vendor without consultation or negotiation with the purchaser. Examples are a "shrink wrap licence" in retail transactions and a "click wrap licence" or "web wrap licence" in online transactions. By breaking open the cellophane packaging or clicking the mouse after loading the program, the purchaser may be required to agree to a contract prohibiting copying or lending.

The increasing use of standard form agreements to govern the use of digital products is creating a growing number of conflicts between the prohibitions embedded in contracts and uses permitted by copyright law. The lending of CD-ROMs by Canadian libraries is illustrative of this problem. The Canadian *Copyright Act* provides copyright owners with a bundle of exclusive legal rights allowing them to control specified uses of their works. One of these rights is the right to "rent" a computer program. Since many CD-ROMs contain computer programs, for the purposes of the Act many CD-ROMs are protected as computer programs. However, the rental right was drafted so that the copyright owner's right to rent was balanced by the right to lend. The rental right in the Copyright Act does not apply if the activity does not involve a financial "gain", which makes it inapplicable to lending activities. The public policy balance was established so that lending would be free of the copyright owner's control. Vendors are using contract law in the form of shrink wrap licences to establish a lending right when the legislature has denied them this right in the copyright law.

This raises the question of what can be done to ensure that the normal activities of educational institutions, libraries, archives and museums that are permitted by the *Copyright Act* will not be undermined by the imposition of contractual obligations over which an institution has no effective control. A legislated solution is recommended, using the United Kingdom's *Copyright Act* for guidance.

The United Kingdom's *Copyright Act* addresses a similar, but not identical, issue to the one flagged above. Section 36(4) of the U.K. Copyright Act provides:

> *36 (4) The terms of a licence granted to an educational establishment authorizing the reprographic copying for the purpose of instruction of passages from published literary, dramatic or musical works are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.*

This section has the legal effect of rendering licence terms ineffective insofar as they purport to override statutory provisions in the copyright law, thus preserving the carefully thought out policy balance in the U.K. copyright law. Section 36(4) has been used as a model for a proposed legislative solution that would ensure, for example, that the terms of a standard form licence prohibiting lending a work are of no effect as far as they purport to restrict lending that is permitted under the copyright law.

Appendix B

4.3 Educational Use of the Internet

Recommendation

Amend the *Copyright Act* to permit an educational institution or a person acting under its authority, including a student, to do the following acts in relation to all or part of a work or other subject-matter that has been made publicly available on a communication network, provided the act is done in a place where a student is participating in a program of learning under the authority of an educational institution, is done for educational or training purposes, and is not for profit, and provided that the source is mentioned, and, if given in the source, the name of the author, performer, maker or broadcaster:

- **(n) use a computer for reproduction, including making multiple reproductions for use in the course for instruction;**
- **(o) perform in public before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution, or any person who is directly responsible for setting curriculum for the educational institution; *and,***
- **(p) communicate to the public by telecommunication to or from a place where a person is participating in a program of learning under the authority of an educational institution.**

The term "publicly available" should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption, or similar techniques intended to limit access or distribution.

The exception should not apply if the educational institution or a person acting under its authority has knowledge that the work or other subject-matter has been made available to the public on a communication network without the consent of the copyright owner.

The purpose of the exception for educational use of the Internet is to permit students and teachers to make effective use of the Internet as part of a program of learning. This includes copying certain material from the Internet, performing music or a play on line for students, incorporating text or images in assignments, and exchanging materials with teachers or other students electronically.

The recommended exception is not open-ended. To be entitled to use the exception, a student or teacher would need to be participating in a program of learning under the authority of a publicly funded educational institution. The scope of the exception is also limited by the condition that the material must have been made "publicly available" on a communications network, by or with the authority of the copyright owner, without restrictions on access to it.

These conditions of entitlement to the exception are very important. The challenge is to devise an exception that permits students and teachers to use digital technologies to their fullest potential as an educational tool, while at the same time ensuring that the rights of the copyright owner to exploit his or her works in the marketplace are not impeded. It would be inappropriate for the exception to cover uses for which educational institutions currently pay. Examples include subscription databases, licensed software, purchased CD-ROMs, and online courses and curriculum resources that include copyright materials.

However, use of material made freely available on the Internet should be covered by an exception for educational use. Students and teachers routinely copy material from the Internet for class work and assignments. In fact, teachers encourage this practice and the material, once copied, is communicated by e-mail, on a regular basis, between students and teachers.

The argument for a new exception covering educational use of the Internet is based on the following considerations:

- a negative financial impact on copyright owners resulting from this exception is unlikely since it would only apply to material that is put on the Internet without any expectation of payment;
- even if the assumption regarding expectation of payment is incorrect, there is little likelihood that collectives will make available blanket licences for items accessible on the Internet;
- in the absence of blanket licences, obtaining copyright clearance for real-time classroom use of the Internet by students and teachers is not practical or possible within any acceptable time limits; if a student wants to include an image or text from the Internet in a class assignment, there is no time to obtain permission, even if the copyright owner can be identified and contacted, since copyright owners of digital works can come from all over the world;
- the recommended exception would not be available if the copyright owner has taken steps to prevent access to the material by using passwords, encryption, or other technological protection measures; it would only apply to material placed on the Internet with unrestricted access;
- the federal government invests millions of dollars in projects designed to develop Internet skills among Canadian students, while current policy, as reflected in the copyright law, makes much of what students do under these federally funded projects illegal.

Since this exception applies only to material made publicly available without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. When an author makes a work publicly available on line, without seeking compensation or restricting access, there is no economic exploitation envisaged. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

An issue arising in connection with the definition of "publicly available" is how to address the situation where a work has been communicated without the consent of the copyright owner. A teacher or student using the exception will not know whether a work has been communicated with or without "the consent of the copyright owner". Yet a requirement that the work be communicated with the copyright owner's consent is a reasonable safeguard in the exception from the copyright owner's point of view. It is recommended that the teacher or student be required to have knowledge that the work or other subject-matter was communicated without the copyright owner's consent before she or he loses the benefit of the exception for educational use of the Internet.

Appendix C

5.1 Electronic Publication

<u>**Recommendation**</u>

Amend the *Copyright Act* to make it clear that "electronic publication" (i.e., the making available to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them) is the equivalent of "publication" for the purposes of the Act.

The term "publication" has significant import in the Copyright Act. For example, whether or not a work or other subject matter is protected by copyright in Canada is in certain cases dependent on where the work was first published, the term of protection is in certain cases dependent on the date of first publication, and certain exceptions apply only to published works.

With the advent of the Internet and the World Wide Web, "electronic publishing" has emerged as an alternative to conventional means of making copies of a work available to the public. For all intents and purposes, works made available to the public via the Internet, the World Wide Web, or similar means of communication are "published" works.

The status of such works under the *Copyright Act*, however, is problematic. For the purposes of the Act, the term "publication" is defined so as to specifically exclude "communication to the public by telecommunication" as a mode of "publication". As a consequence, works "published" via the Internet, etc. technically remain "unpublished" works, unless they are also "published" through conventional means of distributing copies.

Amendments are required to make it clear that communicating a work on the Internet is effectively the same as publishing the work and that for the purposes of the Act such works have the same status as "published" works.

The notion of electronic publishing is also relevant to fair dealing. If, as it is sometimes argued, fair dealing applies only to published works, it is important to establish whether "electronic publications" are, for the purposes of fair dealing, "published" works. If they are not, and as a result are deemed to fall outside the scope of fair dealing, fair dealing will in practice become an increasingly meaningless concept as more and more works are made available exclusively in a networked mode.

Appendix D

5.3 Exceptions for Libraries, Archives and Museums
(a) Management and maintenance of collections (section 30.1)

Recommendation

Amend section 30.1 of the *Copyright Act* to permit the making of a copy in an alternative format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.

The exception that permits a library, archive or museum to make a copy of a work, under certain circumstances, for the purpose of maintaining or managing its permanent collection, includes a provision relating to technological obsolescence.

The provision, however, is problematic, in that, as it is written, it would appear to apply only after the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain works in their collections that are in digital formats, libraries, archives and museums will have to migrate those works to new formats and to new technological environments while the technology that enables them to "access" and "read" the original digital format is still available. Once the technology becomes unavailable migrating the work may in fact be impossible.

(b) Research and Private Study (section 30.2)

Recommendation

Amend section 30.2 of the *Copyright Act* to remove the restrictions that currently limit the exception to "printed matter" and "reprographic reproduction" so as to permit a library, archive or museum to make a copy of a legally obtained, digitally encoded original that forms part of its collection, and/or to provide a digital copy to a patron, provided the copy is used only for the purpose of research or private study. The exception would apply both in the case of a request made directly to the library, archive or museum and in the case of a request made through another library, archive or museum on behalf of one of its patrons.

Place the following safeguards on the making of a digital copy under the exception in sec. 30.2:

- **(a) all intermediate copies must be destroyed once the transaction is complete;**
- **(b) the library, archive or museum must employ reasonable technological measures to prevent unauthorized use of the digital copy that is provided to the patron;**
- **(c) the library, archive or museum must not circumvent any technological measures used by the copyright owner to protect the work, except where a specific limitation to the prohibition against circumvention has been provided for in the Act;**
- **(d) the library, archive or museum must not remove or alter rights management information accompanying the work, except in cases where the rights management information interferes unreasonably with the authorized display or reproduction of the work;**
- **(e) the library, archive or museum must warn patrons against infringement of copyright and provide them with ready access to information on the *Copyright Act* and any relevant tariffs, licences, etc.;**
- **(f) the library, archive or museum must maintain records on digital copying done under the exceptions in subsections 30.2(2) and 30.2(5), as required by regulation.**

The exceptions in section 30.2 of the *Copyright Act* permit a library, archive or museum (a) to act on behalf of a person engaged in fair dealing, and (b) subject to certain restrictions, to make a copy of an article published in a newspaper or periodical for a person requesting to use the copy for research or private study. The exceptions apply to requests made by

patrons of other libraries, archives and museums as well as to those made directly by patrons of the library, archive or museum answering the request.

Within a digital environment the application of this set of exceptions to facilitate research and private study is problematic in a number of respects:

- the scope of application of the exception in subsection 30.2(1) is dependent on clarification of the applicability of fair dealing in a digital environment;
- the scope of application of the exceptions in subsections 30.2(2) and 30.2(5) is dependent on whether a work made available originally or exclusively via the Internet, World Wide Web or similar means of communication is considered to have been "published"; *and,*
- elements of the present exception are circumscribed by language that deals only with printed matter and reprographic reproduction.

The need for clarification of fair dealing and the uncertainty surrounding "publication" in a digital environment are both issues that must be clarified in section 30.2 of the Act.

In addition, subsections 30.2(2) and 30.2(5) require revision so as not to prevent a library, archive or museum from using digital technology to achieve efficiencies in support of research and private study. In recognition of the fact that the use of digital technology introduces new risks of diminished control over the work for the rights holder, appropriate safeguards should be built into the exceptions to ensure that their application continues to be linked to private study or research use.

Appendix E

6.1 Term of Protection

Recommendation

Maintain the existing term of copyright protection of the life of the author plus 50 years.

Amend the *Copyright Act* in order to treat Crown works the same as other works as far as term of protection is concerned.

Both the European Union and the United States have recently extended the term of copyright to life of the author plus 70 years. Under the terms of the international treaties it has signed, Canada is not obliged to follow suit, but the political realities of a global economy and the proximity of the United States make it likely that Canada will be under heavy international pressure to extend its term of protection.

The Copyright Forum opposes such an extension of term. The Forum strongly believes that effective public policy must maintain a balance between a robust public domain and appropriate protections for the rights of copyright owners.

Under the current *Copyright Act*, any work that is prepared or published by or for the Crown is protected until it is published and for an additional 50 years after publication. The result is that Crown works that remain unpublished are protected by copyright indefinitely. In Phase II of the revision process, a similar provision for non-Crown unpublished works was replaced by a new provision that gives the same term of protection whether a work is published or not. Unpublished works protected by Crown copyright are the only works that remain protected by copyright indefinitely. The Copyright Forum believes that there is no valid reason to justify such a difference.

Appendix F

6.2 Crown Copyright

<u>**Recommendation**</u>

Amend the *Copyright Act* to place legislative material and court decisions in the public domain.

Retain copyright protection on all other types of government documents until a more in-depth analysis of the issue of Crown copyright within a digital environment has been completed.

Under section 12 of the *Copyright Act*, the Crown holds copyright for any work prepared or published by or for any federal or provincial government organization. The question of whether Crown copyright should continue to exist in Canada is an issue that has been the object of numerous discussions, studies and reports, mainly because in the United States there is no copyright in government works, all material produced by the U.S. government being in the public domain as it is created. The U.S. approach is based on the notion that taxpayers have paid for the creation of government works and should therefore not be required to ask permission to use those works. But the Commonwealth tradition has always considered Crown copyright as being an important prerogative, and favours the retention of Crown copyright. In 1997, through an Order-in-Council, the federal government made an exception to the Crown copyright principle by allowing federal laws and federal court and tribunal decisions to be reproduced without requesting permission.

Access to government information is one the pillars of a democratic society and it is obvious that digital technology—and more specifically the Internet—should enable all Canadians to have better access to basic democratic material such as the law of the land and the court decisions affecting their daily life. While there is not yet a consensus on the future existence of Crown copyright in Canada, the Copyright Forum strongly believes that a statutory exception should be made at least for all legislative material, including parliamentary material such as debates and committee proceedings and reports.

Governments are among the most important providers of information, sometimes on a statutory basis and in other cases based on their moral obligation as guardian of democratic values. While there is general agreement that government information should be made available as easily as possible and at a minimal cost, it is important as well that it be controlled in order to avoid inappropriate use, such as abusive commercial use. Crown copyright being among the tools available to exercise such control, it cannot simply be abolished without a thorough study of the issue.

The United Kingdom recently announced a new access policy applicable to government information. The basic policy principles adopted by the U.K. government are two-fold: first, to maintain the integrity and status of works produced within the government by stating that Crown copyright will continue to exist; and second, to encourage the widest possible dissemination of and access to government content. Significantly, the new policy treats Crown works differently depending on whether or not they have been published. The U.K. government waives its copyright in public records that are available to the public, and that were unpublished when they were transferred to the national public records office (in England, Scotland, Wales or Northern Ireland). The Canadian archival community and the researchers they serve would welcome a similar approach. More and more government information, including specialized reports and studies, is now made available exclusively on the Internet through departmental web sites. As well, growing numbers of Canadians now have access to the Internet as a result of the implementation of government policies aimed at facilitating public use of the Internet. Within such a context, there is an urgent need to clarify the status of Crown copyright in order to avoid a conflicting situation where citizens would be legally denied the right to reproduce and/or use material that is being made available to them as part of national public policy.

Appendix G

6.4 Database Protection

__Recommendation__

If the Government decides to enact legislation to strengthen the legal protection of databases, the increased protection should be achieved through minor amendments to the *Copyright Act* that will maintain an appropriate balance in our copyright laws and ensure that fair dealing and copyright law exceptions will continue to apply to databases.

There is some uncertainty in Canadian law regarding the extent to which the *Copyright Act* protects "sweat of the brow" databases. In limited cases, these databases may require extensive time, labour and expense to compile but may not pass the minimal threshold test of "originality" to qualify for copyright protection. As a result, certain members of the database industry have expressed concerns about the vulnerability of digital databases to unfair commercial copying and asked the government to enact additional legal protections for databases, including possible new forms of intellectual property protection for databases. Legitimate concerns about unfair commercial copying, however, should not lead to the introduction of a new sui generis database protection law that may go beyond the curtailment of industrial piracy and threaten public access to facts and public domain works.

If the government seeks to strengthen the protection of databases, it should do so through minor amendments to the *Copyright Act* that will maintain balance in our laws while addressing reasonable concerns about unfair commercial competition.

Careful consideration needs to be given to the scope of protection that is provided to databases to ensure that users have reasonable access to the content of a database. Caution also needs to be exercised to ensure that the protection provided does not have the effect of giving the producer of the database exclusive control over the intellectual content of the database for a protracted period of time.

Appendix H

6.3 Rights Management Information

<u>**Recommendation**</u>

Legal restrictions on the removal or alteration of rights management information should apply only where the term of copyright protection of the attached work or other subject-matter is still in force.

The removal or alteration of rights management information should be permissible where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject-matter.

Any provision for the protection of rights management information added to the *Copyright Act* should be explicit about what is encompassed within the meaning of the term "rights management information".

The WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both contain provisions requiring that member states enact remedies against the removal or alteration of "rights management information" attached to works or other subject-matter, and against the distribution of works or other subject-matter in the knowledge that such information has been removed or altered. "Rights management information" is broadly defined in the WIPO treaties to mean information attached to a work or other subject-matter that identifies the work or other subject-matter, author, performer, performance, producer of a sound recording, copyright owner, or any information regarding the terms and conditions for use or the work or other subject-matter.

The discussion papers commissioned by the federal government in relation to the WIPO treaties recommended a new section in the *Copyright Act* to deal with rights management information.

Canadian law needs to be very clear on what constitutes "rights management information" for the purposes of the Act, and standards need to be established for the presentation of such information.

Any new provision of this nature in Canadian law must be drafted carefully so as to avoid hindering legitimate activities. For example, when the term of copyright protection for a work has expired, it should be permissible to remove rights management information attached to the work.