

Copyright Protection in Unpublished Works:

Final Report

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Copyright Protection in Unpublished Works: Final Report

Background

Section 7 of the *Copyright Act* was significantly amended by Bill C-32 (*An act to amend the Copyright Act*) which was introduced in the House of Commons in April 1996. Prior to these amendments, authors of “posthumous” works had perpetual copyright protection. A posthumous work is one which had not been published, performed in public, or communicated to the public by telecommunication by the time of the author's death. Such works were protected for fifty years after the date of publication, performance, etc. If a work was never published, performed, etc., the effect was perpetual copyright.

Bill C-32 phased out perpetual protection for posthumous works. The Bill provided the standard term of protection (life of the author plus 50 years) to works whose authors died after the coming into force of the section, regardless of whether or not the works were published before the author's death. However, to be fair to those authors' heirs who thought they had perpetual protection, the rules could not change overnight. Two transitional provisions were provided. First, posthumous works by authors who died more than one hundred years before the coming into force of this section would be protected for an additional five years from the end of the calendar year in which the section came into force. Secondly, posthumous works by authors who died during the one hundred years before the coming into force of this section would be protected for an additional fifty years from the end of the calendar year in which the section came into force.

The proposed amendments proved to be quite controversial. Vigorous lobbying by academic historians, archivists, and genealogists urged that the transition periods be shortened so that older archival material (much of it unpublished) would come into the public domain sooner. Their arguments convinced the government to reduce the transitional periods from 100 years to 50 years. As amended, the transitional rules apply respectively to the works of authors who died more than fifty years before, and in the fifty years immediately preceding, the coming into force of the section. The Bill received Royal Assent on 25 April 1997.

However, the changes to section 7 did not come into force until 31 December 1998. Those whose interests were compromised (e.g., the heirs of L.M. Montgomery, and others whose unpublished works would come into the public domain five years after section 7 came into force) mounted a campaign to delay this section from coming into force until the transitional period could be changed. A meeting was held in September 1997, attended by government officials and certain stakeholders (archival representatives and counsel for several writers' associations). The parties discussed possible changes that would benefit both creators and users of copyright material. A Discussion Paper summarizing the options was not released until February 1999. The stakeholders were invited to provide comments; however, the response was inconclusive, and the matter remained unresolved.

The rules relating to the term of copyright in posthumous works are summarized in the following table:

Rule No.	Situation	Rule
1	An author died with an unpublished work which his/her estate published before December 31, 1998.	The work is protected for 50 years from the date it is published.
2	An author died before December 31, 1948 with an unpublished work which was not published on or before December 31, 1998.	The work is protected until December 31, 2003 (for 5 years following the end of 1998). It comes into the public domain on January 1, 2004.
3	An author died on or after December 31, 1948 with an unpublished work which was not published on or before December 31, 1998.	The work is protected until December 31, 2048 (for a period of fifty years following the end of 1998). It comes into the public domain on January 1, 2049.
4	An author dies after December 31, 1998 with an unpublished work.	The work is protected until the end of the year in which the author dies and for a period of fifty years following the end of that calendar year.

The Consultation

As the government embarked on another round of copyright reform in 2001, section 7 was included on the list of issues to be addressed. The government commissioned a study which outlined the issues and a number of possible solutions. Using this study as a starting point, a consultation of the stakeholders was convened in early 2002 to attempt to resolve the matter. The consultation was facilitated by Wanda Noel. Rachel Rajput attended on behalf of the Department of Canadian Heritage. The stakeholder participants were:

Organization	Represented by:
Canadian Historical Association	Chad Gaffield, Council member (first meeting) Mary Vipond, President (second meeting)
Bureau of Canadian Archivists	Nancy Marrelli, Chair, BCA Copyright Committee
National Archives of Canada	Greg Eamon, Policy Branch
The Writers Union of Canada	Penny Dickens, Executive Director Marion Hebb, Legal Counsel

Representatives of the stakeholders met on January 31, 2002 to consider various ways of resolving the issue. After considerable discussion, a proposed solution was developed and the participants took it back to their respective constituencies. However, concerns were expressed that the proposed solution would delay access to a considerable volume of material scheduled to come into the public domain in 2004. Consequently, the group met again on February 25, 2002 to consider alternative

possibilities. The following solution represents the compromise reached at the second meeting, and subsequently approved by the executive boards/governing bodies of the stakeholder organizations.

The Solution

The solution consists of two parts. First, section 7 of the Act would be amended to provide the following:

a) where an author died before January 1, 1930 with a work which had not been published by December 31, 2003, the work is protected until December 31, 2003. If, however, the work is published on or before December 31, 2003, the work is protected for 20 years from the date of publication.

b) where an author died after December 31, 1929 and before January 1, 1949 with a work which had not been published by December 31, 2003, the work is protected until December 31, 2017. If, however, the work is published on or before December 31, 2017, the work is protected for 20 years from the date of publication.

If the Act is amended as suggested, the rules relating to the term of copyright in posthumous works would be summarized as follows:

Rule No.	Situation	Rule
1 (No change)	An author died on or before December 31, 1998 with an unpublished work which his/her estate published before December 31, 1998.	The work is protected for 50 years from the date it is published.
2 (New)	An author died before January 1, 1930 with an unpublished work which has not been published on or before December 31, 2003.	The work is protected until December 31, 2003.
3 (New)	An author died before January 1, 1930 with an unpublished work which his/her estate published on or after December 31, 1998 and before January 1, 2004.	The work is protected for 20 years from the date of publication.
4 (New)	An author died after December 31, 1929 and before January 1, 1949 with an unpublished work which has not been published on or before December 31, 2017.	The work is protected until December 31, 2017. It comes into the public domain on January 1, 2018.
5 (New)	An author died after December 31, 1929 and before January 1, 1949 with an unpublished work which his/her estate published after December 31, 2003 and before January 1, 2018.	The work is protected for 20 years from the date of publication.
6 (New)	An author died after December 31, 1948 and before January 1, 1999 with an unpublished work which his/her estate published on or after December 31, 1998.	The work is protected until December 31, 2048. It comes into the public domain on January 1, 2049.
7 (No change-- Old rule No. 4)	An author dies after December 31, 1998 with an unpublished work.	The work is protected until the end of the year in which the author dies and for a period of fifty years following the end of that calendar year.

The second part of the solution would amend section 30.21 which provides archives with an exception to make single copies of unpublished works in an archival institution for research and private study purposes, provided that certain conditions are met. This exception creates two categories of unpublished works: those which were in an archive before September 1, 1999 (the date the exception came into force) and those which are placed in an archive after September 1, 1999. For the first category (unpublished works already in an archive before September 1, 1999) there are currently two statutory conditions. The copy can be made only if the archive "is unable to locate the [copyright] owner", and records must be kept of copies made under this section. The second part of the proposed solution is to amend section 30.21 to eliminate both of these conditions.

Conclusion

The solution described above has been approved by the executive boards/governing bodies of the stakeholder organizations. It represents a satisfactory solution to a difficult and complex problem. In reaching this solution, each of the stakeholders had to give up something; however, in doing so, each gained something more valuable which will benefit their constituents in the years to come. From the government's perspective, one of the issues left over from the Phase II process has been resolved in a satisfactory manner. Work can now proceed on other issues.