

Memorandum

To Canadian Research Knowledge Network
From Clark Wilson LLP
Date September 29, 2021
Re **Analysis Regarding Acquisition and Use of Commercial Microfilm**

I. Issue

You have asked for our analysis regarding adding material from a microfilm collection of newspapers (the “News Collection”), to your Canadiana collection. In particular, you have asked us to consider (1) whether you can digitize any content (and if so, within what parameters), (2) what (if any) permissions you might need, and (3) what time period would be appropriate.

II. Background and Context

The News Collection is being donated to Library and Archives Canada (“LAC”), by a commercial digital imaging company called Western Canadian Digital Imaging Inc. (“WD”). WD had been retained by various newspaper publishers¹ (some of the titles and some publishers may now be defunct) to prepare microfilm versions of their publications. WD does not own any rights in the underlying publications, but is simply donating its physical microfilm to LAC. WD is not providing any representations or assigning any rights, except for ownership of the physical microfilm. LAC, in turn, has approached the Canadian Research Knowledge Network (“CRKN”) about adding some of the News Collection to your Canadiana collection.

In this case, due to the commercial context of newspaper publication, WD’s donation and the more recent nature of some of the publications covered in the microfilm (ranging from the 1800s, but some of which appear to be as recent as 2017), CRKN has asked us to consider the News Collection.

We understand that while CRKN would make any digitized pages available to the public, they would be displayed ‘as is’ (i.e. no extraction of text, etc., and merely as images of what would be newspaper pages).

We understand the physical microfilm will belong to LAC, once the donation is complete.

III. Summary

Based on our evaluation of the legal issues associated with copyright in the News Collection, and taking into account both legal and practical considerations, while CRKN can safely digitize *some* of the News Collection (where copyright has expired), it appears likely that a material portion is likely to be covered by copyright based on the timeframes involved—that said, in addition to a date-based consideration, there are a number of risk management and mitigation recommendations to minimize dispute risk.

¹ We understand that the News Collection is almost entirely comprised of newspaper microfilm.

In all cases, obtaining permission from the publishers and individual authors that may potentially retain any active copyright in the works² would be the safest approach, but this may not be practical and/or it may be that the rights holder cannot be located today.

It is *likely* that works in the News Collection that pre-date 1913 are now in the public domain (the “Low Risk Works”). Works that are from 1913 through to approximately 1931 *may* now be in the public domain (the “Moderate Risk Works”), while for works created after 1931 it would be safest to assume some copyright exists, though this would expire on a rolling basis as time passes (the “High Risk Works”).

In the case of the Low Risk Works, the legal risk (risk in respect to whether copyright has expired in relation to an item) is **low**. The dispute risk (risk of a potential claim by an extant rights holder) based on performing a risk management analysis (as discussed below) to define parameters of the sub-set of such works to digitize/make available, is likely also **low**. Thus, these are the category of works that CRKN should likely begin with digitization and making available.

For the Moderate Risk Works, the legal risk is **low-moderate**, but based on performing a risk management analysis to define the parameters of the sub-set of such works to digitize/make available, you are likely able to keep the dispute risk to **low or low-moderate**.

For the High Risk Works, the legal risk is **high or moderate-high**, but once again performing a risk management analysis to define the parameters of the sub-set of such works to digitize/make available, you are likely able to keep the dispute risk to **low-moderate**.

IV. Discussion

Generally

Assumptions

For simplicity (since we do not have specific information regarding the authorship of the works in the News Collection—which appears primarily to be of newspaper pages—and as we expect few anonymous or posthumous works in the typical newspaper context), we have considered the current general copyright term, which lasts for the life of the author plus the remainder of the calendar year in which they died, plus another 50 years (in the case of joint-authors, based on the last author to die). Therefore, if an author (either sole author or the last remaining joint-author—the remainder of our analysis assumes either a single author, or that we are considering the ‘last to die’ joint-author) passed away at any time during the year 1970, the copyright term would continue to run to end of the calendar year 1970, plus another 50 years – so it would expire on December 31, 2020, with such works entering the public domain on January 1, 2021.

Canadian life expectancy for *women born* during the 1970-1972 period, was approximately 77 years³. Of course, as life expectancies generally increased during the 1900s⁴, using the life expectancy for this

² We note that there may be copyright in each article, in addition to copyright in a newspaper as a ‘compilation’—in some cases, a publisher (or their successor-in-interest) may have both sets of rights, but this will not always be the case.

³ See <https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016002-eng.htm>.

latter period *over states* the likely life of any author born earlier, which would necessarily be the case for someone dying in 1970—this conservative assumption is meant to understate where copyright has expired, so as to minimize legal and dispute risk. Further, historically for that era, it is *likely* that most of the authors at issue were men, who had a lower life expectancy compared to women⁵—for the same reasons, this conservative assumption has been used to minimize risk for our Low Risk Works. We also assume that the average age of an author when creating a work is at least 20 years, given that most newspaper ‘men’ would have been adults (though, of course, there may be cases with younger or older authors).

Categorization of Temporal Risk

With these assumptions and the above framework in mind, if a 20 year old author creates/publishes a work in 1913, and lived for another 57 years, they would be expected to pass away in 1970, i.e. such works would have entered the public domain on January 1, 2021. Thus, we can relatively safely assume that any work created by an author *before* 1913 have had copyright expire, and are in the public domain (our Low Risk Works). Again, there may be exceptions based on specific circumstances, but this is meant as a generalization.

For works created from 1913 to approximately 1931, based on the lower average life expectancy for men and the variability of average life expectancy, and still assuming a minimum author’s age of 20, we can say it is possible that some works may have had copyright expire, but this would not be universal. So, for example, for works authored in 1931, a 20 year old male author would have been born in 1911—while the life expectancy data only readily goes back to 1920/1922⁶, if we take the men’s average expectancy for persons born then of approximately 59 as a proxy for 1911, we can reasonably assume that on average such men would have died by 1970, which is the year of death in order for a work’s copyright to have expired at the end of 2020 per the general copyright term (our Moderate Risk Works).

Taking the same assumptions as above, it is *likely* that works created after 1931 would have some copyright remaining, at least on average (our High Risk Works), though this would, of course, expire on a rolling basis every year.

In addition, while the above time-based analysis deals with the legal risk of a given work still being covered by copyright, it is noted that even where a work is still covered by copyright, there are fair dealing arguments to allow for your use. As fair dealing is contextual and still involves risk of a claim, we have not considered this in detail, however, the risk management questions we pose further below do consider this implicitly.

Risk Management and Mitigation Recommendations

In the case of the News Collection, notwithstanding just legal risk vis-à-vis whether copyright has, or has not, expired, there are added considerations given the commercial nature of newspapers that impact dispute risk, even for out-of-copyright works.⁷

⁴ *Ibid.*

⁵ *Ibid.*, “Life expectancy has historically been lower for men than for women. While the gap was small in 1920–1922 (1.8 years), it reached a high of 7.3 years in 1975–1977 and narrowed to 4.3 years in 2009–2011”.

⁶ *Ibid.*

⁷ Of course, even if there is no dispute risk, that does not mean in-copyright works may be freely used.

In that light, there are a number of ‘due diligence’ and risk management/mitigation questions to consider (and of course, generally risk, in particular legal risk, increases as we move from Low Risk Works → Moderate Risk Works → High Risk Works, which is a temporal-based division). Using these questions, you would be able to further particularize which sub-set of works to digitize/make available.

In each case below, a ‘no’ answer would decrease dispute risk:

- Is the publication still being published?
- Is the publisher (or a successor, if applicable) still active today? If so, are they known to be aggressive about enforcing/attempting to enforce copyright (whether or not the material is actually covered by copyright)?
- Is the publication (or some sub-set of the Low, Moderate or High Risk Works) currently available via a paid/commercial service?
- Is the publication (or some sub-set of the Low, Moderate or High Risk Works) currently available in any form at all?

In each case below, a ‘yes’ answer would also decrease dispute risk:

- Is there a currently active publisher (or successor, if applicable) from whom you secure rights to digitize and make available the publication (or some sub-set of the Low, Moderate or High Risk Works)?
- Is the publication (or some sub-set of the Low, Moderate or High Risk Works) currently available via a free educational and/or free governmental service?
- Is the publication (or some sub-set of the Low, Moderate or High Risk Works) currently available under license terms that explicitly allow for re-distribution/use and/or have the works been ‘donated’ to the public domain (or the copyright owners have indicated they will not exert any of their rights)?

As we understand the CRKN’s intent is likely to begin with marginalized/out-of-print/not-online-already works from the News Collection, on balance, we expect the dispute risk would be low for such a sub-set, particularly if you begin with the temporal Low Risk Works, and the answers to most of the questions above are negative/positive (as applicable).

In all cases, having a mechanism to deal with a potential rights holder’s complaint would mitigate and manage dispute risk, particularly if we begin with works where there is *unlikely* to be current copyright.

We look forward to discussing our analysis with you, and to answering any questions.