



BY EMAIL

January 13th, 2010

Mark Akrigg
Project Gutenberg Canada

Dear Mr. Akrigg

Re: Retroactive effect of copyright extensions on material already in the public domain

Background

As is often discussed around this time of year, copyright in a given work persists for a specific and generally limited term, which varies depending on the enabling statute. After this term expires, barring renewal provisions, the work enters the public domain.

However, as the copyright term is a creation of statute, it can generally be altered by statute, as has occurred recently in jurisdictions including Europe, the United States, and Canada. The most recent Canadian copyright term extension addressed the term of copyright in photographs, which was extended by 1997's Bill C-32 from a flat fifty years, to the general term of life-of-author plus fifty years. (Corporate authors here retained the shorter term.)

Many works that had already passed into the public domain under the old rules would not have done so if the new rules applied retrospectively. In other jurisdictions that have extended copyright terms, copyright has been revived over such works. The status of such works in Canada deserves clarification.

Issues

1. Did the 1997 extension of copyright terms in photographs act retrospectively, to revive copyright protection over works that had already passed into the public domain?

Short Answers

Copyright has been viewed by both British and American courts as a creature of statute, rather than something applied at common law and derived from natural law. Similarly, the civil *droit d'auteur* that has influenced Canadian copyright law is, of course, a creature of statute.

As such, Canadian copyright law derives entirely from its enacting statutes, and does not operate where they do not. Canadian copyright law specifically disclaims application beyond the length of its specified term. Thus, a work that has passed into the public domain is beyond the reach of the copyright law as written.

Given the presumption against retroactivity in Canadian law, a specific provision to restore expired copyrights in a given case would have to exist, similar to those extant in corresponding British and

American legislation. No such provision exists regarding the C-32 extensions, and they thus do not apply retrospectively.

Discussion

The Default State of Copyright

The question of what law applies in the absence of copyright statutes is as old as the notion of copyright statutes, and far more settled. The first British copyright statute, the 1710 Statute of Anne, applied for a limited term of 21 years. After the booksellers who mainly benefited from it were denied an extension by Parliament, disputes over whether it continued to operate rose to the House of Lords, at the time the court of final appeal. In *Donaldson v. Beckett*,¹ the House of Lords ruled that, absent the operation of the Statute of Anne, copyright protection did not exist. This ruling is the foundation of today's legal concept of the public domain, though it served at the time only to confirm what was commonly believed. The United States Supreme Court echoed (and cited) this ruling in 1834's *Wheaton v. Peters*.² Similarly, the civiliste *droit d'auteur* that stands as the second parent to the Canadian law is itself, like all civil law, a creature of statute.

The Canadian Statute

In Canada, while the Statute of Anne was received with the body of existing English statute law, it has of course been superseded several times over. The modern *Copyright Act*, like its predecessors, provides that copyright shall exist for a specific term. The Act states in section 5(1) that "Subject to this Act, copyright shall subsist in Canada, *for the term hereinafter mentioned*, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met...."³ More importantly for the purposes of this discussion, the Act provides⁴ that "Copyright *shall not subsist in Canada otherwise than as provided by subsection (1)*, except in so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend."⁵

These provisions combine to strictly limit the operation of the copyright statute in Canada – outside the term laid out by the Act for a given work, the Act specifically declines to enact copyright, and it thus no longer exists for those works.

The 1997 Term Amendments

Following the Berne Convention, the *Copyright Act* sets out a general protection term of life-of-author plus fifty years.⁶ Until 1997, section 10 of the Act set out a specific term for photographs: the remainder of the calendar year of their making, followed by fifty more years.⁷ 1997's Bill C-32 replaced that specific term with the general term, but the exact mechanism of its doing so is pertinent.

The relevant portion of Bill C-32 reads as follows:⁸

¹ *Donaldson v. Beckett*, 17 Cobbett's Parl. Hist. 953, 98 E.R. 257 (1774).

² 33 U.S. (Pet. 8) 591 (1834)

³ *Copyright Act*, R.S.C. 1985, c. C-42, s. 5(1)

⁴ *Ibid.*, s. 5(1.2)

⁵ The italicized words refer to section 5(1). All emphasis in these quotations is mine.

⁶ *Copyright Act*, s. 6.

⁷ R.S.C. 1985, c. C-42, s. 10, as re-en. by S.C. 1997, c. 24, s. 7.

⁸ *An Act to amend the Copyright Act*, S.C. 1997, c. 24, s. 7, amending R.S.C. 1985, c. C-42.

7. Section 10 of the Act is replaced by the following:

Term of copyright in photographs

10. (1) Where the owner referred to in subsection (2) is a corporation, the term for which copyright subsists in a photograph shall be the remainder of the year of the making of the initial negative or plate from which the photograph was derived or, if there is no negative or plate, of the initial photograph, plus a period of fifty years.

Where author majority shareholder

(1.1) Where the owner is a corporation, the majority of the voting shares of which are owned by a natural person who would have qualified as the author of the photograph except for subsection (2), the term of copyright is the term set out in section 6.

Author of photograph

(2) The person who

- (a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or
- (b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate,

is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this Act to be ordinarily resident in a treaty country if it has established a place of business therein.

Revoking the specific protection term given by the previous provision, and replacing it with an even more specific one for corporate authors of photographs, had the effect of enacting the general term for individual authors of photographs. However, what is conspicuous by its absence, and, it will be shown, fatal to the proposition at issue, is any specific treatment of photographs that had been created prior to the change in the law but already passed into the public domain

The Presumption Against Retroactivity and Retrospectivity

In effect, the changes to the protection term amend the specific rights granted by the umbrella term 'copyright'. They do not, on their own, open that umbrella wider to cover things that had previously fallen outside it. Thus, to have the effect of bringing photographs out of the public domain, the amendments must apply at a point where these works were subject to copyright – in short, the amendments would have to have been retrospective.

Among the canons of statutory interpretation in Canada, there is a standing presumption against the retrospective application of law, perhaps best described by Dickson J. (as he then was) in the Supreme Court's opinion in *Gustavson v. M.N.R.*, where he stated that:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.⁹

Extension Legislation That Does Revive Copyright

Unlike in the United States, where such laws are (theoretically) constitutionally proscribed in general, Canada's principle of parliamentary supremacy allows for Parliament to pass retrospective laws in all areas save criminal law, where such behaviour is proscribed by the Charter in section 11.¹⁰ As such, it would

⁹ *Gustavson Drilling (1964) Ltd. v M.N.R.*, [1977] 1 S.C.R. 271.

¹⁰ See for example *British Columbia v. Imperial Oil*, 2005 SCC 49 at para. 69.

have been within Parliament's power to expressly enact these amendments retroactively – as both the United States and United Kingdom have done in certain cases.

The United Kingdom's case is most directly applicable given the similarity in law. Seeking to implement an EU directive harmonizing the terms of copyright protection across the Union, the UK amended its regulations to extend a variety of copyright terms to life-plus-70 years. In doing so, they specified that:¹¹

Duration of copyright: application of new provisions

16. The new provisions relating to duration of copyright apply—
- (a) to copyright works made after commencement¹²;
 - (b) to existing works which first qualify for copyright protection after commencement;
 - (c) to existing copyright works, subject to Regulation 15 (general saving for any longer period applicable under 1988 provisions); and
 - (d) to existing works in which copyright expired before 31st December 1995 but which were on 1st July 1995 protected in another EEA state under legislation relating to copyright or related rights.

The s. 16(d) provision acted to withdraw works from the public domain, subject to various subsequent provisions aiming to protect those who had relied on the previous lack of copyright in those works. Similarly, United States' amending legislation implementing GATT Uruguay Round obligations¹³ provided that:¹⁴

(a) IN GENERAL.—Section 104A of title 17, United States Code, is amended to read as follows:

“§ 104A. Copyright in restored works

“(a) AUTOMATIC PROTECTION AND TERM.—

“(1) TERM.—

“(A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.

“(B) Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

“(2) EXCEPTION.—Any work in which the copyright was ever owned or administered by the Alien Property Custodian and in which the restored copyright would be owned by a government or instrumentality thereof, is not a restored work.

Where “restored works” were defined as follows:

“(6) The term ‘restored work’ means an original work of authorship that—

“(A) is protected under subsection (a);

“(B) is not in the public domain in its source country through expiration of term of protection;

“(C) is in the public domain in the United States due to—

“(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;

“(ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

“(iii) lack of national eligibility; and

“(D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country.

In both these cases, the amending legislation specifically included works that had entered the public domain

¹¹ *The Duration of Copyright and Rights In Performances Regulations 1995*, S.I. 1995/3297.

¹² As defined *ibid*, s. 12: “the date on which these Regulations come into force”.

¹³ In this trade agreement, the U.S. undertook to abolish the requirement for copyright formalities in their own law, and restore the copyright of works that had lost their copyright for that reason *inter alia*.

¹⁴ *Uruguay Round Agreements Act*, Pub. L. No. 103-465, § 514, 108 Stat 4809 (1994)


in their ambit, and so acted upon them where they otherwise would not have. Both these examples were available to Parliament when they amended the Act in 1997, and it was within their power to explicitly define the statute as retrospective. They chose, instead, to simply replace the old term with the new term without further comment. As such, the statute as written cannot, and Parliament cannot be seen as having intended to, withdraw any photographs from the public domain in extending the protection term for that class of works.

Conclusion

Copyright is a creature of statute, and the statute as written says that copyright shall subsist in a given work until the expiration of its stated term, and then it shall not subsist. The stated term is a property of the copyright, and amendments thereto amend the copyright. But where the copyright does not apply, neither do amendments to that right.

The solution has this been hit upon by other legislatures seeking to shrink the public domain: either extend the terms before they expire, as in the *Sonny Bono Act*, or extend them such that the extension specifically applies retroactively to works that have previously entered the public domain. However, in Canadian law, provisions with retroactive effect must be explicitly stated or implicitly required in the statute, and the 1997 Act does nothing of the kind. As such, it does not operate to withdraw photographs from the public domain.

Sincerely,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive, slightly slanted style.

David Fewer,
Director

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