Copyright in the Real World: Making Archival Material Available on the Internet

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy

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ABSTRACT

The purpose of this study is to investigate the practices of Canadian repositories in making their archival holdings available on the Internet to see whether they are more or less restrictive than copyright law requires. The Internet provides an opportunity to make archival material more widely accessible; however, repositories’ copyright practices in making their holdings available online may affect the extent to which wider access to archival material is actually achieved. The study employed four different sources of evidence, i.e., the website content of 154 Canadian repositories whose websites feature archival material from the repository’s holdings; copyright policy and procedure documents of those repositories; 106 responses to a questionnaire sent to the staff of those repositories; and 22 interviews with repository staff members. In terms of selection for online access, the study found that the repositories studied prefer to select items that are perceived to incur little risk of copyright infringement (because the copyright has expired or because the repository owns the copyright), or items that require few or no resources to investigate copyright status or obtain copyright authorizations. Thus, with regard to selection, repositories were more restrictive than the law required, largely due to lack of resources. Although repositories have no legal or professional obligation to enforce others’ copyright interests, they nonetheless attempt to control further uses of their online holdings through the use of technical measures (e.g., low resolution images, watermarks, etc.) or non-technical measures (e.g., conditions placed on further uses), for reasons not necessarily related to copyright. Overall, the study found that repositories’ practices in making their holding available online were more restrictive than copyright law envisages. While this may be due to factors other than copyright, access to online documentary heritage may be limited as a result.
ACKNOWLEDGEMENTS

My thanks are due to all who assisted in various ways in bringing this dissertation to fruition. First among them are the members of my committee: my supervisor, Dr. Wendy Duff, Dr. Joan Cherry, and Dr. Margaret Ann Wilkinson of the Faculty of Law and the Faculty of Information and Media Studies at the University of Western Ontario. Wendy’s ability to see the forest while I was dealing with the twigs and branches of my data was invaluable; she was generous with her time, and I am grateful for financial support out of her research grant. Joan provided guidance regarding research methods, and her careful review of the later versions of the dissertation saved me from several lapses in logic or clarity. Margaret Ann provided expert guidance on the copyright aspects of the study, and I appreciate her willingness to travel to Toronto for meetings. I am indebted to them all for their advice and insights throughout the preparation of the dissertation.

Thanks are also due to others who assisted in particular ways. Dr. Doug Thomson’s advice about the input of the questionnaire data to facilitate the subsequent data analysis was enhanced by his marvellous sense of humour. Paul Chappell, in addition to being unfailingly supportive throughout the ups and downs of the process, assisted with the tedious work of verifying the data entry of the questionnaire responses. My sister, Dr. Donna Dryden, meticulously and mercilessly edited the final draft, as only a sister can. And I am grateful to those archival colleagues across the country who responded to my questionnaire and consented to be interviewed, and to my fellow doctoral students for their support and friendship throughout the process.

I would like to thank the Social Sciences and Humanities Research Council of Canada for the doctoral fellowship that enabled me to carry out this research, and the Association of Colleges and Research Libraries for the Doctoral Dissertation Fellowship that covered the costs of data collection.

Finally, I would like to dedicate this to my parents, who taught me the value of education, and the ability to persevere in achieving my goals.
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Chapter 1 Introduction

1.0 Introduction

Digital and communication technologies provide unparalleled opportunities to increase access to cultural resources that traditionally have been available only in the library, archives or museum that preserved them. The possibility of world-wide access to such materials via the Internet has spawned many digitization projects, and, in due course, a number of “how-to” manuals on the successful conduct of such projects. Such manuals invariably include a prominent section on copyright, which is discussed using such phrases as “major hurdle,” “significant factor,” and “first crucial issue to address.” The ubiquity of such statements suggests that copyright is widely perceived to be a barrier to making the holdings of libraries, archives, and museums available on the Internet. If this is the case, then the vision of world-wide access to cultural heritage information via the Internet may not be fully achieved. However, whether, and in what ways, copyright is a barrier to making such materials available on the Internet has not been systematically investigated.

1.1 Problem Statement

This study explores the perceived copyright “problem” in relation to a particular class of cultural heritage information, i.e., the archival material held in Canadian archives, libraries, and museums. Archival material is acquired and preserved in order to be made available for the broader benefit of society, and the Internet provides an opportunity to make hitherto relatively inaccessible archival material more widely available.

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4 Cultural heritage information, for the purposes of this study, refers to documents and artifacts preserved in libraries, archives, and museums.
Archival material is the focus of the study for two reasons. First, archival holdings are a particularly important segment of cultural heritage in that they constitute the raw material for products such as biographies, theses, scholarly articles, family histories, and local histories; as well as novels, plays, and television series. Secondly, the nature of archival material presents some particularly interesting copyright issues. For example, that much archival material is unpublished is of interest partly because one of the fundamental rights of the copyright owner is the right to determine when and how the first publication of a work will take place, and also because unpublished works have historically been subject to long terms of copyright protection.

Just as archival repositories play an important role in making documentary cultural heritage available for research and use in all manner of new creations, so too does copyright. Although the Canadian Copyright Act does not include an articulated foundational purpose, the Supreme Court has recently provided a clear statement of the dual purpose of copyright, i.e., “The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect, and obtaining a just reward for the creator.” While ensuring that the provisions of the Act achieve the appropriate balance between these two competing interests may not necessarily be easy, it is clear that one of the roles of copyright law is to facilitate access to copyrighted works to “[serve] the interests of further creation and the growth of knowledge and culture.”

In a sense, copyright law and archival repositories have a goal in common: to make cultural heritage material available in the long-term interest of society as a whole.

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5 See, for example, Margaret Atwood’s historical novel *Alias Grace* (Toronto: McLelland and Stewart, 1996) based on the story of Grace Marks, convicted of the murder of her employer and his mistress in Ontario in 1843.
7 See, for example, *Canada: A People’s History* (Ottawa: Canadian Broadcasting Corporation, 2000), a television series about the history of Canada from prehistoric times to 1990, available in video and DVD formats.
such technologies also have profound implications for copyright law.\textsuperscript{10} While an appropriate balance in the law may have existed prior to the widespread use of computers and communication technologies, “this balance … has come under significant threat due to a large extent to the impact of digitization,” and may be tipping in favour of creators.\textsuperscript{11} As Trosow explains at the beginning of his discussion of the threat that an expansion of copyright law poses for libraries in educational institutions, “as technology makes it easier for users of information resources to share content, there is a corresponding need to match such technological changes with increased restrictions on user access through new forms of technological controls, increasing the scope and reach of copyright, restricting exceptions and limitations on enforcement, and increasing penalties as well as modes of enforcement.”\textsuperscript{12} If copyright somehow impedes online access to, and use of, the rich resources of Canada’s archival repositories, its effect must be clearly understood.

\textbf{1.2 Purpose of the Study}

The purpose of this study is to investigate the impact of copyright law on the practices of Canadian repositories in making their archival holdings available on the Internet. As yet, we know very little about the behaviour of institutions within the constraints of copyright, particularly in the digital environment. Thus, the study is largely exploratory, in that it aims “to gather as many insights as possible about [a] phenomenon and the variables that influence it.”\textsuperscript{13} The phenomenon in this case is the impact of copyright law on repository practices in making their archival holdings available on the Internet. At the beginning of the present study, there was not enough empirical data to identify the variables, or factors, that affect this phenomenon or to suggest testable relationships between them. This study is exploratory in that it attempts to identify those factors within a conceptual framework that offers a tentative explanation of the relationships between them.


\textsuperscript{11} Ibid, 33.

\textsuperscript{12} Samuel E. Trosow, “The Changing Landscape of Academic Libraries and Copyright Policy: Interlibrary Loans, Electronic Reserves, and Distance Education.” In \textit{In the Public Interest: The Future of Canadian Copyright Law}, ed. Michael Geist (Toronto: Irwin Law, 2005), 377. Trosow was not advocating further restrictions; in fact, he was arguing against such measures.

\textsuperscript{13} Ted Palys, \textit{Research Decisions: Quantitative and Qualitative Perspectives}, 2\textsuperscript{nd} ed. (Toronto: Harcourt Brace, 1997), 83.
The study employs several methods of data collection and analysis to address the following research questions:

1. What factors influence the decisions of Canadian archival repositories in making their archival holdings available on the Internet?

2. How do Canadian archivists understand their position vis-à-vis copyright law in making their holdings available on the Internet?

3. What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?

4. What are the processes by which the copyright knowledge and attitudes of individuals are transformed into institutional practices?

1.2.1 Research Question 1: The Copyright Factor

Research Question 1 asks, “What factors influence the decisions of Canadian archival repositories in making their archival holdings available on the Internet?” The digitization manuals suggest that copyright is a significant factor in this activity. There may, however, be other factors, and this question provides a means of identifying other factors and the strength of the copyright factor in relation to them.

1.2.2 Research Question 2: Archivists and Copyright

Research Question 2 asks “How do Canadian archivists understand their position vis-à-vis copyright law in making their holdings available on the Internet?” The purpose of this question is to explore archivists’ knowledge and perceptions of copyright. The following three sub-questions address key aspects of this area.

2a. How do Canadian archivists perceive the role of copyright in making their holdings available on the Internet?

2b. Where do Canadian archivists get their knowledge of copyright?

2c. What do Canadian archivists know about copyright?

Although the study looks at the practices of archival repositories, it is staff members who learn about copyright, communicate that knowledge to their co-workers, and transform it into institutional policies and procedures that are the basis of the repository’s copyright practices. The sources of archivists’ copyright knowledge, the quality of their knowledge and perceptions of copyright, and their attitudes toward it will influence institutional practice.
1.2.3 Research Question 3: Repositories’ Copyright Practices

Research Question 3 asks “What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?” From a copyright perspective, posting a document on a repository’s web server normally requires the permission of the copyright owner, unless the copyright in the work has expired (or never existed), or unless the repository owns the copyright in the work. If the work is going to be changed in some way for presentation on the Internet, the permission of the author may also be required. As will be discussed later, identifying and locating the copyright owners and authors of archival material is often difficult, so a repository could decide that only works in which copyright has expired, or works in which it owns the copyright, will be made available on the Internet. Such a decision may, however, mean that many interesting documents in the repository’s holdings cannot be made available on the Internet. If the pool from which documents can be selected is expanded to include documents that are still protected by copyright, and the copyright is not owned by the repository, staff time (and possibly funds for licensing fees) will be required to obtain the necessary authorizations from copyright owners and authors. The following sub-questions address this aspect of repository practice.

3a. In what ways do copyright issues affect the selection of archival material for Internet access?
3b. What resources do archival repositories devote to seeking authorization from copyright owners and authors in order to make documents available on the Internet, and why?

While the archival repository may be authorized to make selected holdings available on the Internet, that authorization does not necessarily extend to those who want to copy and use a document from a repository's website. Thus, the archival repository has to decide whether, and how, it will try to control further uses using measures such as notices to users, watermarking the images, or disabling the right-click function. To address this issue, the following sub-question was asked.

3c. How do archival repositories attempt to control further uses of their Internet-accessible holdings, and why?

Related to the control of further uses of their Internet-accessible holdings is the provision of copyright information for users. Such information can take a variety of
forms, such as rights information about individual works, information about obtaining copies of documents on the website, and instruction about copyright law and the further use of the documents. The following sub-question addresses this aspect of repository practice.

3d. What copyright information is provided to users, and why?

1.2.4 Research Question 4: Linking Archivists and Repository Practices

Research Question 2 addresses aspects of the copyright knowledge of individual archivists and their attitudes to copyright. However, the unit of analysis in this study is the archival repository, so it is necessary to connect what is in the heads of individual archivists to the institutional copyright practices that are explored in Research Question 3. Therefore, Research Question 4 asks, “What are the processes by which the copyright knowledge and attitudes of individuals are transformed into institutional practices?” It links individuals’ knowledge and attitudes with institutional practice by looking at the processes through which the copyright knowledge of staff archivists is transformed into institutional copyright practices.

1.3 Significance of the Study

Although there is a widespread impression that copyright is a barrier to making cultural heritage available on the Internet, whether, and in what ways, this is the case has never been systematically investigated. This study is the first to do so, focusing on the archival holdings and the copyright practices of repositories located in Canada that make their archival holdings available on the Internet. The study will document the extent and nature of the perceived copyright “problem,” and how archival repositories in Canada are dealing with it.

The study will be of interest to a number of constituencies. Most directly, it will increase knowledge about an aspect of professional archival practice. By providing a picture of actual practice based on empirical data, the research may provide information that will be useful to archival repositories in reviewing, developing, and communicating their copyright policies and procedures. Using these findings, it may even be possible to standardize aspects of copyright practice pertaining to making archival material available online, for example, by developing guidelines to assist archivists in assessing the risk of
using documents for which they cannot identify or locate the copyright owner. The study also provides insight into the archival community’s needs regarding education about copyright matters. If it is the case that copyright laws are less restrictive than archivists think they are, the study may serve to increase the archival material available online.

The study will also be of interest to users of archives and members of the general public who are the beneficiaries of Internet access to archival material. For those who think that everything in a repository’s holdings is (or should be) available online, this study will identify any constraints imposed by copyright. The study also addresses the nature and quality of the copyright information supplied to website users. If awareness of copyright is an aspect of information literacy, websites are a means of acquainting users with what they can (and cannot) legally do with website content from the point of view of copyright. The study looks at how archival repositories have used their websites for that purpose.

The investigation of this issue is also important from a public policy perspective, as the federal government considers ways to address the application of copyright law in the digital environment, and the merits of expanding the current exceptions for libraries, archives, museums, and educational institutions into the digital environment. To the extent that the study demonstrates that repositories’ copyright practices limit the archival material that can be made available on the Internet, and if online access to archival material is thought to be desirable (as is currently the case), there may be a need for changes to the law, Canada's cultural policy, archival practice, or all three. To the extent that the study demonstrates that repositories’ copyright practices do not restrict the archival holdings that can be made available on the Internet, then the practices revealed will provide a picture of permissible uses, and will assist in more clearly delineating fair dealing and other users’ rights as they pertain to archival material. In either case, the study will provide an empirical basis for public policy to support access to Canada’s documentary heritage.

1.4 Archival Context

This dissertation explores the copyright policies and practices of Canadian repositories in making their archival holdings available on the Internet. However, before setting out the findings of the dissertation, it is necessary to situate those findings in the context of the archival holdings of Canadian repositories. Thus, this section describes the characteristics of archival material, and the aspects of archival repository practice that are related to copyright.

1.4.1 Archival Material

The materials preserved in archival repositories are “the information by-products of organizational or social activity.” As such, they are created and accumulated naturally and automatically in the course of employment, volunteer activities, or personal relationships. A recently-published glossary defines archival records as:

Materials created or received by a person, family, or organization, public, or private, in the conduct of their affairs that are preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator.

Pearce-Moses goes on to note:

Archival records connotes documents rather than artifacts or published materials, although collections of archival records may contain artifacts and books. Archival records may be in any format, including text on paper or in electronic formats, photographs, motion pictures, videos, sound recordings.

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16 Richard Pearce-Moses, A Glossary of Archival and Records Terminology (Chicago: Society of American Archivists, 2005), 28. Canadian archival repositories generally espouse the “total archives” concept, in that they acquire both institutional records and records from outside their sponsoring institution. However, in other jurisdictions (particularly the U.S.), public records and private sector archives are preserved in separate institutions and are seen as different types of material (Laura Millar, “Discharging Our Debt: The Evolution of the Total Archives Concept in English Canada,” Archivaria 46 (1998), 104).
17 Pearce-Moses defines document as “information or data fixed in some media,” and goes on to note, “While traditionally considered to mean text fixed on paper … document includes all media and formats.” (Pearce-Moses, 126).
18 Pearce-Moses defines artifact as “a man-made, physical object” and goes on to note that the term is often used to distinguish three-dimensional materials from two-dimensional materials” (p. 36). The definition of object (“a three-dimensional artefact or a naturally occurring entity”) found in Rules for Archival Description is closer to Canadian archivists’ understanding of the term.
Certain characteristics of archival records that are important from a copyright perspective can be inferred from this definition.

It is obvious that archival material is not limited to any documentary form or medium. While some archival repositories may specialize in particular material (e.g., films or architectural records), most collect everything. While textual records and photographs predominate, archival holdings also include sound recordings, moving image material, maps and plans, and documentary art. All such material potentially falls within the subject matter of copyright.

What is less obvious is that archival material is often old. Records frequently come to the archives several decades after they were created; they are deposited in archives only after they are no longer needed to conduct the current business of the organization or the individual. Moreover, because archival holdings consist of that portion of recorded information that has been appraised as having “enduring value,” they are preserved, at least in principle, forever. In other words, archival holdings continue to accrue, so that as time passes, the age of the holdings increases. From a copyright perspective, this has certain consequences related to determining whether the copyright interests have expired, and identifying or locating the rights holder(s). The age of archival material has further consequences when it comes to making documents available on the Internet. Although archival repositories are increasingly acquiring records in electronic form, few of their current holdings were “born digital,” and most documents selected for Internet access would first have to be reproduced in a digital format.

As noted above, archival records are created and accumulated naturally and automatically in the course of organizational or social activity. The documentary evidence of everyday business or personal transactions was not created for commercial distribution. For example, the correspondence files of senior executives of Eaton’s department stores, the minutes of the Board of Stewards of St. Andrew's Presbyterian Church, or the weekly letters enclosing photos of the new baby from a daughter in
England were never created to be distributed and sold. As a result, the majority of the works in archives are unpublished when they come to the repository.\textsuperscript{19}

In sum, archival material consists in large part of old, analogue,\textsuperscript{20} largely unpublished documents in a variety of documentary forms and formats. Producing digital copies of archival documents and making them available on repository websites involves a number of copyright issues that arise because of these characteristics of archival material.

1.4.2 Archival Repositories

The institutions whose holdings include archival material are also part of the context for this study. Archival records are preserved in several different types of cultural heritage institutions. While many would be formally designated as an archives because their primary mandate is to preserve the archival records of their parent bodies, other cultural heritage institutions such as libraries and museums also acquire and preserve archival materials as a secondary activity. Thus, the broader term repository will be used to refer to any type of organization that holds archival material, including business, institutional, and government archives, manuscript collections, libraries, museums, and historical societies. While repositories such as museums or libraries may not operate in accordance with recognized archival principles and practice, they are responsible, to a greater or lesser extent, for archival material, and as such carry out the functions of an archival repository.

Stated concisely, an archival repository acquires and preserves archival material, and makes it available for use. Archival textbooks routinely state that archival material is

\textsuperscript{19} Tim Padfield, Copyright for Archivists and Users of Archives, 2nd ed. (London: Facet, 2004), 1. However, as the note amplifying the definition cited above observes, most archives’ holdings also include some published material.

\textsuperscript{20} In the cultural heritage domain, i.e., libraries, archives and museums, ‘analogue’ is increasingly being used to mean non-digital. See, for example, Hughes, who characterizes analogue information as having three qualities, i.e., “tied to a physical medium, … bound to a sequential representation that is pre-determined by the author, … [and] it degrades when copied.” (Lorna M. Hughes, Digitizing Collections: Strategic Issues for the Information Manager, (London: Facet, 2004), 3-4. See also Deegan and Tanner who routinely contrast the analogue world with the digital world (Marilyn Deegan, and Simon Tanner, Digital Futures: Strategies for the Information Age (London: Neal-Schuman, 2002), and Marilyn Deegan, “Surrogacy and the Artefact,” in Preservation Management for Libraries, Archives and Museums, ed. G.E. Gorman and Sydney J. Shep, (London: Facet, 2006), 55-57).
preserved, not for its own sake but to be used. Thus, archival repositories are in the business of providing access to their holdings in the broadest sense of the word, i.e., “[the] right, opportunity, or means of finding, using, or approaching documents and/or information.” Access is a complicated business, and is the culmination of a number of activities involving, to a greater or lesser degree, the core archival functions of acquisition, arrangement and description, preservation, reference services, and outreach services. Access to archival holdings is also subject to a number of limitations in order to “ensure that legislative requirements and donor agreements are upheld, and that the records are protected from theft, damage or rearrangement.” Among the legislative requirements that must be upheld is copyright law; as noted earlier, while copyright law is in part about encouraging access and use, it is also about protecting the rights of the copyright owner; in doing so, access to, and use of, archival holdings may be limited in some way.

Copyright can affect all archival functions to some extent, but this study is concerned primarily with copyright practices related to the archival functions associated with access, i.e., acquisition, description, reference services, and outreach services. The functions of archival arrangement and preservation are outside the scope of this study. Furthermore, only selected aspects of acquisition, description, reference services, and outreach services are relevant in the context of copyright. For example, acquisition refers to “the process by which archives add to their holdings by accepting material as a transfer, donation, loan or purchase.” However, for the purposes of this study, the aspect of the acquisition function that is of interest is the ownership of copyrights in documents acquired. Even when a repository owns the physical objects in its holdings, it does not necessarily own the copyright in those items. Where a repository preserves the

23 McCausland, 273.
24 While having a digital copy may contribute to preservation in that it reduces handling of the original, digital formats are not considered suitable for preservation at this time because long-term access to such formats cannot be assured (Hughes, Digitizing Collections, 52, 209-210).
25 Ellis, 460.
records of its parent body, the parent body owns the copyright in the records created by its employees, and the repository will probably be authorized to administer the copyright in those holdings, although it will not control the moral rights in such works unless the employees have waived their moral rights as a condition of employment. However, most repositories also acquire material from sources other than their sponsoring organization. In such cases, repositories increasingly attempt to obtain an assignment of all copyright interests from the donor when documents are deposited in the archives. If the donor is also the copyright owner, the archives will thus acquire the copyright in the newly acquired documents. However, if the donor does not own the copyright in the works being deposited in the archives, as is commonly the case where, for example, the donor is depositing letters received from many different people, the donor cannot authorize any assignment of copyright, because the donor does not own the copyright in letters written by others. Similarly, while repositories may also, in the course of the acquisition process, attempt to obtain a waiver of moral rights in the works being deposited, the donor can waive moral rights only in those documents he or she has created.

*Description* refers to “the process of recording information about the nature and content of the records in archival custody;” however, this study is interested only in the extent to which copyright status, ownership, and restrictions are included in descriptions of documents appearing on the website. Thus, this study is concerned only with the outcome of the description process, i.e., the structured verbal representation of some or all of the characteristics of a single document or an archival aggregation of documents. Archival material is arranged and described in hierarchical groupings called levels. The lowest level in the hierarchy is the item or the individual document, i.e., the photograph, the letter, the map. Groupings of archivally-related items may be described at one or more of three aggregate levels, depending on the characteristics of the material and the application of archival principles to its arrangement. However, from the perspective of copyright, the distinctions between the different aggregate levels are not important, and it is sufficient to deal with two levels, i.e., the item level and the aggregate level. For the

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26 *Copyright Act*, R.S.C. 1985, c. C-42, s. 13(3).
27 Ellis, 467.
purposes of this study, it is important to note that archival description proceeds from the
general to the particular. The highest aggregate level (e.g., the entirety of the records
created by an individual or organization) is described first, followed by the aggregations
that make up the set of records, followed by the individual items; however, it must be
noted that item level description, particularly for textual documents, rarely occurs. The
amount and type of copyright information included in a description depends on whether
the description is of an aggregation or an item.  

Reference services is a wide-ranging function defined as “the activities by which
archivists bring users and records together to meet user needs,” and includes
registration, orientation, assisting patrons in locating materials relevant to their interests,
and providing copies of the holdings. As noted earlier, the documents preserved in
archives were rarely produced in multiple copies; as a result, archival material is for the
most part unique and irreplaceable. Consequently, it must be used on the premises of the
archives, or reproduced in some way for use elsewhere. People requiring access to
archival documents have traditionally had to visit the archives and take notes or request
copies of documents that support their research. Archival repositories also respond to
inquiries from remote users unable to visit the archives. Responses to inquiries frequently
include copies of documents. The reprographic component of reference services involves
copyright issues because copying is a cornerstone of the rights of copyright owners.

The ability to make digital copies of archival documents available on the Internet
has enormous potential to increase access to archival material. However, for many
repositories, the potential for increased access and higher profile is tempered by concern
about what users might do with the repository’s online holdings. Archivists are
accustomed to communicating with individual users, either face-to-face or through letters
or telephone conversations. When users request copies of archival holdings, the copying
is done onsite, and such requests provide an opportunity for two-way communication
about what users want to do with archival material, and about the repository's policies

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28 While the aggregations form entities that are the basis for the arrangement and description of archival
material, these aggregations are not ‘works’ as understood by copyright law, and thus are not protected by
copyright. However, the individual items that comprise an aggregation may be protected by copyright.
29 Pugh, 24.
30 O’Toole and Cox, 126. Only in the most exceptional circumstances, e.g., for display purposes, can
archival documents be borrowed from the repository that preserves them.
31 Pugh, 216-218.
and practices regarding copies, permissions, and credits.\textsuperscript{32} It hardly needs to be said that the digital environment is very different. Online communication of the repository’s policies on uses of copies from its holdings is entirely one-way to an unknown audience.\textsuperscript{33}

\textit{Outreach services} (sometimes called public programs) refers to “a planned sequence of community outreach projects and promotional activities which informs the wider community about archival holdings and services.”\textsuperscript{34} Traditionally, outreach services meant onsite exhibits, publications, public lectures, educational programs, and the like. However, the Internet provides new opportunities to make archival documents available to a much wider audience. For the purposes of this study, outreach services refers to the activities involved in making documents available on the Internet, including making digital copies of analogue documents, and deciding how they are going to be presented in the digital environment.

Selected aspects of the foregoing archival functions are the focus of this study. However, repository resources are not equally distributed across these functions. Lack of resources is a persistent theme in the operation of Canadian archival repositories.\textsuperscript{35} In many repositories, staff are preoccupied with reference services and acquisition; as a result, arrangement and description, preservation, and outreach suffer. The Canadian Council of Archives (CCA) was established in 1985 “to encourage and facilitate the evolution of an archival system in Canada.”\textsuperscript{36} Support for the archival system has included federally funded grant programs to support arrangement and description,

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\textsuperscript{32} McCausland, 279-287; Pugh, 163, 209-242.
\textsuperscript{33} While this was true of the repositories studied, it is not necessarily true of all archives, as technology provides opportunities for increased interaction with online users.
\textsuperscript{34} This definition is Ellis’ definition of public programs, 476.
\textsuperscript{36} The CCA provides coordination within the system; its membership consists of representatives of the provincial and territorial councils (representing the archival repositories and archivists within each province and territory), the national professional associations, and the National Archives (now Library and Archives Canada), \texttt{www.cdncouncilarchives.ca} (accessed 18 October 2006).
preservation, and professional development. Many institutions have come to rely on grant funding of various sorts to make any headway in the neglected functions.\footnote{Audit and Evaluation Division, Library and Archives Canada, “Evaluation of the Grants and Contributions Program. Final Report,” (2004), Section 3.0, \url{http://www.collectionscanada.ca/about-us/014/012014-202-e.html} (accessed 18 October 2006).}

The Canadian archival community saw the opportunities that the Internet offered, and in 1997 the CCA established a committee to promote and secure funding for the Canadian Archival Information Network (CAIN), whose vision was “to enhance the knowledge and appreciation of our past by providing access to the nation's archival record via the information highway.”\footnote{Ibid., Section 1.1.} With support from the CCA, the National Archives, and the Department of Canadian Heritage, CAIN’s work resulted in the Archives Canada portal (www.archivescanada.ca), launched in October 2001. The Canadian government also saw opportunities to make Canadian content available online to Canadians and around the world, and developed funding programs to support this goal. Among them was the Canadian Culture Online Program (CCOP) which began in fiscal year 2000-01.\footnote{The CCO Program has evolved since its beginning, but has always included several funds earmarked for particular types of projects. The current list of funds and their respective purposes can be found at \url{http://www.canadianheritage.gc.ca/progs/pcc-e-ccop/about_e.cfm#2} (accessed 19 January 2006).} Starting in 2000-01, archival repositories that were members of a provincial or territorial archives council were the beneficiaries of grants for scanning and digitization of archival holdings and finding aids.

The foregoing section provides the archival context for the study by discussing the characteristics of archival holdings and the aspects of archival repository practice that are related to copyright. Generally speaking, archival holdings are old, analogue, largely unpublished documents in a variety of documentary forms and formats. As will be seen, when examined through the lens of copyright, these characteristics raise some particular issues for repositories wanting to produce digital copies of their archival holdings and make them available on repository websites. The repositories that preserve such documents carry out a variety of functions; however, because this study focuses on copyright, only selected aspects of the archival functions associated with access are defined and described. The advent of the Internet and digital technologies has provided archival repositories with opportunities and challenges; how they deal with the copyright aspects of these possibilities is the focus of this study.
1.5 Canadian Copyright Law

The foregoing section provided the archival context for the study; similarly, it is necessary to set out the current state of Canadian copyright law as it applies to archival material and to making documents available on the Internet. Canadian copyright law is established by the Copyright Act, its attendant regulations (e.g., the Exceptions for Educational Institutions, Libraries, Archives and Museums Regulations), and relevant case law. This section looks at what is protected, the ownership of copyright, the duration of copyright protection, the rights of the copyright owner and author, penalties for infringement, and the statutory exceptions or, as they have been characterized by the Supreme Court, users’ rights. The aspects that are relevant to repositories in making their archival holdings available on the Internet are identified within each area.

However, this exploration of the current state of the law must first be set in the context of copyright in the digital environment. As mentioned, copyright is seen in terms of a balance between competing interests, i.e., the rights of copyright holders and the public interest in access to copyright works. A succession of new technologies, whether piano rolls, the photocopier, the VCR, or the Internet, have threatened to upset that balance. As Wirten says, “The Internet is perhaps the most current example of how reproduction of content is facilitated on an unprecedented scale by technology.” When a new copying technology comes along, the legal response is two-fold: attempt to apply the existing rules to the new circumstances, and amend the law to take account of the new technology. With regard to the application of Canadian copyright law to digitization and the Internet, both avenues have been pursued.

Dealing first with amending the statute, in 2001 the federal government launched a copyright reform initiative to address “new issues which have arisen due to technological developments… [and] issues that will emerge over the coming years.” A

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40 Copyright Act, R.S.C. 1985, c. C-42.
statutory review of the provisions and operation of the Act set out a proposed agenda for copyright reform; included in the short-term priorities were digital issues and WIPO treaties, access and educational use, and photographic works. A bill to amend the Act was introduced by the Liberal government in the House of Commons in June 2005. This bill would have brought Canada’s statute into compliance with the WIPO treaties, changed the provisions for ownership and term of copyright in photographs, addressed the liability of Internet service providers, and permitted wider educational and research access to electronic formats. Many of these proposed amendments would have directly affected archival repositories. However, the bill died on the order paper when Parliament was dissolved. The Liberal Party was defeated in the ensuing election; the Conservative Party took office in January 2006, with priorities other than copyright reform.

Canadians await statutory amendments; however, despite the fact that much of Canada’s copyright regime was “put in place years before anyone could even consider the possibility of [the Internet],” courts have interpreted the existing law and the Supreme Court has made landmark decisions that have clarified the application of copyright in both the analogue and digital environments. Four particular cases have clarified the purpose of copyright, expanded and clarified fair dealing, clarified the concepts of originality and authorization, reiterated the principle of media neutrality, and addressed the transmission of protected material on the Internet. These decisions are discussed in the relevant sections of the following analysis of the current state of Canadian copyright law as it applies to making archival holdings available on the Internet.

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46 Supporting Culture and Innovation, 33-39.
47 Canada has existing obligations under a number of international copyright and trade treaties. The WIPO Treaties are two treaties concluded under the auspices of the World Intellectual Property Organization in 1996 that address certain issues in the digital environment. Canada has signed these treaties, but has not yet ratified them by amending the Copyright Act to comply with the specific provisions of the treaties (Myra Tawfik, “International Copyright Law: W(h)ither User Rights?” In In the Public Interest: The Future of Canadian Copyright Law, ed. Michael Geist (Toronto: Irwin Law, 2005), 72-82).
48 Supporting Culture and Innovation, 34-6.
49 Bill C-60, An Act to Amend the Copyright Act, 1st Sess., 37th Parl., 2005.
50 Wirten, 57.
1.5.1 What is Protected

Before discussing the criteria for copyright protection, it is important to note that not everything is protected by copyright. Fundamental to copyright law is the idea-expression dichotomy, i.e., the principle that copyright protects only the expression of ideas; but not the ideas themselves. Ideas are considered to be in the public domain for anyone to use. Similarly, facts are part of the public domain, and are not protected by copyright, although their expression (provided that their selection or arrangement is sufficiently original) could be. The public domain is an essential component of a copyright regime that enables “[the production of] new works by building on the ideas and information contained in the works of others.”

However, simply being the expression of an idea is not sufficient for copyright protection; whether a particular item within a repository’s holdings is protected by copyright is determined by the provisions of the Copyright Act. The provisions of the Act pertaining to ‘works’ are different from those pertaining to ‘other subject matter’. The Act protects “every original literary, artistic, dramatic, and musical work” [emphasis added]. ‘Other subject matter’ need not be original to be protected by copyright, but if a ‘work’ is not original, it is not protected by copyright. The Act, however, does not define “original”; determining its meaning has been left to the courts. The Supreme Court of Canada found that “an original work under the Copyright Act is one that originates from an author and is not copied from another work…. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be


53 An item that is in the public domain is not protected under intellectual property laws and thus is free for all to use. Items are most commonly said to be in the public domain when the copyright has expired. (David Vaver, Copyright Law, (Toronto: Irwin Law, 2000), 309). However, the Supreme Court has suggested that the public domain may also include uses of protected works that fall within the exceptions such as fair dealing (Théberge, ¶32). As Wilkinson demonstrates, the public domain is an ambiguous term (Margaret Ann Wilkinson, “National Treatment, National Interest and the Public Domain,” University of Ottawa Law and Technology Journal 1 (2004), 28-40).


55 CCH, ¶23.

56 Copyright Act, s. 5(1).
characterized as a purely mechanical exercise.” In the Court’s view, a standard for originality that requires more than mere “sweat of the brow” protects “society’s interest in maintaining a robust public domain that could help foster future creative innovation.”

This decision about the meaning of “original” has implications for archival holdings. Works that do not meet these criteria for originality are not protected by copyright. Thus, archival holdings that consist of facts recorded on standard forms (such as baptismal registers, land records, and the like) are automatically in the public domain and could be made available on the Internet regardless of age and without authorization. However, in some cases, courts have found the selection and arrangement of data in the forms themselves to be sufficiently original to attract copyright protection.

Scassa has noted the expansion of copyright law to apply to what she calls “utilitarian works” which she characterizes as “works that do not have creative or artistic expression as their primary purpose. Instead, they are intended to perform a practical or useful function…. Many utilitarian works are ‘information products’ (an echo of Ellis’ characterization of archival material as “the information by-products of organizational or social activity”). Many archival holdings, particularly the records of organizations, could fall within Scassa’s definition. Whether such works are protected by copyright depends upon whether or not they are the product of non-trivial skill and judgment. Scassa also speculates about the effect of applying this standard to family snapshots, in contrast to the work of professional photographers. While the Court has provided a test that “reflects … a more balanced approach to interpreting the Copyright

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57 CCH, ¶25. The facts of the case are summarized in Appendix A.
58 Ibid., ¶23.
62 Ellis, 477.
Act, and a welcome concern for the public domain,” its application requires considerable interpretation.\(^{64}\)

The Act protects four categories of ‘works’ (literary, artistic, dramatic, and musical works),\(^ {65}\) and three categories of ‘other subject matter’ (sound recordings,\(^ {66}\) performers’ performances,\(^ {67}\) and communication signals\(^ {68}\)). The Act defines each category,\(^ {69}\) and sets out the criteria for protection of works\(^ {70}\) and for each category of ‘other subject matter’.\(^ {71}\) Knowing the statutory categories of protected subject matter is important because the Act’s provisions for ownership and duration of copyright and the rights of the rights holders are determined by the category of subject matter.

In many cases, determining what category a document falls into is straightforward. For example, a letter is a literary work; a photograph is an artistic work, as is a map or a painting. However, both ‘works’ and ‘other subject matter’ may carry two or more “layers” of copyright.\(^ {72}\) For example, a scrapbook containing letters, drawings, and photos would be protected at two levels. The scrapbook itself would be protected as a compilation\(^ {73}\) “of the category making up the most substantial part of the compilation,”\(^ {74}\) and each of the works within the scrapbook would be protected as an individual literary or artistic work. Similarly, sound recordings, performer’s performances, and communication signals often include underlying works or other categories of ‘other subject matter’.\(^ {75}\) For example, a sound recording of someone singing a song can involve copyright in the music (a musical work), the lyrics (a literary work), and rights in the performance, as well as rights in the sound recording itself. Archivists

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\(^{65}\) *Copyright Act*, s. 5(1).

\(^{66}\) *Copyright Act*, s. 15.

\(^{67}\) *Copyright Act*, s. 18.

\(^{68}\) *Copyright Act*, s. 21.

\(^{69}\) *Copyright Act*, s. 2.

\(^{70}\) *Copyright Act*, s. 5.

\(^{71}\) *Copyright Act*, ss. 15(2), 18(2), and 21(2).


\(^{73}\) *Copyright Act*, s. 2. The Act defines compilation as “a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or a work resulting from the selection or arrangement of data.”

\(^{74}\) *Copyright Act*, s. 2.1(1).

\(^{75}\) Although archival holdings do not include communication signals or performers’ performances *per se*, some archival repositories acquire fixations of communication signals and performers’ performances.
wishing to determine the copyright interests in the scrapbook or the sound recording must be aware of the rights in these entire documents as well as in their components.

1.5.2 Ownership of Copyright

The Act includes provisions that determine copyright ownership; the provisions for the ownership of copyright in works are different from, and more complex than, the provisions for the ownership of copyright in ‘other subject matter.’ Accordingly, the ownership provisions for ‘other subject matter’ will be discussed first. The first owner of copyright in a sound recording is the maker,76 defined in the Act as “the person by whom the arrangements necessary for the first fixation of the sounds are undertaken.”77 The first owner of copyright in a performer’s performance is the performer,78 and the first owner of copyright in a communication signal is the broadcaster that first broadcasts it.79

The provisions for the ownership of copyright in works are more complex. Generally speaking, the author of a work (i.e., the person who created it) is the first owner of the copyright in it,80 but the Copyright Act includes a number of provisions that designate other parties as the first copyright owner, e.g., the author's employer81 (including the Crown, where the work is “prepared or published by or under the direction or control of Her Majesty or any government department”),82 the owner of the initial negative or plate on which a photographic image was captured,83 or the commissioner of a photograph.84 While some of these provisions are easy to apply, others are not. For example, if a repository acquires the negatives of a photograph studio, such a collection is likely to contain many commissioned photos, e.g., baby pictures, weddings, graduations, etc. Unless the copyright has expired, the Act currently provides that the person who commissioned and paid for the photograph owns the copyright in the image, in the absence of an agreement to the contrary. Business records such as the contracts with the studio's clients would provide evidence of agreements to the contrary. However, it is

76 Copyright Act, s. 24(b).
77 Copyright Act, s. 2. For the purposes of the Act, a person can be a corporate body or an individual.
78 Copyright Act, s. 24(a).
79 Copyright Act, s. 24(c).
80 Copyright Act, s. 13(1).
81 Copyright Act, s. 13(3).
82 Copyright Act, s. 12; Gervais and Judge, 44.
83 Copyright Act, s. 10(2).
84 Copyright Act, s. 13(2).
often the case that only the images are deposited in the archives, without the business records documenting the studio’s practice regarding copyright ownership. Without evidence of agreements to the contrary that would have assigned copyright from the commissioner to the studio, the repository wishing to make these images available online is faced with the task of identifying and locating the many commissioners of these photos, unless the copyright in them has expired.

In addition to the various ownership provisions that are part of the statute, it is possible that the original copyright owner may have assigned the copyright in a particular work to another person, or that there may be a series of subsequent assignments by successive copyright owners. Because copyright is a bundle of rights, each of which can be assigned independently, it is also possible that some rights have been assigned to others, and other rights retained by the original copyright owner. Unless the records documenting such agreements are also deposited in the archives, the archivist may be completely unaware of their existence, and will not know the identity of the current owners of particular copyright interests. For similar reasons, the reversionary interest provision may also be difficult for archivists to apply. 85 This provision means that where the author is the first owner of the copyright (i.e., the work was not created in the course of the author’s employment), any assignment of copyright (other than by the terms of the author’s will) becomes void twenty-five years after the death of an author, and all copyright interests revert to the author’s estate for the remaining twenty-five years of the term. A repository is unlikely to know of the existence of such assignments, which would be in force during the first twenty-five years after the author’s death. Regrettably, the passage of time means that any agreements pertaining to subsequent copyright owners are unlikely to accompany the work to the archives.

Even if it is possible to identify the copyright owner, locating the copyright owner (or the owner’s heirs) may not be easy. Consider, for example, the letters written to friends in England by a young Englishwoman who came to Saskatchewan in 1909 for a visit, and stayed to marry and raise a family. The letters revealed how old she was and where she lived in 1918 when the last letter was written, but the subsequent details of her life are unknown. Considerable research would be required to find her (or her

85 Copyright Act, s. 14.
descendants) to obtain permission to digitize such letters. A letter to a senior government official written in 1957 by the mother of a child at a residential school may include the writer's name and address at the time, but locating her fifty years later to request permission to reproduce the letter in an historical study about residential schools is a daunting task. Where a repository wishes to digitize many such primary sources and put them on a repository’s website, the task of identifying and locating the copyright owners likely requires much time and effort. Furthermore, even if the repository has correctly identified and located the copyright holder, there is no guarantee that the person will respond to requests for authorization to use the work. No response has the same effect as an express refusal.

Obtaining authorization from a collective society is a possibility, although an unlikely one, given that much archival material is not part of collective societies’ repertoires because it is unpublished and was not created for commercial purposes. Collective societies are organizations that are authorized by rights holders to act on their behalf to license particular classes of uses of a repertoire of protected subject matter, issue licences setting out the terms of use, and collect and distribute royalties. Collective management of copyright allows rights holders to control uses of their works or other subject matter “that would otherwise be unmanageable individually due to the large number of users…. Collective management also ensures that users will have easy access to the rights needed to use material protected by copyright.” Canada has some 36 copyright collectives that administer particular classes of uses in particular categories of subject matter. However, their mandates and repertoires of protected material vary widely; only certain types of archival holdings would fall within their repertoires, and not all would be able to authorize posting to the Internet. In order to obtain authorization to make a document available on its website, a repository would have to determine which collective (if any) administers the relevant rights for that particular category of subject matter, submit a request, (possibly) negotiate the terms of the licence, and pay the licence

86 Copyright Act, s. 2.
fee.\textsuperscript{90} It may be that a particular use involves several different rights that are administered by different collectives.\textsuperscript{91} Given that this process requires time and money, it is not clear that a repository would consider this course of action.

Where, despite the repository’s best efforts, the copyright owner cannot be located, the Act provides that a person can apply to the Copyright Board for a non-exclusive licence to deal with the work, provided that “the Board is satisfied that the applicant has made reasonable efforts to locate the copyright owner and that the owner cannot be located.”\textsuperscript{92} This provision applies only to published works and sound recordings (as well as to fixations of performances and communication signals), and thus would not be available for those wishing to use unpublished archival material.

\textbf{1.5.3 Duration of Copyright}

Copyright protection is not supposed to last forever. The copyright owner has the right to control certain uses of a work or ‘other subject matter’ for a specified period of time. Once the term of copyright has expired, the item is in the public domain, and may be used freely by anyone.

Even though the first owner of the copyright may be a corporate employer, the general term of copyright for works is the life of the author, the remainder of the year in which the author dies, plus an additional fifty years.\textsuperscript{93} Trying to ascertain the death dates of the authors of, for example, the letters in a file of personal papers or an organization’s records is often difficult. To a large degree, the authors of such works are ordinary citizens or administrators whose biographical details rarely appear in easily accessible reference sources. It is very difficult and time-consuming to undertake what amounts to a genealogical search to ascertain the death dates of ordinary citizens.

\textsuperscript{90} For example, SOCAN (Society of Composers, Authors and Music Publishers of Canada) licenses the public performance and communication to the public (i.e., on the Internet) of music (including the musical work, the performance, and the producer’s sound recording) in accordance with a schedule of tariffs or fees set by the Copyright Board, \url{www.socan.ca} (accessed 6 July 2007). CARCC (Canadian Artists Representation Copyright Collective Inc) licenses and administers copyright for visual and media artists in Canada, including making digital reproductions available on the Internet, \url{www.carcc.ca} (accessed 6 July 2007).

\textsuperscript{91} Gervais, “Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing.” \textit{In In the Public Interest}, ed. Michael Geist (Toronto: Irwin Law, 2005), 522.

\textsuperscript{92} \textit{Copyright Act}, s. 77.

\textsuperscript{93} \textit{Copyright Act}, s. 6.
Although some Canadian repositories hold records from the eighteenth century, the bulk of material in Canadian repositories consists of unpublished works created in the nineteenth and twentieth centuries. Given that the general term of copyright protection is the life of the author plus fifty years, one would think that copyright would have expired in the material up to the early twentieth century. However, special term provisions extend copyright protection for certain types of works, and therefore invalidate such an assumption.

Much of the material in archives is subject to longer terms of protection because of special term provisions for posthumous works. What the Act calls “posthumous” works, i.e., literary, dramatic, or musical works or engravings that had not been published, performed in public, or communicated to the public by telecommunication during the author's lifetime, are subject to a longer term of copyright. Before the Act was amended in 1997, such works were protected for fifty years after the date of publication, performance, etc. If such a work was never published, performed, etc., the effect was perpetual copyright protection because the event that triggered the fifty year term never occurred. Many archival holdings remained unpublished during the author’s lifetime, and thus were perpetually protected by copyright until the 1997 amendments came into force in 1998.

The 1997 amendments phased out perpetual protection for posthumous works by providing the standard term of protection (life of the author plus 50 years) to works whose authors have died or will die after the coming into force of the amendment (on 31 December 1998), whether or not the works were or are published, performed, etc. before the author's death. However, to be fair to those authors’ heirs who thought they had perpetual protection in their ancestor’s unpublished work, the rules were not changed overnight. Three transitional provisions were provided. First, posthumous works that were published, performed, etc. before 31 December 1998 are protected for fifty years from the date of publication. The second transitional provision expired on 31 December

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94 Copyright Act, s. 7.
95 An Act to Amend the Copyright Act, S.C. 1997, c. 24, s. 6.
96 Copyright Act, s. 6.
97 Copyright Act, s. 7(1) and (2).
2003. Finally, posthumous works by authors who died between 31 December 1948 and 31 December 1998 are protected for an additional fifty years from the end of 1998, i.e., until 31 December 2048, whether the work is published or not.

Perpetual copyright may continue to apply to an extensive volume of archival material by virtue of a special provision in the Act for the term for Crown works (works “prepared or published by or under the direction or control of Her Majesty or any government department”) which states that copyright lasts for fifty years from the date of first publication. Some interpret this provision as meaning that Crown works that are never published are protected by copyright in perpetuity. Some, however, argue that the standard term of life of the author plus 50 years applies to unpublished Crown works, just as it applies to the works of employees generally. Resolving this complex issue and other aspects of Crown copyright (characterized by Torno as “a legacy of confusion”) is beyond the scope of this study. All provinces and territories, as well as the federal government, have well-established archives whose holdings consist in large part of Crown works, i.e., the correspondence, reports, maps, plans, photos, etc., created by federal or provincial civil servants. Selecting such holdings for Internet access does not pose a copyright problem for such institutions because their parent body controls the copyright in the Crown works it creates. For other institutions, it is enough for the purposes of this study that there are differing interpretations of this provision of the Act.

98 Copyright Act, s. 7(4). It provided that posthumous works by authors who died before 31 December 1948 were protected until 31 December 2003, whether published or not. However, without knowing the death dates of these authors, it is not necessarily easy to determine which works have entered the public domain.
99 Copyright Act, s. 7(3).
100 Copyright Act, s. 12.
101 Wanda Noel, Staff Guide to Copyright: National Archives of Canada (Ottawa: National Archives of Canada, 1999), 28; Harris, Canadian Copyright Law, 101; Supporting Culture and Innovation, 13; Normand Tamaro, The 2007 Annotated Copyright Act (Scarborough, ON: Carswell, 2006), 320. John S. McKeown (Fox on Canadian Law of Copyright and Industrial Designs, 4th ed. (Toronto: Carswell, 2005), §§16.8, 18.5) and Vaver (Copyright Law, 107) are less categorical; Hughes and Peacock (Roger T. Hughes, and Susan J. Peacock, Hughes on Copyright and Industrial Design, 2nd ed. (Markham, ON: Butterworths, 2005-2007), §34) and Handa (249) do not address the implications of not being published; Gervais and Judge (44, 47-8) and Judge (“Crown Copyright and Copyright Reform in Canada,” In the Public Interest: The Future of Canadian Copyright Law, ed. Michael Geist (Toronto: Irwin Law, 2005) do not mention the term provision at all.
102 Copyright Act, s. 6; s. 12 limits the period of protection in published Crown works only. See, for example, Mark Perry, “Judges' Reasons for Judgments--To Whom Do They Belong?” New Zealand Universities Law Review 18 (1998): 257-93.
The term of protection for photographs also changed as a result of the 1997 amendments. Before the amendments, the term of copyright for photos was 50 years from the making of the initial negative. On 1 January 1999 the term changed to life of the author (i.e., the owner of the initial negative) plus fifty years. However, this change was not retroactive. Photographs already in the public domain prior to 1 January 1999 remain there. In other words, copyright in a photo taken on or before 31 December 1948 has expired, and the photo is in the public domain.

For photographs taken on or after 1 January 1949, the term of protection depends on who the “author” of the photo is. The author of a photograph is the owner of the initial negative. If the author is a natural person, i.e., not a corporation, the term is the life of that person plus an additional fifty years (the same general rule which applies to all categories of works). If, however, the author is a corporation, there are two possibilities, depending on who owns the shares in the corporation. If the majority of the voting shares of the corporation are owned by an individual who would have qualified as the author of the photograph if there were no corporation, the term is the life of that individual plus fifty years. Otherwise, the term is the remainder of the year in which the photo was made plus 50 years.

From the perspective of archival repositories, these changes complicated the application of copyright law to photographs. A term based on the date of creation of the photograph is both easier to calculate, and generally shorter, than a term based on someone's life. Even if the photo is not clearly dated, it may be possible to determine the date it was taken based on the content, e.g., clothing styles, cars, etc. Basing the term on the life of the author makes it much more difficult to determine which works have entered the public domain. While the death date of a well-known photographer may be readily ascertained, it is often very difficult to determine the death date of the owner of a community studio or the author of family snapshots. Even though the new provisions retain one aspect of protection based on date of creation, it is part of a bifurcated rule that

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104 An Act to Amend the Copyright Act, S.C. 1997, c. 24, ss. 7 and 54.1 (now s. 10 of the Copyright Act).
105 Copyright Act, s. 10(2).
106 An Act to Amend the Copyright Act, S.C. 1997, c. 24, s. 54.1(a).
107 An Act to Amend the Copyright Act, S.C. 1997, c. 24, s. 54.1(b). The purpose of this rule is to grant photographers who incorporate their businesses the same term of protection as an unincorporated individual would have.
108 Copyright Act, s. 10(1).
is difficult to deal with because it is not easy to know the details of share ownership in corporations.

The length of copyright protection for ‘other subject matter’ is different from that for ‘works’. Sound recordings are protected for fifty years from the first fixation;\textsuperscript{109} performers’ performances are protected for fifty years from the performance (if not fixed in a sound recording) or its first fixation in a sound recording;\textsuperscript{110} and communication signals are protected for fifty years from broadcast.\textsuperscript{111} The sound recording, performance, or communication signal may, however, include underlying works and related copyright interests with different terms of protection.

**1.5.4 Rights Pertaining to Making Archival Material Available on the Internet**

Several groups of rights are addressed in the *Copyright Act*. One group of rights enumerated in the Act (and referred to as economic rights) protects the economic interests of those who own copyright in ‘works’\textsuperscript{112} and in ‘other subject matter’.\textsuperscript{113} In this regard, the term “copyright” in the Act refers to a bundle of rights or actions that only the copyright owner may do (or authorize others to do) with the protected subject matter. To the extent that these rights are involved in making archival material available on the Internet, the repository requires the permission of the copyright owner, unless the copyright has expired, or unless the Act includes an exception permitting the activity. The Act also provides for moral rights, which one author has defined as “authors’ rights to have work properly attributed and not prejudicially modified or associated with other products.”\textsuperscript{114} Moral rights are discussed in more detail in a later section. The Act also provides for exceptions to the exclusive rights of copyright owners, which the Supreme Court has characterized as users’ rights.\textsuperscript{115} These too are discussed later. Only the rights involved in the process of making a document available on the Internet are of interest to this study.

\textsuperscript{109} *Copyright Act*, s. 23(1)(b).
\textsuperscript{110} *Copyright Act*, s. 23(1)(a).
\textsuperscript{111} *Copyright Act*, s. 23(1)(c).
\textsuperscript{112} *Copyright Act*, s. 3(1)(a)-(f).
\textsuperscript{113} *Copyright Act*, s. 15 (performances), s. 18 (sound recordings), and s. 21 (communication signals).
\textsuperscript{114} Vaver, *Copyright Law*, 307.
\textsuperscript{115} *CCH*, ¶¶12-13, 48.
In making its holdings available on its website, a repository is producing a digital resource consisting of documents selected from the repository’s holdings by repository staff. Making a document that is not already in digital form available on the Internet requires a number of steps. The document must first be scanned into digital form. The scanning may involve only part of a document, or it may involve manipulation of the scanned image to varying degrees, e.g., adjusting contrast, removing stains, cropping edges, etc. The scanned images and any descriptive or explanatory content must then be copied onto the repository’s web server (the “host” server), along with the appropriate code and software necessary to ensure that a copy of the content is transmitted via the Internet. When a user accesses a repository’s website from a remote computer, a copy of the website content is transmitted from the host server, via the user’s Internet Service Provider’s server (and one or more routers, and possibly via one or more data “caches” which speed transmission and reduce costs), to the end-user’s computer. Copyright issues arise where the process undertaken by the repository requires an action that coincides with one or more of the rights of the copyright owner or author set out in the Copyright Act.

The advent of the Internet and rapidly changing information and communication technologies have revolutionized the speed with which information can be produced, reproduced, and disseminated. These new technologies put pressure on a copyright regime that is historically based on the reproduction and distribution of physical objects. The legal response has been “the expansion of copyright law onto the Internet and in relation to digital works” by interpreting existing rules and amending the legislation. The Supreme Court in Robertson v. Thomson Corp. noted that Canada's Copyright Act is based on the concept of “media neutrality” which means that “the Copyright Act should continue to apply in different media, including more technologically advanced ones.” The Court went on to say that “media neutrality is not a license to override the rights of authors—it exists to protect the rights of authors and others as technology evolves.”

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118 Robertson, ¶49. The facts of the case are summarized in Appendix A.
119 Ibid.
Based on this principle, digital formats and electronic communications are covered by the current statute. Nonetheless, while Canadian copyright law has accommodated new technologies, either through statutory amendments or through judicial interpretation, amendments and jurisprudence have inevitably lagged behind technological change. Just how the rights of copyright owners, authors, and users apply in the digital environment has not been fully canvassed in case law. Within this context of uncertainty and rapid change, the rights likely to be of interest for the purposes of this study are enumerated below.

1.5.4.1 Economic Rights

In relation to works, the rights of interest to this study are: the right to reproduce a work, the right to communicate a work to the public by telecommunication, the right to publish a hitherto unpublished work, the right to present an artistic work at a public exhibition, and the right to authorize these acts.\(^{120}\) The rights pertaining to ‘other subject matter’ are somewhat different. As far as sound recordings are concerned, the rights pertaining to an archival repository making its holdings available on the Internet are the right to reproduce the sound recording, the right to publish it for the first time, and the right to authorize such acts.\(^{121}\) Regarding performers’ performances and communication signals, it was noted earlier that repositories hold fixations of performances and communication signals. For performers, the relevant rights are the right to reproduce a fixation of the performance and the right to authorize such acts.\(^{122}\) For communication signals, the relevant rights are the right to reproduce any unauthorized fixation and the right to authorize such acts.\(^{123}\) As noted earlier, works may also be embedded within ‘other subject matter’, and any dealing with sound recordings or fixations of performers’ performances or communication signals must also deal with any underlying rights in the works within them.

Before discussing each of these rights in relation to making archival material available on the Internet, it must first be noted that economic rights apply not just to an

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\(^{120}\) *Copyright Act*, s. 3(1), 3(1)(f) and 3(1)(g). Depending on the nature of the documents chosen and how the repository wishes to present them, other rights may also be involved if, for example, the repository wishes to translate a document into another language (*Copyright Act*, s. 3(1)(a)).

\(^{121}\) *Copyright Act*, s. 18(1).

\(^{122}\) *Copyright Act*, s. 21(1).

\(^{123}\) *Copyright Act*, s. 15(1).
entire work or ‘other subject matter’, but also to “any substantial part” thereof. Thus, doing any of these acts with an insubstantial part of a work does not infringe the copyright owner’s rights. The Act does not define “substantial;” however, the issue has been dealt with by the courts. While a determination of what is substantial would depend on the facts of a particular case, it is clear from case law that substantiality in Canada depends not just on a simple calculation of quantity but also on the significance of the part used in relation to the entire original work. The determination of substantiality is a matter of judgment. However, the right to use an insubstantial part is largely irrelevant to the business of putting an archival document on the Internet, since generally only a substantial part (up to and including the entire work) will meet user needs.

That making archival holdings available on the Internet involves the right of reproduction is not a matter of debate; reproduction is fundamental to the entire process. Each document, if not “born digital,” must first be reproduced into a digital format. Then the digital images must be reproduced onto the repository’s web server or the server of the repository’s Internet Service Provider (ISP). In making a digital copy and posting it to the web server, the repository is reproducing the original, and requires the permission of the copyright owner to do so, unless the copyright has expired or unless the repository owns the copyright in the item.

However, the right of reproduction in making content available on the Internet has not been directly addressed in jurisprudence. Although the SOCAN case provided a detailed analysis of the process of transmitting music files on the Internet, “the parties did not frame an issue in relation to infringement of the right of reproduction, and its role, if any, did not play a significant part in the [Copyright] Board’s decision.” Instead the discussion was framed in terms of the right to communicate to the public by telecommunication. Within that framework, the Court distinguished between content providers and Internet intermediaries (ISPs), and found that “ISPs are not liable to copyright owners when they act as mere conduits of content.” While the Court found that content providers authorize the communication of (in this case) music when the file

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124 Tamaro, 238-256; McKeown, 21:2(c).
125 SOCAN, ¶28.
126 Copyright Act, s. 3(1)(f).
127 Gervais, “Purpose of Copyright,” 323.
is posted to the host server, the ISPs do not communicate the content “as long as [their]
role in respect to any given transmission is limited to providing the means necessary to
allow data initiated by other person to be transmitted over the Internet [under s. 2.4(1)(b)
of the Act].”

Regarding liability for providing content, SOCAN focussed on the right to
communicate a work to the public by telecommunication, and the authorization right. The
Court found that, although posting a work on the host server does not immediately
communicate it, the content provider, in posting the work, authorizes its communication,
and is therefore liable for any copyright infringement that may occur in this activity. In
making their holdings available on the Internet, repositories are content providers, and
thus, a repository that is posting a digital copy of a work from its holdings on a web
server requires the permission of the rights holder to do so, unless the copyright has expired or unless the repository owns the copyright in the item.

Because archival holdings consist in large part of unpublished material, the
publication right, i.e., the right to publish a work or a sound recording for the first time,
[emphasis added] is of particular interest to archival repositories wishing to make their
holdings available online. The Act defines publication as “making copies of a work…[or]
a sound recording available to the public.” Whether making a hitherto unpublished
document available on the Internet publishes it has not been interpreted by the courts.
However, SOCAN addressed the meaning of “to the public” in the context of the right to
communicate a work to the public by telecommunication. The Court agreed with the
Copyright Board’s finding that an Internet communication is “to the public” because the
music files are “made available on the Internet openly and without concealment, with the
knowledge and intent that they be conveyed to all who might access the Internet.
Accordingly, a communication may be to the public when it is made to individual
members of the public at different times … chosen by them (as is the case on the

128 SOCAN, ¶93-95.
129 Ibid.
130 Copyright Act, s. 3(1) (works) and s. 18(1)(a) (sound recordings).
131 Copyright Act, s. 2.2(1)(a)(i) (works) and s. 2.2(1)(b) (sound recordings).
In other words, the communication need not be instantaneous or simultaneous to be a communication to the public.

However, it is not clear whether transmission on the Internet makes “copies” available to the public (as required by the definition of publication) if many different individuals are accessing the same copy on the host server. Gervais and Judge argue that the definition of publication does not require that the “copies” be in tangible form, and conclude that “making a copy of a protected work on the Internet server could be said to constitute ‘publication’” (provided that it is done with the rights holder’s consent, because the Act provides that a work published without the rights holder’s consent would not be considered published). On the other hand, the Act explicitly states that the definition of publication does not include communication to the public by telecommunication, or performance in public, of a work or a sound recording, or the public exhibition of an artistic work. Whether making a work or sound recording available on the Internet publishes it has yet to be resolved.

The right to “present at a public exhibition, for a purpose other than sale or hire, an artistic work created after 7 June 1988, other than a map, plan or chart” was added to the Act in 1988. The question of whether posting an artistic work on a website is presentation at a public exhibition was not envisaged when this right was enacted. A guide prepared for the Canadian Heritage Information Network states that “for any artistic work created after June 7, 1988, the museum must obtain exhibition rights before the artistic work can be posted on the museum’s web site.” The issue has not been addressed in case law.

The authorization right, i.e., the right of the copyright owner to authorize someone else to do any of the acts that only the rights owner may do, is a discrete right within the bundle of economic copyrights. Authorization was dealt with in CCH and in SOCAN.

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132 SOCAN, ¶30.
133 Gervais and Judge, 42, 53.
134 Copyright Act, s. 2.2(1)(c).
135 Copyright Act, s. 2.2(1)(d).
136 Copyright Act, s. 3(1)(f).
138 Copyright Act, s. 3(1), Gervais and Judge, 60.
In *CCH*, the court found that the Great Library did not authorize infringement simply by providing self-serve photocopiers in the reading room.\textsuperscript{139} Shortly afterward, in *SOCAN*, the Court made a similar finding with regard to Internet intermediaries when it said, “The operation of the Internet is obviously a good deal more complicated than the operation of a photocopier, but it is true here, as it was in the *CCH* case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyright material as opposed to non-copyrighted material.”\textsuperscript{140} As noted above, the *SOCAN* court also dealt with authorization in its finding that the content provider, in posting the work on the host server, authorizes the communication, and is therefore liable for any copyright infringement that may occur in this activity.\textsuperscript{141}

In sum, it is clear that the economic rights of reproduction, communication to the public by telecommunication, and authorization are involved in making archival material available on the Internet. However, the extent to which the publication right and the public exhibition right are involved has not yet been clearly resolved.

1.5.4.2 Moral Rights

The Act also provides the author with what are called moral rights.\textsuperscript{142} Moral rights apply only to works, and protect the reputation of the author and the integrity of the work. Moral rights include the right of the author to have his or her name associated with the work as he or she chooses (including the right to use a pseudonym or to remain anonymous), the right to prevent the use of the work in association with a cause or organization that would be prejudicial to the author’s reputation or honour, and the right to prevent changes to the work that would be prejudicial to the author’s reputation or honour. Given the ease with which digital formats can be manipulated, the possibility of moral rights infringement may be of even greater concern in the digital environment.

Unlike economic rights, moral rights cannot be assigned or licensed; they always belong to the author or the author’s estate. Thus, if a repository wants to change a work or put it on its website without attribution to the author, without having to request the

\textsuperscript{139} CCH, ¶38.
\textsuperscript{140} SOCAN, ¶123
\textsuperscript{141} Ibid., ¶93-95.
\textsuperscript{142} Copyright Act, ss. 14.1, 28.1, and 28.2.
author’s permission on a case by case basis, the only efficient alternative is to obtain a waiver of the author’s moral rights at the time of acquisition. Just as the donor of the archival material may not necessarily be the copyright owner, the donor may not necessarily be the author of all of the works being deposited. Thus, it may not be possible for a repository to obtain a waiver of moral rights from the donor. Where an archives is authorized to administer the copyright in its holdings on behalf of its parent body (or where an organization that has donated its records and assigned copyright in them to the archives), it may be the case that employees have waived their moral rights in the works they have authored as a condition of employment, but the repository cannot be certain of this without having access to the waiver(s).

1.5.5 Infringement and Penalties

The Act provides that, “It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do,” and “Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.” These provisions deal with direct infringement, i.e., someone does something that only the rights owner is entitled to do.

Enforcement of copyright interests is the responsibility of the rights holder. Infringement has consequences, and the Act provides civil remedies or penalties for infringement of economic copyrights or moral rights “by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.” Dealing with each in turn, the penalties may consist of a court order to stop the infringing activity, or a requirement for the infringer to pay the owner of the right invoked an amount to compensate for the “damages”, including losses incurred as a result of the infringement. The infringer may have to provide an account of the

143 Copyright Act, s. 27(1).
144 Copyright Act, s. 28.1.
145 The Act also provides for secondary infringement, where someone buys, sells, or imports infringing copies for commercial purposes (s. 27(2)), but this is unlikely to apply to repositories making their holdings available on the Internet.
146 The Act also provides for criminal remedies where the extent of the infringement is such that the state takes action against the infringers; however, any infringing activities of archival repositories in making their holdings available on the Internet are unlikely to attract criminal sanctions.
147 Copyright Act ss. 34-41.
profits gained from the infringing activity, or give the stock of infringing copies to the
rights owner. In certain circumstances, the Act also provides for a copyright owner to
recover statutory damages in an amount established by the court (ranging from $200 to
$20,000, depending on the circumstances) without having to calculate the amount of
actual damages or profit.\footnote{Copyright Act s. 38.1.} The cost of court proceedings would likely exceed the value
of these remedies. As Vaver states, “Most intellectual property disputes settle without
going to court. The incentives for settlement or informal dispute resolution are high
because litigation can quickly become prohibitively expensive.”\footnote{Vaver, 252.} Not surprisingly, there
is no Canadian case law regarding infringing uses (either by a user or by the repository
itself) of material in an archival repository’s holdings. Nor is the author aware of any
reports of out of court settlements (other than those reported in this study).

1.5.6 Users’ Rights

As noted earlier, the Supreme Court views the Copyright Act as “a balance
between promoting the public interest in the encouragement and dissemination of works
of the arts and intellect, and obtaining a just reward for the creator (or, more accurately,
to prevent someone other than the creator from appropriating whatever benefits may be
generated).”\footnote{Théberge, ¶30.} The Court went on to say:

\begin{quote}
The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. …Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways … and to add new protections to reflect new technology…..\footnote{Théberge, ¶¶ 30-32.}
\end{quote}

Essential to the balance are the exceptions (or users’ rights) in the Act, which permit
specified uses of protected works or ‘other subject matter’ without the permission of the

\begin{footnotesize}
\footnote{Copyright Act s. 38.1.}
\footnote{Vaver, 252.}
\footnote{Théberge, ¶30.}
\footnote{Théberge, ¶¶ 30-32.}
\end{footnotesize}
copyright owner, provided that certain conditions are met. According to Gervais, the Court’s message in Théberge was that “exceptions to the exclusive rights of copyright owners are not mere afterthoughts, but an integral part of a “balanced” level of protection.”

The CCH decision characterized exceptions as “users’ rights,” which resulted in much analysis and speculation on the part of legal scholars about the impact of this apparent shift in the scope and role of exceptions, particularly the fair dealing provisions. While the thought that “user rights are as central to copyright law as author rights” is encouraging to those such as repositories whose role is to make their holdings available for use, the meaning of “users’ rights” is ambiguous. As Scassa points out, the interests of users and creators are far more complex than a simple binary proposition. She explores the varied and overlapping copyright interests of creators, owners, users, and society, and sets out a typology of uses of protected material. Consequently, the meaning of users’ rights is subject to interpretation by other courts, and may also be affected by future legislative amendments. As Scassa cautions, “Any exercise in balancing interests, whether through law reform or judicial interpretation, should be attentive to the substance, and not just the rhetoric, of the interests involved.” Whether labelled users’ rights or exceptions, only the fair dealing

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152 Copyright Act, ss. 29-32.2.
153 Gervais, “Purpose of Copyright,” 320.
154 CCH, ¶¶ 12-13, 48.
157 In fact, users’ rights include more than the exceptions, and could include such things as the right to use an insubstantial part of a work, private copying, and the right to use facts and non-original works; however, a full analysis of them is beyond the scope of this study.
159 Scassa, “Interests in the Balance,” 56-64.
provisions (ss. 29, 29.1, 29.2) and the archives exception (s. 30.21) are of interest to this study.

The *Copyright Act* provides that “fair dealing for the purpose of [research, private study, criticism, or review] does not infringe copyright.”\(^{161}\) It is not limited to particular categories of subject matter, to particular rights of copyright owners, to particular classes of users, or to particular technologies; the only condition is that fair dealing for criticism or review requires that the source be mentioned, and (if given in the source) the name of the author, performer, maker, or broadcaster. In 1997, the Act was amended to extend fair dealing to a repository or its employees acting on behalf of a patron when the following wording was added, “it is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 [research or private study] or 29.1 [criticism or review].”\(^{162}\) However, the application of fair dealing to making archival material available on the Internet raises a number of questions, particularly regarding the use of an entire work, and the use of works that have never been published.

The first question arising in any discussion of fair dealing is how to determine what is “fair.” The Act neither defines “fair” nor provides any guidance in determining fairness. Until recently, consolidated lists of factors that might be considered in determining fairness have been found in monographs and articles rather than in Canadian jurisprudence.\(^{163}\) However, determining the scope of fair dealing in Canada became easier as a result of the Supreme Court’s decision in the *CCH* case.\(^{164}\) In finding that the Law Society's activities fell within the scope of fair dealing, the Court identified the following six factors to be considered in determining whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the effect of the dealing on the market for the work, and the nature and quality of the work.

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161 *Copyright Act*, s. 29 (research or private study), and s. 29.1 (criticism or review). News reporting also falls within fair dealing (s. 29.2), but will not be considered in the following discussion since making archival material available on the Internet is unlikely to be considered news reporting.

162 *An Act to Amend the Copyright Act*, S.C. 1997, c. 24, s. 18.1(30.21(1)).


164 The facts of the case are summarized in Appendix A.
alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.\footnote{165} As the Court noted, “Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.”\footnote{166}

In addition to enumerating the factors, the Court found that, although the Great Library staff were not actually doing research for Law Society members, by providing copies of legal materials that members used for research (one of the purposes of fair dealing), the Library could benefit from any fair dealing entitlement that would apply to Library patrons. As the Court said, “The Law Society’s custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the Copyright Act.”\footnote{167} This finding is significant because it is “the first clear statement that agency is permitted within the scope of the fair dealing exceptions.”\footnote{168}

The Court's analysis of fair dealing is potentially relevant to the actions of a repository in making its archival holdings available on the Internet. However, what a repository does in making its holdings available on the Internet differs from the Great Library’s photocopying service in several ways. For one thing, the staff of the Great Library were copying published legal materials in response to specific requests from individual members;\footnote{169} whereas the staff of repositories are copying mainly unpublished documents selected for Internet access for reasons other than user requests. In terms of rights, the Great Library staff were dealing with the right of reproduction; as discussed earlier, repository staff are dealing with the reproduction right, the telecommunication right and the authorization right, and possibly the publication right and the public exhibition right as well.

Each of the Court's six factors is examined in relation to making archival holdings available on the Internet. The first factor is the purpose of the dealing, which will be fair if it is for one of the allowable purposes enumerated in the Act, i.e., research, private

\footnotesize{\bibliography{references}}
study, criticism, review, or news reporting. Although the Great Library’s written Access Policy specified that single copies would be made for several purposes (“research, review, private study and criticism”), the Court focused on the research purpose and held that “‘research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.” If the library is not doing the research, but is simply the intermediary providing copies for its members’ research, what is the responsibility of the library in ensuring that Law Society members are actually doing research in a way that is fair? The Court held that “persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyright works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or showing that all individual dealings with the materials were in fact research-based and fair.” The Court found that the Law Society’s custom photocopy service was fair dealing because the service was grounded in its Access Policy, which placed certain limits on what would be copied for members.

A repository making its holdings available on the Internet is not likely to know who uses its website, so it would be impossible for a repository to show that users of its website content are dealing with it fairly. Thus a repository can only demonstrate “that [its] own practices and policies [are] research-based and fair” by having its practice in making its holdings available online governed by an appropriate policy or procedures along the lines of the Law Society’s policy, or by having other evidence of practices that are fair.

The second factor is the character of the dealing, which requires a court to examine “how the works were dealt with.” The Court remarked that wide distribution of multiple copies (as opposed to a specific use of a single copy) would tend to be unfair, and went on to note, “there is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession.”

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170 CCH, ¶54.
171 CCH, ¶51. The Court went on to state the need for a liberal interpretation of all the allowable purposes "or this could result in the undue restriction of users' rights." ¶54.
172 CCH, ¶63.
173 CCH, ¶55.
174 CCH, ¶55.
implying that to do so would have been unfair.\footnote{CCH, ¶67.} Moreover, the Court found in SOCAN that making content available on the Internet is a communication to the public [emphasis added], a right of the copyright owner. Making archival material available on a repository’s website disseminates archival documents to many unknown users around the world. Dealing with protected material in such a way almost certainly will not meet this criterion for fairness, and will therefore not be considered fair dealing.

The third factor is the amount of the dealing.\footnote{CCH, ¶56.} The application of fair dealing to an entire work is a matter of particular concern to users of archival material, since it is frequently the case that only the entire letter or photograph or map will meet a user’s needs. In CCH, the Court found that the entirety of an article or case was necessary for research or private study; thus, “it may be possible to deal fairly with a whole work.”\footnote{CCH, ¶56.} This puts to rest the proposition that copying of all of a protected work can never be fair dealing. The quantity reproduced, even if it is the entire work, is but one factor to be taken into account in a determination of whether the dealing is fair.

The fourth factor identified in the CCH case is the availability of alternatives to dealing with the work.\footnote{CCH, ¶57.} With regard to the Law Society, the Court found no reasonable alternatives to the Great Library’s custom photocopy service. For one thing, many members live and work at some distance from the Great Library; secondly, the Great Library’s holdings cannot be borrowed. For these reasons, the Court found that requiring those living outside Toronto to visit the library in person to conduct their research was not a reasonable alternative. As far as archival material is concerned, there are few realistic alternatives, for similar reasons. As noted above, archival repositories do not lend their holdings; users requiring access to archival documents have traditionally had to visit the repository or request that copies be sent to them. In contrast, the Internet provides a means of immediate access to archival documents by users anywhere in the world that is a superior alternative to the traditional means of access.

\footnote{CCH, ¶67.}  
\footnote{CCH, ¶56.}  
\footnote{CCH, ¶56.}  
\footnote{CCH, ¶57.}
The Court also suggested that using a non-copyrighted equivalent of the work, or not using the work at all, were both alternatives to be considered.\textsuperscript{179} Since archival records tend to be unique, locating “a non-copyrighted equivalent” may not always be possible. In making a repository’s holdings available on the Internet, the archival equivalent of not using a work at all would be to make only descriptions of archival material available, without the images of corresponding documents. This is an unsatisfactory alternative. As previously stated, archivists describe their holdings at aggregate levels, and rarely describe at the item level. The user wanting to see all the items in a file will still have to visit the repository or request copies. Furthermore, where material is described at the item level, i.e., photographs, it is difficult to describe each item in sufficient detail to cover every possible aspect of interest to a user; having the image available as well provides the user with a means of more easily locating exactly what they need. There appear to be no reasonable alternatives to including digital images of archival documents in repository website content.

The fifth factor the Court identified is the nature of the work, and the Court suggested that a work’s publication status may be an issue to consider (even though the facts of the case involved only published works).\textsuperscript{180} The issue of whether unpublished works fall within the scope of fair dealing is of interest to archivists, since much archival material is unpublished. Somewhat surprising (in light of the fact that the right to control when (and whether) a work will be published is one of the fundamental rights of the copyright owner)\textsuperscript{181} is the Court’s remark, “if a work has not been published, the dealing may be more [emphasis added] fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work--one of the goals of copyright law.”\textsuperscript{182} Thus, the Court has said that unpublished works may well fall within the scope of fair dealing.

The final factor identified in \textit{CCH} is the effect of the dealing on the market for the work. As the Court stated, “If the reproduced work is likely to compete with the market

\begin{footnotes}
\item[179] \textit{CCH}, ¶57.
\item[180] \textit{CCH}, ¶58.
\item[181] Copyright Act, s. 3(1).
\item[182] \textit{CCH}, ¶58.
\end{footnotes}
of the original work, this may suggest that the dealing is not fair.”\textsuperscript{183} However, the publishers provided no evidence that the market for their publications had been negatively affected by the Great Library’s photocopying service.\textsuperscript{184} As far as archival material is concerned, much of it was not created for commercial purposes. However, “shifting usefulness” is one of the characteristics of records, in that the purpose for which they were created may be supplanted by “secondary” values (the information about persons or events that may be of research or broad cultural interest).\textsuperscript{185} There may be a later market for such materials; for example, L.M. Montgomery’s personal correspondence with friends and fellow authors (unlike her novels) was not created for commercial purposes, but a market exists for scholarly editions of her letters.\textsuperscript{186} Consequently, the extent to which making such material available on the Internet may compete with the market for the original cannot readily be determined.

In sum, the \textit{CCH} decision greatly clarifies the application of fair dealing to archival material generally, in that it states that it is possible to deal fairly both with an entire work and with a work that has never been published, and in the Supreme Court’s recognition that the practices of an archival repository, when acting on behalf of its users, can fall within fair dealing. However, the foregoing discussion has also examined the decision from the perspective of whether fair dealing applies to making content of any sort (including archival documents) available on the Internet. In this regard, the analysis of the second factor (the character of the dealing) strongly suggests that making archival documents available on the Internet would not fall within fair dealing. The \textit{CCH} case was brought to the attention of the archival community when a brief comment, prepared by copyright lawyer Wanda Noel for the Bureau of Canadian Archivists Copyright Committee, was posted the Arcan-l listserv\textsuperscript{187} on 3 June 2005.\textsuperscript{188} According to Noel,

\begin{footnotesize}
\begin{enumerate}
\item [183] \textit{CCH}, ¶59.
\item [184] \textit{CCH}, ¶71.
\item [185] O’Toole and Cox, 39.
\item [187] The Arcan-l listserv is provided “for the discussion of archival issues and interests of particular relevance to Canadian Archives and archivists,” \url{http://www.mailman.srv.ualberta.ca/mailman/listinfo/arcan-l} (accessed 25 April 2007).
\item [188] The summary stated, “On March 4, 2004 the Supreme Court of Canada issued a landmark decision that interprets fair dealing for research as including copying entire works….In giving fair dealing a broad and liberal interpretation, the Court has opened the door to copying for research purposes in an archival
\end{enumerate}
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making archival material available on the Internet does not fall within the scope of fair dealing.

The exceptions for libraries, archives and museums (LAMs) were part of the 1997 amendments but did not come into force until 1999, six years after the legal publishers commenced their action against the Law Society, and thus were not directly before the courts in that case. Nonetheless, the CCH Court considered the relationship between fair dealing and the exceptions for LAMs, and found that “it is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the Copyright Act to prove that it qualified for the library exemption.” According to Gervais and Judge, this suggests that fair dealing has been given a special status among exceptions (perhaps even a user’s right equivalent to the rights of the author), and that analysis of any potentially infringing action should start with fair dealing, and only afterward move to a specific exception.

As the foregoing suggests, the archives exception (s. 30.21) is more precise than the fair dealing exception. It permits an archival institution, or a person acting under its authority, to make a single copy of an unpublished work in the archives’ holdings for a patron’s research or private study, provided that certain conditions are met. It does not appear that putting documents on a repository’s website would fall within the scope of s. institution. Since much of the copying occurring in archival institutions is for research, this decision eases the need for copyright permission in many instances.” The summary went on to note, “There is a difference between copying for research and copying for other purposes. Putting a photograph on a website or including a literary work in a publication like a book can NOT [emphasis in the original] be considered to be research copying. These, and other activities that are not research related, remain governed by normal copyright rules requiring permission from the copyright owner.”

The Act provides four exceptions for LAMs, i.e., copying for maintenance and management (s. 30.1), copying of periodical articles (s. 30.2) and archival material (s. 30.21) for research or private study, and providing self-serve photocopiers (s. 30.3). In order to benefit from these exceptions, a LAM (including those located in educational institutions) must meet the conditions specified in the statutory definition of “library, archive or museum.” The “library, archive or museum” must be a non-profit institution which holds or maintains a collection of documents and other materials that is open to the public or to researchers. A library, archives or museum operated by a ‘for-profit’ corporation, such as the archives of a bank, is excluded from the definition, and is not entitled to the exceptions.

Gervais and Judge, 82 n. 221.

CCH, ¶49.

Gervais and Judge, 88-89. See also Wilkinson, “Filtering the Flow,” 357.

Copyright Act, s. 30.21. Until it was amended in 2004, this provision included two statutory requirements that directly affected daily repository operations, i.e., a requirement to try to locate the copyright owner before the copy could be made, and a requirement to keep records of copies made for patrons under this section (An Act to Amend the Copyright Act, S.C. 1997, c. 24, s. 18.1 (ss. 30.21(5) and (6) of the Copyright Act)). The 2004 amendments removed these requirements (Library and Archives Canada Act, S.C. 2004, c. 11, s. 21(3)).
30.21, primarily because the statute and the regulations imply that this provision applies only to copies made by the repository in response to a request from a patron.\textsuperscript{194} This provision has not been directly addressed in case law; either in regard to onsite copying or dissemination via the Internet; however, it may have been rendered redundant in light of the Supreme Court’s interpretation of fair dealing in \textit{CCH}.\textsuperscript{195}

To sum up, copyright clearly exists in the Internet environment. Repositories that digitize protected materials in their holdings to make them available on the Internet, without permission, potentially infringe the copyrights and the moral rights of the rights holders. The copyright issues facing a repository wishing to make its holdings available on the Internet can be complex and often difficult. Items in which all copyrights have expired are free for all to use; however, statutory provisions for particularly long terms of protection may delay the expiry of copyright in some material. Where copyright still exists, the repository may not own all the copyrights in its holdings, and efforts to identify or locate the rights owners can be time-consuming and frustrating. Where the duration of copyright is based on the life of an author who cannot be identified or located, the expiry of copyright can only be estimated. While judicial decisions have clarified certain important aspects of the application of copyright law in the digital environment, some uncertainty remains with regard to certain economic rights and the scope of users’ rights. Clarification of these matters awaits statutory amendments, further judicial interpretation, or both.

\textsuperscript{194} Section 30.21(2)(c) of the Act states “the archive must be satisfied that the person for whom it [the copy] is made will use the copy only for purposes of research or private study.” Section 6 of the regulations sets out the procedure “if a person requests a copy of a work from an archive under section 30.21.”

\textsuperscript{195} Wilkinson, “Filtering the Flow,” 339.
Chapter 2  Literature Review and Conceptual Framework

2.0  Introduction

The purpose of this study is to investigate the impact of copyright law on the current practices of Canadian repositories in making their archival holdings available on the Internet; thus, the study is located at the intersection of archival practice vis-à-vis Internet access to archival holdings and Canadian copyright law. After reviewing the relevant professional, research, and legal literature, the chapter concludes with a discussion of the conceptual framework for the study.

2.1  Literature Review

The ability to make cultural heritage resources generally, and archival holdings in particular, available on the Internet is a relatively new area of professional activity. While much has been written to encourage best practices in this area, relatively little research had been published at the time that this study was designed. In monitoring the literature during the process of data collection and analysis, it became clear that the literature about digitization of cultural heritage resources for Internet access is rapidly evolving and increasingly complex, due in part to the speed of technological change, but also because it involves a wide range of issues such as technical standards and formats, metadata requirements, training and support, user needs, access pricing models, ongoing preservation and management of digital resources, and of course, copyright issues. Not surprisingly, the boundaries of this area and its constituent elements are not clearly defined. Furthermore, while guidance regarding professional best practices continues to evolve as the field matures, and new challenges and issues emerge, relatively little research has yet been published. Only four research studies include a discussion of the

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196 Chowdhury and Chowdhury group the literature on digital library research into eight “thematic clusters,” of which information law and policy is one (G.G. Chowdhury, and Sudatta Chowdhury, Introduction to Digital Libraries (London: Facet, 2003), 35).
role of copyright in digitization projects across repositories. None focuses entirely on copyright issues; only one includes Canadian repositories (albeit a small number); and the material digitized extends beyond unpublished archival materials to include a broad range of heritage and research materials.

Thus, determining the scope of the literature review for this study presented a number of challenges. First, the professional literature does not constitute research; however, it has been used selectively because it is written mainly by archivists and it reflects the culture of the profession. Within the broader literature of information professionals, the advice and guidance about digitization projects was found to be useful in identifying the ways that copyright issues affect such projects, and because it is what archivists are likely to read as they add digitization to their institutional mandates. It was also used selectively because much of it comes from other jurisdictions (preponderantly the United States) and the same themes recur.

Second, the focus of the study is Canadian archival repositories (and thus Canadian copyright law), but the literature contains no studies of Canadian repositories’ digitization projects. Thus, it was necessary to expand the scope of the review to include reports of digitization projects in the United Kingdom and the United States. However, discussion of the details of the British and American statutes or the differences between national statutes was outside the scope of the study. This study is limited to the current state of Canadian copyright law in which Canadian repositories carried out their digitization projects. The relevant legal literature has been canvassed in the discussion of Canadian copyright law in Chapter 1.

Third, while the focus of the study is archival material, it was necessary to expand the scope of the literature review beyond archival material to cultural heritage and

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198 What this study calls “professional literature” refers to written advice or guidance on how to do something (e.g., administer copyright, or manage a digitization project), accounts of what was done (e.g., this is how our digitization project went), or opinions on a topic.
research materials, and beyond traditional archival practice to the ill-defined realm of so-called digital libraries and archives. Archival materials are obviously preserved in institutions designated as archives, but they are also preserved in other cultural heritage institutions such as libraries and museums, and studies of the projects undertaken by such institutions to digitize their archival materials are not confined to the archival literature. An extensive body of library literature documents the library profession’s copyright concerns, moving from reprography collectives, electronic journal subscriptions, and database licensing to current questions such as open access journals and electronic reserves. However, such issues are of little relevance to this study because they deal largely with published material created for the commercial market; thus, the library literature regarding copyright has been used selectively.

An additional challenge in conducting a literature review has been the ambiguity surrounding the terms digital library and digital archives. There is no universally agreed-upon definition of either, and they are not mutually exclusive. The term digital library has been used to refer to collections of material of any kind in digital form, including that traditionally found in the holdings of archives. The term digital archives may also refer to archival material in digital form, although more frequently it is used in the context of ongoing preservation and access to both archival and library holdings in digital form. While many interesting copyright issues are associated with ongoing preservation and access, they are outside the scope of this study. Finally, while vigorous discussion about the challenges of applying copyright law in the digital environment and how to address them fills both the popular media and professional and scholarly literature in many disciplines, that literature is beyond the scope of this study.


201 The Task Force on Archiving of Digital Information distinguished between the two on this basis, i.e., while both collect and provide access to digital information, only digital archives are “responsible for long-term accessibility of the nation’s … heritage instantiated in digital form” (Donald Waters, and John Garret, Preserving Digital Information: Report of the Task Force on Archiving of Digital Information (Washington, DC: Commission on Preservation and Access, 1996), iii).

2.1.1 Professional Literature

The literature review first explores the professional literature about copyright, including selected commentaries from users of archival materials, before looking at the “how-to” manuals on digitization and reports of digitization projects involving archival material.

2.1.1.1 Administration of Copyright in Archives

Archivists have been concerned about copyright primarily from an operational and administrative perspective, rather than as users of their own holdings. For example, comprehensive guides such as those written by Noel and Padfield are available for those responsible for the administration of copyright in archival repositories;\(^{203}\) Dryden’s guide was written for both users of archives and libraries, and for repositories responding to users’ copyright questions.\(^{204}\) Articles in the professional journals proffer advice on how to overcome the particular difficulties of administering copyright in archival holdings. For countries whose copyright laws fall within the Anglo-American copyright tradition, such articles are consistent across national boundaries and time, reflecting common difficulties such as identifying and locating copyright owners, and the need to advise users about further uses of copies provided by the repository so as to minimize the repository's potential liability for copyright infringement.\(^{205}\) Within the Canadian archival community, the literature also documents the profession's attempts to address these

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\(^{203}\) Wanda Noel’s *Staff Guide to Copyright* is widely used in archival repositories across the country. See also Tim Padfield, *Copyright for Archivists and Users of Archives*, 3rd ed. (London: Facet, 2007). The first edition of Padfield’s book was published in 2001. That a third edition was published within six years “says something about the desire of archivists and records managers to do the right thing, but it is more an indicator of how the law keeps changing” (Padfield, 2007, xi), as well as a commitment to keeping this reference book up to date. Peter Hirtle is writing a similar guide for American archivists to be published by the Society of American Archivists.

problems through legislative change, in the form of briefs submitted on behalf of the profession, responses to proposed amendments, and reports on the impact of changes to the law. Significant judicial decisions and their implications are communicated to the archival community by specialists through professional newsletters.

Archival repositories receive frequent requests from users for copies of documents and for permission to use archival documents in various ways. Regardless of whether they own the copyright in their holdings, archival repositories own the physical property, and they often wish to control the uses of their holdings for a variety of reasons, ranging from a desire to ensure that the source is correctly and appropriately acknowledged, to a need to generate revenue. Several authors have identified various copyright issues involved in the commercial exploitation of archival holdings or other forms of cultural heritage. Beamsley reviews the copyright aspects of securing a repository's digital assets. Zorich discusses a number of ways to manage institutional intellectual property rights in a variety of forms of cultural heritage. Focusing on the growing trend by some cultural institutions to restrict access to public domain works in the interests of revenue generation, Hirtle says that “many repositories would like to maintain a kind of quasi-copyright-like control over the further use of materials in their holdings,” and comments on the potential conflict between a repository's desire for revenue generation through the “commercial exploitation of archival holdings, [and archivists’] core principles and values.” Loe discusses the issues facing archival institutions in responding to commercial requests to use the repository's holdings.

While archivists wish to increase access to their holdings, the copyrights in archival

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207 See, for example, the following commentary on CCH Canadian v. Law Society of Upper Canada in Lesley Ellen Harris, “Editorial,” Copyright and New Media Law Newsletter 8, no. 1 (2004).
holdings (or simply the ability to make copies for users) may have a monetary value, which repositories themselves may wish to exploit.

2.1.1.2 Users of Archives

In making their holdings available on the Internet, archival repositories join their traditional researchers as users of their holdings. The disciplines that traditionally use archival material in their research, particularly historians and literary scholars, also discuss the copyright issues that arise in conducting archival research. In the United States, a report from the Copyright Office that signalled a policy change caused considerable uncertainty about the use of unpublished materials, particularly quotation of extracts. Responding to this uncertainty, Benedict summarized the problems faced by American historians wishing to use archival material in ways that had formerly been considered fair use.\textsuperscript{212} Hirtle presents a more current view of the problems copyright poses for the use of archival material in the digital environment.\textsuperscript{213} Literary scholars faced similar issues associated with their use of literary papers; LeFevre, Overbeck, and Spoo discuss the issues in the context of American copyright law.\textsuperscript{214} LeFevre's fictional account of the quest for permission to use the papers of writer Athena Rhetoric is particularly insightful, and echoes many of the points made by archivists in their own literature about the problems copyright poses for the use of archival materials. Dryden presents similar issues facing literary scholars from the perspective of the current Canadian context.\textsuperscript{215} This literature of the disciplines that use archival material in their research echoes the themes of the archival literature, i.e., that using archival material in the end products of archival research entails a number of problems in identifying and locating copyright owners, and ensuing uncertainty about the risks of using archival materials without authorization.

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Legal scholars who are also historians or librarians have analyzed the American cases that deal with the application of fair use to unpublished works; five of those cases dealt with works deposited in archival repositories. The matter was eventually clarified by means of an amendment to the American statute that stated: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” However, even after the amendment, judicial decisions dealing with unpublished material continue to be inconsistent. As discussed earlier, the Supreme Court of Canada has said that unpublished works fall within the scope of fair dealing, although in a rather odd statement. In commenting on similarities between the CCH court’s criteria for evaluating the fairness of a dealing, and the U.S. criteria for fair use, Scassa notes, “it is also reasonable to consider the extent that U.S. fair use case law can now be referenced in constructing a fair dealing argument.”

2.1.1.3 Digitization Projects

Relatively few of the holdings of cultural heritage organizations were created in digital form. As new technologies have provided a way to make such holdings available on the Internet, a number of manuals or information papers have been written to offer guidance to those undertaking digitization projects. While such manuals do not constitute scholarly research, archivists are likely to read them as they seek information about how to conduct a digitization project. Some of these manuals focus entirely on copyright

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216 It is necessary to note the distinction between fair dealing (Canadian) and fair use (American). While the Canadian statute permits fair dealing for five named purposes (research, private study, criticism, review, and news reporting (Copyright Act, ss. 29.29.1, 29.2)), the American statute permits fair use for a non-exhaustive list of purposes including teaching, scholarship and research, subject to four statutory factors (17 U.S.C. §107). As discussed earlier, Canada’s statute does not include such factors; it is left to the courts to identify the factors to be used in determining whether a dealing is fair.


Others address copyright as one of many issues to consider. Without exception, such manuals place considerable emphasis on the challenges of copyright compliance, particularly in selecting items for digitization to make them accessible online. As Hughes said, “The management of intellectual property is potentially the greatest challenge to the development of digital collections.” While not a manual, Zorich’s survey of digital cultural heritage initiatives refers to “the online intellectual property miasma.” Moss and Currall’s article resembles a manual in that they reiterate the issues that British archival repositories should take into account prior to embarking on a digitization project. They make no mention of the role of copyright in selection, but they are concerned that repositories give some thought to how they “control” the digital content so that “it is not misused by those who might wish to profit from the digital objects that have been created.” While none of these manuals is directed to Canadian repositories, the Canadian Heritage Information Network (CHIN) website provides a page of links that address various aspects of creating and managing digital content, as well as a page of links related to intellectual property issues, both aimed primarily at the museum community. The only guideline prepared for the Canadian archival community addresses digitization projects mainly from the perspective of preservation.

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223 Hughes, Digitizing Collections, 286.


however, it does include copyright as a factor to consider in selection of holdings for
digitization.228

The professional literature contains a handful of reports of digitization projects in
American and British repositories that mention the role of copyright in digitization for
Internet access. Tschabrun and Shepard respectively describe how they selected materials
which were not likely to require copyright clearances, either because the copyright had
expired, or because the repository owned the copyright in the images.229 Watson and
Graham mention copyright only in relation to selecting “copyright-free monographs,” but
not in relation to “unique and rare documents from manuscript holdings.”230 While Arms
reveals the Library of Congress’s decision to digitize only photos that do not require
extensive resources to clear copyrights, she does so in the course of a discussion about
the complex copyright issues in making copies for users and the need to include rights
information in the information accompanying the images.231 Although not associated
with a particular digitization project, Coyle notes that because online resources frequently
stipulate that users are responsible for ensuring that their uses of digital materials comply
with copyright law, “it is … a matter of good user service for the library to provide all
available information relating to the copyright status of the work.” She proposes a set of
descriptive data elements that should accompany online materials to inform users of each
item’s copyright status.232 Pritcher, and Cave, Deegan, and Heinink describe their
respective repositories’ processes for obtaining permissions from copyright owners to
post twentieth century material (published advertisements, and largely unpublished
material documenting forced migrations) on their websites.233 Brown’s article describing
various digitization projects undertaken by a Scottish university archives states only that

228 Canadian Council of Archives Preservation Committee, Digitization and Archives (Ottawa: Canadian
229 Susan Tschabrun, “Off the Wall and into a Drawer: Managing a Research Collection of Political
Posters,” American Archivist 66, no. 2 (2003), 321; Elizabeth Shepard, “Digitizing a Photographic
230 Andrea Watson with P. Toby Graham, “CSS Alabama Digital Collection: A Special Collections
to Pictorial Images,” Library Trends 48, no. 2 (1999), 495.
2 (2000); Mike Cave, Marilyn Deegan and Louise Heinink, “Copyright Clearance in the Refugee Studies
“The creation of such resources emphasised the importance of establishing the ownership of collections and the ownership of copyright in the records.” On the other hand, Hughes makes no mention of copyright issues in her report on a project to digitize an extensive collection of flyers and other promotional material about Chautauqua performers.

2.1.2 Research Studies

The research studies fall into two categories: cross-repository studies of digitization projects (actual or proposed), and studies of institutional copyright administration issues, either in relation to particular digitization projects or in relation to particular aspects of onsite copyright administration related to this study.

2.1.2.1 Digitization Studies

Astle and Muir surveyed 20 British public libraries and archives to explore the relationship between access and preservation in digitization projects. While their focus was preservation, their study looked at selection criteria for digitization, and found that “no copyright complications” ranked fourth as a factor (below access, preservation and public demand). They found this “very surprising, given the high profile of copyright issues amongst librarians in general and the emphasis placed on the avoidance of these issues in the literature.” They also looked at type of material digitized and revenue derived from digitized materials, and found that photographs accounted for 78% of the digitized material, and that only five of the 20 institutions reported “significant income” (the highest amount being £1000) from digitized material.

Liu and his students examined the websites of 100 digitization projects of American repositories in order to get a snapshot of particular aspects of library digitization practices. Of particular interest is his finding that standards and policies vary across institutions. Liu conducted an online survey of online exhibits from a wide range of cultural agencies around the world in order to examine “issues that impact on the

235 Carolyn Hughes, “Lessons Learned: Digitization of Special Collections at the University of Iowa Libraries,” D-Lib Magazine 6, no. 6 (2000).
236 Astle and Muir, 73.
237 Ibid, 72, 74.
238 Liu, 340-1.
access to cultural heritage resources,” of which copyright was but one. He found that museums, libraries, and archives did not rank “managing intellectual property issues” in the top five factors contributing to the success of online exhibits, although it was a critical factor for government agencies, historical societies and foundations. He also found that “activities involving digitisation, archival and rights management are currently implemented in an ad-hoc manner characterised more by discrete rather than strategically-driven practices.” However, of his 49 respondents, half were museums; only three were archival institutions, and only three agencies were from Canada.

Bültmann and her colleagues used a web-based questionnaire, followed up by interviews, to investigate the research materials available online in the post-secondary education sector in the U.K. with a view to suggesting a national digitization strategy for the British research community. While not focused on copyright, the study identified a number of copyright issues in relation to selection of, and access to, online content. A number of its findings are of particular interest to this study. Improved access was the reason most frequently given for digitizing. For those repositories that had not digitized their holdings, their main reason for not digitizing was a general lack of resources; however, copyright restrictions were also mentioned. Regarding the criteria for selection of material to be digitized, the study found that copyright restrictions were a factor to be considered but it ranked below “good collection management principles.” In terms of access, respondents were asked why their digital resources were not freely available (i.e., on a public website as opposed to onsite only); their responses indicated that “copyright is the most frequent hindrance to public access.” The study also notes that “digitizers were using a number of different services and sources of advice,” and proposed “a single point of access to guidance and advice on different aspects of digitization, including technical, legal and management guidelines and case studies.”

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239 Liew, 373.
240 Ibid., 377.
241 Ibid., 384.
242 Bültmann et al., 107, 109, 110, 115.
243 Ibid., 107.
244 Ibid., 108.
245 Ibid., 109
246 Ibid., 110.
247 Ibid., 121.
Two other studies looked across repositories at audio holdings online. Brewster examined 64 web sites containing oral history in various forms (e.g., lists, transcripts, audio) “to see how they have handled the ethical and legal issues surrounding copyright and use permission.” She found that “while oral history on the Web is becoming more…common, the issues of copyright and permission remain complicated and the solutions diverse.”\footnote{Karen Brewster, \textit{Internet Access to Oral Recordings: Finding the Issues} (Fairbanks, Alaska: University of Alaska Fairbanks, 2000).} More recently, Breaden systematically evaluated 25 online exhibits that included audio media from repositories in the U.S., Canada, and the U.K.\footnote{Ian Craig Breaden, “Sound Practices: On-Line Audio Exhibits and the Cultural Heritage Archive,” \textit{American Archivist} 69, no. 1 (2006): 33-59.} While he was not looking at copyright issues \textit{per se}, he suggests that “a muddled set of copyright laws” may be one reason why archives do not present their audio materials online as well as they might,\footnote{Ibid., 51.} and went on to state that, “Rights issues have a significant impact not only on whether, but how, users are allowed to access digital documents” (italics in the original).\footnote{Ibid., 53.}

Gilliland-Swetland, in a survey of repositories in the Los Angeles area to identify “the criteria that repositories currently, or might potentially use to select materials for digitization and inclusion in digital access systems” found that ownership of the rights in the materials by a party other than the repository would be a factor against digitization of those particular materials, and that repositories would consider materials with “commodity or other entrepreneurial value” less likely to be digitized.\footnote{Anne J. Gilliland-Swetland, “An Exploration of K-12 User Needs for Digital Primary Source Materials,” \textit{American Archivist} 61, no. 1 (1998), 151-2. Her questionnaire survey was one part of a larger study that also observed and interviewed teachers to ascertain their needs \textit{vis-à-vis} digital teaching materials, and mapped these needs against repository selection criteria.}

\section*{2.1.2.2 Copyright Administration Studies}

Another group of studies deals with various administrative aspects of copyright, either in relation to digitization projects, or in relation to in-house administration. One large research project stands out in that the copyright issues are documented in background papers on the project website. Variations\textsuperscript{2}, Indiana University’s Digital Music Library Project, “aims to establish a digital music library testbed system…to be
used as a foundation for digital library research in the areas of instruction, usability, human-computer interaction, and intellectual property rights.” While the findings from other research areas in this project have been reported in journals, the legal analysis of the copyright aspects of the project is documented on the copyright research area of the website in a series of working papers by Crews setting out the application of U.S. copyright law to music in the digital environment.

Troll Covey and George report on several studies conducted at Carnegie Mellon University Libraries to investigate the most efficient processes, costs, time, and success rates for obtaining permissions to digitize published materials. Troll Covey reports on three successive studies using three different samples of published items; the Library refined its approach based on what they had learned from the previous project(s). George reports in greater detail on the first study reported by Troll Covey. The processes and difficulties appear to be no less onerous than obtaining permissions to use unpublished works, for many of the same reasons.

Tanner and Deegan’s study of 51 libraries, museums and archives used a questionnaire, followed up by 15 interviews, to look at pricing models for digital copies that repositories provide to users. They found that some repositories were concerned about asserting their rights in items they make available on the Internet. They also found in some cases that “the gatekeeping concern [i.e., concerns about reduced income from sales of copies of cultural objects] was more founded in moral rights issues than copyright or profit motivations… related to the preservation of an accurate

facsimile/representation of the original and its intent with considerations of trust and curatorial responsibility the main concern behind digital service provision.”

The next studies look at copyright issues outside the context of digitization projects. Working on the assumption that library websites represent the libraries’ attitudes toward copyright matters, Shachaf and Rubenstein examined the websites of 50 American academic libraries to identify the presence, visibility, amount, institutional context, and purpose of information about copyright. The study is methodologically interesting in the ways they operationalized visibility (the number of clicks it takes to get to the copyright information from the home page), and amount (word count, number of pages, and number of links). The study used content analysis to explore the extent to which American libraries educate or inform their patrons about copyright matters. They found that (15%) have a copyright officer or a copyright committee. As seen in other studies, copyright practice is inconsistent across these institutions; as the authors say, “There is no consensus at all as to their [the academic libraries studied] responsibility over copyright and intellectual property issues.”

Another American study looked at the copyright information provided to website users. In his evaluation of 12 websites featuring primary sources on American history, Congleton considered the presence of copyright information for the material, e.g., copyright status or terms of use, to be an essential feature of a quality website. Two of the 12 did not meet this criterion; in one case, the copyright information was not easily accessible; the other provided no copyright information.

In the course of examining the costs of copyright compliance in British academic institutions, Maynard and Davies investigated the number of institutions that employed a designated copyright officer, and the amounts spent on staff training in copyright and

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258 Ibid., 21.
259 Pnina Shachaf, and Ellen Rubenstein, “A Comparative Analysis of Libraries' Approaches to Copyright: Israel, Russia, and the U.S.” Journal of Academic Librarianship 33, no. 1 (2007): 94-105. As the title states, this study also looked at the website content of academic libraries in Israel and Russia; although seven Israeli library websites were examined, the Russian libraries’ websites contained no references to copyright.
260 Ibid., 100.
support materials. They found that few institutions have a designated copyright officer; responsibility for copyright issues is more commonly distributed throughout the institution. Amounts spent on training and support varied, but were generally low in relation to the institutional budget; however, many institutions were not able to provide precise information on the indirect costs of copyright compliance. The present study explores similar issues in relation to Canadian archival repositories.

Oppenheim and Woodward surveyed 47 participants in a British copyright listserv in order to look at the sources of the copyright knowledge of staff in higher education libraries in the U.K., and how they kept their knowledge current. While most survey respondents were “very confident” or “quite confident” in their responses to queries, nearly one-quarter reported that they were “not very confident;” not surprisingly, many indicated that they need more training. The national copyright listserv for librarians was the main means of keeping up-to-date, followed by newsletters and websites.

While its focus is published material, Maskell’s recent dissertation is the only Canadian research study that deals with copyright issues in the development of buying consortia among Canadian academic libraries, as well as in their role as open-access “publishers” of scholarly research. While the Copyright Act provides for collectives that “sell” rights, the Act does not provide for buyer collectives, thus raising the possibility that, by creating the initial consortia encouraged by federal government funding opportunities, academic libraries may have placed themselves in conflict with the Competition Act.

2.1.3 Evaluation of the Literature

It remains to summarize and evaluate the professional literature and research studies reviewed here and the legal literature reviewed in Chapter 1. The present study is located at the intersection of three areas (archival practice, Internet access to archival holdings, and Canadian copyright law), each of which (individually and in various combinations) has an extensive literature; however, the literature review has been tightly

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focused on literature that addresses issues relevant to the study. As well, digitization for Internet access is a relatively new area, and there has not yet been time for robust research to be completed and published. The professional literature has been used very selectively because it does not constitute robust research. Furthermore, whether addressing the institutional administration of copyright, the use of archival material in products of research, or copyright aspects of digitization of archival material for Internet access, the professional literature is repetitive. Despite jurisdictional differences, archivists on three continents mention the same problems in dealing with copyright in their holdings; users raise many of the same issues. Digitization manuals all say that copyright issues must be considered in relation to selection, the resources required to obtain rights, and the extent of control of further uses of digitized content. From a scholarly perspective, this literature is useful as a means of identifying the perceived problems, and as a possible starting point for empirical research to see if these issues are indeed problems, in order to discern possible solutions. The copyright issues identified in the digitization manuals are raised in the accounts of individual projects, but the published accounts are reports rather than scholarly case studies designed to investigate these issues, and there are so few of them that they represent only scattered pieces from a large puzzle. This is not particularly surprising; the need for more research in archival science is well known.\footnote{Ann E. Pederson, “Development of Research Programs,” Archivum 39 (Proceedings of the 12th International Congress on Archives, Montreal, 6-11 Sept. 1992) (1994): 312-59; Carol Couture, “Today’s Students, Tomorrow’s Archivists: Present-Day Focus and Development as Determinants of Archival Science in the Twenty-First Century,” Archivaria 42 (1996), 100-101; Barbara L. Craig, “Serving the Truth: The Importance of Fostering Archives Research in Education Programmes, Including a Modest Proposal for Partnerships with the Workplace,” Archivaria 42 (1996), 107; Mary Ellis, “Establishing a Research Culture for Archive Administration in the UK,” Education for Information 23, no. 1&2 (2005): 91-101.\footnote{Barbara L. Craig, 110.}

Moreover, even where applied research is being done in institutions, it is rarely disseminated; as Craig notes, “Publication of research undertaken by archivists has never been the profession’s long suit.”\footnote{Barbara L. Craig, 110.}

Turning to the research studies, their quality is uneven. Within social science research, a rigorous research study includes clear research questions; a literature review; methods that will elicit the necessary data; clear reporting of findings (appropriately illustrated); acknowledgment of limitations; and meaningful conclusions,
recommendations, or both. The four cross-repository studies of digitization projects (all conducted by academics) provide examples of rigorous studies and weaker ones. The studies by Astle and Muir, and Bütemann et al. (including Muir) meet the criteria for robustness on all counts. In particular, Astle and Muir went to some effort to ensure that their questionnaire went directly to the person likely to have the information sought. In contrast, Liu’s study provides no clear information about how the digitization projects studied were selected or examined, and the trite conclusions provide a weak foundation for any future studies. Liew’s study is stronger in terms of methods, but lacks a literature review, and the analysis is overly refined by type of cultural agency, with some categories consisting of only 3 or 4 participants. The studies by Brewster (a practitioner) and Breaden (his award-winning course assignment) are less rigorous. Nonetheless, their studies are more than mere reports, and the profession would benefit if more such applied research were published.

The studies about aspects of copyright administration also demonstrate a range of quality. All of these were conducted by academics, or librarians or archivists working in academic libraries. The strongest studies in this group are those by Troll Covey, George, and Tanner and Deegan. They are particularly valuable because they address issues of practical concern to many repositories (i.e., efficient and effective permission-seeking processes, and pricing of digital surrogates), and because their methods provide a robust model that could be adopted or adapted to investigate similar questions in relation to other types of institutions or different types of holdings. On the other hand, the studies by Oppenheim and Woodward, and Maynard and Davies both lack clearly stated research questions and a literature review. Maynard and Davies’ study may have been stronger had they supplemented the questionnaire responses with interviews to get a better sense of the indirect costs of copyright compliance. Shachaf and Rubenstein’s study is interesting from a methods perspective, but weak overall because it lacks stated research questions, it is based on certain undocumented assumptions, and sampling decisions limited their comparison to two nations instead of three.

To sum up, the strongest research studies start with clear research questions, and obtain data from a targeted participants likely to have the data required (as opposed to a self-selected group of respondents). Where appropriate, multiple methods are used, e.g., a
survey followed up with interviews. While both the professional and research literature suggest that copyright issues are an important aspect of digitization projects, they provide neither a comprehensive nor consistent picture of the copyright issues or practices because of their narrow focus on specific types of material or a single repository, and their diverse approaches to copyright matters. Efforts of Canadian archival repositories to make their holdings available on the Internet are barely reported, let alone studied. While the efforts of the American community are better reported, little rigorous research has taken place. The British research studies are of most relevance and interest because they tend to look across repositories, and because they are conducting rigorous research as they begin to investigate whether the public funding for digitization in the cultural heritage sector has achieved the government’s goals.

The legal literature discussed in Chapter 1 is the third group pertinent to this study. The legal literature cited is of three types: comments on particular judicial decisions, comprehensive commentary and analysis of a broader issue, and textbooks designed for law students. While they do not always agree, legal scholars’ analyses of the implications of the recent Supreme Court cases within the broader context of copyright theory are valuable supplements to the judicial decisions themselves. The authors cited, for the most part, favour a robust public domain and generous users’ rights, reflective of the dual purpose of copyright. However, in doing so, some seem to be using the term “users’ rights” as a code for a wide range of concepts beyond the Court’s statements, recalling that only the CCH court explicitly mentioned users’ rights (which it equated with statutory exceptions). Scassa notes the “loaded” nature of the term, and provides a more nuanced analysis of uses.

Digitization for Internet access is a relatively new area, and there is no lack of things to be investigated. Regarding the application of copyright law in the digital environment, a number of issues have not yet been clearly resolved. As far as repositories’ efforts are concerned, there has not yet been time for a great deal of robust

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267 For example, Scassa, “Recalibrating;”; Hagen; Sookman.
268 For example, the essays in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005).
269 Howell, Vincent and Manson; Gervais and Judge.
270 Drassinower, “Taking User Rights Seriously.”
271 Scassa, “Interests in the Balance,” 56-64.
research to be completed and published. All the studies generate further questions, and what research has been done should be replicated in other jurisdictions or other types of repositories.

2.2 Conceptual Framework

This dissertation is about access to archival material and the role of copyright law in making archival holdings available online. As noted in Chapter 1, access is a complex matter that includes not just the ability to consult documents but also to use them in various ways. The Internet provides an opportunity to make the archival material preserved in Canadian repositories more widely available to regular users and to new audiences. However, repositories’ copyright practices in making their holdings available online may affect the extent to which wider access to archival material is actually achieved. This study looks at repositories’ copyright practices in making their holdings available online to see whether they are more or less restrictive than copyright law requires.

The study is largely exploratory, in that it aims to gather as many insights as possible about the impact of copyright law on repositories’ practices in making their archival holdings available on the Internet. We have seen that Canadian copyright law is extremely complex and, like all laws, subject to interpretation; furthermore, the application of copyright law in the rapidly changing digital environment is not completely clear. The study is placed within a conceptual framework that posits that overall, the copyright practices of Canadian repositories in making their archival holdings available on the Internet fall along a spectrum ranging from more restrictive than copyright law requires, through a midpoint which reflects practices consistent with the scope of copyright law, to less restrictive (or more generous) than the law appears to allow. The extent to which a repository’s copyright practices are more or less restrictive will affect online access to its holdings. For the purposes of this study, the spectrum has been divided into three categories labelled More Restrictive, Midpoint, and Less Restrictive. The “restrictiveness” spectrum provides a framework within which to examine the copyright practices of archival repositories in making their holdings available on the Internet.
The conceptual framework for this study is limited to repository practices in making their holdings available on the Internet. However, while the repository is the unit of analysis for this study, a repository’s copyright practices are created by its staff members in that it is staff members who learn about copyright, communicate that knowledge to their co-workers, and transform it into institutional policies and procedures. It is assumed that the copyright behaviour of staff members is, in turn, influenced by their professional norms and their knowledge and perceptions of copyright.

This study starts with the premise that, while laws are a means of maintaining social order, they do not operate in isolation, but within a broader societal context. Thus, law is not the sole means of social control. A number of authors have identified informal social norms (“the shared beliefs, common practices, and mutual expectations among members of a group”) as one of the means of social control. Members of a profession, archivists in this case, possess a common culture consisting of “shared norms, values, terminology, ethos and ethics.” Closely related to the concept of a common culture is another attribute of a profession, i.e., cohesion, usually evidenced by a professional organization in which its practitioners participate to establish and promote the profession’s standards, including education and a code of ethics. While there are no studies of the norms of Canadian archivists, evidence of what they should aspire to in their professional lives is reflected in pronouncements of their professional association, the Association of Canadian Archivists (ACA), particularly the ACA Code of Ethics.

Within the norms of the archival profession, what are the norms pertaining to access to archival holdings? The first principle of the ACA Code of Ethics says, “Archivists appraise, select, acquire, preserve, and make available for use archival

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275 Cox, 232; Mykland, 104, 107.
records…for the benefit of present users and future generations.”  However, as noted earlier, access to archival holdings is not without limits. A qualified view of access is expressed in Principle 3 of the ACA Code of Ethics, “Archivists encourage and promote the greatest possible [emphasis added] use of the records in their care, giving due attention to personal privacy and confidentiality, and the preservation of records.” This is amplified in the Application of Principles relating to Appraisal, Selection and Acquisition which notes, “Archivists discourage unreasonable restrictions on access or use, but may accept as a condition of acquisition clearly stated restrictions of limited duration and should suggest such restrictions to protect personal privacy.” Although this provision does not deal directly with copyright, it suggests a practice of restricting access to archival holdings. The archivist’s interest in making the maximum amount of information available to users may be constrained by restrictions on access to, or the use of, archival material in order to protect the physical records or the privacy rights of the donors, creators, or subjects of the records.

Of interest to this study are the copyright issues involved in providing access to archival holdings online, both in terms of examining the documents, and further uses of them. While the Code of Ethics supports restrictions for preservation purposes or to protect privacy rights, it refers to copyright only in terms of the archivist’s obligation to inform users about copyright matters, i.e., “Archivists should endeavour to inform users of copyright restrictions on records and inform users that it is their own responsibility to obtain copyright clearance from the copyright owners.” While the statement suggests that copyright may restrict use, it does not suggest that archivists should use copyright to restrict use in the same way that access and use may be restricted for privacy or preservation reasons. The professional obligation to inform users of copyright restrictions and their copyright responsibilities does not extend to enforcing others’ copyright interests.

However, the ability to make their holdings available online provides repositories with a new means of providing access that allows remote users to consult digital copies

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277 Ibid.
278 Ibid.
279 Ibid., A3.
280 Ibid., C4.
of documents. The repository decides what to make available online, and in doing so should comply with legal obligations, of which copyright law is obviously one. As the literature review reveals, the need to ensure that any necessary copyright clearances are obtained before making holdings available online is strongly and universally emphasized in digitization manuals; as Anderson says, copyright is “the 800 pound (or kilo) gorilla” for all information professions involved in creating digital libraries.\footnote{Anderson, Ethical Decision Making, 37.} The issue is whether the copyright practices of Canadian repositories in making their holdings available online are more or less restrictive than envisaged by copyright law.

As stated, the conceptual framework posits that repositories’ copyright practices pertaining to making their archival holdings available on the Internet fall along a “restrictiveness” spectrum that has been divided into three categories: More Restrictive, Midpoint, and Less Restrictive. What might those three categories look like? At this stage, restrictiveness can be tentatively described in relation to two aspects of digitization for Internet access: what is made available online and attempts to control further uses. Repositories in the More Restrictive category would make less available than copyright law allows, e.g., they might select only documents in which the copyright had expired, even though it would be possible to include material in which the repository owned the copyright, or for which permission had been obtained from the rights holder(s).

Repositories at the Midpoint would make available online documents to the extent that copyright law allows, i.e., those in which copyright has expired or those that do not merit copyright protection, those in which the repository owns the copyright, and those for which the repository has obtained permission from the rights holder(s). The repositories in the Less Restrictive category would make available more than the law allows, e.g., even though they had not been able (or had not attempted) to obtain the necessary permissions, or perhaps unintentionally because of a mistaken understanding of copyright law.

Regarding attempts to control further uses, repositories are entitled to enforce their copyrights in materials in which they own the copyrights.\footnote{Given that making their holdings accessible to users is a fundamental role of archival repositories, one might question how enforcing their copyrights relates to their mandate to make their holdings available, but they have the right to do so from a copyright perspective.} However, they have no
legal or professional obligation to enforce other people's copyrights when documents that
the repository has made available online are used in various ways by users of the
repository website. Nonetheless, as noted earlier, the professional literature indicates that
repositories are accustomed to placing conditions on onsite patrons’ uses of copies of
documents from the repository’s holdings for a variety of reasons, not all of which are
related to copyright. Furthermore, the digital environment provides technical ways of
limiting further uses, e.g., image resolution, watermarking, or disabling the right click.
When making their holdings available online, repositories may attempt to limit or control
further uses by patrons using such technical measures as well as non-technical measures
such as terms of use statements that place conditions on patrons’ further uses of copies of
archival holdings. Even though the use of such measures may not be a copyright matter
(unless the repository owns the copyright), if the repository is placing restrictions or
conditions on how its holdings may be used, this may limit access in the broadest sense
of the term. The restrictive repository would make its online holdings less accessible than
copyright requires, e.g., by using low resolution images or watermarks, or placing
conditions on further uses. The repository at the midpoint would make high resolution
images available online with no limitations or conditions on further uses. However, from
the perspective of copyright, no repository would be less restrictive with regard to further
uses, because the scope of copyright law does not extend to repositories’ control of their
patrons’ uses of their holdings.

As noted, the conceptual framework for this study is limited to repository
practices in making their holdings available on the Internet; however, the study assumes
that repository practices are in large part the product of what repository staff know and
think about copyright. Thus, although the study was not designed to link individual
archivists’ perceptions and knowledge of copyright with their repositories’ practice, the
study also explores archivists’ overall perceptions and knowledge of copyright, and the
ways in which their perceptions and knowledge are transformed into the institutional
practice of the repositories in which they work.

Canadian copyright law is extremely complex, and certain characteristics of
archival material add to the challenges of administering copyright in a repository. What
archivists know about copyright, i.e., the quality of their knowledge in terms of both
accuracy and currency, and how they perceive copyright, could also affect access. By extension, it is also logical to assume that the quality of their copyright knowledge will in turn be influenced by the sources of their knowledge. Kidder has identified three categories of filtering agents that modify the impact of law, i.e., law enforcers, law interpreters (lawyers and judges), and what he calls “target populations, the people who are supposed to be regulated by particular laws.”283 He notes “a growing list of institutions, processes, and agents which filter any legal command, bending, modifying, or deflecting its effects according to the tides of conflict and cooperation among groups interested in, or having to react to, those laws.”284 Ellickson's study of the behaviour of ranchers and farmers in California found that they used a system of social norms rather than the law to maintain order in relation to livestock and fencing, and in fact were quite ignorant of, or “badly misperceived,” certain aspects of the laws that regulated the situations they faced.285 Given the complexity of copyright law, it would not be surprising if Canadian archivists lacked a detailed understanding of copyright. If archivists misunderstand copyright in some way, that could affect online access to their repositories’ holdings. On the one hand, the repository could needlessly withhold online access to a large quantity of material if, for example, they were unaware that copyright in the posthumous works of authors who died before 1949 had expired at the end of 2003; on the other, the repository could expand access but infringe copyright by selecting for online access photos that were at least 50 years old, unaware that the term provision for photos had changed as a result of the 1997 amendments.

Furthermore, statutes are written at a high level and their application to a particular set of circumstances may require interpretation. Just as the quality of archivists’ copyright knowledge may affect access to their holdings, so too could their interpretations of copyright law. Not only is Canadian copyright law complex, but its application copyright in the rapidly changing digital environment is not completely clear. Within their repositories’ copyright practices related to making their holdings available on the Internet, archivists are interpreting copyright law in this complex, uncertain, and

284 Ibid., 142.
285 Ellickson, 141.
evolving environment in ways that may affect access, depending on how restrictively they apply the law.

While the conceptual framework for the study is limited to the degree of restrictiveness of repository copyright practices, the research questions created to investigate the research problem address both the institutional and the human dimension. From the repository perspective, the study looks at the extent to which copyright influences repositories’ decisions about what documents to include on their websites (Research Question 1), and their copyright practices in making their holdings available on the Internet (Research Question 3). Research Question (RQ) 3 is divided into four sub-questions about specific aspects of repository practices, i.e., the selection of documents for mounting on a website (RQ3a), the resources devoted to obtaining authorization from copyright owners and authors (RQ3b), repositories’ attempts to control further uses of Internet-accessible documents (RQ3c), and the provision of copyright information for users (RQ3d). From the perspective of staff archivists, the study looks at the copyright knowledge and attitudes of staff archivists (Research Question 2), specifically their perceptions of copyright (RQ2a), what they know about copyright (RQ2c), and where they get their knowledge (RQ2b). Research Question 4 explores the connection between repository practices and the knowledge and attitudes of repository staff archivists by looking at the processes through which the knowledge of individuals is transformed into repository practices.

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286 RQ1: What factors influence the decisions of Canadian archival repositories in making their archival holdings available on the Internet?
RQ2: How do Canadian archivists understand their position vis-à-vis copyright law in making their holdings available on the Internet?
   2a. How do Canadian archivists perceive the role of copyright in making their holdings available on the Internet?
   2b. Where do Canadian archivists get their knowledge of copyright?
   2c. What do Canadian archivists know about copyright?
RQ3: What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?
   3a. In what ways do copyright issues affect the selection of archival material for Internet access?
   3b. What resources do archival repositories devote to seeking authorization from copyright owners and authors in order to make documents available on the Internet, and why?
   3c. How do archival repositories attempt to control further uses of their Internet-accessible holdings, and why?
   3d. What copyright information is provided to users, and why?
RQ4: What are the processes by which the copyright knowledge and attitudes of individuals are transformed into institutional practices?
Copyright law is complex and does not always provide clear direction about what to do in a particular situation. Thus, in dealing with the copyright issues that arise in making archival holdings available online, repository staff make decisions about how they apply and interpret copyright law. In making these decisions, archivists can take a more or less restrictive approach, which will have a corresponding effect on online access to the repository’s holdings. Archivists’ decisions in turn are reflected in repository practices. The “restrictiveness” spectrum provides a framework within which to examine the copyright practices of archival repositories in making their holdings available on the Internet.
Chapter 3 Methods

3.0 Introduction

The study employed four different sources of evidence, i.e., the website content of repositories located in Canada whose websites feature archival material from the repository’s holdings; copyright policy and procedure documents of those repositories; responses to a questionnaire sent to the staff of those repositories; and interviews with repository staff. This chapter describes the methods used to collect and analyze the data from these four sources.

3.1 Data Collection

The unit of analysis for this study is the archival repository. Therefore, the first step was to identify the repositories that would serve as the research population for this study. The Archives Canada portal ([www.archivescanada.ca](http://www.archivescanada.ca)) was used because of its primary focus on archival material. The Archives Canada portal is a joint initiative of the Canadian Council of Archives (CCA), the provincial-territorial archival networks, and Library and Archives Canada. Launched in 2001, the portal provides online access to holdings in Canadian archival institutions. In addition to providing access to searchable databases of descriptions of these holdings, the portal provides links to repository websites that include not just descriptions of their holdings, but digital copies of archival documents presented in virtual exhibits and databases.\(^\text{287}\)

The content of the Archives Canada portal is accessible in various ways, among them a “Links” section\(^\text{288}\) and a “Virtual Exhibits” section.\(^\text{289}\) The Links section allowed me to examine repositories by jurisdiction (“province/territory”) or by “type” (e.g., municipal archives, institutional websites, provided that the site is freely accessible and directly related to archives.

\(^{287}\) An alternative to using the Archives Canada portal would have been to examine the websites of the repositories that are institutional members of their provincial or territorial archives council. This pool of repositories also would have had a strong archival focus; however, this alternative was rejected because some of the online provincial institutional membership directories are known to be considerably out of date, whereas the Archives Canada portal has a fulltime coordinator and is regularly updated.

\(^{288}\) The Links section includes institutional websites, provided that the site is freely accessible and directly related to archives.

\(^{289}\) The Virtual Exhibits database is a compilation of links and information on virtual exhibits produced by Canadian institutions. The virtual exhibit must have been created using archival material relevant to Canada. The exhibits do not have to be funded by the CCA to be included in this database. The Archives Canada Coordinator is the gatekeeper on this database. While some creators submit their new exhibits as they become available on the Internet, the Coordinator spends some time searching the net and other portals such as Canada's Digital Collections or specific archival websites (e.g., universities) for exhibits that use archival material and adds them to the Virtual Exhibits database.
Because the “province/territory” heading included more than repositories (i.e., the websites of provincial associations and databases of descriptions), the “type” heading was a more efficient means of access to repository websites. Examination of the Virtual Exhibits section revealed a number of repositories with virtual exhibits that were not included in “type.” The link to each virtual exhibit also includes a brief description of the exhibit itself which provides useful information about the types of documents used, their date coverage, and information about copyright ownership and terms and conditions pertaining to the use of these digital resources. Thus, the repositories to be included in the study were identified by systematically examining the repository websites listed under each of the six “type” categories and the Virtual Exhibits section on the Archives Canada portal.

Determining whether to include a particular repository in the research population was not always a straightforward matter, and a number of decisions had to be made in the course of examining the websites. The Archives Canada portal includes repositories whose primary mandate is to preserve archival materials as well as other cultural heritage institutions such as libraries, museums, and historic sites that preserve archival materials. Although they may not fit the classic definition of archives, the repositories listed on the Archives Canada portal are responsible, to a greater or lesser degree, for archival material, and thus potentially fall within the scope of this study, subject to the following criteria.290

In order to be selected for inclusion in the study, a repository’s website had to contain archival material from the repository’s holdings. Excluded were repositories whose website content consisted entirely of information of two types:

a) basic information about the repository’s location, mandate, services, and contact information; and

b) lists, finding aids, and indexes that describe a repository’s holdings.

Furthermore, the amount of archival material on the website had to be more than a token; those with websites containing five or fewer documents were also excluded. Also excluded from the

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290 Similar issues would have arisen had the research population been identified by examining the websites of the repositories that are institutional members of their provincial or territorial archives council, since all kinds of cultural heritage institutions whose holdings include archival material are provincial council members because council membership is the means of access to grant funding.
study were four repositories to whom I had provided consulting services relating to copyright policies.\footnote{These repositories were used to pre-test the questionnaire.}

Other questions arose because each link in the portal did not necessarily represent a different repository. Where there were several links for the same institution (e.g., a link to a university archives, and a separate link to a website for the university archives’ most prestigious holding), the website for the holding was considered to be part of the repository’s website. In other cases, the portal included separate links to a university’s archives and to the special collections department of its library, or to a separate collection of a particular form of material (e.g., architectural records) housed in a different department. Not wanting to assume that copyright practices would be consistent throughout a university or other large organization, criteria were required to decide whether to consider each link a separate repository. The first criterion was that the names of the entities had to be different, e.g., B University Archives, and B University Special Collections. The second criterion was the contact information provided on the website. Where the contact person was the same for all links, it was considered to be a single institution. Where different people were responsible for different collections, each was considered to be a separate repository.

A list of all the repositories whose websites were examined was maintained; where appropriate, the list was annotated with the reasons why a particular repository was excluded. Between May and 8 November 2005, 290 websites were examined.\footnote{The total does not include links to entities that are not repositories (e.g., links to other portals or to databases of subject-related records). Also excluded from the count were duplicated links, that is, repositories that appear in two places, either because of an error or because a repository is listed in two type categories (for example, where a repository serves as the archives for both a university and a religious denomination), or where a repository appears in both the virtual exhibit listing and the type listing.} Based on the foregoing criteria, 154 repositories (listed in Appendix B) were identified as being within the scope of the study.\footnote{Three websites that could not be accessed because the hyperlinks were broken were excluded. Where possible, the webmaster was informed and the problem addressed; however, where no response was received, or where there was no contact information given, the website was excluded.}

### 3.1.1 Website Content

The process of identifying relevant repositories was combined with the first step of the data gathering. Upon identifying a repository with a website that met the criteria (i.e., six or more archival documents), the site was examined in more detail to identify the parts that were relevant
to this study. Because the size, organization, structure, and complexity of the 154 websites vary greatly, examining them was extremely challenging. Most websites contained a number of different parts, not all of which were organized or labelled in the same way on the home page, so it was necessary to follow many links, some of which turned out to be irrelevant. However, as the examination of websites proceeded, the easier it was to discern the possible places one might find the aspects important to this study.

Some parts of a website were not included because they were not relevant to the study’s purpose or the research questions. For example, databases and exhibits that consisted entirely of published materials or artifacts were excluded because their content is not within the scope of archival material. Furthermore, not even all the archival material on a repository’s website was selected for inclusion in the study. For example, some repository websites include virtual exhibits that were done as cooperative ventures, often by the institutional members of a provincial or territorial archives council. Such exhibits contain documents from many repositories, one of which simply acts as a host for the exhibit. While such exhibits likely include documents from the host repository, they were excluded because they do not necessarily reflect a single repository’s practices.

Similarly, in some provinces, repositories contribute digitized documents to a provincial server. Although these centralized databases obviously contain much archival material, they were not included in the study because they are not repositories. Content on such a server was considered in the study only if a repository’s own website contained a direct link to its holdings included in the central database.

The examination was an iterative process, requiring (for all but the simplest websites) several passes to be sure that all the relevant information on each website had been identified. The first pass explored each website’s organizational structure and content to gain an understanding of its scope, and how best to approach it. This was usually done by examining links on the home page, the sitemap, or both.

The second pass involved looking for the aspects that were likely to appear only once on a website (e.g., how to order copies of archival documents). The third pass identified the particular ways in which the material was presented (the “digital resource types” discussed in

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294 See, for example, Alberta InSight (photographs) and Alberta InWord (textual records) at www.archivesalberta.org.
more detail below). The examination process then zeroed in on each instance of each digital resource type. Websites with relatively little content required only one or two passes; websites with a great deal of content required up to a half dozen.

In order to address the research questions, a number of particular aspects of these websites were of interest.\textsuperscript{295} A website data collection sheet (Appendix C) was created to serve both as a checklist of aspects to look for while examining the websites, and as a template for a standardized summary of the relevant aspects of the website content. The data collection sheet was revised during the early stages of the examination of websites, as the disparate nature of the websites suggested new things to look for. However, because of the wide variation in the size, organization, structure, and complexity of the 154 websites, the data collection sheet had to remain open-ended, in that it could not account in advance for all the possible variations that became evident in the course of examining the websites. Thus, in addition to the aspects included on the data collection sheet that were likely to appear on most websites, any additional or unusual copyright aspects of every website had to be noted, as well as any indications of copyright practices that appear to be somewhat inconsistent with Canadian copyright law. Furthermore, the absence of certain types of information was considered to be important, and was also noted.

As each website was examined, the relevant pages from the site were printed, numbered, and annotated as they were selected to note the hyperlinks, the presence (or absence) of common aspects, as well as any unique aspects of particular websites. Each repository was given a unique alphanumeric identifier,\textsuperscript{296} and the pages for each website numbered sequentially. The annotated pages from each website were then filed in binders in identifier order and numerical order within that.

As well, a summary sheet was completed for each website, summarizing its salient aspects with references to the numbered pages in the binders, where appropriate. The summary was prepared using the annotated copies of pages from the website, but inevitably, part of the summarizing process required going back to the website to check or verify things that were not clear. Not surprisingly, given the dynamic nature of websites, the verification process sometimes


\textsuperscript{296} The alphanumeric identifiers for repository websites are used in reporting the findings.
revealed that, although the website structure had not changed, new material (usually another exhibit) had been added since the website was first examined. Such additions were not included. In three cases, the website had been redesigned and it was no longer possible to locate the area to be checked.

While the binders and summary sheets represent a great deal of data, they fall far short of documenting every archival document on every website. These websites contain at least a million archival documents, each of which, from a copyright perspective, constitutes a separate work or item of ‘other subject matter.’ With that volume of documents, examining every archival document on every website was not realistic. Instead, choices had to be made about the nature and quantity of documents to be examined on each website. Such choices were based on selection decisions driven by the research questions.

Certain aspects of these websites, such as how to order copies of archival documents, terms and conditions of use of such copies, and information intended to educate visitors to the website about copyright, generally appear only once on a website (if they did not appear, that was also noted). For such aspects, no selection was necessary—all were examined and either the relevant pages were printed and annotated, or the significant details were described on a data collection sheet.

The selection done for this study is what Miles and Huberman call “within-case sampling.” That is, the “cases” are the repository websites, but each website has a number of aspects or characteristics that must be “sampled” or selected in a systematic way. Selection proved to be a complex and iterative process, bearing out Miles and Huberman’s statement that, “within-case sampling is almost always nested.” Selection within each repository website was done on the basis of “digital resource type,” and within that, on the basis of “document category,” and within that, on the basis of the “display mode” of the documents. Each of these

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297 Few websites state how many documents are included on the site; however, a spot check of just seven repository websites that do indicate the numbers of documents on particular parts of their sites put the count at 603,100 documents at the time the data were collected. Just the attestation papers of those who served in World War I on Library and Archives Canada website consisted of approximately 400,000 documents. The virtual exhibit mounted by Nova Scotia Archives and Records Management, Nova Scotia and the Sea, contains 6700 documents, and there are 3600 documents from the Winslow Papers project on the University of New Brunswick Archives website. As far as photos are concerned; the Glenbow Archives site had 82,000; the Archives of Ontario 10,000; British Columbia Archives 80,000, and the City of Vancouver 20,800.


299 Ibid.
aspects (“digital resource types,” “document categories,” and “display mode”) is explained and defined before discussing the details of the selection process within the “digital resource types.”

Selection first came into play with regard to “digital resource types,” i.e., groupings of archival documents presented together on the repository website because of some relationship among them. The presentation of the digital resources varied, depending on the nature of the documents and the relationships among them. As a way of making sense of this vast amount of material, it was necessary to identify and define the main digital resource types. Five different digital resource types were identified; each is defined below.

**Virtual Exhibit:** An exhibit consisting of documents selected from various fonds to illustrate a topic, theme, event, or the like. An exhibit includes explanatory text that may explain the themes, the provenance of the documents, and the relationships between them. A Virtual Exhibit can range in size from the nine photos found in narrowly focused Virtual Exhibits like McGill’s *Student Unrest, 1968-1970* to the 6700 documents included in Nova Scotia Archives and Records Management’s *Nova Scotia and the Sea.*

**Single Fonds Exhibit:** An exhibit consisting entirely of documents selected from a single fonds or series. Also included in this category are documents from collections of documents of diverse provenance accumulated by a donor.

**Collection:** A collection of documents from different fonds put together by the archives. Such collections are frequently of the same documentary form (e.g., all photos or all maps, or related forms such as graphic material consisting of photos and documentary

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300 A fonds is “the whole of the documents, regardless of form or medium, organically created and/or accumulated and used by a particular person, family, or corporate body in the course of that creator's activities and functions.” (Pearce-Moses, 173). The Canadian standard for describing archives (*Rules for Archival Description*) designates the fonds as the primary unit for arrangement and description of archival material.

301 See, for example, Mount Allison University Archives’ *Marshland,* [www.mta.ca/marshland.index.htm](http://www.mta.ca/marshland.index.htm) (accessed 19 September 2005) or the City of Winnipeg’s *Pathways to Winnipeg History: 1874-1924,* [www.winnipeg.ca/Clerks/docs/pathways/](http://www.winnipeg.ca/Clerks/docs/pathways/) (accessed 19 August 2005).


305 See, for example, the University of New Brunswick Archives’ Indian Affairs Documents, [www.lib.unb.ca/archives/ia/Indian_Affairs.html](http://www.lib.unb.ca/archives/ia/Indian_Affairs.html) (accessed 7 July 2005), and the Alberta Folklore and Local History Collection, [http://folklore.library.ualberta.ca/](http://folklore.library.ualberta.ca/) (accessed 1 July 2005).
but may also include a range of documentary formats. Collections also are usually searchable by various access points, e.g., subject, place, photographer, and others depending on how the images are indexed.

**Historical Vignette:** A small number of documents (up to nine, but in most cases one or two) that illustrates a very specific item or topic, with little information beyond a caption.

**Sample:** A small number of documents (usually one of each documentary form), unrelated to each other by topic or provenance, selected to illustrate the range of the repository’s holdings. Usually this is by documentary form (e.g., a map, a photo, a diary, or other textual document). Such items serve as ‘teasers’ to encourage users to visit the archives, or to liven up the website beyond just contact information. Included in this category are automatically changing photos on a website home page, e.g., University of Saskatchewan Archives.

The 154 repository websites contained a total of 1016 digital resources of interest to this study. The number of digital resources in each category is reported in Figure 1.

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Selection also came into play with regard to what are called “document categories.” As discussed in Chapter 1, the Copyright Act protects four categories of ‘works’ and three categories of ‘other subject matter’. Each digital resource was examined to ascertain which of the statutory categories were included in it. The presence of photographs, transcripts, or translations of textual documents, and transcripts of oral history interviews was also noted because they raise particular copyright issues. Photographs were divided into two chronological groups because the copyright has expired in photos taken before 1949, an important detail if a repository limits its online holdings to works that are in the public domain.

The third aspect where selection was required is in “display mode,” that is, the way that a document is presented on the website. Display mode encompasses three aspects: image size (e.g., whether it was a thumbnail, and whether it could be enlarged), any technical controls on copying or further uses (such as watermarks\(^{311}\) or disabling the right click function), and any description...
of the item (particularly data elements such as creator, date, copyright status, and restrictions on copying or use).

In fact, the selection was a two-step process consisting first of examining the website components, followed by recording the results of the examination. Once all the digital resource types on a website had been identified, each instance of each type was examined, i.e., by reading the description or introduction on the digital resource home page, examining its subdivisions on the site map, or by checking selected links. The examination process involved looking specifically for the characteristics of the archival documents used (particularly document categories and the date range of documents used), and display mode (described above), but also included looking out for any other noteworthy features, such as the presence of (or a clear link to) copyright information in relation to each document or to the digital resource as a whole. The examination involved looking at 3 to 5 examples of each document category and its display mode (within each instance of each digital resource type) to be sure that any differences in display mode were identified. The second step in the selection process documented the results of the scrutiny. If, for example, an exhibit consisted entirely of photographs taken by the same photographer and all were presented in the same way, only one example of its display mode was printed. Similarly, if a website contained five exhibits, each consisting of photographs from the fonds of a different photographer, and all were presented the same way, only one example was printed, and the consistency across all five exhibits noted. As noted above, further selection strategies were required within the “digital resource types.” Each digital resource type typically yielded somewhat different sorts of data, and consequently, had to be examined separately. The selection strategies, as applied to each digital resource type, are described in detail below.

The Virtual Exhibit digital resource type was the most complex. A Virtual Exhibit can be very large, containing several thousand documents in a range of document categories, although not all are that extensive. Furthermore, Virtual Exhibits accounted for more than half (535 out of 1016, or 53%) of the digital resources relevant to this study. Before making any selection decisions, it was important first to spend some time looking at introductory information (which could include such things as the date range of documents, document categories, provenance of the documents, copyright statements, credits, any external funding, and any technical details.

312 External funding is of interest to the extent that funding agencies imposed requirements relating to copyright matters.
about the exhibit project), and following link sequences to determine the range of document categories, and display mode(s). With a good understanding of the exhibit, it was much easier to see what selection decisions had to be made with regard to documents. One example of each document type and each display mode (where it differed for each document type), was selected for printing and annotation.

A similar process was followed when dealing with the 242 Single Fonds Exhibits, 103 of which consist entirely of photos. Exhibits consisting of documents selected from a single fonds (usually that of an individual) may contain a variety of documents from different categories created by that individual. In such cases, it was also important to note the life dates of the individual creating the fonds (if given), and whether the content consisted entirely of documents created by the fonds’ creator, or whether other documents were used. If the latter, the presentation had to be scrutinized more closely, and a greater number of examples examined.

As noted, not every document could be looked at; similarly, not every digital resource on every website was examined in detail. Selection decisions also had to be made in cases where a repository website contained several Virtual Exhibits or Single Fonds Exhibits. Depending on the topic and when the exhibit was created, such aspects as the display of individual documents (including limits on further uses, accompanying descriptions, enlargeability, etc.), copyright statements, and terms of use may be different for each exhibit (or some of the exhibits). For example, the University of Saskatchewan Archives website contains fifteen digital resources (ten Single Fonds Exhibits and five Virtual Exhibits) of interest to this study. All fifteen were examined, and it was evident that the display mode was generally consistent across the exhibits. Where this was the case, it was not considered necessary to take an example from each exhibit; it was sufficient to take one example of each document category from a single exhibit whose display mode matched the rest. Where there were important differences, e.g., one of the Single Fonds Exhibits was presented in an entirely different display mode, an example of the different display mode was added. The Archives of Ontario website, which contains 9 Single Fonds Exhibits and 31 Virtual Exhibits that were included in this study, provides another illustration of the selection process. After a close examination of the first half dozen, it appeared that the display mode was entirely consistent for both exhibit types. The remaining exhibits were not

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313 A fonds usually consists not only of documents authored by an individual, but also includes documents received and accumulated by the fonds’ creator which can be an individual or an organization.
examined in the same detail; nor was an example taken from every exhibit; instead they were scanned to ensure that at least one example of all document categories was included, and to be certain that the display mode was entirely consistent (which it was). The same was the case with the 252 Virtual Exhibits on the CBC website. The extent to which this was done depended on the number of exhibits on any given repository website, and the level of consistency among them revealed by the initial scan.

The Historical Vignette digital resource type (of which there were 122 instances) was generally presented consistently within a website. By their nature, Historical Vignettes are limited in extent, with the entire contents often visible on the same page (i.e., without having to follow a link). Descriptive information is often limited to a caption (rather than a more structured description); the image cannot be enlarged and rarely contains controls on copying or further uses. Once again, all the Historical Vignettes on any given website were examined to determine how many document categories were included, and whether the display mode changed according to vignette. One example representing each document category and each different display mode was printed and annotated where necessary.

The Collection digital resource type was the most straightforward to deal with. Of the 67 Collections on the websites, 47 of them contained only documents in the same category, for example, photographs, maps, or transcripts of oral history interviews. Of those 47, 33 consisted solely of photographs. Of the 67, another 5 consisted of a mix of graphic materials, mostly photographs, but also including documentary art, cartoons, and the like. Only 15 Collections consisted of various combinations of textual, visual, or audiovisual documents. The display mode for the Collection digital resource type is usually standardized so that the collection database is searchable and documents can efficiently be added to the database without having to revisit the technical or metadata standards. Where the documents in a Collection were all the same category, it was deemed sufficient to examine two or three documents to determine the nature of the display mode, and to ensure that it was consistent; if that was the case, one was printed out and annotated as required. Where the documents in a Collection were from different categories, it was deemed sufficient to examine two or three documents from each category to determine the nature of the display mode, and to ensure that it was consistent. Once again, if that was the case, one was printed and annotated as required.
The Sample digital resource type was also relatively straightforward to deal with. For one thing, Samples were often identified as such on the websites; as well, by their very nature, they are few in number; only 50 instances of the Sample digital resource type were found on these websites. All the Samples on any given website were examined to determine how many document categories were included. One example from each document category (sometimes the only instance for a category)\textsuperscript{314} was printed and annotated as required, particularly if the display mode differed according to document category.

3.1.2 Questionnaire

The aim of the questionnaire (Appendix D) was to explore the copyright policies, practices, and decisions related to the website content consisting of archival material from repositories’ holdings. The questionnaire was pre-tested with archivists in four repositories that were excluded from the study because I had provided consulting services relating to their copyright policies. Minor changes were made in response to their suggestions for clarification. The questionnaire consisted of 46 questions (a mix of closed and open-ended questions) organized into the following sections:

- Factors in digitizing for Internet access
- Your repository’s website content
- Selecting documents for Internet access
- Further uses of documents from your website
- Your repository’s copyright policies
- Learning about copyright
- Your views about copyright
- About you (demographic information about questionnaire respondents and their repositories)

Although related questions were grouped together, to some degree the questions crossed categories and overlapped. Question 48 of the questionnaire asked those who had indicated in their responses to Question 25 that their repository has written copyright policy or procedure documents, to include copies of their copyright policies along with their completed questionnaires. Those unwilling or unable to send copies of policy documents themselves were asked to list the topics covered in such a document, or send a copy of the table of contents. The questionnaire was also used to recruit interviewees. Question 49 of the questionnaire asked those

\textsuperscript{314} See, for example, The Rooms, \url{www.therooms.ca/archives/collections.asp} (accessed 4 November 2005).
willing to be interviewed in English to indicate this by providing their name and contact information and recording their questionnaire number as part of their response. The questionnaire made it clear that by doing so, they were agreeing to the linking of their questionnaire response (and any accompanying policy documents) with their repository and its website.

The questionnaire and all related mailing materials were translated into French by a francophone archivist, and the translation checked by a former archivist who now runs a translation business. Twenty francophone institutions (identified as such because their websites were entirely in French or, if they were bilingual, the contact person was a francophone) received French versions of the questionnaire and related mailing materials. Advance letters (Appendix E) addressed to the head of each repository were mailed on 28 October 2005, explaining the study and its importance, and telling them that they would soon receive a questionnaire to be completed by the person responsible for the repository’s initiatives to make its holdings available on the Internet. Ten days after the advance letter was mailed, the cover letter (Appendix F), the questionnaire, a draw ticket (Appendix G), and a stamped pre-addressed envelope were sent to each repository. A week after the questionnaire was sent out, a follow-up letter (Appendix H) was sent to each repository, thanking those who had responded and asking those who had not yet responded to do so. Finally, on 9 December, a second follow-up letter (Appendix I) and another copy of the cover letter, the questionnaire, and a stamped pre-addressed envelope went out to those repositories that had not yet responded.

To enable follow-up procedures, each questionnaire was numbered, and the corresponding number recorded next to the appropriate name on the mailing list. The list with questionnaire numbers was destroyed once the follow-up mailing procedures were completed so the repositories that submitted completed questionnaires could not be identified (except as noted below). Completed questionnaires (all of them useable) were received from 106 repositories, a response rate of 69%. Of those who did not complete a questionnaire, 12 repositories returned blank questionnaires or communicated that they would not be able to complete the questionnaire due to lack of resources, because they felt it was not relevant, or in one case because the archivist had just died; 36 other repositories who received the questionnaire did not respond in any way.

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315 To encourage a timely return of the completed questionnaire, those who returned the completed questionnaire postmarked within three weeks of the mailing date were offered a chance to enter a draw for $250, by completing the draw ticket and returning it with the questionnaire.
3.1.3 Interviews

The aim of the interviews was to explore archivists' understanding of copyright, as well as the reasons underlying institutional copyright practices related to making archival material available on the Internet. Interviewees were chosen from those who indicated their willingness to participate in an interview by responding to Question 49 of the questionnaire. The plan had been to interview up to 20 people; however, 44 individuals indicated their willingness to be interviewed. Thus, criteria had to be developed to reduce this to a manageable number. After one anomalous response was screened out,\(^{316}\) the application of the following criteria (based on the remaining 43 volunteers’ responses to Questions 43, 44, and 45 in the questionnaire) produced 28 potential interviewees.

- six or more years working in their present position (Question 43). Working at least six years in their present position makes it likely that they are familiar with their institution’s policies and practices.\(^{317}\)

- six or more years working with archival material (Question 44). Having at least six years working with archival material makes it likely that they are familiar with professional archival norms.

- post-secondary education (Question 45). Generally speaking, in order to be employed as a professional archivist, it is necessary to have an undergraduate degree, or in some cases, a diploma from an archives technician program.

The 28 questionnaire respondents who indicated their willingness to be interviewed, and who met the foregoing criteria, were sent a description of the study, the consent form, and a covering letter proposing possible dates/times for the interview (Appendices J-L). Of these, 22 returned the consent form, and an interview time was arranged. The interviews were conducted between 22 February and 13 June 2006. Three interviews were conducted in person, 19 by long-distance telephone. The semi-structured script (Appendix M) consisted mainly of open-ended questions. In addition, the repository’s website content and questionnaire response were

\(^{316}\) In one case, the archivist filled out the questionnaire in consultation with the parent body’s intellectual property officer. While their responses to most of the questions represented the practices of the repository, they provided two responses to questions 41-43 in the “About You” section, and it was not possible to distinguish between them for the purposes of applying the first interview criterion. Despite this, the responses from this repository to the other questionnaire questions are deemed useable.

\(^{317}\) The break point between categories (i.e., 1-5 years and 6-10 years) requires that a minimum of 6 years be specified so as not to include those who have been in their present position just a year.
reviewed prior to each interview, and, where necessary, additional questions were added to the interview script to clarify specific aspects of the website, the questionnaire response, or both. Each interview lasted approximately an hour, and was audio recorded. At the end of each interview session, all participants were asked to indicate whether they were willing to be contacted to clarify their responses, and whether or not they wanted to review the interview transcript. I transcribed the interviews. Ten interviewees reviewed their transcripts, and added clarifying information, either of their own accord, or in response to my questions.

It was considered to be important to be able to link the interview data with the repository's questionnaire data, its website content, and any institutional policy documents provided. However, because the ability to link sources of data increased the possibility that a repository or an interviewee may be identifiable from the reported data, interviewees were informed of the implications of linking the data from different sources, and were asked for their consent to do so. This was addressed in the description of the study and in the consent form sent to interviewees in advance so they would have an opportunity to think about this issue and ask any questions, before agreeing to participate.

The matter of linking data from different sources was also addressed in letters to the 16 people who had volunteered to be interviewed but were not selected as a result of the application of the interview criteria. Those 16, as well as the 6 who did not respond to the invitation to be interviewed, received a letter thanking them for volunteering to be interviewed, reiterating that, by doing so, they had agreed to the linking of their questionnaire response (and any accompanying policy documents) with their repository’s website, and asking them to contact me if they had any concerns in this regard. None did.

3.1.4 Policy and Procedure Documents

For this study, policy and procedure documents constitute the fourth source of data about repository copyright practices related to making archival material available on the Internet. The following definition of policy documents was used, “policies, guidelines, procedures, forms, FAQs, and the like that were created by the repository administration to provide guidance for staff, or direction to users, or both, about how the repository addresses copyright matters related to its digital resources made available online.”

318 For telephone interviews, the post-interview follow-up consent form (Appendix N) and a stamped pre-addressed envelope were mailed with a request to complete and return the form after the interview.
The policy documents analyzed in this study came from two sources. Most were found on the repository websites; the remainder were submitted with the questionnaire responses. The collection of policy documents began with the websites. I cast a wide net in my examination of the websites in order to capture all possible documents that address policy matters, even if some were later rejected. Because copyright is related to a number of archival functions, I was looking not just for the obvious documents entitled, for example, “copyright policy” or “procedure manual” but also for documents that communicate specific aspects of archival copyright practices directly relevant to this study. The archival functions and the specific aspects of each relevant to this study include:

- acquisition (in terms of the transfer of rights in documents acquired),
- description (in terms of the extent to which copyright status, ownership, and restrictions are included in descriptions of documents appearing on the website),
- reference services (particularly reprographic services, i.e., making copies of documents for users), and
- outreach services (including making documents available on the Internet, as well as any terms or conditions pertaining to making and using copies from the website itself).

As the examination of the websites proceeded, it quickly became evident that many of the policy documents related to repositories’ practices in making copies of archival documents for users, e.g., ordering instructions, order forms, price lists, available formats, and any terms or conditions pertaining to the use of such copies. Because the focus of the study is the online content of the repository websites, a detailed examination of onsite copying practices is outside the scope of the study; however, as discussed later, such policy documents were used as evidence of archivists’ understanding of copyright law.

The process of data collection from the websites has been discussed earlier; the identification of policy documents was part of the systematic examination of each website. Upon encountering a policy document, that page was copied (and annotated as required), numbered, and added to the binder with the other documents from that website. Policy documents, where they existed, may appear only once on a website; for example, a repository may present all the details of its reprographic policies (e.g., available formats, fees, instructions on how to order, terms and conditions of use) in one document. Others may present such details in a series of separate documents, e.g., order form(s), fee schedule, application(s) for permission for
commercial use, etc. In either case, such documents appear only once, and for such aspects, no decisions about selection were necessary.

Selection came into play only with regard to what could be called “copyright pages,” i.e., pages containing information about the copyright status or terms of use for individual digital resource types (primarily Virtual Exhibits, Single Fonds Exhibits, and Collections). Some repositories whose websites contain several exhibits or collections include a separate “copyright page” for each one. While selection took place with regard to the archival documents and display mode of each (as explained earlier), the “copyright page” (where one existed) from each digital resource was included in the data collection. For example, of Repository 1Y’s fifteen digital resources of interest to this study, eleven have a copyright page, each of which is included as a separate policy document. This was the case with all repository websites, with two exceptions: Library and Archives Canada, and the CBC. In both cases, the presentation of copyright information relating to each digital resource type is consistent throughout the website, and a representative sample from each repository was selected.

The questionnaire responses were accompanied by 41 policy documents from 23 repositories, and one listing of the topics covered in what appears to be the repository’s copyright policy document. Thirty-nine questionnaire respondents (37% of the 106 respondents) indicated in their responses to Question 25 that their repository has written copyright policy or procedure documents; of those, 22 respondents sent along copies of various policy or procedure documents or a URL for a website containing such documents, or both. One other respondent (who reported that the repository did not have copyright policies) nonetheless sent along a copy of the repository’s photo reproduction request forms. Of the 23 repositories that sent policy documents with their questionnaires, 21 already had at least one policy document of some nature (and often more than one) on their websites. The remaining two repositories had no policy documents on their websites but sent internal documents with their questionnaires.

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319 The topics listed were: Definition of copyright; synopsis of Act; general provisions; special media formats; key concepts and FAQ; where to get help. It is not clear from this minimal information whether this document is intended as an internal document to guide staff in administering copyright, or as a means of educating users about copyright, or both.

320 Three repositories explained that they were not able or willing to share their policy documents, in two cases because they were considered internal documents, and in one case because the document was still in draft form.

321 Of those 21 repositories, 5 sent items that were already on the website; 6 sent items that included both ‘new’ items and items on the website, and 10 sent documents that were additional to those available on the website.
Of the 41 policy documents that accompanied 23 questionnaires, 14 duplicated documents that had already been identified in the examination of the websites. The remaining 27 documents were examined for relevance to the study along with the policy documents taken from the websites. The analysis began by listing the policy documents from each repository on a spreadsheet, examining each, and briefly describing it, noting its corresponding page number from the data binders. During this first review, the documents were coded by archival function, and a draft typology developed of policy document types associated with these archival functions, including a preliminary definition of each type. All the documents were then reviewed again, the descriptions expanded, and the document type definitions refined until all the documents could be satisfactorily accommodated.

Determining whether any particular item fell within the working definition of policy document and how to code it was not always easy, given the range of document types that communicate policy. Some documents are clearly policies or procedures, e.g., repository 2L’s Copyright Policy or repository 2V’s Reproduction Services Manual. Such documents may be long and complex; however, short statements can also communicate policy. Accordingly, one-line statements such as “All images found on this site are for educational purposes only, and may not be reproduced in any form without the written permission of [Repository 4C],” were considered to be as much a policy on terms of use as Repository 6B’s six page Use of Reproductions document. Similarly, policy can also be communicated as a series of FAQs, i.e., frequently asked questions and their answers.

Other documents set down and communicate discrete parts of a larger policy; for example, forms for ordering copies of archival documents, fee schedules, and terms and conditions of use of such copies would all be parts of a repository’s reprographic services policy.322 For the purposes of this study, each item (i.e., the order form, the price list, and the terms of use) was considered a separate document if it appeared separately on the website. If, however, the price list, the instructions on how to order copies, and the terms of use were combined in a single document entitled “Reprographic Services and Fees,” that was counted as one document. In a related situation, where a repository website contained several digital resources, each with its own copyright page or terms of use statement, each of those documents

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322 Indeed, one questionnaire respondent and four interviewees noted that they had no single comprehensive copyright policy, but that particular aspects of copyright were addressed in individual policies and procedures.
was counted as a separate policy document, even if the wording was identical or similar for them all, or even if it repeated terms of use statements that also appeared in a longer policy document. Certain items were deemed not to be policy documents. Three website statements that simply said that the repository would make copies of items from its holdings, but did not mention copyright, were excluded. Post hoc reports about practice or the application of policy in a specific situation, for example, the criteria for selecting documents for a particular exhibit were of interest in other contexts but not as policy documents. Also excluded were policy statements setting out terms of use of the parent body website, because such statements are not created by the repository administration, and because they do not directly address repository practices. The presence of links to such statements on the websites of 12 repositories is, however, discussed briefly at a later point. Of the 27 policy documents submitted with the questionnaires, ten were found to be outside the scope of the study, leaving 17 “new” policy documents from 13 repositories submitted with the questionnaires.

Of the 154 repositories that constitute the research population for this study, 108 repositories (70%) made available on their websites or with their questionnaires 250 policy documents that fall within the operational definition used in this study. Of those, 106 had at least one policy document of some nature (and often more than one) on their websites; the other two submitted policy documents with their questionnaire responses. The policy documents available to this study, coded by archival function, are summarized the Table 1. The total number of repositories in Table 1 exceeds 108 because the same repository may have several policy documents, each of which relates to a different function category.

\[323\] Retained within the pool of policy documents, however, were the copyright notices for two federal government repositories. These notices were adapted by the repository administration from the federal government copyright policy template to reflect the particular situation of each repository.
Table 1  
Policy Documents Coded by Archival Function  
(N = 250 documents from 108 repositories)

<table>
<thead>
<tr>
<th>Archival Function</th>
<th>No. of Repositories</th>
<th>Policy Documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Functions</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Copyright</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Acquisition</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Reference</td>
<td>70</td>
<td>116</td>
</tr>
<tr>
<td>Outreach</td>
<td>73</td>
<td>124</td>
</tr>
</tbody>
</table>

* It is understood that copyright is not a core archival function like the others; however, the seven documents in this category deal with copyright aspects pertaining to more than one archival function.

3.2 Data Analysis

Data analysis has been defined as “the process of bringing order, structure, and interpretation to the mass of collected data.” However, the process of data analysis, particularly in qualitative research, is difficult to describe clearly. The data are usually voluminous, unstructured, and unwieldy; the human researcher is the instrument of analysis; and the process is iterative in nature. Scholars of research methodology have attempted to articulate the process. Huberman and Miles break data analysis into three sub-processes: data reduction, data display, and conclusion drawing and verification, emphasizing the cyclical and iterative nature of the process. While this model is discussed in the context of qualitative data, similar stages can also be applied to the quantitative data from the questionnaire responses.

This study is based upon four different sources of data, i.e., 106 questionnaire responses, 154 repository websites, 250 policy documents, and 22 interviews. The following section describes the methods and processes employed in analyzing the data from the questionnaire responses, the websites, the policy documents, and the interviews, using examples to illustrate the process, before discussing how the findings from the various sources of data were brought together to address the research questions. Excel spreadsheets were used to organize and

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326 Because most of the policy documents came from the websites, the methods used to analyze website content and policy documents were the same.
summarize both quantitative and qualitative data, and to produce descriptive statistics and illustrative tables and charts. NVivo 7, the latest version of a widely-used qualitative data analysis software, was used to manage the qualitative data.

3.2.1 Questionnaire Responses

A profile of the 106 questionnaire respondents in terms of education, experience working with archival material, and experience working in their current position, and repository type is presented in Figures 2, 3, and 4. Figures 2 and 3 show that the questionnaire respondents are generally well-educated with many years of experience, often at the same institution. Half of them have Masters degrees; however, we do not know how many of their Masters degrees are from programs in archival studies. Seventy-three percent of them have spent more than ten years working with archival material; 44% of the respondents have spent more than ten years working in the same position.

Figure 2
Percentage of Questionnaire Respondents by Level of Education Completed
(N = 106)
Figure 3
Percentage of Questionnaire Respondents by Years in Current Position and Years Working with Archival Material
(N = 106)

Figure 4 presents a comparison of the websites and questionnaire responses by repository type. University archives account for 26% of the websites but only 22% of the questionnaire responses. That difference is off-set by the representation of municipal archives, which account for 18% of the websites but 22% of the questionnaire respondents. For most repository types there are slight differences in their representation in the questionnaire responses and the websites; however overall, the repository types represented in the questionnaire responses generally reflect the website repository types.
While the responses to most questions were of a “yes-no” variety (in that a choice was
either checked or not), other questions required respondents to rank a list of items, or to indicate
where their opinion lay along a scale. The responses to such questions were given values, e.g., a
ranking of 1st would be given a value of 4, a ranking of 2nd a value of 3, and so on. Where a five-
point scale was used, a response of “strongly agree” was given a value of 1; a response of
“strongly disagree” was given a value of 5. The questionnaire responses also contained some
qualitative data in response to open-ended questions and where space was provided to elaborate
on a response of “other.” The shorter qualitative responses (i.e., those consisting of words or
phrases) were input into a separate Excel document for each question or each related group of
questions; the longer responses were input into a separate word-processing document for each
question.

The data input, both quantitative and qualitative, was checked against the original
questionnaire responses. Once the data input was verified, the total number of respondents for
each question, and the number of respondents who checked off each choice were recorded on a
blank copy of the questionnaire which was used as a master summary of the quantitative
responses. The results of the analysis of the quantitative responses to individual questions (e.g.,
total responses for each choice, the percentages of the total number of respondents each represents, and the like) are reported in the findings related to each research question.

For the most part, descriptive statistics were sufficient to present the summarized questionnaire responses. However, it was of interest to determine if the differences between the repository copyright designates’ views about copyright and those of other respondents not so designated were statistically significant. The groups’ responses were analyzed using Excel's t-Test (Two-Sample Assuming Equal Variances) data analysis tool.

It was also of interest to determine if the differences between the repository copyright designates’ sources of copyright knowledge and those of other respondents were statistically significant. Respondents were asked in separate questions to indicate their sources of copyright knowledge, the sources they would consult if they had a specific copyright question, and the sources they would consult first if they had a specific copyright question. The frequency with which copyright designates and other respondents checked off each item were compared using Fisher’s exact test, which examines the significance of the association between two variables in a 2 x 2 contingency table. Fisher’s exact test was also used to determine if the differences between the interviewees’ and non-interviewees’ questionnaire responses regarding the importance of copyright issues as a factor influencing a repository’s decisions in determining what documents to include on its website were statistically significant.

The qualitative responses to the open-ended questions were coded. For example, respondents who reported that they selected documents in which the copyright had expired were asked to describe how they determined this for any particular document. The analysis of the responses revealed that they fell into five categories, and the responses were coded to reflect those categories. Where appropriate, the categories were further sub-divided. For example, one of these categories (i.e., reference to a specific rule) was broken down further to identify the specific provisions of the Act that the respondents use to determine that the copyright has expired. In most cases, the qualitative questionnaire responses required only a few specific codes related to that particular question. However, other more comprehensive qualitative responses (e.g., when respondents were asked what, if anything, they would change about copyright law as it affects their jobs) were imported into NVivo and coded using the same codes used for the interviews.
3.2.2 Website Content

The analysis of the website data was the most challenging and time-consuming aspect of the data analysis process. The website data consisted of eight binders of annotated copies of pages from the 154 websites. To make this voluminous data more manageable, a summary sheet was prepared for each website; however, the summary sheets were not sufficiently detailed to provide meaningful insights into the many interrelated aspects of repository copyright practice of interest to this study. Because of the number of relevant characteristics and aspects, the number of repositories, and the wide variation in the content and organization of the websites, the data analysis of the website content required many spreadsheets, each related to a particular aspect of the inquiry.

The following analysis of the policy documents from repository websites in relation to an aspect of Research Question 3c (How do archival repositories attempt to control further uses of their Internet-accessible holdings?) is used as an example to illustrate the complexity of the process. As noted, the policy documents came from the repository websites or were submitted with the questionnaire responses. As a first step, the website data binders and the summary sheets were reviewed, and two spreadsheets prepared, one listing (and briefly describing) the policy documents found on the websites (and noting where a repository website contained no policy documents); the other listing and describing those submitted with the questionnaires. The two lists were then consolidated, deleting the repositories without policy documents, deleting duplicate documents, and (as described earlier) removing documents not considered relevant to the study. The remaining policy documents were reviewed again, expanding the descriptions, coding each by archival function category, and in the course of doing so, refining the category definitions until all the documents could be satisfactorily accommodated.

Table 1 presents a summary of the policy documents by function. Outreach accounts for a great many policy documents, and the analysis required a more detailed breakdown. From the master list of policy documents, a spreadsheet containing only the documents from the Outreach category was created. An examination of each of these documents revealed that they fell into two uneven groups: six dealt entirely with archival staff responsibilities; the remainder informed website users of the terms and conditions of use of some (or all) of the website content. The terms of use documents were then coded to indicate whether they applied to the entire website, or to specific digital resources.
A separate spreadsheet was created for each type, with a column for each repository, and a row for each requirement or condition on use, e.g., permitted uses, attribution of source required, wording specified, changes to images prohibited or permitted as long as they are described, and so on. The terms of use statements themselves were coded for the presence of each ‘condition,’ and other details such as whether the statement was permissive or proscriptive, permitted purposes, etc. so that they could be compared within and across repositories.

The foregoing description of the analysis of the policy documents found on the repository websites as they pertain to an aspect of Research Question 3c has been used as an example of the data analysis process for the website content. A similar iterative process took place to analyze the website data pertaining to other research questions. For example, policy documents in part also address Research Question 2 (How do Canadian archivists understand their position vis-à-vis copyright law in making archival material available on the Internet?). To the extent that a document indicates who developed or approved it, policy documents may also provide information that addresses Research Question 4 (What are the processes by which the copyright knowledge and attitudes of individuals are transformed into institutional practices?). Similarly, other types of website content, e.g., archival descriptions or categories of works and ‘other subject matter’ also address aspects of the research questions, i.e., what is selected for online access, and copyright information provided to users.

3.2.3 Interviews

A profile of the 22 interviewees, based on their questionnaire responses, is presented in Figures 5 to 8. As discussed above, years in the same repository, years of experience working with archival material, and level of education completed were factors used to select interviewees from the pool of volunteers. Not surprisingly, Figure 5 shows that the interviewees have extensive experience; 14 of the 22 interviewees (64%) have been working in their current position for over a decade; 18 (82%) have been working with archival material for over a decade. In this regard, the interviewees are not representative of the questionnaire respondents, 43% of whom have been working in their current position for over a decade; 73% have been working with archival material for over a decade.

The interviewees are also well-educated; 14 have graduate degrees, although we do not know how many are graduates of archival studies programs. In this regard they are more representative of the questionnaire respondents; 41% of the interviewees have a masters degree
(as do 50% of the questionnaire respondents; 36% have an undergraduate degree (29%); 14% a doctorate (8%).

Figure 5
Percentage of Interviewees by Years in Current Position and Years Working with Archival Material
(N = 22)

Figure 6
Interviewees by Level of Education Completed
(N = 22)

Figure 7 shows what types of repositories the interviewees came from. Seven (32%) come from university archives; an equal number come from government archives. The remainder are distributed across the remaining categories except religious archives. University archives accounted for 26% of the websites, municipal archives for 18%, and national, provincial or
territorial archives for 8%; by comparison, 32% of the interviewees were from university archives, 18% from municipal archives, and 13% from national, provincial, or territorial archives. Compared with the websites, the interviewees include a higher proportion of archivists from universities and national, provincial, or territorial governments.

**Figure 7**  
**Percentage of Interviewees by Repository Type**  
(N = 22)

![Bar chart showing percentage of interviewees by repository type](image)

Figure 7 shows the interviewees’ repository copyright responsibilities. Of the 12 that come from repositories that have a designated staff member responsible for copyright, 10 (45%) have some copyright responsibilities; nine are their repository’s copyright designate and another is one of several staff members with copyright responsibilities. The remaining two are not the designated copyright person, but one of them had the interview transcript reviewed by the copyright designate, who added helpful annotations. Although 10 came from an institution that did not have a designated copyright person, they were, on the basis of their years of experience, thought to be knowledgeable about the repositories’ copyright practices.

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327 So as not to influence the responses to Question 1 of the questionnaire by emphasizing the copyright aspect of the study, the questionnaire was to be completed by “the person responsible for your repository’s initiatives to make digitized archival documents from your holding available on the Internet.” Thus, the questionnaire may have been completed by someone other than the repository’s copyright specialist.
I transcribed the 22 interviews, following up, where necessary, with interviewees by email to clarify details or meaning. All interviewees were given the opportunity to indicate whether they wished to review the transcript; ten interviewees did so. The verified transcripts were imported into NVivo, and a coding dictionary was developed. My supervisor and I each coded one of the interviews as a means of ensuring agreement on the sorts of concepts to be coded and at what level of detail. While we assigned the same codes in a number of cases, it was clear that many new codes had to be added to cover the wide range of interview content. The result was a decision to code those concepts related to copyright at a more detailed level, but remain at a higher level for non-copyright concepts. Having all 22 interview transcripts coded by a second person in order to check my coding for bias was considered. However, difficulties in finding someone with the time to undertake such a task, and some pressure to complete the coding in a timely manner, meant that a second coder was not used.

Before starting to code the remainder of the interviews, the coding dictionary was extensively revised, adding the necessary categories (as well as their preliminary definitions and the research questions they related to), deciding for the purposes of NVivo which were hierarchical tree nodes and which were free nodes, and setting up the necessary structures in NVivo. In the course of coding the next two interviews, additional codes were added to the coding dictionary at the end of that coding session. After each of the next two coding sessions, a
number of additional codes were added to the coding dictionary; however, after that, the number of new codes required after each session dropped sharply.

Once the interview transcripts were coded, the analysis of the interview data proceeded according to the research questions. The coded nodes relating to a particular research question or sub-question were examined to see what insight they shed on the relevant aspect of the question. Notes were taken to indicate themes, patterns, and frequency of occurrence, and a memo written summarizing the interview data related to each particular code, also noting quotations from the interviews that best illustrated the theme or finding. Each interviewee was given a fictional name which is used when quoting from the interview transcripts; the fictional names do not necessarily match the sex of the interviewee. Each memo was a building block in the process of addressing the research question or sub-question at hand; however, the interview data was not fully analyzed in relation to each research question until the consolidation of the findings from all data sources, as described below.

3.2.4 Consolidating Findings from Separate Data Sources

The analysis of the main data sources consists to a large extent of what Huberman and Miles call data reduction. However, it also involves taking the data from their original context and rearranging them according to the research questions. This was done for the questionnaire data, the website data, and the policy documents, creating building blocks of findings that then were further rearranged to bring together all the building blocks in relation to each research question or sub-question. The analysis of the interview data was done as part of the consolidation of the findings from all data sources. This pulling together consists of what Huberman and Miles call data display. Although they view the processes of data reduction and data display as distinct, the boundaries between the stages are not sharp and clear, and the process is an iterative one as the researcher goes back and forth trying to make sense of the mass of data.

Huberman and Miles' final stage is conclusion drawing and verification. This is the most elusive aspect of the process as the researcher looks for groupings, patterns, relationships, and explanations within the big picture. As described earlier, it was possible to link the interview data with the repository's questionnaire data, its website content, and any institutional policy documents provided, and this proved to be a useful means of verifying similarities, or in some cases explaining contradictions, between website and questionnaire data.
It remains to discuss the potential for bias in the study arising out of my position in the archival community as an expert on the application of copyright to archival material and one who has developed and delivered many copyright training sessions for the archival community. My experience and knowledge comes with assumptions about the value of educating archivists about copyright matters, what archivists should know about copyright, their perceptions of copyright, the copyright issues they deal with in their day-to-day work, and their practices in addressing these issues. In order to mitigate possible bias in relation to archivists’ knowledge of copyright, I asked questionnaire respondents about their confidence in their knowledge of copyright, and tested their self-assessment of the quality of their knowledge against other evidence of the accuracy and currency of their knowledge. Regarding repositories’ copyright practices, it was essential, particularly while conducting the interviews, and throughout the course of the data analysis, to be aware of my assumptions, and carefully question my conclusions about what the data revealed.
4.0 Introduction

The copyright practices of Canadian archival repositories in making archival material available on the Internet are the focus of this study. However, archival repositories and their staff members were dealing with copyright long before the Internet made it possible to make their holdings available online. Thus, this new activity takes place within a pre-existing context of archivists’ perceptions and knowledge of copyright. The study assumes that how archivists perceive copyright and what they know about it influences repository practice, and the extent and quality of their knowledge is in turn influenced by the sources of their knowledge. Thus, Chapter 4 presents the findings related to Research Question 2 (How do Canadian archivists understand their position vis-à-vis copyright law in making their holdings available on the Internet?), and Research Question 4 (What are the processes by which the copyright knowledge and attitudes of individuals are transformed into institutional practices?). In doing so, Chapter 4 sets the stage for the findings regarding repository practices in making their archival holdings available on the Internet presented in Chapter 5. The discussion begins by exploring archivists’ perceptions of copyright, their confidence in their knowledge of copyright, and the sources and quality of their knowledge, before looking at the extent to which copyright practice is documented, and the ways that the knowledge of individuals is transformed into institutional practice.

4.1 Archivists’ Perceptions of Copyright

Research Question 2a asked, “How do Canadian archivists perceive the role of copyright in making their holdings available on the Internet?” Archivists’ perceptions of copyright generally, and their perceptions of the Act (both particular provisions of it and what should be changed) were explored in the questionnaires and the interviews.

328 Those findings are presented in Chapter 5.
4.1.1 General Perceptions of Copyright

All 22 interviewees were asked what they thought of copyright as it affected their jobs. Twenty-one interviewees considered it to be part of an archivist's job, despite the fact that some commented on negative aspects such as its complexity or the time it took. Judy had no doubts that it was part of an archivist’s job, but noted, “It’s hard and it takes up too much time….to do all the legwork: looking through the accession files, the original documents, the finding aids, etc., to try to locate copyright and donor restriction info.” Richard summed it up this way:

I think that it’s just one of these things that we have to have some understanding of. It’s the law; it’s there for very valid reasons, and we need to conduct ourselves properly in relation to the law, at the same time without becoming too nuts about it and becoming the local chapter of the copyright police. So I think really it’s just simply we have to, as archivists, understand what the intention is, have a good general knowledge of what’s involved, and where we might be penalizing somebody or risking the reputation of our organization. I think it’s just something that we have to accept that it’s part of our job. Lots of people moan about this but other professions have far more rigorous things than we do. So we need to just suck it up and deal with it.

Six others described it in strong negative terms as “an impediment,” “a nightmare,” “restrictive,” “very tricky,” something that “complicates the job,” or something they wish would go away. Alex said, “It really complicates the job.” It adds yet another layer on top of the complex archival services world… in the archives it’s yet one more thing that you’re trying to explain and cover as you try to provide service to individuals using the material. Because it is so complex, and specialized, and changing, and every case is different. Yeah, it’s difficult.” Laura said, “I think it’s very tricky and I think that we have a very shaky hold over it. I think we’re just sort of one step ahead all the time.” Lee, who wishes that copyright would go away, said, “… I feel like as an archivist there’s a whole lot of things that I have to deal with that I don’t want to deal with. I’d just like to be able to do my work and help researchers and arrange and describe material and collect material and all that sort of thing.” Two others thought that copyright was important but did not have time to spend on it; as Jan said, “I think it is a part of my
job that I have to be really aware of, but I don’t spend a lot of time on it because there are so many other pressures on my time.” The remaining interviewee thought it did not apply to her volunteer-run repository. Based on the views of the interviewees, it appears that, while archivists are well aware of many of the difficulties associated with copyright, they are accustomed to dealing with it.

Questionnaire responses to a question that allowed respondents to comment on any other aspect of the questionnaire topics that they thought would be of interest to the study shed further light on archivists’ views of copyright. Of 32 responses, 20 (63%) commented on one or more problematic aspects of copyright. One respondent called it “frustrating.” Two others called it “complicated,” particularly for institutions holding a variety of media. Six questionnaire respondents mentioned the time required to deal with copyright, whether it is time spent dealing directly with copyright matters (“v. time-consuming to review what seem to be scores of permutations of copyright options.”), or time spent “keep[ing] ‘on top’ of the issues.” One regretted that copyright and other legal issues (like privacy or health and safety) required an increasing amount of time, to the detriment of core archival functions. Two noted that archives are also hampered because they do not have the documentation required to identify or locate copyright owners because such information was not routinely recorded in the past. Five respondents called for more training or interpretive publications. Two of them stressed the need for training or publications to be accessible to small institutions staffed by volunteers, both in terms of affordability and readability. Two interviewees also commented on how small archives perceive copyright. As Donna said, “those things are real difficulties for small archives where a person has to have expertise in all these areas, or archives run by volunteers … who are very good and well-meaning, but you throw that at them and they become very frightened and it isn’t easy for them to give the right answer, so they may just hole up and close things down or worry a lot about it or whatever.” One respondent summed it up this way,

In general, copyright should be administered with a healthy dose of risk assessment/analysis → no archives has the time, and few the expertise (or access to it) to permit thorough review/application of copyright law in every instance. [respondent’s emphasis]
Three other questionnaire respondents expressed concerns about unspecified legal consequences, and the implications for their digitization programs. Although one said only, “I can see the red lights flashing!,” another explicitly stated that copyright concerns would limit what they would put on their websites, “This is something [I] have given very little thought to! I do not think we will be putting archival photos on the Internet in the near future, primarily due to lack of time/lack of funds and lack of knowledge about the implications!” These questionnaire responses suggest that archivists are somewhat apprehensive about copyright because they lack the knowledge, the time, and the tools to feel confident that they are not infringing copyright.

Questionnaire respondents were asked to indicate their level of agreement with a number of statements on a 5-point scale that ranged from Strongly Agree to Strongly Disagree. Two statements addressed archivists’ perceptions of the level of risk of copyright infringement associated with archival material. The responses are reported in Figure 9.

**Figure 9**
Archivists’ Perceptions of the Risk of Copyright Infringement

The risk of legal consequences for copyright infringement involving archival material is low. N = 104

Copyright is not a problem for archival repositories making archival material available on the Internet. N = 106

More than half (52%) of 104 questionnaire respondents disagreed or strongly disagreed with the statement, “The risk of legal consequences for copyright infringement involving archival material is low.” Thirty-seven percent agreed or strongly agreed, i.e.,
they think that the risk is low; 11% were neutral. In other words, a bare majority of respondents believe that there is some risk of legal consequences.

Eighty percent of 106 respondents disagreed or strongly disagreed with the second statement, “Copyright is not a problem for archival repositories making archival material available on the Internet.” Only 14% agreed or strongly agreed with the statement; 6% were neutral. In other words, most questionnaire respondents believe that copyright is a problem for archival repositories making archival material available on the Internet. In sum, while 80% believe that copyright is a problem, fewer (just over half) believe that there is some risk of legal consequences. Although fewer respondents think there is a risk of legal consequences, the responses to both statements, taken together, suggest that Canadian archivists think that copyright is something that causes problems.

4.1.2 Perceptions of the Act

Questionnaire respondents were also asked to indicate their level of agreement or disagreement with three statements about the Copyright Act and certain provisions in it. Forty-one respondents (40% of the 103 questionnaire respondents) disagreed or strongly disagreed with the statement, “The Copyright Act as it currently stands has achieved an appropriate balance between the rights of creators and the rights of users.” Eighteen (17%) agreed; however, 44 respondents (43%) had no strong opinion one way or the other.

Two other statements dealt with specific aspects of the Act, i.e., the archives exception and the fair dealing provision. In response to the statement “The exception in the Copyright Act that permits non-profit libraries, archives, and museums to make a single copy of an unpublished work in their holdings for the patron’s research and private study (sec. 30.21) is adequate,” 56 (55% of the 101 respondents) agreed or strongly agreed. Twenty-three (22%) had no opinion, and a similar number (22 or 23%) disagreed or strongly disagreed. When questionnaire respondents were asked what they would change about copyright law to make their jobs easier, four proposed removing one or more of the specific conditions from this section, such as the removal of the distinction between published and unpublished works. Thirty-nine of the 106 questionnaire respondents are the designated staff member responsible for copyright in their repository. While 62% of those not so designated agreed or strongly agreed with the statement that s.
30.21 is adequate, only 38% of the repository copyright designates agreed or strongly agreed with the statement; an equal number of repository copyright designates disagreed or strongly disagreed. Those without particular responsibilities for copyright (M = 2.227, SD = .958) are statistically more likely than the repository copyright designates (M = 2.925, SD = 1.071) to believe that s. 30.21 is adequate (t (104) = +3.476, p = .0007, two-tailed).

Questionnaire respondents were then asked to indicate their level of agreement with the statement “The fair dealing provision of the Copyright Act should be more specific.” Of the 103 responses, 50 (48%) agreed or strongly agreed; 48 (47%) were neutral, and 5 (5%) disagreed. Nearly half of the respondents think that the fair dealing provision should be more specific, but an equal number have no strong opinion one way or the other. Six questionnaire respondents (only two of whom were interviewed) who agreed or strongly agreed with the statement also mentioned fair dealing in response to an open-ended question that asked what, if anything, they would change about copyright law as it affects their job. Five called for the definition or clarification of fair dealing, or that it be more specific; one of these also wanted it expanded. The sixth called for “more latitude in fair dealing provisions.”

Interviewees were asked about their questionnaire responses to the statement, and what they thought of the fair dealing provision of the Act. 329 Interviewees who disagreed with the statement that the fair dealing provision should be more specific thought that being more specific could limit what could be done. As Colin said, “Having it general allows case law and practice and everything else to establish how it should be. If it was specific, no doubt it would leave things out we need.” He went on to remark, “I’ve never seen fair dealing as being all that applicable to what we’re doing. The exemptions for libraries and archives seem more useful.”

Those who thought that fair dealing should be more specific made comments such as Beth’s, “To me it’s totally confusing…. I think fair dealing … is just too loosey-goosey,” or Margaret’s statement, “Well, we worry about it. … Is a copyright owner

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329 The interviewees’ views of fair dealing differ from those of the questionnaire respondents as a whole, in that 59% of the interviewees agreed or strongly agreed that it should be more specific (as opposed to 48% of the questionnaire respondents); 27% were neutral (47% of the questionnaire respondents), and 14% disagreed with the statement (5% of the questionnaire respondents). However, these differences were found not to be statistically significant.
going to object for a photocopy of a map going to a grade 11 student for a local history project? I’m thinking that that would be fair dealing. Most of our uses here are not people copying photographs and then going off to make their fortune with them.” Two called for more latitude on the part of institutions to be able to make materials available, particularly for non-commercial uses. As Pat said, “I’d like to see more flexibility on the part of institutions to be able to give permission depending on the uses that it’s going to be put to, and if it’s not going to be a money-making venture, and it’s not going to go out and overtly embarrass somehow the people that, the creators of the object, there should be more discretion given to institutions.” Another wanted it to be more like the American fair use in that it included educational uses; another wanted the law to include specific amounts that could be copied, and suggested 10%.

Others thought that fair dealing was a generally satisfactory. As Leslie remarked, “It gives the latitude to enable institutions to make material available with reasonable metes and bounds around making it available, and having the sense of some latitude that some hand is not going to come down from the sky and hit it,” and as Bill said, “I don’t think it’s too general …. In fact, I think it’s the one clause that allows the researchers to get access to material that otherwise they couldn’t.”

Archivists’ perceptions of copyright were also revealed in the questionnaire responses to the question, “What, if anything, would you change about copyright law as it affects your job?” Fifty-nine questionnaire respondents answered this question, with 20 of them offering more than one suggestion. Ten respondents indicated that they did not know or did not consider themselves sufficiently well-informed to comment. Thirteen respondents wanted changes or information that had more to do with the administration of copyright; of those, the most frequent call (from six respondents) was for an interpretive guide or access to a copyright expert.

Forty-four respondents called for changes to the Act. Their responses are summarized in Figure 10; some mentioned two or more changes so the total exceeds 44. The most frequent comment (from 18 respondents) was that the Act should be simplified or clarified. One respondent’s plea: “Make it simpler to understand and apply!” was accompanied by the comment “(not much chance of this!)”
Others called for general changes such as special rules for archives (7 respondents) or expanded users’ rights for research or education (3 respondents), or for specific changes relating to the duration of copyright, fair dealing, photos, or the archival exception. Those who want special rules for archives wanted the application of copyright law to archival records to be “less cumbersome,” or, in one case, not to apply to archival materials at all. One suggested, “Put in explicit rules about putting material on the web that would acknowledge that particularly for older materials there would be no penalties incurred if: 1) it was an archives, library or museum, 2) there was no profit made, 3) the repository agrees to remove the material. (This is not entirely thought out, but you get the gist of the matter).”

Of the eight that addressed term issues, three specifically noted the lengthy term in posthumous works. Another wanted the term of copyright “based on publication/creation date rather than death dates” because death dates are not easily
determined.\textsuperscript{330} Six want fair dealing to be defined, expanded or both. Four commented specifically about term of protection for photos; of those, three noted how difficult it was to apply a term rule based on life of the author when the author was often unknown; the fourth wanted the rules for photographs simplified. Four proposed removing one or more of the specific conditions from the archival exception. The other suggestions included simplified procedures for unknown copyright owners (2 respondents), rules for putting material on the Internet (2 respondents), uniform terms for all media, changes to the reversionary clause, and “more ‘specifics’ in law.”

All interviewees were also asked what they would change about copyright to make their jobs easier. Few of the responses mentioned specific amendments to the Act. As Richard stated in another context, “I don’t know how you could simplify the Act. It doesn’t necessarily approach it the same way that we do. We’re trying to interpret it, so we’re looking at interpretation.” Of the 14 interviewees who made specific suggestions, seven stressed the need for an interpretive guide or access to on-call experts. Four others suggested various ways in which archival material should be treated differently for copyright purposes; as Pat said, “I wish … we were just given permission to let people use the material for whatever purposes they wanted to put it to. Short of making a ton of money off it and money not flowing back to the copyright holder. But anything short of that would open it up.” As Judy said,

\begin{quote}
The fact that a lot of archival material was never created with the thought of it being a commercial product. Even with family photos and so on, it seems a bit ridiculous if someone wants to use a photograph of Aunt Mabel making potato salad, it shouldn’t have the same restrictions as a Karsh photograph. I think that would be very useful. And I don’t know how you determine that because it’s such a grey area, but if the intent of the creation was not artistic and not for commercial use, then maybe it shouldn’t be as restricted as those things that were.
\end{quote}

\textsuperscript{330} As will be seen in a subsequent section, 26 questionnaire respondents indicated that they base their calculation of copyright term on the age of the document. That so many do so may be evidence of the fact that it is very difficult to know life dates of the author, whereas the creation dates of documents are frequently known.
4.2 Sources of Copyright Knowledge

How archivists learn about copyright, and the sources of their knowledge also influence repository practices. This section looks at different aspects of archivists’ sources of copyright knowledge, including how archivists learn about copyright initially, how they keep up-to-date, where they seek answers to specific questions, and how they learn about repository copyright practices. Data from the questionnaire responses, the interviews, and the websites addressed Research Question 2b, “Where do Canadian archivists get their knowledge of copyright?”

4.2.1 Learning about Copyright

Questionnaire respondents were given a list of 12 ways that archivists could learn about copyright (as well as space to add others) and asked to mark all that applied. The results are presented in Table 2. Four sources were marked by at least half of the respondents. The top two were professional association workshops and colleagues in the profession, mentioned by 88 (83% of the 106 respondents) and 85 (80%) respondents respectively. Books and newsletters followed closely, marked by 76 respondents (72%). Sixty-five respondents (61%) marked statute and regulations. The remaining sources were marked by fewer than half of the respondents.

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331 Question 32 of the questionnaire asked, “Where do you get your knowledge of copyright?” The question included a list of ways that archivists could learn about copyright; respondents were asked to “indicate all that apply by marking an X in the column headed ‘Applicable?'”
Table 2  
Sources of Archivists’ Copyright Knowledge  
(N = 106)  

<table>
<thead>
<tr>
<th>Source</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional association workshops</td>
<td>88</td>
<td>83 %</td>
</tr>
<tr>
<td>Colleagues in the profession</td>
<td>85</td>
<td>80 %</td>
</tr>
<tr>
<td>Books and newsletters</td>
<td>76</td>
<td>72 %</td>
</tr>
<tr>
<td>Statute and regulations</td>
<td>65</td>
<td>61 %</td>
</tr>
<tr>
<td>Colleagues in your repository</td>
<td>52</td>
<td>49 %</td>
</tr>
<tr>
<td>Archives listservs</td>
<td>49</td>
<td>46 %</td>
</tr>
<tr>
<td>Provincial archives advisor</td>
<td>34</td>
<td>32 %</td>
</tr>
<tr>
<td>In-house legal counsel</td>
<td>30</td>
<td>28 %</td>
</tr>
<tr>
<td>Copyright consultant</td>
<td>21</td>
<td>20 %</td>
</tr>
<tr>
<td>Outside legal counsel</td>
<td>16</td>
<td>15 %</td>
</tr>
<tr>
<td>Case law</td>
<td>9</td>
<td>8 %</td>
</tr>
<tr>
<td>In-house workshops</td>
<td>8</td>
<td>8 %</td>
</tr>
<tr>
<td>Other</td>
<td>12</td>
<td>11 %</td>
</tr>
</tbody>
</table>

Respondents were then asked to rank the top four sources of their copyright knowledge in order of importance. However, because the instructions were unclear, only the top three responses were coded so that a ranking of 1 (most important) was given a value of 3, a 2nd place ranking was given a value of 2, and a 3rd place ranking a value of 1. The results are presented in Figure 11. Workshops sponsored by professional associations are considered by far the most important source of copyright information, followed by books and newsletters tied with the statute and regulations, and colleagues in the profession. Another cluster of “archival” sources (provincial archives advisor, colleagues in your repository, and archives listservs) follows. The lowest rankings are

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332 The second part of Question 32 instructed respondents, “In the second column [which was headed “Rank the top 4”), rank the top 3 in order of importance, with 1 being the most important, 2 the next most important, and so on.” Ninety-seven respondents completed the ranking component of the question; however, due to the misleading instructions, 37 ranked only their top three items, 52 ranked their top four, and 8 others ranked only their top one or two.

333 Following the 1997 amendments to the Act, the Bureau of Canadian Archivists (BCA) Copyright Committee developed a curriculum for a two-day workshop “on Canadian copyright law and its application to archives [to be] available to any association or institution wishing to sponsor the workshop” (“BCA Copyright Committee 1998-9 Annual Report”). The workshop was intended to be taught jointly by an archivist and a copyright lawyer.
found in a cluster consisting of legal counsel (in-house or outside), copyright consultants, in-house workshops, and case law.

**Figure 11**
**Ranking of Importance of Sources of Archivists’ Copyright Knowledge**
(N = 97)

When asked to elaborate on their questionnaire responses regarding how they learned about copyright, eight interviewees mentioned the value of training opportunities such as workshops (particularly those sponsored by the professional associations) as a means of getting started. As Leslie commented, “Those workshops were seminal. They provided us with the tools, the broad understanding as much as you can cram into the people attending in a day or two days. That’s enough to get them going.” Judy, whose
repository made a conscious decision to take copyright seriously, noted, “When it started getting crazy [requests for copies of documents skyrocketed in the months preceding an important anniversary of the parent organization], we divided up the responsibilities and everybody had to go off and take copyright courses.” Margaret valued the workshops, and also noted that her awareness of copyright originated as a graduate student in an archival studies program.\(^{334}\)

The questionnaire responses provided a direct answer to the question, “where do you get your knowledge of copyright?” However, policy documents from 22 repositories also provide indirect evidence of the print or online sources of Canadian archivists’ copyright knowledge. Five repository policy documents, intended primarily for internal use by repository staff, contain footnotes or bibliographies that document the secondary sources on which the policy was based. Of these, two cite Noel’s *Staff Guide to Copyright* prepared for the National Archives; one cites Harris’s *Canadian Copyright Law*; a third cites both.\(^{335}\) A more recent policy (“still in development”) cites Harris’s online course, taken in 2005.\(^{336}\) The fifth (much longer) document from Repository 4V (that “informs [the repository’s] digital copyright work”) cites many disparate sources including Harris’s book; federal government reports going back to the Information Highway Advisory Committee; the websites of collective societies (including Access Copyright); American, British and Canadian law journals; and other American sources.

Twelve repositories, in documents primarily intended for users, direct their researchers to sources of further information about copyright. Such sources are usually links to the Act itself (or Bill C-32),\(^{337}\) or to websites of federal government departments or agencies with a mandate for copyright matters, including the Canadian Intellectual Property Office, the Copyright Board, and the two departments responsible for copyright policy (Department of Canadian Heritage Copyright Policy Branch, and Industry Canada). One repository

\(^{334}\) Due to an oversight, the choices in Question 32 did not include “post-secondary education program” or something similar.

\(^{335}\) Noel, *Staff Guide*; Harris, *Canadian Copyright Law*.

\(^{336}\) Since 2002, copyright lawyer Lesley Ellen Harris has offered online courses on copyright. One interviewee and one questionnaire respondent reported having taken one of her online courses.

\(^{337}\) Bill C-32 (*A Bill to Amend the Copyright Act*) was passed by Parliament and received royal assent in April 1997. Its provisions are now part of the *Copyright Act*, and its proper citation is *An Act to Amend the Copyright Act*, S.C. 1997, c. 24. However, some research participants (as will be discussed in the next section) still refer to Bill C-32 on their websites and in their questionnaire responses, and appear to think that Bill C-32 is the *Copyright Act*. Where this is the case, references to Bill C-32 have been retained.
links directly to specific (albeit out of date) documents within the Department of Canadian Heritage’s Copyright Policy Branch site.

Two documents produced by the Bureau of Canadian Archivists (BCA) Copyright Committee were referred to or included in the data from three repositories. One repository’s form for ordering copies suggests that users consult a booklet summarizing the changes resulting from the 1997 amendments. Two other repositories (in an in-house policy document, and on the website, respectively) refer to a report prepared by Noel for the BCA Copyright Committee and sent to the archives listserv in 2005 that summarizes the 2004 amendments to the Act and the Supreme Court decision in the CCH case. Two university archives also refer their website users to the university library copyright policies and the university’s Access Copyright licence.

The sources discussed thus far are grounded in Canadian copyright law; however, somewhat problematic are the references to American sources in Repository 4V’s position paper (discussed above), and on repository 5H’s site, which includes (without its title or attribution) a link from the word “copyright” in the repository’s fee chart to the U.S.-based Association of Research Libraries’ 1994 statement of principles on intellectual property. As will be discussed in a later section, two other repositories appear to have taken some of their practices and wording from outdated U.S. copyright law, although the specific sources are not indicated.

Questionnaire responses reveal that archivists learn about copyright primarily from workshops sponsored by professional associations, printed sources, professional colleagues, and the statute itself. Sources cited in policy documents include the same printed sources as well as online resources from federal government agencies responsible for copyright matters.

### 4.2.2 Keeping Up-to-date

Learning about copyright once is not sufficient; it is also important to keep up-to-date. Copyright is an evolving area of law, particularly in Canada, where the federal

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338 In December 2005, responsibility for the Copyright Committee was transferred from the Bureau of Canadian Archivists to the Canadian Council of Archives.
340 These sources are somewhat misleading because they do not deal with archival material, and neither archival material nor digital copying fall within the scope of Access Copyright licences.
government launched an ongoing copyright reform initiative in 2001, and where the Supreme Court has, over the past five years, issued some landmark decisions relating to the application of copyright in both the analogue and digital environments. Questionnaire respondents were asked, in an open-ended question, how they keep up-to-date with changes in the law. The results are presented in Table 3.

Just over a third of respondents (35%) mentioned only one means of keeping up-to-date; 65% of respondents mentioned two or more. Listservs are by far the most common means of keeping current. The most frequently mentioned listserv is Arcan-l, but some just said listservs generally and a few mentioned other listservs, e.g., museum listservs. The second most common means of keeping up-to-date was publications, a category that included newsletters, articles, books, and printed material. Workshops and training activities were mentioned as often as colleagues as a means of keeping up-to-date. Keeping current through colleagues included emails from, or discussions with, colleagues (including the provincial archives advisor). Following closely was information or alerts from professional associations. Other means included Internet sources (8), legislation (7), professional meetings (5), legal counsel (4), and news media reports (3).

Table 3
Ways in which Archivists Keep Up-to-date with Changes to Copyright Law (N = 89)

<table>
<thead>
<tr>
<th>Means of Keeping Current</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Listservs</td>
<td>42</td>
<td>47 %</td>
</tr>
<tr>
<td>Publications</td>
<td>34</td>
<td>38 %</td>
</tr>
<tr>
<td>Workshops &amp; training activities</td>
<td>20</td>
<td>22 %</td>
</tr>
<tr>
<td>Colleagues</td>
<td>20</td>
<td>22 %</td>
</tr>
<tr>
<td>Professional association information or alerts</td>
<td>18</td>
<td>20 %</td>
</tr>
<tr>
<td>Other</td>
<td>29</td>
<td>33 %</td>
</tr>
</tbody>
</table>

341 Question 33 asked, “How do you keep up to date with changes in the law?”
342 The Arcan-l listserv is provided “for the discussion of archival issues and interests of particular relevance to Canadian Archives and archivists. It provides a forum for the exchange of ideas and information amongst Canadian archivists and their colleagues in other countries,” http://www.mailman.srv.ualberta.ca/mailman/listinfo/arcan-l (accessed 25 April 2007). Many of the provincial archives associations also have listservs for their members.
Seven questionnaire respondents expressed particular views on this issue. Three noted en passant that it was not easy to keep their knowledge of copyright current. Two others did not respond directly to the question; one noted, “We have not done a very good job of this.” Two more were somewhat disdainful of the need to keep current; in response to the question “How do you keep up-to-date with changes in the law?” one stated, “I don’t. Very little in our holdings is copyrighted by any external entity.”

How archivists keep up-to-date with changes to copyright law was also explored in the interviews. Interviewees mentioned two particular ways of keeping current about copyright: workshops and the Arcan-l listserv. Two stressed the importance of workshops as a means of learning about changes to the law once they were in place. As Lee said, “I think the workshops are really, really important particularly when there are changes and updates. And I guess it’s the provincial and national associations’ job to make sure that we are aware of the changes.” Seven more mentioned the bulletins on the Arcan-l listserv as the prime way in which they become aware of changes to copyright law. Of these, three mentioned the role of the BCA Copyright Committee as the body responsible for informing the archival community of changes to the law.

As noted earlier, amendments to the statute in 2004 and the Supreme Court decision in the \textit{CCH} case that same year were particularly relevant to archivists. As well, amendments to the Act were introduced in Parliament in June 2005 but died on the order paper when an election was called.\textsuperscript{344} Archivists’ awareness of these specific changes, actual and proposed, was explored in a series of interview questions. Their awareness of these events is discussed in more detail in the next section; however, the responses provided further insights into how they keep current.

Five interviewees noted that they keep a reference file or binder on copyright to which they would add any information disseminated on the listserv (or from other sources) regarding recent developments. While few could accurately recall the details about the specific events, they noted that, had these questions come up in the course of the workday, they would have gone to their reference file. For example, one interviewee

\textsuperscript{343} The BCA Copyright Committee uses the Arcan-l listserv to disseminate information about developments in copyright law.
\textsuperscript{344} Bill C-60, op.cit.
could recall no details about the *CCH* case, but his repository’s copyright guide included a copy of the message to the listserv summarizing its implications. Two others remarked that they would ask a particular colleague that they rely upon for copyright information. Colin noted that he follows the progress of legislation, “When I’m aware that something’s happening I’ll check Legisinfo [www.legisinfo.ca] and that sort of thing to see what the progress of a bill is.”

With regard to proposed amendments, three interviewees noted that they would be unlikely to pay attention until a change actually happened. As Judy said, “I know there are things that I have saved and put in that file [her reference file], but because they haven’t been passed yet I haven’t paid a whole lot of attention. It’s on my peripheral vision but I figure until it’s actually happening, why am I filling my head with this stuff?” They appear to rely on others (particularly the BCA Copyright Committee) to inform the community of changes once they actually occur.

Archivists use a variety of sources to keep up-to-date with copyright law; with announcements on listservs most frequently mentioned, followed by publications of various sorts. In addition to being a means of learning about copyright, workshops are also a means of keeping up-to-date. When informed of a change, many add the information to a reference file for consultation.

### 4.2.3 Answering Specific Questions

Learning generally about copyright is one aspect of acquiring a knowledge of the area; however, finding the answer to a specific question is another important element to consider. Questionnaire respondents were given a list of possible sources they might consult if they had a specific question about a copyright matter, and were asked to check all that applied.\(^{345}\) The results are presented in Table 4. Questionnaire respondents consider colleagues in the profession, the statute and regulations, and books and newsletters to be the three most important sources consulted in seeking the answer to a specific question. Another cluster of sources (listservs, repository colleagues, and in-house legal counsel) are consulted by approximately one-third of respondents. The archives advisor is next, followed by a cluster of those with expertise in copyright law, or

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\(^{345}\) Question 34 asked, “Which of the following do you consult if you have a specific question about a copyright matter?”
in law generally (in-house copyright specialist, outside legal counsel, and copyright consultants). Of the ten respondents who mentioned other sources, five mentioned searching on the Internet.

**Table 4**

<table>
<thead>
<tr>
<th>Source</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colleagues in the profession</td>
<td>76</td>
<td>72 %</td>
</tr>
<tr>
<td>Statute and regulations</td>
<td>70</td>
<td>66 %</td>
</tr>
<tr>
<td>Books and newsletters</td>
<td>63</td>
<td>59 %</td>
</tr>
<tr>
<td>Archives listservs</td>
<td>36</td>
<td>34 %</td>
</tr>
<tr>
<td>Colleagues in your repository</td>
<td>35</td>
<td>33 %</td>
</tr>
<tr>
<td>In-house legal counsel</td>
<td>34</td>
<td>32 %</td>
</tr>
<tr>
<td>Provincial archives advisor</td>
<td>25</td>
<td>24 %</td>
</tr>
<tr>
<td>In-house copyright specialist</td>
<td>19</td>
<td>18 %</td>
</tr>
<tr>
<td>Outside legal counsel</td>
<td>14</td>
<td>13 %</td>
</tr>
<tr>
<td>Copyright consultant</td>
<td>11</td>
<td>10 %</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>9 %</td>
</tr>
</tbody>
</table>

Questionnaire respondents were then asked to indicate which of the sources listed they would consult first. The results are presented in Table 5. One-quarter of respondents indicated that the first source they would check would be the statute and regulations. Eighteen percent would first check secondary sources; seventeen percent would consult colleagues in the profession. Each of the remaining sources would be consulted first by fewer than ten percent of respondents.

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346 Question 35 asked, “Which of the sources listed in Question 34 would you consult first if you have a specific question about a copyright matter?”
Table 5
Source Consulted First in Response to a Specific Question about a Copyright Matter
(N = 100*)

<table>
<thead>
<tr>
<th>Source</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute and regulations</td>
<td>25</td>
<td>25%</td>
</tr>
<tr>
<td>Books and newsletters</td>
<td>18</td>
<td>18%</td>
</tr>
<tr>
<td>Colleagues in the profession</td>
<td>17</td>
<td>17%</td>
</tr>
<tr>
<td>Provincial archives advisor</td>
<td>9</td>
<td>9%</td>
</tr>
<tr>
<td>In-house legal counsel</td>
<td>9</td>
<td>9%</td>
</tr>
<tr>
<td>Colleagues in your repository</td>
<td>8</td>
<td>8%</td>
</tr>
<tr>
<td>In-house copyright specialist</td>
<td>6</td>
<td>6%</td>
</tr>
<tr>
<td>Copyright consultant</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>Outside legal counsel</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>5%</td>
</tr>
</tbody>
</table>

* Six responses that reported more than one source were not counted.

That two text sources rank at the top may be somewhat surprising, since it is well-known that information seekers tend to go first to other people, and some archivists perceive the statute to be complex and difficult to understand. It is true that the remaining sources (selected by 52% of the questionnaire respondents) are all people; however, they are not a homogenous group, and the responses require a more nuanced analysis. If related sources are combined by first combining colleagues in the profession, colleagues in your repository, and the provincial archives advisor to create a category called “archival colleagues”; second, by combining in-house copyright specialist and in-house legal counsel to create a category called “in-house expertise”; and third, by combining copyright consultant and outside legal counsel to create a category called “external expertise”, the results are those presented in Table 6.

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348 Fifty questionnaire respondents provided comments on what they would change about copyright law to make their jobs easier. Of those, 22 called for the Act to be simplified or clarified, or for an interpretive guide, or both.
349 In five of the six cases where the in-house copyright specialist would be consulted first, that specialist is within the parent body but outside the repository. Thus, the in-house specialist was not included in the ‘archival colleagues’ category.
### Table 6
**Categories of Sources Consulted First in Response to a Specific Question about a Copyright Matter**  
*(N = 100*)

<table>
<thead>
<tr>
<th>Category</th>
<th>Sources Included</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Archival colleagues</td>
<td>Colleagues in the profession, colleagues in your repository, archives advisor</td>
<td>34</td>
<td>34%</td>
</tr>
<tr>
<td>Statute and regulations</td>
<td>n/a</td>
<td>25</td>
<td>25%</td>
</tr>
<tr>
<td>Books and newsletters</td>
<td>n/a</td>
<td>18</td>
<td>18%</td>
</tr>
<tr>
<td>In-house expertise</td>
<td>Copyright specialist, legal counsel</td>
<td>15</td>
<td>15%</td>
</tr>
<tr>
<td>External expertise</td>
<td>Outside counsel, copyright consultant</td>
<td>3</td>
<td>3%</td>
</tr>
<tr>
<td>Other</td>
<td>n/a</td>
<td>5</td>
<td>5%</td>
</tr>
</tbody>
</table>

* Six responses that reported more than one source were not counted.

If sources are combined in this way, 34% of questionnaire respondents would consult professional colleagues first; as one of them noted, “I usually begin by contacting colleagues in the profession.” One-quarter would first consult the statute and regulations. Eighteen percent would consult books and newsletters; fifteen percent would consult in-house resources, be they the copyright specialist or legal counsel. External sources that would incur a fee are least likely to be consulted first. Only one questionnaire respondent reported that they go first to outside legal counsel, noting that this occurs only “if we have the money!”

It is not surprising that the statute and regulations would be consulted at some point, but it is somewhat surprising to find that this source ranks ahead of books and newsletters, given the number of questionnaire responses noted earlier that commented on the complexity and difficulty of copyright law. This seeming discrepancy was explored with 13 interviewees who had indicated in their questionnaire responses that they would, at some point, consult the statute and regulations if they had a specific
question about copyright. Of those, four find the statute difficult and would try to find the answer from another source. As Alex said,

…and in fact I have looked at these things. But it’s absolutely true these things are so complex that if there’s some other way to get advice from someone who is more cognizant of the complexity of the law, that would be a first step ahead of actually looking at the Act.

The other nine, however, are quite comfortable going to the statute, either because they are accustomed to dealing with legislation in other areas, or because they want to go to the source to see what it says, seeking clarification from other sources if necessary as a follow-up step. As Rose said,

This has become much more the norm if you’re an archivist to deal with all of these different aspects of … legislation, and regulation. … I would go to the authority first; … see what it is, and then if I have to talk to somebody, I can be much more specific to what I’m referring to.

Diane described the process she follows,

I like to start there [with the Act], but I use the National Archives Staff Guide a lot to interpret areas where I don’t feel it’s clear or I need more clarification. … If I can’t find anything that seems to cover a particular situation, I would consult colleagues who I felt have dealt with situations like this, or who have perhaps more knowledge ….That’s the process that I go through until I got to someone who could help me out with it.

Dick reported that he looks at the legislation as a follow-up to copyright-related discussions or notifications on the archives listserv.

As far as books are concerned, the National Archives (NA) Staff Guide was specifically mentioned in the questionnaire responses, in the interviews and on the websites. As noted earlier, three repositories document it as a source for their copyright policies; these three and two others specifically mentioned the NA Staff Guide in their questionnaire responses (instead of simply checking off books and newsletters as the source they would consult first if they had a specific question about a copyright matter). Eight interviewees (six of them from different repositories from those discussed above) also mention it as a valuable source; Leslie mentioned the NA Staff Guide in his questionnaire response and in his interview, when he said (of the guide), “Best money I

\[350\] Noel, Staff Guide.
ever spent.” That the *Staff Guide* is mentioned specifically by 11 repositories is not surprising, because it was made available to repositories and individuals in the Canadian archival community through the Canadian Council of Archives for $15, and was the “textbook” for the copyright workshops developed by the BCA Copyright Committee. Because of its low price, its use in training events, and its focus on archival holdings, this book is a resource most repositories would be likely to have. Harris’ *Canadian Copyright Law* is also used in five repositories (mentioned in one questionnaire response and by four interviewees, two of whom also refer to it in their policies or in their questionnaire responses). However, as two questionnaire respondents noted, they use the NA *Staff Guide* in conjunction with the copies of notices of updates that some keep in a reference file of more recent copyright information. One of these respondents was interviewed; in his interview Richard also noted that printed sources may not be current, saying, “if I’m looking at something that was published in 1996 chances are I should be looking at a more recent source.”

As Table 6 shows, 15% of the respondents would consult in-house expertise, either the copyright specialist, legal counsel, or both. Two interviewees from university archives noted that, although the copyright officers at their respective universities deal mainly with licensing of published materials and classroom uses, and may not know much about archives, they are knowledgeable and helpful in assisting with copyright questions. Of these interviewees, Beth noted that she relies on the copyright officer in part because they do not have easy access to legal advice. Lee also relies to some extent on the in-house lawyer, although she noted that “the problem with lawyers is that lawyers don’t know anything about archives. So you have to educate them about archives and archival material and then let them try and blend that in with what they know about copyright.” If Lee had a specific question she would consult her workshop notes first, then a colleague in another repository on the same campus, and then the university library’s copyright officer. Judy noted that turnover in the legal services staff available to her government repository meant that there was little continuity, stating.

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351 Two other university archives refer their website users to the university’s copyright officer for further information about copyright; however, it is not known whether these archivists also consult the copyright officer.
Because we work for the government, we are assigned different lawyers from time to time. Some are more aware than others. The one we have now is very good. … So I feel quite confident that we’re getting the right advice now. … [However with her predecessor, we had to push a bit] We did ask questions, and then what [the former lawyer] did was ask a colleague who knew more, and it took months and months but in the end it seemed like it was OK.

A questionnaire respondent from another government repository also commented that “in-house legal counsel is not necessarily well-versed in copyright legislation.”

Just as archivists learn about copyright from a variety of sources, they also consult a variety of sources in seeking answers to specific questions; interview data suggests that seeking an answer to a specific question may require consultation with several sources until an answer is found. Colleagues in the profession, the statute, and printed sources are mentioned most frequently. However, when asked what they would consult first, archival colleagues moved to the top of the list, followed by the statute, and printed sources. Although other data suggest that some archivists find the statute daunting, many interviewees are comfortable looking at the statute as a starting point before consulting further sources.

### 4.2.4 Learning about Repository Practices

Knowing the provisions of a statute and its regulations is one thing; administering legal obligations within a repository is another matter. Training sessions, publications, and updates about amendments are primarily a means of learning about the provisions of the Act, but they may not address such matters as what to include in a copyright policy, or the terms and conditions that a repository may put on uses of its website. For this aspect of copyright knowledge, there is evidence on the websites and in the interview data that repositories base their institutional practice on documents and wording borrowed from other repositories. For example, twelve repositories use the following statement setting out the terms and conditions of use of website content:

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353 One other repository uses only the first sentence.
Access to digital images and text found on this website and the technical capacity to download or copy it does not imply permission to re-use. Prior written permission to publish, or otherwise use images and text found on the website must be obtained from [repository].

In another example, two municipal archives use identical wording to communicate copyright information and the twelve conditions of use pertaining to photographs ordered from the institution. These two repositories’ wording of the particular condition specifying one-time use is used by four other repositories. Duplication on a smaller scale is seen in the virtually identical wording of the terms of use statements for two single fonds exhibits on two other municipal archives websites. While it is impossible to determine which repository first used these statements, the presence of identical or similar wording suggests that repository staff may look to see what others have done, rather than composing a copyright statement or terms of use from scratch.

This is borne out in the interview data. Four interviewees reported that they turn to the Internet for guidance to see how others have dealt with a particular issue, e.g., a selection policy, virtual exhibit design, making copies for researchers in digital formats, and a strongly-worded terms of use statement for website content. For example, when designing the repository's first virtual exhibit, Alex reported looking first at a major exhibit done by another repository, and then, “we kind of wafted around, looked at a few things, and took bits and pieces, thought that it was important to have those sections.” The same interviewee also uses her personal networks, e.g., knowing that a colleague in another province was working on national guidelines for digitization projects, she was able to obtain a copy of the draft. Two interviewees from small community archives rely on the provincial archives advisor, whose mandate includes making model documents available to institutions in the community for their adaptation and use. Another interviewee reported that the policy document that “informs [his repository’s] digital copyright work” was made available on request to other repositories in the province, and it continues to be used in the orientation of contract staff who do the scanning in his repository. Interview data about the role of personal networks and the archives advisor support the findings from the questionnaire data indicating that archival colleagues are an important source of knowledge about copyright. When asked if he had anyone in
particular in mind, an interviewee who had had ranked colleagues in the profession as the most important source of information about copyright, responded, “There’s no particular individual. There’s discussions that come up from time to time, and just watching what other people tend to do on their websites and just more or less learning from other folks but no particular individuals.”

In sum, when it comes to the administration of copyright within repositories, repositories often borrow from each other. Other repositories (and colleagues in them) are a source of models for institutional practice.

4.3 Quality of Archivists’ Copyright Knowledge

Archivists’ sources of copyright knowledge are diverse, ranging from structured training events to publications to professional colleagues. It is logical to assume that what Canadian archivists know is in large part determined by their sources of knowledge about copyright, and, if the sources of knowledge are accurate and current, it is likely that the quality of archivists’ knowledge will reflect that. The preceding discussion of the sources of archivists’ copyright knowledge suggests that some of these sources are not current, or are from another jurisdiction. Professional colleagues are reported to be an important source of copyright information, but they themselves may not always be well-informed.

This section looks at what Canadian archivists know about copyright; Research Question 2c (What do Canadian archivists know about copyright?) was intended to discern the quality of their knowledge of copyright. For the purposes of this study, quality of knowledge is understood to reflect accuracy and currency, i.e., the extent to which they correctly understand the relevant provisions of the Act, and the extent to which their knowledge is up-to-date in that it reflects recent amendments and case law. It is also assumed that institutional policy documents and websites are just as much evidence of archivists’ knowledge as questionnaire responses and interviews because repositories’ policies are written by staff archivists.

However, the study was not designed to administer a comprehensive “test” of archivists’ copyright knowledge. The questionnaire did not include specific questions to determine what archivists know about copyright. Because respondents could always look up the answer, it was felt that the responses to such questions would not necessarily
produce an accurate picture of their knowledge. Furthermore, because of concerns that interviewees may have felt uncomfortable answering detailed questions about their knowledge of copyright, the interview script focused on awareness of recent changes to copyright law affecting archival repositories.

4.3.1 Archivists’ Confidence in their Knowledge

In order to address archivists’ confidence in their knowledge of copyright, questionnaire respondents were asked to indicate their level of agreement with the statement “I am reasonably confident that I can provide colleagues and researchers with accurate information and advice about copyright issues.” Just over half (54 or 51% of the 106 respondents) agreed or strongly agreed with the statement; nearly a quarter (22 or 21%) disagreed or strongly disagreed with the statement, and more than a quarter were neutral (30 or 28%). It appears that half of the questionnaire respondents are confident in their knowledge of copyright issues. Others, however, are not. As one questionnaire respondent commented, “Staff is very uncomfortable about the complex issue of copyright primarily because they are not confident they have the right answers.” Only one respondent expressed some confidence, if not in her knowledge, at least in knowing where to look for answers; as she stated, “I don’t consider myself an expert on copyright but others would who have much less experience in the matter than I do. At least I know who/where to look for answers.”

Evidence of uncertainty was found in other questionnaire responses and in the interview data. When asked, “What, if anything, would you change about copyright law as it affects your job?” 4 of the 59 questionnaire respondents (7%) indicated that they did not consider themselves sufficiently knowledgeable to comment. Two questionnaire respondents noted that this study made them aware of copyright issues they had not considered or addressed. Three others appeared to regard the study as an inspection of copyright practices, and, aware that their copyright practices were somehow wanting, used this area to confess their weakness and in some cases, promise to do better. Three different questionnaire respondents wanted clarification about the specific question of whether putting something on a website published it. Three interviewees were pleased

\[\text{354 Differences between the responses of repository specialists and non-specialists regarding this statement were not statistically significant, using Fisher’s exact test.}\]
that someone was investigating these issues; as Tony said, “I think it’s wonderful that you’re doing this because I think a lot of people maybe are like me. You get kind of immersed in the quotidian of it all and you don’t really pay as much attention to these more basic issues which should inform the work that you do.”

4.3.2 Accuracy of Archivists’ Copyright Knowledge

As noted, the study was not designed to test archivists on their copyright knowledge. Furthermore, policies and website statements are not necessarily written to convey the details of a repository’s knowledge of copyright; thus, many of the policy statements available to this study provide no evidence one way or the other about the accuracy of their knowledge, and where details of copyright are presented, they are unlikely to be comprehensive. Similarly, questionnaire respondents who provided very specific or detailed answers to open-ended questions may have revealed something about the accuracy of an aspect of their copyright knowledge, but those who provided general responses disclosed no information in this regard. In other words, most repositories are silent on this matter, or if they reveal something, it is about a particular element of copyright. Finally, the sources of data vary greatly in their evidential weight, i.e., institutional policy documents and website policy statements are probably more reliable as evidence of accuracy than “off the cuff” questionnaire responses and interviews.

However, the quality of archivists’ copyright knowledge is of interest in relation to access to, and use of, the holdings that their repositories make available on the Internet. As previously noted, it appears that archivists go to some effort to learn about copyright in order to deal with copyright correctly, but they find copyright complicated and difficult. Incorrect or out of date information may affect access in terms of selection; for example, if a repository’s policy is to select only material in which the copyright has expired, a mistaken understanding of the provisions for the duration of copyright could mean that material in the public domain would not be selected for the website. Their websites may also contain information about how the online content can be used; a mistaken understanding of copyright may limit uses, and, where it is publicly available on websites, it may mislead users and other repositories. While it is not possible to

355 Only two detailed guides prepared to assist repository staff in applying copyright to their holdings were available to this study.
provide more than a general impression of the accuracy of archivists’ copyright knowledge, some observations can be made about selected aspects of the accuracy of archivists’ copyright knowledge in relation to access and use.

Evidence that archivists correctly understand aspects of copyright law was found mainly in the questionnaire responses to Questions 8 and 40, in internal policy documents, and in website data from the few repositories that provide explanations of copyright law for researchers. Twenty-six repositories provided 32 instances of an accurate knowledge of copyright law. The data are summarized in Figure 12.

**Figure 12**
Instances of Accurate Knowledge of Copyright Law
(N = 32 Instances from 26 repositories)

Question 8 asked those who said that they selected (for the repository’s website) documents in which the copyright has expired, “How is it determined that the copyright has expired in any particular document?” Responses from 11 repositories provided 12 instances of correct term provisions, 8 of which applied to photos and 4 to textual material. Question 40 asked “What, if anything, would you change about copyright law as it affects your job?” Of interest are the 16 responses from 14 repositories that revealed that some archivists are sufficiently well-versed in the current provisions of the Act to make specific and well-informed suggestions about what to change. Seven questionnaire respondents called for shorter terms of copyright protection, e.g. “Réduire les delais. 50 ans après la mort est trop long.” Of those, three specifically addressed the issue of the
lengthy term in posthumous works, none more emphatically than the following respondent:

People who died between 1949 and 1998 should NOT have their unpublished material protected until 2049. This exception to the life plus 50 year rule is hard to explain to the public, as well as keeping fabulous resources from being fully used.

Another wanted the term of copyright “based on publication/creation date rather than death dates” because death dates are not easily determined. Five others wanted simpler terms; of those, one wanted uniform terms for all media; the other four commented specifically about photos. Of those four, three noted how difficult it was to apply a term rule based on life of the author when the author was frequently unknown; the fourth said, “Revoir le droit d’auteur s’appliquant aux photographes professionnels pour permettre la diffusion complète des photographies, même lorsqu’elles ont été payées.” Two others wanted special provisions for situations where the copyright owner or author was unknown. Two more called for changes to particular provisions, referring to them by section number, rather than name, i.e., one said “Modifier l’article 14 [the reversionary clause];” the other said “30.21(3) onerous for archives.” Two others wanted special provisions for situations where the copyright owner or author was unknown. The detailed guides prepared by two repositories to assist their staff in applying copyright to their holdings are for the most part correct. Two other repositories, whose websites provide explanations of copyright law for researchers, provide accurate explanations of fair dealing, and the non-infringing use of an insubstantial part of a work, respectively. Not only do these responses indicate an accurate knowledge of particular aspects of copyright, but the suggested changes also reveal a desire to make holdings available sooner than the current term provisions allow, and to make the application of copyright law to archival material less complicated.

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356 S. 30.21(3) lists the conditions a LAM must comply with before making copies of archival holdings for researchers.
However, the data sources also included direct statements that provide evidence of inaccuracies or misunderstandings pertaining to a number of aspects of copyright.\(^{357}\) The following analysis is limited to inaccuracies or misunderstandings found in policy documents and websites, on the assumption that they have undergone a review, unlike questionnaire responses and interview content. Such statements were analyzed first by determining whether the possible result was serious or not, based on its effect in terms of access to holdings, compliance, or copyright guidance for researchers. For example, that two websites refer to “the Canadian Copyright Act (1999)” or “the 1999 Copyright Act” as the authority for their copyright policies may be evidence of confusion regarding the coming into force of certain provisions of Bill C-32,\(^{358}\) but is unlikely to impede website visitors wanting to look at the *Copyright Act* for themselves. Amendments to the Act in 2004 repealed the statutory requirement to keep records of copies made for researchers. Two repositories still have the record keeping requirement on their websites. Continuing to keep such records affects internal practice, but has no major consequences for access, compliance, or user guidance. While this may suggest that their knowledge of the law is not current, it could also simply be evidence that they do not regularly review and update their websites.

Specific areas of misunderstanding that could have serious consequences were then analyzed using the following three codes:

- it could reduce access to archival holdings in some way;
- the repository could be infringing copyright; or
- it provided misleading information to visitors to the repository's website.

While one could argue that an erroneous understanding of a provision of copyright law is also misleading, the three categories were considered to be mutually exclusive, and a specific instance of a misunderstanding is assigned to only one category.

The areas of serious misunderstanding are reported in Table 7. The 30 instances of misunderstandings of copyright law come from the websites and policy documents

\(^{357}\) Only statements that revealed direct evidence of inaccuracy or misunderstanding were analyzed; statements that may be inaccurate due to the absence of information were not included, e.g., where it is not explicitly stated that a repository’s Access Copyright licence does not apply to unpublished works.

\(^{358}\) Bill C-32 (*An Act to Amend the Copyright Act*, S.C. 1997, c. 24) received royal assent in April 1997, although its provisions were not fully in force until October 1999.
from 19 repositories. Within each area of misunderstanding, a repository has been counted only once, even if a particular misunderstanding was mentioned in both sources, which happened in five cases. However, where a repository misunderstands more than one aspect of copyright, it is counted more than once. Of the 19 repositories, two are counted in four different areas of misunderstanding; one is counted thrice, three are counted twice; the remaining 13 appear once. Of the 30 instances of misunderstandings in Table 7, 15 (50%) potentially reduce access; 2 (7%) may put the repository in an infringing position, and 13 (43%) provide misleading information to website users. Each area of misunderstanding is discussed below.

Table 7
Repositories with Misunderstandings of Specific Aspects of Copyright Law (N = 19)

<table>
<thead>
<tr>
<th>Term of protection</th>
<th>Reduced Access</th>
<th>Infringing</th>
<th>Misleading</th>
</tr>
</thead>
<tbody>
<tr>
<td>Posthumous works</td>
<td>5 (w)</td>
<td>1 (p)</td>
<td>2 (w), 3 (p)</td>
</tr>
<tr>
<td>30.21 narrowly interpreted</td>
<td>4 (w)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fair dealing</td>
<td>2 (w)</td>
<td>1 (w)</td>
<td></td>
</tr>
<tr>
<td>Bill C-32 = Act</td>
<td></td>
<td></td>
<td>4 (w)</td>
</tr>
<tr>
<td>Moral rights</td>
<td></td>
<td>1 (p)</td>
<td>1 (w)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>15</strong></td>
<td><strong>2</strong></td>
<td><strong>13</strong></td>
</tr>
</tbody>
</table>

Key:  w = website  p = policy document

Six repositories misunderstand the term of protection in some way. As noted above, the term provision of creation plus 50 years continued to apply to photographs taken after 1948 in which the author is a corporation whose shares are widely held. None of the four repositories that discuss the “new” term provisions on their websites or in policy documents mentions the “corporate” term provision; they mention only that the duration of copyright in photographs is the life of the author plus 50 years. Because the “corporate” term provision (creation plus 50) is very likely shorter than life plus 50, such photos could be in the public domain.

A copyright policy that is in the process of development also bases the calculation of the term of copyright on the date of the document, i.e., “When copyright status is unclear the archivist will attempt to establish date of creation to determine length (term)
of copyright.” The same policy also presents the general provision for the term of copyright protection as “the fifty plus principle,” without specifying a triggering event. Repository 6J’s website conflates several different provisions for copyright duration and ownership into one when it states, “Copyright of unpublished records remains with the creator, commissioner or owner of the records for life plus 50 years.” The rules are far more complex than this one sentence indicates. In addition to confusing ownership of the documents with ownership of copyright in them, this statement also is misleadingly ambiguous in that it does not specify whose life is the basis of the duration of copyright.

While it is often very difficult to ascertain the life dates of the authors of archival documents, the dates of the documents are frequently known, and it is generally true that the older the document, the more likely it is that copyright in it has expired, now that the possibility of perpetual copyright protection for posthumous works no longer exists. However, basing the term of copyright on the age of the document may expose the repository to the possibility of copyright infringement. The 1997 amendments changed the provisions for the term of copyright in posthumous works with the result that many older documents whose authors died after 1948 but which were never published during the author’s lifetime will continue to be protected until 2049.

The provisions for posthumous works are very complex, and may not be well understood. As reported in Table 7, nine repositories misunderstand aspects of these provisions; of those, five appear to be unaware of any changes, and four others misunderstand the scope of the provisions. Turning to the first group, three repositories apparently are either unaware of the changes to the term of copyright in posthumous works, or they have not updated their websites, which include special provisions for unpublished material, such as, “Under Canadian copyright law, copyright to unpublished material resides with the creator, his/her heirs or literary executors.” Two of them use identical wording, “Literary rights to all unpublished materials remain in the possession of the authors, heirs, or assignees. The user assumes full responsibility for obtaining permission to publish such items in whole or in part.” Two other repositories place similar conditions on the use of unpublished materials, using wording that reflects pre-
For example, Repository 1X uses the following statement in its application for reproductions form: “To publish or publish excerpts from a manuscript or letter which under common-law copyright is controlled by the writer, his heirs, executors or assigns, it is necessary that the applicant seek written permission from the holder of the rights.” When asked about the references to common law copyright on his website, Larry responded, “I think a lot of these documents have been around for quite some time. … a lot of that is taken from old practice.” These special conditions for unpublished works are not unusual if the works are still protected by copyright; however, the expiry of the second transitional provision for posthumous works brought many early works into the public domain in 2004. Thus, these statements that imply that copyright in unpublished works will never expire may be considered as barriers to access, because there is no recognition that some of these works may already be in the public domain, and that the amendments ended the possibility of perpetual copyright in posthumous works.

Four other repositories misunderstand the scope of application of the posthumous works provisions. Internal policy documents from two repositories contain errors in this regard. Repository 2O’s chart to assist staff in applying copyright does not include the transitional provision that protects posthumous works whose authors died between 1949 and 1998 until 2049, saying instead that the term in such works is life of the author plus 50 years, thus exposing the repository to the risk of copyright infringement. The problem is compounded by the fact that the chart also erroneously excludes moving image materials from the application of the posthumous term provisions, while including within posthumous works documents iconographiques which it defines as “[des] oeuvre[s] exécutée[s] à la main, telle qu’un dessin, une peinture, une gravure.” Of all the types of artistic works, only engravings are covered by the provisions for posthumous works. Repository 6B’s staff manual is confusing in that it inconsistently presents the death dates of authors of posthumous works; speaking in some places of those who died before 31 December 1948 (which is correct), and in others of those who died before 1948.

Until the American copyright law was amended in 1976, unpublished works were protected, not by the statute, but by common law, and as long as a work remained unpublished, the creator’s rights never expired. In 1976 the law was amended to provide that all works, published or not, are subject to a statutory term of protection. In one sense, these details are irrelevant, because common law copyright does not exist in Canada (s. 89), and because American copyright law does not apply in Canada. However, two repositories appear to have borrowed or adapted wording that refers to common law copyright.

Copyright Act, s. 7(1).
The expiry of the second transitional provision brought a host of older works into the public domain on 1 January 2004. However, based on the policy documents available to this study, only two repositories changed their policy documents to reflect this. A comparison of the 2002 version of the copyright section of Repository 2V's policy and procedure manual with the 2005 version of the manual reveals that they added the following statement to their policy (and to their reading room regulations): “As of 2004, unpublished literary works whose authors died prior to 1949 are now in the public domain.” This, however, is an oversimplification of the substance of the amendment; on one hand, the change is not limited to literary works; on the other, it applies only to works that had not already been published after the author’s death and before 31 December 1998. The second repository presents a summary of the 1997 amendment that reveals a serious misunderstanding, i.e., “Written works by an author who died prior to 1945 are in the public domain; written works by an author who died between 1945 and 1998 are copyrighted until 2048. Written works by an author who died after 1998 are copyrighted until 50 years after their death.” Not only is the date wrong; it misses the fact that the transitional provisions apply to more than written works, and it also misses entirely their application to posthumous works. Because both these policy documents are available on the repositories’ websites, this information has the potential to mislead website visitors.

The 1997 amendments also added a provision (s. 30.21) that allows an archives to make a single copy of an unpublished work in its holdings for a researcher, provided that certain conditions are met. Four repositories appear to have a narrow understanding of the scope of this exception. One charges a $15 research fee “where copyright has to be established before an item can be photocopied.” The basis for this is not clear, nor is it clear how it is administered in practice, but it is needlessly restrictive, since both the archives provision and the fair dealing provisions permit making photocopies for research or private study without clearing copyright first. Another repository stated (with regard

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361 Posthumous works published after the author’s death and before 31 December 1998 are protected for 50 years from publication (Copyright Act, s. 7(2)); e.g., the work of an author who died in 1949 that was first published in 1970 would be protected until the end of 2020.

362 Consistent with this restrictive approach documented on their website, this repository’s questionnaire response to a question asking them to indicate what, if anything, they would change about copyright law
to its photocopying policies), “copying of entire works is prohibited” which has no statutory basis. Repository 5H misunderstands the Act by limiting copying on the basis of membership, “Due to our understanding of Canadian copyright rules, we can only make copies for Members of our society; we must also ask that you confirm that you would use any copies for personal research only.” Repository 7D in its photographic reproduction policy states, “In instances where copyright for a photograph rests with another institution or individual, the researcher is required to make reproduction arrangements directly with them.” This policy puts the researcher to needless effort, because a repository can provide a single copy for research or private study regardless of who owns the copyright.

Table 7 includes evidence of misunderstanding of moral rights by two repositories. One addresses the author’s right of attribution in the terms of use statement for two virtual exhibits. Its website states, “Le défaut de mentionner la source et le nom des ayants droit sera considéré comme une atteinte au droit moral, de même que toute modification du contenu de ce site et individuellement, de chacun des documents présentés.” This is misleading in that it implies that the name of the copyright owner is required, when in fact it is the name of the author(s). The other repository’s draft policy contains an erroneous statement about the duration of moral rights, i.e., “They remain with the creator until his or her death unless the author agreed to have these rights waived.”

In an effort to educate their users about copyright, four repositories provide a link to the current version of the Copyright Act on the federal Department of Justice website. However, four other repositories refer, not to the Act, but to Bill C-32, which amended the Copyright Act in 1997. No amendment bill stands alone; its provisions can be understood only with reference to the statute it is amending, and in any case, once Bill C-32 received royal assent, its provisions were incorporated into the Act. Three of these repositories include links to Bill C-32 on their websites; one of these links both to Bill C-32 and the current statute. The fourth repository refers to Bill C-32 as the
Canadian Copyright Act in three different policy documents. The archivists in these four repositories appear to believe that Bill C-32 is the Copyright Act. Where the reference is a website link, it could be that archivists do not regularly review and update their websites; in the fourth case, while the repository’s copyright policy was changed to reflect the amendments that took place in 2004, the references to Bill C-32 were carried forward unchanged from the repository’s 2002 copyright policy to the 2005 revision and the reading room regulations. Because the policy is on the repository website, this may be misleading for users. Because repositories borrow from each other, users may include other repositories, thus perpetuating wrong information.

Fair dealing is an area of copyright law of particular interest to archivists and archival repositories. As seen in Table 7, misunderstandings of fair dealing can restrict access in some cases or mislead in others. Evidence about archivists’ understanding of fair dealing is found on three websites. Two websites present, respectively, a narrow interpretation of fair dealing, or lack of awareness of fair dealing entirely, that may present a barrier to access to archival material. Repository 2N suggests that fair dealing applies only to published materials when it says, “… The Archives can also provide a copy of a portion of published material for the purpose of research or private study under the Fair Dealing provisions of the Copyright Act.” Repository 2V does not appear to be aware of fair dealing as an alternative to the exceptions for libraries, archives, and museums when its policy and procedure manual states, “Under the new [sic] Copyright Act, the Archives is no longer able to make photocopies from published works held in the Reference Library. Researchers are advised to obtain copies from institutions that hold a special copying license.” Repository 5S “grants” what it calls “fair use” of the content of its website for non-profit research or study provided that the repository is cited as the source. This statement is misleading for two reasons. Fair dealing is a user's right under

365 However, this does not appear to be the case for Repository 4R, whose website also includes a link to Bill S-16, a private bill introduced in the Senate that died on the order paper when Parliament was prorogued in 2004, and was not reintroduced. Because repository 4R’s questionnaire response also refers specifically to Bills C-32 and S-16 (“CCA [Canadian Council of Archives] projects must fall under Can. Copyright law Bill C-32 & Bill S16”), it appears that the belief that these two bills are the copyright law is well-entrenched in this repository.

366 This policy decision may, however, be based on an interpretation of s. 30.21 (which permits an archives to make a single copy of an unpublished work in its holdings for researchers) as prohibiting making a copy of a published work.
the statute, and is not within a repository’s power to grant or withhold; furthermore, this statement suggests that the repository owns the copyright in the digitized works that appear on the site, which may not be the case.

Although interviews are not included in Table 7, archivists’ understanding of fair dealing was explored in the interviews.\textsuperscript{367} It appears that seven interviewees do not have a clear understanding of fair dealing. As James commented, “When I think of fair dealing, I think of books. I don’t think of archival material when I think about fair dealing.” Others confuse fair dealing with blanket licences or the archives exception. Four interviewees are uncertain about the difference between the Access Copyright licence and fair dealing. When asked what she thought about the fair dealing provision, Jan responded, “This is the CanCopy thing? Like you can copy 10%?” and Colin said, “I’m often hearing special collections staff telling people you’re allowed to copy 10% of a book, and I’ve never been clear whether that was them interpreting what fair dealing means or may be that’s a CanCopy provision.”

Two others did not realize that the archival exception was different from fair dealing. As Judy said,

\begin{quote}
Obviously I’m confused about this because we just refer to the archival exceptions here. That’s what we use. So fair dealing I don’t know. Either we have felt that it doesn’t affect us more, I don’t know. Anyway we’re not in the interpretation business for our researchers. So what we do is talk about the archival exemptions; that’s what we’re concerned with here but so far as fair dealing, we leave a lot of that up to them to try and figure out.
\end{quote}

It appears that archivists’ understanding of fair dealing varies widely, including confusing fair dealing with licences or with other provisions of the Act.

It is not easy to combine the foregoing discussions of accurate and inaccurate knowledge to produce a meaningful comparison. The issues are wide-ranging, and reflect the complexity of copyright law. However, one area of copyright law that is very pertinent to this study invites comparison, i.e., the term of protection for photos. As discussed earlier, the 1997 amendments changed the term provisions for photos from 50 years after creation to the life of the author plus 50 years (except where the author is a corporation whose shares are widely held). These changes came into force on 1 January

\textsuperscript{367} Their opinions about fair dealing have already been discussed.
1999; but they were not retroactive, so that photos taken before 1949 are in the public domain. This is one of the most straightforward provisions in the *Copyright Act.* However, the data from all four data sources reveal different understandings of the cut-off date, as set out in Table 8.

Table 8
Repositories’ Understandings of the Public Domain Cut-off Date for Photos (N = 25)

<table>
<thead>
<tr>
<th>No. of Repositories</th>
<th>Data Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-1949 (correct)</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>1P, 2W, 6Q, 2I</td>
</tr>
<tr>
<td>Pre-1948</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>7Q, 1I</td>
</tr>
<tr>
<td>Pre-1950</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>1W, 1I</td>
</tr>
<tr>
<td>Creation + 50 yrs</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>4Q</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>1P, 3W, 17Q, 4I</td>
</tr>
</tbody>
</table>

Key:  I = Interview  P = Policy document  Q = Questionnaire response  W = Website

Eleven repositories correctly understand that photos taken before 1949 are in the public domain. However, another fourteen are wrong in some way: eight think that any photo taken before 1948 can be used freely; two more think that any photo taken before 1950 can be used freely. Questionnaire respondents from four other repositories are apparently unaware that the term provisions have changed; their questionnaire responses indicate that they think that the term provision continues to be 50 years from the date of the photo. To sum up, 11 (44%) of the 25 repositories that address this issue are correct; 10 (40%) are out by a year in either direction; 4 (16%) apparently are unaware of any change. In other words, more than half of the repositories that provide information about this straightforward matter are inaccurate, with potential for the following consequences.

If a repository selects for online access only photos in which copyright has expired, believing that photos taken before 1948 are in the public domain (but photos

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368 Another respondent (not included in Table 8 because the respondent appears to have confused the date the change came into force with the cut-off date) is far off the mark in stating that “most digital images up to this point have been photographs taken prior to 1999 giving them an automatic transfer to the public domain.”

369 While this is still true for photos in which the author is a corporation whose shares are widely held, the responses do not mention that distinction.
taken in 1948 are not) has the effect of blocking online access to an entire year of photos that could be made available without concerns about copyright. On the other hand, those repositories that think that the cut-off date is before 1950 may be selecting photos that they think are in the public domain, but are still protected by copyright, without any efforts to obtain authorization, and thus are risking the possibility of copyright infringement. As well, the pre-1950 cut-off date is on one repository’s website, and potentially misleading to users.

To conclude, the accuracy of Canadian archivists’ knowledge of copyright appears to vary across different aspects of copyright, although these findings must be used cautiously, given the design of the study, and bearing in mind that the statements that speak to the accuracy of copyright knowledge, one way or the other, are from a minority of the repositories in the study. While some archivists appear to have a correct understanding of particular provisions of the Act, others misunderstand aspects of copyright in ways that have consequences for access and use, or that may put the repository in a position of infringing copyright, albeit unintentionally. Even when dealing with a straightforward provision such as the cut-off date for public domain photos, more than half the repositories that provide data about this issue are inaccurate in some way.

### 4.3.3 Currency of Copyright Knowledge

Archivists’ awareness of changes to Canadian copyright law, actual and proposed, was explored in a series of interview questions designed to learn more about the quality of their knowledge in terms of its currency. The first question asked about the most recent information they recalled about a change to copyright law that affected their institutional practices. It was expected that interviewees would mention the 2004 amendments that removed the statutory requirement for record-keeping, or possibly the CCH decision of the same year. However, while responses to the question included aspects of the 2004 amendments, they also included various changes that were part of the 1997 amendments. The responses are summarized in Figure 13. Five interviewees gave two issues in their responses, so the number of responses totals more than 22.

Ten did not recall any change to copyright law that had affected their institutional practice. Two recalled a change that had to do with the end of the requirement to keep records of copies made. Six recalled a change that had something to do with the works of
L.M. Montgomery; of those, three were aware that the proposed change to the term provisions had not passed; two did not know the status of the measure, and one was unable to provide details. Four interviewees said that the most recent change they recalled was the changes to the term provisions for photos that came into force in 1999; five referred in various ways to the changes to section 7 of the Act (which came into force in 1998) that ended the possibility of perpetual copyright in unpublished works.

Figure 13
Interviewees’ Awareness of Recent Changes to Copyright Law
(N = 22)

Interviewees were then asked if they recalled hearing anything about three specific changes, i.e., the 2004 amendments, the proposed amendments that were introduced in Parliament in June 2005 but died on the order paper when an election was called, and the Supreme Court decision in the CCH case. The responses are summarized in Figure 14.  

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370 One interviewee was not asked about any of these specific changes because it was evident from earlier responses that the volunteer-run repository lacked the resources, expertise, and interest to follow copyright. Another person declined to answer the question about the CCH case.
Regarding the 2004 amendments, four interviewees were not at all aware of them and eight reported having heard something about them but could supply no details. Two more were mistaken about the details; one thought the amendments had something to do with privacy issues; another thought they had something to do with fair dealing. Seven were partly correct but their recollections were incomplete or combined with the earlier amendments. Of those seven, two referred both to the 1997 changes (photos in one case, and the transitional provisions in section 7 in the other) and the so-called L.M. Montgomery term extension aspect of the 2004 changes. Three referred only to the Montgomery aspect. Two interviewees noted both key aspects of the 2004 amendments, i.e., that the term was not extended and that the statutory requirement for record keeping was repealed, but one was not sure whether it had passed or not. One mistakenly believed that the efforts by the Montgomery estate to extend the term of copyright protection in Montgomery’s works had gone to the Supreme Court, which had ruled against the estate.

Based on the policy documents available, only one repository reviewed its policy between 2002 and 2005 and removed the record-keeping requirement. However, three interviewees from other repositories reported on specific changes to their practice because they no longer had to keep records of copies made for researchers. As Richard
put it, “We heaved a sigh of relief at the point that we didn’t have to maintain those records.”

The interview script also included a specific question about the Supreme Court decision in the CCH case, which clarified and broadened the scope of fair dealing. In response to this question, seven interviewees recalled nothing about it, and nine reported hearing something about it but could supply no details. One thought it had something to do with Lexis-Nexis; another was sure that Judge Rothstein had written the decision. Only two had a partial understanding of the case in terms of its implications for repository practice; one was aware that the outcome favoured users and that it represented a significant precedent, the other recalled that the case dealt with self-serve photocopying and claiming copyright in law reports.

The responses to these questions suggest that archivists know little about recent changes. Admittedly, it may have been somewhat unreasonable to expect that the interviewees would keep all the details of these matters in their heads. As noted earlier, several interviewees keep a file or binder of reference material, and had these questions come up in the workplace, they would have consulted their reference file for the details. Nonetheless, with regard to the questions about recent changes, two-thirds or more of the interviewees indicated no awareness of them, awareness (but no details), or a mistaken understanding of the outcome. Their knowledge is also confused in that it conflates events that occurred at different times.

4.4 Linking Archivists and Repository Practices

The preceding sections address aspects of archivists’ attitudes to, and knowledge of, copyright. However, the unit of analysis in this study is the archival repository, so it is necessary to connect the knowledge and attitudes of individuals to institutional copyright practices. One way of exploring this issue is to examine the extent to which institutional copyright practices are documented, and the processes through which the copyright knowledge of staff archivists is transformed into institutional practice. Research Question 4 asks, “What are the processes by which the copyright knowledge and attitudes of

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371 Judge Rothstein was not appointed to the Supreme Court until 2006; he wrote concurring reasons in the decision of the Federal Court of Appeal, which heard the same case in 2002 (CCH Canadian Ltd. v. Law Society of Upper Canada (C.A.) [2002] 4 F.C. 213).
individuals are transformed into institutional practices?” This section examines how institutional copyright practices are developed and approved, how new information about copyright is disseminated within the repository, and the role of a designated staff member responsible for copyright matters.

4.4.1 Documenting Practice

The most obvious means of providing evidence of repository practices is to codify them in formal policy and procedure documents. Questionnaire respondents were asked, “Does your repository have written policies, procedures, or guidelines relating to the administration of copyright in your institution?” Of the 106 respondents, 39 (37%) said that they did; 67 (63%) indicated that they did not. Only eight of the policy documents available to this study (from six repositories) codify copyright practices in a comprehensive manner. Only one document includes policies relating to all archival functions; the other seven address copyright issues relating to more than one archival function. None deals directly with the copyright aspects of making their holdings available on the Internet. However, as noted above, copyright affects several archival functions, and in some repositories is documented in different places according to function. The policy documents that address copyright aspects of particular archival functions are discussed in more detail in relation to that function.

While two questionnaire respondents reported in qualitative data that they realized that they should have a policy or were taking steps to develop one, the questionnaire responses did not indicate why nearly two-thirds of the repositories do not have a copyright policy. This was explored in the interviews. Of the 22 interviewees, 12 (55%) reported in their questionnaire responses that they did not have a copyright policy. For these repositories, it appears that copyright is just one of many areas lacking policies and procedures. Despite good intentions (as Donna said, “It is such a hard balance to believe and think “I’m going to get that done!” and not get it done”), and a recognition that having a copyright policy is highly desirable (as James said, “Just one of the many things

372 As discussed in Chapter 3, “policy documents” was defined broadly, and as reported in Table 1, 250 policy documents from 152 repositories were available to the study. However, most of those are narrowly-focused fragments that relate to the functions of outreach (e.g., terms of use statements) or reference (e.g., order forms, price lists, etc.). Taken together, they document practice; however, for the purposes of this discussion, only those policy documents that documented copyright more comprehensively were considered.
that we know we should do, and would like to do, but with limited staff and many
demands, we’ve never gotten around to it”), the repositories lack the resources. As Colin
said, “Well, I mean it’s a matter of resources. My predecessor has been talking for 10
years about how we need a policy and procedures manual.” One interviewee noted that,
as a relatively new archives, their focus had been acquisition rather than documenting
policies. Several others noted that the staff, particularly in small repositories, were
already familiar with repository practice; and given the amount of other work to be done
and (as one interviewee said) the fact that there had not been a problem, there was little
need to document it. Two commented that lack of confidence in their understanding of
copyright was also an issue. As Jan said, “Well I think it’s for two reasons. The first one
is probably that we don’t understand the rules and regulations enough to feel that we can
write them down in a formal policy, and the second one is that even if we did, we don’t
have time to do it anyway.” One interviewee noted that, while her repository did not have
a comprehensive copyright policy, aspects of copyright practice were to some extent
documented separately in several places because copyright affects a number of functions.

It is not sufficient to have a copyright policy; such documents must be kept up-to-
date. As one questionnaire respondent noted, after reporting that they did not have a
policy, “Our repository has out-dated [respondent’s emphasis] copyright policies that
need to be revised in view of changes to Act. I do not use them.” Questionnaire
respondents were asked how their repository’s copyright policies and procedures were
kept up-to-date. Of the 37 that responded, six (19%) reported that they have no process
for reviewing or revising their copyright policies, and another seven provided only a
general response (e.g., “review copyright law”) or responded in a way that did not
directly answer the question (e.g., “not needed at the moment”). Seventeen of the 39
repositories that report having policies (44%) claim that they undertake a periodic review
of some sort. Of these 17, 14 provide for a review, either at a specified interval (annually
(4) or every five years (1)), an unspecified “periodic review” (2), or when an event
triggers the review (10).\footnote{Six repositories reported more than one possible occasions for review; thus, the total responses exceed 14.} For those repositories whose review is triggered by an event,
five different triggers were mentioned. The most common is becoming aware of changes
to the law (6), but other triggering events include a regular review requirement embedded in the policy itself (2), attending a copyright workshop (1), the reprinting of the institutional policy and procedure manual (1), or questions arising at the institution that require a policy answer (1). Seven others who responded to this question did not address the issue of what triggers a review; instead they indicated who within the repository was responsible for updating policies.

When asked when their policy had last been revised, 31 questionnaire respondents gave a date between 1999 and 2005; however, for 8 of those, the date of revision was the same as the date the policy was first developed; in other words, the policy has not yet been revised. If those 8 are removed from the total, only 23 repositories have actually gone through the revision process.

To sum up, nearly two-thirds of the repositories in the study report that they do not have a documented copyright policy; interview data suggests that this is largely due to lack of resources, as well as a lack of confidence in the staff’s knowledge of copyright. For similar reasons, it appears that the policies that do exist are not regularly reviewed and revised. However, as noted earlier, all but two of the 154 repositories in the study have at least some narrowly-focused policy documents that pertain to particular functions.

The process for developing and approving a repository’s policies was addressed in the questionnaires and in the interviews, and by examining policy documents themselves. Questionnaire respondents were asked who developed the repository’s copyright policies or procedures. The responses revealed that the development of copyright policies or procedures is very much a collaborative process. Of the choices provided, three refer to a single person or position (i.e., head of repository, in-house copyright specialist, or outside consultant); the remaining two choices (senior management group, ad hoc staff committee) represent a group effort. Of the 38 responses to this question, 16 (42%) indicated that the copyright policy was developed by an individual (the head of the repository (11), the archivist (2) (if the archives was part of a

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374 However, it should be noted that two of the eight had just developed their policies in 2004 or 2005, so it is not unreasonable that a review had not yet taken place.
375 Question 27 asked, “Who developed your repository’s copyright policies/procedures/guidelines?” and asked respondents to check off all that applied from a list of five options (plus a space to specify other possibilities).
larger repository), the in-house copyright specialist (2), or another position in the organization (1)). Twenty-one (55%) repositories developed their policy by bringing together groups of people, i.e., senior management group (4), an ad hoc staff committee (3), or various combinations of the choices offered (9), or other combinations described under ‘other’ (5). The remaining repository reported that its copyright policy was developed by its head office.

While none relied solely on the services of an outside consultant, two repositories (5%) supplemented in-house resources with the advice of such a person. Only three repositories (8%) indicated that the work of policy development included legal advice. However, interviewees from two other repositories indicated that they have access to legal counsel. Lee, whose repository does not have a policy, noted “Certainly if I was to write a copyright policy for here, I would probably run it through her [the university copyright officer], and then I would even go so far as to run it through the lawyer.” Judy, whose repository has a copyright policy, but who did not report in her questionnaire response that legal advice had been sought in the preparation of the policy, noted that advice from in-house counsel is sought occasionally, “any of our semi-legal forms, like a certificate of gift or letter of permission, because they’re going out to the public and we feel there are potentially legal aspects to that, we have to put them through our lawyers. So whenever that kind of situation arises, we write down what we think we should and we send it to the lawyer and they say no this is actually what you should write, so that’s how that happens.” That so few seek legal advice is not surprising, given the cost; those who do seek legal advice have access to in-house lawyers at no cost.

A questionnaire response from a repository that does not have a copyright policy described their plans to develop one. “We recognize that it is a subject that we should be more familiar with so I sent one of our staff to a workshop … recently on copyright. He is in the process of writing a report for the archive on the workshop. We will be discussing this further and will obtain a copy of the Act for in-house reference. We will then prepare our own copyright policy.”

Questionnaire respondents were then asked at what level in their organizational structure the copyright policies were approved. Of the 37 who responded, the majority of policies (32 or 86%) are approved at a level above the archives in the organizational
structure; the level varies according to the nature and structure of the organization. For example, a policy developed by a staff committee or the in-house copyright specialist is approved by the head of the repository; in other cases (e.g., where the archives is part of a university library), the policy developed by the archivist is approved by the chief librarian. In two cases the policy is approved both by the executive director of the organization and the board of governors. In only three repositories (8%) does it appear that the same entity both writes and approves the policy. The remaining two repositories noted that their policy had not yet been formally approved by higher authority.  

Two interviewees whose repositories do not have a copyright policy nonetheless mentioned the process for formal adoption. Donna referred to an established process for getting policy approved, but lacked the time to fully document the policies themselves, saying, “Drafted up some of them, but didn’t take them through the process.” In the other case, Colin noted that they had no process for documenting policies, but commented on their informal processes, “There’s things that are informally documented. We’re a small enough staff for one thing that a lot of procedures can be conveyed informally in terms of best practice and so on…. Basically the head says here’s a document, let’s follow this, and let’s remember this is what we need to do.”

Only a handful of the policy documents available to the study provide information about the development process for policies and procedures, for example, by attributing authorship or indicating responsibility for formal approval. Only two documents from two repositories (one a procedure for checking rights ownership in photographs, the other a comprehensive policy and procedure manual) attribute authorship (to the archivist responsible for audiovisual holdings, and the staff archivists, respectively). Neither provides any insight into how the documents were approved. Four repositories have formal copyright policies that appear to be part of a larger institutional policy manual because they are consistently formatted, numbered, and approved by a senior official or a

376 These two situations were explored in the interviews. Of these, one (whose repository is part of a library) would take the policy to a library administration committee, but noted that there were difficulties in getting the library-centric group to move beyond licences for published resources to consider a policy that addresses the particular needs of the archives. The other reported that the policy was still a draft “because board of directors resists implementing (approving) the policy.” In the interview, she reported that the board did not see themselves as taking an active role in approving policy, and on another policy matter, she had taken it to the manager (instead of the board) and had received approval.
governing board; a fifth repository whose policy is still in draft form indicates that approval rests with the Board of Directors.

Even if a repository has a documented copyright policy, situations will arise that are not directly addressed by the policy or procedures. Questionnaire respondents were asked, in an open-ended question, “Who in your organization makes decisions in situations where the copyright policies/procedures/guidelines are difficult to apply?” The responses varied according to a number of factors, most notably the nature of the matter requiring a decision, and the organizational structure of the repository. Generally speaking, such decisions were made by a more senior person in the organization; in large repositories, the decision could be made at any one of several points in the organizational hierarchy, depending upon the complexity of the question and the issues involved. As the head of a university archives said in her questionnaire response, “director of libraries, head [of archives], [senior staff] archivist--controversial decisions are ultimately made by the director.” The nature of the question is also a factor. Some respondents indicated that they have several people they can consult with, depending on the situation, including colleagues in other repositories who are seen to have particular expertise in copyright. Only three mentioned that they occasionally consult legal counsel in this situation; one other noted that her repository did not have easy access to legal advice and relied on the parent body’s copyright specialist.

In sum, to the extent that documented copyright policies or procedures exist, processes for their development and approval vary, depending on the organization, as does the authority to make decisions in specific copyright situations.

### 4.4.2 Disseminating New Knowledge

Another aspect of the process of transforming the knowledge and attitudes of individuals into institutional practices is the way that new information about copyright is disseminated within repositories. In order to explore this matter, interviewees were asked what they would do with information learned at a copyright workshop or from an article in which they learned something new about copyright. While the responses varied, depending on the size of the repository and the interviewee’s position within the organization, various combinations of the following three things are most likely to happen. First, the information would be shared in some way with other staff members,
including management, so that all who dealt in some way with copyright issues were aware of the information. As Dick said, “Well, depending on the circumstances, I’d share it with staff who are dealing with it here, in the first case. And then I’d file it away for use when those circumstances came up. But I would first share it so everyone knows that OK here’s something new that we should be aware of.” The means of sharing could vary; he went on to say, “Well I might have a little meeting. If there were handouts at the workshop or the session I would share those. If it was simple, then it could be an email.”

The second result would be to look at repository practices in light of the new information to see if anything needed changing. In some cases, the workshop or article may also serve as an opportunity to remind staff of aspects of existing practice. As Colin said, “Part of it would be a follow-up in terms of procedures at the institution, or reminders of what we’re supposed to be doing already and that sort of thing. That’s plus anything formal such as presenting what one had learned…. There’d be teaching moments that come up because of it.”

Third, as noted earlier, many repositories maintain a reference file or a binder that contains copyright information such as workshop materials, listserv announcements, articles and the like, and any documentation would be placed in that file for reference should a question arise about that particular issue. Judy said, “What I have is a file, and so every time something new comes out, I send it out to everybody who does copyright checks here, as well as management, and then it’s kept on the [shared] drive or if it’s paper it’s kept in the paper file so that will inform our eventual policy, and in the meantime it informs our procedures.”

4.4.3 Designating a Staff Member to be Responsible for Copyright Matters

Another way in which an institution can systematize the copyright knowledge and opinions of individual staff members is to designate a staff member to be responsible for copyright matters. Questionnaire respondents were asked “Does your repository have a designated staff member who is responsible for copyright matters?” Of the 105 who responded to this question, slightly less than half (50 or 48%) reported that they have such a person. Of those, five respondents noted that more than one staff member was trained in copyright, or that all staff members had some expertise in copyright, or there was some shared responsibility. The situation of the one-person archives was highlighted
by a questionnaire respondent who reported that the repository had a designated staff member responsible for copyright matters “in the sense that I am all the people at my institution.” Two others, as heads of the institution, noted that responsibility for copyright matters stopped at their desks, either because they were the designated copyright person, or because, while no one was designated, the ultimate responsibility was theirs. A questionnaire respondent whose repository does not have a designated copyright person said, “We realize that we are large enough to need a dedicated copyright officer, but as a non-profit the position has not yet survived the budgeting process.”

Only respondents from repositories that have a person responsible for copyright matters were asked about the designated person’s responsibilities. Of the 47 people that responded to this question; 39 are the person responsible for copyright matters. The results are presented in Table 9.

### Table 9
**Duties of Staff Responsible for Copyright Matters**
(N = 47)

<table>
<thead>
<tr>
<th>Duties</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Responding to copyright questions from staff or users</td>
<td>46</td>
<td>98%</td>
</tr>
<tr>
<td>Negotiating/documenting permissions obtained or granted</td>
<td>44</td>
<td>94%</td>
</tr>
<tr>
<td>Keeping up-to-date with changes to the law</td>
<td>41</td>
<td>87%</td>
</tr>
<tr>
<td>Delivering/organizing training sessions</td>
<td>5</td>
<td>11%</td>
</tr>
</tbody>
</table>

Responding to questions is clearly a significant function of these repository copyright designates. Forty-six respondents indicated that the copyright designates’ duties include responding to copyright questions from staff, researchers, or both. It is worth noting that four study participants (three questionnaire respondents and one interviewee) suggested that archives staff are considered to be well-informed about copyright matters, and are often consulted by others in the wider organization. For example, a respondent who works at a municipal archives noted that the copyright

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377 Question 38 asked, “What are the duties of the person responsible for copyright matters?” and asked respondents to check off all that applied from a list of nine options (plus a space to specify other possibilities).
designate answers questions, not just from archives staff, but also from other city staff. Another respondent (from a university library) always consults the university archivist on copyright matters. Another respondent noted that “archives staff are often consulted by [management] and by law [department] on copyright issues and occasionally face resistance from these sources when it comes to following the law.”

Forty-four respondents deal with the administration of various aspects of permissions, i.e., obtaining permissions from copyright owners, negotiating copyright aspects of new acquisitions, and keeping records of permissions obtained by or granted by the repository. Keeping up-to-date with changes to the law is an aspect that occupies 41 respondents. In comparison, only five spend time delivering or organizing training sessions.

In addition to documented policies, less formal processes exist for disseminating new knowledge about copyright to repository staff. As well, some repositories designate one (or more) staff members to be responsible for copyright matters. An important component of the duties of such staff members is to be a source of copyright knowledge and advice for others.
Chapter 5  Copyright Practices of Canadian Repositories in Making Their Holdings Available on the Internet

5.0 Introduction

Chapter 5 looks at repositories’ copyright practices related to making their holdings available on the Internet. The discussion begins with an examination of the reasons why repositories make their holdings available on the Internet, before exploring the place of copyright as a factor influencing repositories’ decisions in deciding what to make available online. The discussion then turns to repository practices relating to the selection of documents for Internet access, obtaining authorization to make holdings available on the Internet, ways of limiting or controlling further uses of website content, and providing copyright information to users. This chapter addresses Research Question 1 (What factors influence the decisions of Canadian archival repositories in making their archival holdings available on the Internet?) and Research Question 3 (What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?)

5.1 Why Make Archival Holdings Available on the Internet

Repositories’ reasons for making their holdings available on the Internet were addressed in the 22 interviews, on 19 repository websites, and by four questionnaire respondents.\(^{378}\) Their reasons are summarized in Figure 15.

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\(^{378}\) The views of four repositories were expressed in two places, but counted only once; thus the number of repositories is 41.
Increased access to archival holdings is by far the most common reason given; as Pat put it, “Why keep archival records at all if you don’t want to make them available to as wide an audience as possible? That’s got to be the obvious goal of any repository.” Some noted that a wider audience can mean more users who are already aware of archives but cannot come in to use the material in person; others wanted to reach new users. As Donna said, “It brings them to the attention of people who wouldn’t otherwise know we have them or even that we exist.”

Access is largely for the benefit of the user, but repositories also benefit from making their holdings available on the Internet. Eleven repositories mentioned the promotional aspect, in that having a website provides a promotional vehicle that may raise the archives’ profile among resource allocators, users, or the broader community. Although digital formats are not generally considered suitable for long-term preservation, eight repositories indicated that preservation was an additional motive for digitization, mainly in that having digital copies available saves wear and tear on the originals, although one interviewee noted that making high quality digital masters is part of his repository’s long-term digital preservation strategy.

Other factors also come into play. Pressure to meet the expectations of sponsors (“if we don’t put it on the web we will be left behind”), users, or both was mentioned by 13 repositories as a motive for putting their holdings online. Eight interviewees mentioned resource issues. Four noted the availability of funding specifically for

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digitization of holdings; as Lee said, “The second reason would be [after pressure from senior management] that when grant funding goes in that direction, we have to follow it. We have four virtual exhibits on our website that I would say probably would not be there if the grant funding had not allowed it, simply because we wouldn’t have the resources to do it.” Four others noted various ways in which having holdings online allowed a more efficient use of existing resources. As Jan stated, “This [i.e., having a database of digital images] is how we search our photographs. It’s a lot less labour intensive, and it’s less expensive to scan a photograph and then have it on the web and be able to search all of our photographs on the web, rather than making a copy of each one and having it in a file with cards and everything else.” Two commented that having holdings on the web was a way to reduce the demands of users, either in terms of onsite visits or repeated routine inquiries.

At the same time, there are occasional hints of some ambivalence about the desirability of making their holdings available online. For example, Repository 4M’s list of considerations to be taken into account when selecting materials for online access includes the statement “Any Web publication of finding aids should be considered carefully, particularly in relation to issues of subsequent pressure for access to original materials,” and a further statement about the need to control user expectations by indicating, where appropriate, that the web content is “finite” (“we’ve put everything we have up here”). Some archival repositories are apparently mindful of the limitations on their resources, and are wary of creating user demand that exceeds their capacity.

Other repositories convey mixed messages. For example, Repository 1Z stresses access as its reason for creating its online digital resources (“to foster access to knowledge, and … [make] our unique resources available and useful to those beyond our own community”), but its copyright page contains six conditions on the use of material on the website, including a requirement that the user ordering copies must “assume all risk and related cost of copyright infringement and absolve [Repository 1Z] and its staff of any such risk and related cost in fulfilling the above request for copying,” and sign a form indicating agreement with the conditions listed.

In sum, repositories make their holdings available on the Internet for a variety of reasons. The ability to increase access to holdings, for both existing and new users, is the
most common reason given, as well as the opportunity to raise the profile of the archives among users and resource allocators. Other reasons include pressure from, or expectations of, users, parent bodies, and peers, as well as the opportunity to reduce onsite user demands by giving them the means to access online documents. Although digital formats are not considered to be suitable for long-term preservation, having a digital copy may contribute to preservation in that it reduces handling of the original. At the same time, the findings also reveal some apprehension about a higher profile and increased awareness of the repository if it will result in increased demands on the repository staff.

5.2 The Copyright Factor

As discussed in the literature review, digitization manuals and reports of digitization projects suggest that copyright is an important factor in making cultural heritage materials available on the Internet. There may, however, be other factors; Research Question 1 (What factors influence the decisions of Canadian archival repositories in making their archival holdings available on the Internet?) considers other possible factors and the place of copyright in relation to them.

The first question in the questionnaire listed nine factors that could influence a repository’s decisions in determining what documents to include on its website. Respondents were asked to indicate all the factors that they considered important. The results are presented in Table 10. Respondents could check more than one factor; thus, the percentages total more than 100 percent. The factor that was checked off most frequently was availability of staff resources (marked by 89 respondents), followed closely by availability of grant funding to create online content (87), desire to increase web resources so that users can serve themselves (85) and availability of technical expertise and equipment (82). Copyright issues appear in fifth place (marked by 76 respondents, or 72% of the 106 questionnaire respondents).

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380 Question 1 asked, “Your repository’s website content includes documents from your holdings. Generally speaking, which of the following factors influenced your repository’s decisions about what documents to include?” The question included a list of factors (including space for respondents to specify others); respondents were asked to indicate all that are important by marking an X in the column headed ‘Important?’
Table 10
Factors Influencing a Repository’s Decisions in Determining What Documents to Make Available on the Internet
(N = 106)

<table>
<thead>
<tr>
<th>Factor</th>
<th>Frequency</th>
<th>Percentage of Questionnaire Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Availability of staff resources</td>
<td>89</td>
<td>84%</td>
</tr>
<tr>
<td>Availability of grant funding</td>
<td>87</td>
<td>82%</td>
</tr>
<tr>
<td>Increase web content to reduce researcher inquiries</td>
<td>85</td>
<td>80%</td>
</tr>
<tr>
<td>Availability of technical expertise &amp; equipment</td>
<td>82</td>
<td>77%</td>
</tr>
<tr>
<td>Copyright issues</td>
<td>76</td>
<td>72%</td>
</tr>
<tr>
<td>Whether documents were arranged and described</td>
<td>70</td>
<td>66%</td>
</tr>
<tr>
<td>Feedback from researchers</td>
<td>66</td>
<td>62%</td>
</tr>
<tr>
<td>Physical condition of documents</td>
<td>60</td>
<td>57%</td>
</tr>
<tr>
<td>Privacy issues</td>
<td>48</td>
<td>45%</td>
</tr>
<tr>
<td>Other factors</td>
<td>16</td>
<td>15%</td>
</tr>
</tbody>
</table>

After indicating all the factors that they considered to be important, respondents were then asked to rank the top four factors. Their rankings were coded; the factor ranked first in each response was given a value of 4, the second ranked factor a value of 3, the third ranked factor a value of 2, and the fourth ranked factor a value of 1. The total score for each factor is presented in Figure 16.

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381 The second part of Question 1 instructed respondents, “In the second column, rank the top 4 in order of importance, with 1 being the most important, 2 the next most important, and so on.”
A comparison of the responses indicating important factors and top-ranked factors reveals similar, but not identical, results. In both cases, four factors, all related to the resources available to the repository to carry out its mandate, are considered to be more important than copyright. Of those four factors, three of them (i.e., grant funding, staff resources, and technical expertise and equipment) have to do with the human, financial, and technical resources necessary to digitize documents and make them available on the Internet. The third-ranked factor (the desire to increase web resources so that users can serve themselves), while partly access-related, might also be seen as resource-related, in that having certain frequently-used holdings on the Internet could reduce the number of routine inquiries and onsite users. Copyright issues, however, rank above factors related
to the state of the documents (i.e., whether they are arranged or described, or their physical condition), feedback from users requesting what they would like to see on the website, or privacy issues.

It appears that the availability of resources (whether they be financial, human, or technical) is a more important factor than copyright issues in influencing a repository’s decisions about what archival holdings to make available on the Internet. One questionnaire respondent stated this explicitly in response to questions about the role that the copyright status of a document played in the selection of documents for inclusion on the Internet: “Le fait qu’un document soit protégé par le droit d’auteur ou soit de domaine public n’est pas le premier critère de sélection.”

The reasons for the ranking of copyright issues were explored further in the interviews. All 22 interviewees were asked to expand on their responses to Question 1 of the questionnaire. Of the 22 interviewees, 15 indicated in their questionnaire response that copyright issues were a factor that influenced their repository’s decisions about what documents to include on the repository website. Of those, five thought copyright issues were important, but not sufficiently important to rank among the top four factors. Ten ranked copyright as one of the top four factors, with three ranking it first, one ranking it second, two ranking it third, and four ranking it fourth. Five did not check off copyright issues as important, and two responses were not counted because the respondents had ranked more than one factor (including copyright issues) first.

The three interviewees who ranked copyright issues as the most important factor were quite clear that they would not put anything on the repository website if they did not own the copyright. Lee’s remark was typical, “If we think we don’t have the copyright to something then we wouldn’t include it. So it’s probably THE most important, because that’s the first thing we’d look at with the material; if we decided we didn’t have the copyright to it, then the rest of it would fall by the wayside anyway.”

Other interviewees who ranked copyright issues second, third or fourth made similar statements, noting that they would not put something on the repository website if

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382 Fisher’s exact test was used to determine if the differences between the interviewees’ and non-interviewees’ questionnaire responses regarding the importance of copyright issues as a factor influencing a repository’s decisions in determining what documents to include on its website were statistically significant. The results indicate that, with alpha set at .05, the differences between the two groups are not statistically significant.
unless they owned the copyright, or could easily get any necessary copyright clearances. Two who ranked copyright fourth commented in the interview that they perhaps should have ranked it higher; as Richard said, “We had made a fairly conscious decision right off that what we were going to make available was going to be records that were in the public domain. …I suppose once you’ve made that decision it could have ranked higher.” As Diane noted, “Well I wouldn’t use anything where there was any kind of a risk of copyright infringement. I’m trying to remember why I put it fourth.”

However, some of the five interviewees who indicated in their questionnaire responses that copyright issues were important, but not of sufficient importance to be ranked, said similar things. For example, Bill said, “We basically made a conscious decision to only put things that we hold intellectual property rights over online…. So our projects in general have all been dealing with items and material that we hold copyright on.” Larry’s repository considers copyright compliance to be a fundamental value; as he said, “We have to abide by the copyright law; I mean that’s just a…. we’re a public institution; it’s something that we abide by all the time.”

The fifteen who thought that copyright issues were an important factor were of that view because they wished to avoid the risk of infringement, or, as Dick said, to “avoid difficulties and complications,” but other reasons also come into play. Pat suggested that having limited resources to research and negotiate copyright clearances was a further reason to select materials in which the repository owned the copyright. Judy, an interviewee from a provincial archives, felt that it was important to serve as a model to other repositories in regard to copyright compliance. Two interviewees also noted that a further aspect related to copyright had to do with the increased demand for copies once something was put on the web, and they wanted to select materials that would not be problematic from a copyright perspective when responding to such requests.

As noted, five interviewees did not check off copyright issues as being an important factor. When asked why, three indicated that it was because much of the material in their repository’s holdings is sufficiently old that it is likely in the public domain, or because they own the copyright in the documents in their holdings (either because they are documents created by the parent body or because copyright is routinely
transferred to the repository as part of a donor agreement), or a combination of these circumstances. Two of the five appear to base their views on a mistaken understanding of copyright.\footnote{For example, one interviewee thinks that copyright is not an important factor because they put only documents older than 50 years on their website; however they are wrong in thinking that the general term of copyright is 50 years from the date of creation. Another said that it wasn’t a problem because of the low resolution of the images on the website. While using low resolution images may reduce concerns about further uses of images copied from the repository website, it does not address the issues facing the repository in digitizing documents and putting them on the web server.}

In sum, while the questionnaire responses indicate that the availability of resources carries more weight than copyright issues in the decisions of repositories in making their holdings available on the Internet, the interview data suggest that copyright issues may be more influential than the questionnaire responses indicate. Whether or not they considered copyright important enough to rank it in the top four, many repositories make available on their websites only archival documents that they think do not present a copyright problem. Those who consider copyright less important report that they rely on their repository’s acquisition practices and the provenance and age of their repository’s holdings to conclude that little is likely to be problematic from a copyright perspective.

Eighty-two percent of questionnaire respondents said that the availability of grant funding was a factor influencing their decisions in determining what documents to make available on the Internet, and the availability of grant funding placed first in the ranking of the factors. The questionnaire asked about sources of funding for digitization projects; the results are displayed in Figure 17.\footnote{Question 4 asked “How have you funded your repository’s digitization projects?” and asked respondents to check off all that applied from a list of three options (plus a space to specify other possibilities). Questionnaire respondents who had received external funding were also asked whether copyright conditions were imposed by the external funding body (Question 5), and, in Question 6 to state the source of funding and the nature of those conditions. However, the responses are not useful, in part because of the order of the questions. Thus, the responses to these questions are not reported.} Eighty-one repositories (76%) used government grants, either alone (20 repositories), in combination with the repository budget (41),\footnote{This is not surprising because the CAIN program required that at least half of the costs of a project be contributed by the grant applicant.} or in combination with various other sources of funding (20). Eighteen repositories (17%) reported funding their digitization projects entirely out of the repository budget.
The websites were also examined for references to external funding. Sixty repositories (39% of the 154 in the study) explicitly acknowledge external funding for 184 digital resources on their websites. Of those, 38 repositories acknowledged grants from the Canadian Archival Information Network (CAIN) program to produce 115 digital resources. Grants for scanning and digitization of archival holdings and finding aids became available through the CAIN program from fiscal year 2000-01 to 2005-06. The funds were actually part of the Dept. of Canadian Heritage’s Canadian Culture Online Program (CCOP), but were channelled to the repositories through the National Archives of Canada (now Library and Archives Canada) and the Canadian Council of Archives (CCA).

CAIN funding for the digitization of archival holdings was subject to a number of terms and conditions, including those relating to copyright. Information about the copyright requirements for the CAIN funding appeared in the CCA guide to assist repositories in completing the grant application forms, the “Digitization and Archives” guide published by the CCA Preservation Committee, and the CCOP Canadian Heritage Standards and Guidelines for Digitization Projects. The CCA guide stated,

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386 Included are various funding programs run by federal and provincial government departments as well as private sector organizations or foundations, and internal academic funds available to post-secondary institutions.


“Issues of copyright should be clearly resolved prior to the start of the project.” The Preservation Committee’s guide provided a decision tree for digitization projects that asks at step 7 “Is the institution aware of all relevant laws and agreements respecting rights associated with the reproduction and distribution of archival records?” The “Yes” path says “the institution must document that all physical and intellectual rights, including property and copyright, have been cleared and that credit and compensation is provided where necessary.” The “No” path says, “The institution must be assured that project objectives, particularly those concerned with enhanced distribution, are attainable within the context of the Copyright Act, laws pertaining to the protection of privacy and access to information, as well as acquisition agreements between the donor and the institution.” The CCOP Guidelines (which were included in the bibliography of the Preservation Committee’s guide) dwelt almost entirely on technical matters, and mentioned copyright only once, stating, “Rights and permissions for electronic distribution MUST [emphasis theirs] be securable within the parameters of the project and funding available.”

Responsibility for ensuring that the digitization project complied with copyright laws lay with the repository receiving funds; however little detailed guidance was provided about exactly what needed to be done or how to go about obtaining copyright clearances. Only the CCA guidelines would have been sent to every repository; the other documents are available only on websites. As Leslie put it, “They [copyright conditions on grant funding] are not there in capital letters or highlighted. You have to read the fine print to find them.”

5.3 Repositories’ Copyright Practices

Research Question 3 asks “What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?” This section looks at the role of copyright in repository practices relating to the selection and presentation of documents for mounting on a website, the resources devoted to obtaining authorization from copyright owners, attempts to control further uses of Internet-accessible documents, and the provision of copyright information for users.

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389 Digitization and Archives, 4.
390 Canadian Heritage Standards and Guidelines, 7.
5.3.1 Selection

Research Question 3a asks: “In what ways do copyright issues affect the selection of archival material for Internet access?” Data that addressed this question were found in policy documents submitted with questionnaires and on the websites themselves, in the questionnaire responses, and in the interviews.

The content of the websites reveals exactly what documents were selected. However, in the context of this study, this evidence of repositories’ selection decisions was not fully investigated. Because it was not possible to examine every document in every digital resource on every website, a selection strategy was employed to identify the range of statutory document categories evident in the website content, and to note the presence of document categories that raise copyright issues. Moreover, examining the documents themselves is insufficient without additional information such as the date of the document, the identity and vital dates of the author, the circumstances of creation, the repository’s acquisition arrangements, the extent to which permissions were obtained, and the like. Such information is not often provided on the websites. Finally, we cannot know what was not selected for copyright reasons. Thus, an analysis of the documents selected from the websites provides, at best, a general impression of the repositories’ selection decisions of interest from a copyright perspective.

Table 11 shows the number of repositories whose websites contain the statutory document categories listed. As noted earlier, sound recordings, and fixations of performers’ performances and communication signals may contain underlying works. In calculating the totals in Table 11, each document was counted in as many categories as applicable. For example, Repository 2L’s website contains a clip from a television broadcast featuring the star of the show playing a song; this item has been counted as a communication signal, a performance, a musical work, and a dramatic work. The artistic works category and the dramatic works category have been further subdivided, because the category includes a wide range of materials found in archival repositories, because certain types of documents within the category present different copyright issues, or both. While it is not possible to draw many conclusions from this data for the reasons noted above, some observations may be made.
Table 11  
Frequency of Appearance of Statutory Document Categories on Websites  
(N = 154)

<table>
<thead>
<tr>
<th>Statutory Categories</th>
<th>No. of Repositories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Literary works</td>
<td>Textual material</td>
</tr>
<tr>
<td>Musical works</td>
<td>Musical works</td>
</tr>
<tr>
<td>Artistic works</td>
<td>Photos (pre-1949)</td>
</tr>
<tr>
<td></td>
<td>Photos (post-1948)</td>
</tr>
<tr>
<td></td>
<td>Maps &amp; plans</td>
</tr>
<tr>
<td></td>
<td>Illustrations</td>
</tr>
<tr>
<td>Dramatic works</td>
<td>Moving images</td>
</tr>
<tr>
<td></td>
<td>Scripts</td>
</tr>
<tr>
<td>Other subject matter</td>
<td>Sound recordings</td>
</tr>
<tr>
<td></td>
<td>[Fixations of] Performances</td>
</tr>
<tr>
<td></td>
<td>[Fixations of] Communication signals</td>
</tr>
</tbody>
</table>

One observation relates to the use of photographs. Only two repositories do not use photographs on their websites. As noted earlier, copyright in photographs taken before 1949 has expired; thus photographs have been sub-divided according to whether they were taken pre-1949 or post-1948 in order to see whether there is a preponderance of public domain photos. While 29 of the 154 repositories (19%) use only pre-1949 photographs, 118 repositories (77%) use both; 5 repositories (3%) use only post-1948 photos. It appears that repositories do not limit their selection of photographs to those in the public domain.

Table 11 also shows that repositories select literary and artistic works far more frequently than dramatic works and ‘other subject matter’. This could be seen as evidence of repositories’ desire to avoid complex copyright issues, given that moving image materials and documents falling within ‘other subject matter’ may involve further copyrights in the underlying works. For example, of the 29 repositories whose websites include sound recordings, 12 repositories’ websites include sound recordings of musical works (as opposed to sound recordings of oral history interviews). Such sound recordings

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391 The online digital resources of these two repositories feature documentary art.
392 It may also be evidence of the number of undated photographs. Many photos are not dated, and can only be assigned approximate dates based on such aspects as clothing styles. For example, the technical notes for a digital resource consisting of over 260 items include the observation, “Approximately half the items in the online collection have no dates, especially the photographs.”
would comprise the musical works themselves and performers’ performances. Dealing with the copyright issues in such items often requires more knowledge and effort to ascertain their copyright status and obtain any necessary authorizations. As Leslie said, “We tend to stay away from the media formats that we know will present problems. And there I’m thinking particularly of film footage and audio files…. We learned from [a virtual exhibit involving a musician’s television show], stay away from recent stuff that has ACTRA involved.” That few repositories include audio-visual materials on their websites may confirm previously noted findings in the questionnaire responses and interviews that repositories avoid selecting documents likely to present complicated copyright issues. However, the low incidence of such material on the websites could also simply reflect the small quantity of such material in the holdings of some repositories, or that it is more complicated technically to digitize such materials in a format suitable for website access.

The examination of the websites also identified uses of literary works that raise particular copyright issues, i.e., translations of letters, newspaper stories, or songs; transcriptions of handwritten letters or diaries; and transcriptions of oral history interviews. Each of these involves reproducing the original document; to do so requires the permission of the copyright owner. Figure 18 shows the number of repositories whose websites include these types of reproductions. None of these websites gives any indication that permissions were sought or needed for such reproductions.
While the websites provide clear evidence of the results of repositories’ selection decisions, the constraints of this study make it impossible to know whether these documents were selected because of copyright considerations or because they were the best documents for the purpose. Other sources of data were used to discern repositories’ selection practices.

However, before looking at criteria for selection, it is of interest to know who does the selection. As reported earlier, many repositories received grants to produce these digital resources, and the funds may have been used to hire project staff. Twenty interviewees were asked who did the scanning, and whether the scanners also had a role in selection. Thirteen interviewees said that, where the scanners were temporary project staff or permanent staff located in another department, they simply scanned what they were given, and that the selection was done by the archivists. Two others reported that the archives staff and the photography staff made the selection together. The remaining five reported that digital project staff had some role in selection; however, in all cases the archivist made some preliminary selection decisions (e.g., by choosing the fonds or series from which the project staff were to select items), or reviewed the documents selected by the project staff prior to scanning (with power to veto the selection in particular cases), or
both. Even though the actual reproduction of the documents may be done by temporary staff or staff in another department, the archivists play a central role in the selection of documents for Internet access.

5.3.1.1 Documented Selection Criteria

Ideally, the ways in which copyright issues affect the selection of archival material for Internet access would be most directly addressed in documented selection criteria from the repositories in the study. However, only two repositories provided their selection criteria for digitization projects. The first document (“Recommendations re Materials to go on World Wide Web”) was prepared in 2005, and contains six points, three of which deal with copyright. The first states that “All materials to go on Web should be placed there only with the full satisfaction that every effort has been made to gather permissions of collectors, depositors, informants and artists whose materials are placed there.” The second point appears to recognize the work involved in obtaining permissions, stating, “All efforts will be made to give priority to collections which suggest simple [emphasis added] permission structures.” The final point noted the expectation that requests for use of materials from the web would be subject to similar terms and conditions as would requests for use in print publications. Copyright is clearly an important factor for this repository as it considers adding to its online presence, although there is also a recognition that obtaining necessary authorizations from copyright owners may not necessarily be easy.

The other document has been in place since late 2002, and contains six selection criteria for the repository’s projects to digitize for online access, one of which is Intellectual Property Rights Criteria.\(^{393}\) Listed below this heading are the following five points:

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\(^{393}\) In an interview, the author of the document indicated that all six criteria would be taken into account in selecting material for Internet access; no one factor is pre-eminent.
a. Work is in the public domain.  

b. Digitization lies within fair use limits. 

c. [Repository] owns the legal right to make and disseminate digital copies. 

d. [Repository] can get clearance from rights holder. 

e. Permitted usage can be appropriately monitored and controlled. 

These five criteria represent an odd combination, and it is not clear how they are applied. The criteria would make more sense if the list consisted only of criteria (a), (c), and (d). Where (a) or (c) or (d) describes the copyright status of a particular document, that would presumably be a positive factor leading the repository to include the document in its project. However, it is not clear how criteria (b) or (e) would be applied. Regarding criterion (b), no indication is given of how the staff understand the limits on fair use (fair dealing in Canada), and criterion (e) appears to be more a matter of technological controls to be applied to the website content after selection.

Seven repositories documented, on their websites, the selection criteria for eight particular digital resources. Copyright is not mentioned as a factor in selection for four of the projects. In three cases, the documents selected are those that best illustrate the themes of the exhibit or the highlights of the fonds; in the fourth case, unique items were considered most important (as opposed to publications likely available elsewhere). In another digital resource by one of these repositories, the website states that the photos were chosen “on the basis of quality and subject presentation;” however, following that is a statement that the repository owns the copyright in all the material, including the photos, so the repository had no need to be concerned about copyright issues in its selection of images. Two other repositories considered copyright to be a key factor in selecting the documents. As one of these repository websites states,

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394 The selection criteria document does not define “public domain.” While the public domain could include non-original works (as well as works in which the copyright had expired), this possibility is not mentioned in the data sources from this repository, including its position paper on copyright issues for digitization, which does not discuss originality as a criterion for copyright protection of a work.

395 One of these contains only photos from a professional photographer’s fonds, in which the copyright expired in 1991. It is possible that the public domain status of this material was a factor in its selection for digitization.
Our criteria for digitization were that items should have some visual appeal or historical significance and that they represent the content of the entire collection. An additional consideration was that the items had to be either in the public domain or … we had to be able to obtain permission from the copyright holder to digitize the material and make it freely available to all users.

The other noted, “The majority of newspaper clippings and lyrics to songs, as well as a number of excerpts from other peoples' works, have been omitted due to copyright issues.” Repository 4W’s account of its photo digitization project does not directly address selection criteria, but the discussion of the first items selected to be made available on the website suggests that the repository chose items in which the copyright was owned by the parent body.

In sum, documented selection criteria for all repository digitization projects or for specific digital resources are available for only nine repositories. Of those, six repositories (two implicitly) take copyright into account either as a repository policy or for specific resources; three repositories did not mention copyright as a factor in document selection.

5.3.1.2 Informal Selection Criteria

While few formal statements of selection criteria were available to the study, interview and questionnaire data provided some insights into the role of copyright in document selection. Alex, a university archivist, noted,

There’s probably an inclination to only use the material for which you’re sure that the copyright has been transferred to the institution, or that you can contact the person to get their permission for this one time use or whatever. But in general we really shouldn’t be. We should be selecting the best material to make the best case or … [the material] that really reflects the function of the group or creator of the fonds.

That said, however, she went on to state, “So let’s face it, anything that appeared to be very difficult [from a copyright perspective] we avoided. So consequently, there probably may be things that would have added to the richness of the exhibit that we didn’t use, but that’s the way it is.” Diane, responsible for a museum’s archival holdings, said “I mean there are some where you’d look at it and think, gee it would be great to be able to use that, but I’m not a risk taker.” Margaret, a municipal archivist, stated, “Everything we
have on the website is cleared,” and recounted two situations where the copyright owners (of maps and photos respectively) were located and gave permission for their use. She also noted that a large collection of plans was not on the website because they were still under copyright. However, as discussed later in the context of risk assessment, others will put items on their websites even if they have not been able to obtain authorization to do so.

Another concern that affects selection was raised in the context of a discussion about limitations on further uses. Two interviewees viewed the potential for user requests for copies of items on the website as a factor in selection. As Leslie said, “When we are developing our proposals, the material is in the public domain or we know that we can use it without any risk. Because we know the minute we put something up, that even if we’ve cleared the copyright for its use, that opens the door to a whole lot of other problems. Because pick up the phone, the next incoming inquiry is ‘wonderful image on your website; we want to use it on a billboard.’” This interview data suggests that copyright issues very much influence the selection of archival material for Internet access, even to the extent that the “best” documents may be rejected in favour of documents that require fewer resources to obtain authorization from copyright owners, or documents that raise no copyright issues related to further uses by end-users.

The questionnaire responses provided fuller information about criteria for the selection of archival material for Internet access. As noted above, a repository can decide to select items for digitization from one, all, or any combination of the following three categories, i.e., those items in which the copyright has expired, those in which the repository owns the copyright, or those in which the copyright is owned by someone other than the repository. Respondents were asked in separate questions about the extent to which they select from each of these categories when choosing documents from their holdings to be included on the repository’s website. Their responses are indicated in Figure 19.
Eighty percent of the questionnaire respondents indicated that they selected documents in which the copyright has expired. Eighty-six percent indicated that they selected documents in which the repository owns the copyright. These high proportions are not surprising because dealing with copyright matters when the copyright has expired or when the repository owns the copyright requires few resources, and occasions little uncertainty. However, when asked if they selected documents in which the copyright is owned by someone other than their repository, only 36% of the questionnaire respondents said that they did so.

Although these three categories are mutually exclusive, repositories do not have to restrict themselves to a single category. Figure 20 combines the responses to all three questions. Forty-four repositories (42% of the 106 respondents) select documents in which the copyright has expired and those in which copyright is owned by the repository. Twenty-eight (26%) select documents from all three categories. Fourteen (13%) limit their selection to documents in which the copyright is owned by the repository, and eight (8%) limit their selection to documents in which the copyright has expired. Based on the interview data and the questionnaire responses, it appears that repositories prefer to select documents that are in the public domain or those in which the repository owns the copyright.

\[\text{Figure 19}\]
\textbf{Percentage of Respondents that Select Documents by Copyright Status (N = 106 )}

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\[\text{Copyright status of documents selected}\]

\begin{tabular}{l|c|c|c}
\hline
Copyright status of documents selected & Expired & Owned by Repository & Owned by Third Party \\
\hline
Percentage of respondents & 80 & 86 & 0 \\
\hline
\end{tabular}

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396 As long as the repository is confident that the copyright really has expired, or that the repository really does own the copyright.
5.3.1.3 Expiry of Copyright

Eighty-two questionnaire respondents who reported that they selected documents in which the copyright had expired responded to the open-ended question, “How is it determined that the copyright has expired in any particular document?” Of those, 22 respondents (27%) provided only general responses, e.g., “images in public domain” or “according to copyright law” that provided no helpful information, or they referred to a guideline (e.g., “50+ years”) or a process that was not sufficiently detailed to reveal how they decide that copyright has expired (e.g., “Copyright legislation checked and documentation of each record checked to see if it complies”). An additional 26 (32%) reported that they determine expiry on the basis of the age or date of the document or

397 While the fact that few repositories report that they select documents in which the copyright is owned by a third party could be explained if most archives acquired only the records of their sponsoring institution, archives in Canada generally espouse the “total archives” concept in that they acquire both institutional records and records from outside their sponsoring institution in all media (Millar, 104). Figure 19 presents the data from 106 questionnaire responses, and I cannot link responses with repositories; however, based on website content, only 7 of the 154 repositories in this study (4.5%) have only institutional records on their websites. Even if all 7 responded to the questionnaire, that is only 6.6% of the respondents.
image, but did not provide any details about how the age is used to determine whether the copyright has expired. Twenty-five respondents (30%) provided a specific rule (or rules) that they apply, depending on the category of work; of those, 8 rules were correct; 16 were incorrect in some way, as discussed earlier. Seven respondents (9%) indicated that they consult the National Archives Staff Guide or a similar document that includes the term rules that apply to various categories of works. Three (4%) confused the expiry of copyright with the transfer of copyright ownership through donor agreements, i.e., they talked only about donor agreements in response to a question about expiry of copyright. Seventeen of the 82 respondents also conflated the expiry of copyright with the transfer of copyright ownership through donor agreements, by addressing both in response to the question about how they determine expiry.

How repository staff determine that copyright has expired was further explored in interviews. The interview data confirmed the apparent confusion between expiry and transfer that is evident in the questionnaire responses. When asked how they determine that copyright has expired, eight interviewees answered that the copyright was transferred by donor agreement, or they tracked down people for permission, and very few indicated precisely how they determine that copyright has expired. Of those who did, Beth provided details about how she ascertains authors’ death dates, “we do our very best to track information through standard reference sources, through things like OCLC, obviously Amicus, and also Google searches which sometimes come up with surprising information.”

As noted above, 26 questionnaire respondents said that the age of a document was their main criterion for determining whether copyright had expired. The term of copyright is usually based on the life of the author, but it is often difficult to ascertain the death dates of the authors of archival material, and the age of a document serves as an indirect indicator of the author’s death date. When asked about his questionnaire response (“age”) regarding how he determines that copyright has expired, one interviewee laughed and said, “We just make an educated guess for the most part,” but went on to note that they rely far more on licensing agreements with donors. Some questionnaire respondents indicated that they consult a guide of some sort that leads them through the rules for a particular category of work. An interviewee who consults the National Archives Staff
*Guide* described the process of using the guide to determine whether copyright has expired as, “we’d filter it [the document being considered] through the book.”

This data does not provide an entirely clear picture of how archivists determine that copyright has expired. The generality of the responses suggests, however, that few employ a systematic process for determining copyright expiry. Difficulty in ascertaining authors’ death dates appears to be an issue, as reflected by the emphasis on the age of the documents.

### 5.3.1.4 Repository Owns Copyright

Questionnaire respondents were also asked, “How is it determined that the repository owns the copyright in any particular document?” Eighty-nine respondents answered this question; often reporting more than one way of determining this, so the total number of respondents for each grouping exceeds 89. Fifty-three of the 89 respondents (60%) appear to believe that their repositories own the copyright in the documents they have put on the website, either because the documents were created or commissioned by employees of the parent body (17), or because the copyright in documents acquired from donors other than the parent body is formally transferred to the repository as part of the acquisition process (30), or both (6). Twenty-three others said that they determined that the repository owned the copyright by referring to donor agreements or reviewing acquisition documentation, which suggests that copyright may often be transferred to the repository by donors; however, they did not state that explicitly. Seven responses reflected the confusion between assignment of copyright by donor and expiry of copyright that was evident in the earlier responses about determining that copyright had expired. Twenty-one responses did not clearly address the question (e.g., “check with University department mentioned”), or indicated a misunderstanding of copyright (e.g., “nous avons les négatifs originaux”).

Their belief that the repository owns the copyright is well-placed when dealing with material created by the repository’s parent body. Such a situation was mentioned by several interviewees. A provincial archives that is in the process of adding further content to its website is focusing first on government records because the copyright issues are straightforward; as Judy said, “there’s a lot we can choose from in government records so we do those.” Pat, a university archivist, remarked, “And then again because we’re an
institutional repository the focus of our website and the stuff that we’ve chosen to make available online is the institutional record as opposed to the private stuff. Just by definition it’s more clear-cut.”

This section attempts to address the research question, “In what ways do copyright issues affect the selection of archival material for Internet access?” We can say with some assurance that copyright issues are an important factor in the selection of archival material for Internet access. While the websites provide clear evidence of the results of repositories’ selection decisions, the constraints of this study make it impossible to know whether these documents were selected because of copyright considerations or because they were the best documents for the purpose. The handful of documented selection criteria, as well as the questionnaire and interview data, suggest that repositories are reluctant to use material in which they have not obtained copyright clearances (or cannot do so), and that they prefer to select documents that are perceived to incur little risk of copyright infringement, those that require minimal effort to clear copyrights, or both, either because they believe that the copyright has expired, or because they believe that the repository owns the copyright. Although repositories could also select works that are not sufficiently original to merit copyright protection, this possibility was not mentioned in any of the data sources. While it is relatively easy to be certain that the repository owns the copyright in the documents created by the parent body, determining that copyright has expired is often difficult, and a rigorous determination of the copyright status of every document may not take place. One respondent summed it up well in saying, “as much as possible (99% of the time), material used is in the pd [public domain] or under control of repository--there is no time [respondent’s emphasis] for copyright review/analysis.”

5.3.2 Seeking Authorization

Research Question 3b asks, “What resources do archival repositories devote to seeking authorization from copyright owners in order to make documents available on the Internet, and why?” This question has two aspects, i.e., repositories’ practice of obtaining the copyright in new acquisitions by virtue of a copyright transfer clause in agreements with donors, and repositories’ efforts to obtain permissions from copyright holders to use particular documents on the repository website. Each is discussed below.
5.3.2.1 Transfer of Copyright by Donors

As noted in Chapter 1, copyright is a bundle of separate rights. While a repository can deal confidently with material created by its parent body, a similar confidence that the repository owns the copyrights as a result of a transfer of copyrights during the acquisition process may be misplaced, because the donor may not own the copyrights in all documents in the acquisition. Of the 36 questionnaire respondents who reported that they own the copyright in the documents in their holdings because copyright is transferred as part of a donor agreement, only four qualified their response by noting that this applies only to the extent that the donor is also the copyright owner. One of the four elaborated on the issue, “Even though our donation agreement (deed of gift form) includes a section on copyright ownership, I believe that people who don’t actually own it often claim that they do.” A fifth respondent who responded ‘no’ to Question 9 (i.e., that the repository did not select documents in which the repository owned the copyright), explained that response as follows, “In many instances we do not know if we legally own copyright even though our standard receipt form says that the donor is transferring all rights including copyright. Hence the NO answer above.”

How the copyright aspect of archival acquisition is addressed could be discerned in repositories’ acquisition policies or their acquisition agreement forms; however, little such documentation is available to this study. The acquisition section of Repository 2V’s policy and procedure manual notes only that copyright matters are to be negotiated and documented during the process of acquiring records from the private sector. Repository 2L’s copyright policy addresses the issue by stating, “All… instruments transferring ownership of material to [Repository 2L] shall include appropriate copyright provisions as required.” Another repository’s website implies that copyright is normally acquired by the repository, although in some cases “certains individus ou organismes qui ont fait don de leurs collections …conservent toujours leurs droits d’auteur relatifs à l’usage de leurs collections.”

Only two acquisition agreements were available to the study; both illustrate certain problems involved in acquiring the copyright in addition to the physical property. The deed of gift form used by two repositories that share the same space recognizes that the donor may not hold the copyright in the materials being deposited, and asks the donor
to assign the copyright insofar as they control the copyright, or, if they are not willing to assign the copyright, to authorize the repository to make copies for research and private study. The form does not, however, address the matter of moral rights owned by the author (who may be neither the donor nor the copyright owner). The other document (a letter of agreement) includes the statement “copyright is transferred to [Repository] and moral rights are extinguished unless otherwise indicated.” It addresses the moral rights issue in an odd way (as noted earlier, a more usual wording would waive moral rights), and it assumes that the donor is also both the copyright owner and the author.

Whether the donor is legally entitled to dispose of the copyrights was further addressed in the interviews. Sixteen interviewees say they are aware that the donor may not be legally entitled to dispose of the copyrights in all of the records they are depositing in the archives; as Alex said, “I understand that even though we have the [John Doe] fonds, and he’s handed over his copyright, in many of the records in his fonds, he wouldn’t hold the copyright to it anyway.” However, repositories deal with the issue in different ways. Two interviewees are reluctant to acquire material if the copyright is unclear; as one said, “And because we’re small and don’t have adequate staff resources here, we’re careful in not taking in material where copyright is muddy.” Three interviewees stated that the clause in their acquisition agreement that asks donors to transfer the copyright includes a qualification such as “where applicable,” or something similar. Staff of two other repositories talk with the donors at the time of acquisition to attempt to discern the donor’s copyright interest in the material being deposited; as Bill said, “We make an effort to interview the donor at the time and ask them that actual question….. And if they’re unsure, I mean, that’s another warning sign for us that we probably wouldn’t want to try and put them online.” Colin deals with the problem by selecting material from more homogeneous fonds, i.e., “If we have material for which the donor is the photographer and they’ve transferred copyright, it’s a lot easier than a miscellaneous collection where we don’t really know what the provenance is or at least who the photographer was and what the copyright status is.” His repository’s website bears this out; of the 15 Virtual Exhibits and Single Fonds Exhibits, nine consist entirely of documents created by the same person or organization, and three consist of documents created by the repository.
In one case, the interviewee went to the trouble of obtaining a copy of the records creator’s will just to be sure that the creator’s sister had the right to transfer his copyright to the repository; as Dick said, “Part of our search involved … getting a copy of the probated will, just to see who the heirs and assigns were, and then trying to follow that up. So we did in fact come up with a satisfactory answer--that we could deal with it as we wished.” However not all would go to such lengths; two others report that they generally assume that donors own the copyrights. As Edie said, “I’ve had a couple of photographers come to me, and in their lifetime they’ve made these, and transferred copyright, so I know that they should own copyright or they tell me they’re the photographer, …. In those ways I think I’ve established that they actually took the photograph. I suppose a sworn statement would be good to cover my rear end.” One of the digital resources on Repository 1N’s website provides an example of the results of such an assumption. A community group collected photographs from community residents and lent them to the repository for copying; the repository retained the copies in its holdings and returned the originals to their owners. Many of these photos have now been used in a digital resource on the repository website, and the individual owners of these photographs are thanked for permission to use the photograph, but it is not evident that the repository made any effort to ascertain whether the owners of the photos also owned the copyright in them.

Two interviewees spoke of specific problems that arose because the donor was not the copyright owner. Melissa dealt with a collection of several thousand photos. Although many were taken by the donor, many others were acquired elsewhere,

…but of course he didn’t bother to record who he got them from or anything like that, … But he happily signed that form saying he owned them all and he owned the copyright in all of them. … It’s a fabulous collection of photographs, and we’re delighted to have it. But that is one thing about it. That’s why that whole collection has not yet gone on the web, but it might.

Jan spoke of the problems with the images from a photography studio,

I did not realize that the copyright owners of each envelope are the ones that commissioned it, right, and they did not sign the copyright over to the photographer. So I have 12,000 envelopes of photographs that are each
owned by individual copyright owners and the privacy on them is huge. 80% of them are portraits. So it is sitting here. I have tried to do something with it a number of times, and every time I find out oh, there’s a copyright issue; there’s a privacy issue.

Based on the earlier discussion of selection criteria, repositories appear to rely heavily on the assumption that they own copyright in many of their holdings because the copyright was transferred at the time of acquisition. However this assumption may be problematic. While there are undoubtedly situations where the donor does own the copyright in all the materials being acquired by the repository, there are others, as these two examples show, where the donor does not own the copyright. Little formal documentation of acquisition agreements or practices is available to this study; however, interview data suggest that, while some archivists make an effort to ascertain whether or not the donor is also the copyright owner, others simply assume that that is the case and rely on the acquisition agreements.

5.3.2.2 Copyright Owned by a Third Party

Only 26 repository websites out of 154 (17%) provide some evidence that they obtained the permission of copyright owners to post documents to the website, or at least made some effort to do so.398 Of those, 16 repositories include explicit statements, most commonly permissions for specific items; these are available for eleven digital resources found on eight repository websites. Of these eight, two appear to obtain permission for everything (including items in which the copyright is already owned by the parent body); six others appear to obtain permission selectively, e.g., only for items which come from outside the repository, or only those items that are perceived to be problematic, i.e., newspaper stories or music. The other eight repositories provide more general statements that permissions have been obtained from copyright holders without listing individual items.

Three other repository websites include indirect evidence that they obtained permissions, or that some effort went into obtaining the appropriate permissions. For example, Repository 1X’s acknowledgment of the assistance of a copyright licensing

398 Some repositories included acknowledgements of the owner or location of the source materials; however, such acknowledgments (or the absence thereof) were not considered to be clear evidence that authorizations had (or had not) been obtained from copyright owners.
specialist at a larger repository suggests that they made a serious attempt to obtain permissions for documents used in that particular digital resource. Seven other repositories include a disclaimer (for particular digital resources or on their website copyright page) that, while they made reasonable efforts to obtain copyright clearances, they had not always been successful, and they invite copyright owners whose permission has not been obtained to come forward.

The 38 questionnaire respondents who reported that they select documents in which the copyright is owned by someone other than their repository were asked a number of further questions. Thirty-four of the 38 (89%) responded that they tried to obtain the authorization of third party copyright owners to put copies of their documents on the website. They were then asked to provide more detail about the strategies they use to locate the copyright owner. A variety of strategies were reported, some more detailed than others. As already noted, simply identifying the copyright owner can be difficult, and one repository reported that they waste no time trying to identify non-obvious copyright owners; they move on to something else “aussitôt qu'il s'avère que nous ne pouvons identifier le détenteur du droits d’auteur…. Nous choisissons les documents pour lesquels nous connaissons déjà le détenteur, par exemple Radio Canada.”

Regarding the means they use to locate the copyright owner, 22 of 34 respondents (68%) reported strategies that included combinations of three main possibilities, i.e., searches through the repository’s acquisition documentation, searches of various print and online sources, and personal contacts in the repository or the wider community. Thirteen (38%) mentioned various Internet sources, ranging from Google to the WATCH file. As one respondent noted, “Internet searches around creator or title (surprising what you can find for 20th century material!).” Only four (12%) limited their search to the acquisition files alone. Twelve responses (35%) were too general to be helpful, e.g., “general research,” or did not directly address the question.

399 Of the four questionnaire respondents that reported that they did not try to obtain the authorization of the copyright owner, none gave any indication elsewhere in the questionnaire about their reasons for this practice. Only one gave permission to link the questionnaire with the website; however, the repository website does not address this matter, and the repository’s draft copyright policy addresses only what to do with external requests for permission to use the repository’s holdings.
400 The WATCH File (Writers, Artists and Their Copyright Holders) is a database of copyright contacts for writers, artists, and prominent figures in other creative fields at http://tyler.hrc.utexas.edu/.
Strategies for locating copyright owners were also addressed in the interviews. Beth, who appears to seek permission for every item, recounted several examples of the efforts she has expended to identify, locate, and obtain permission from copyright holders, ranging from a phone call to a local photographer, to an extended email correspondence with the author’s descendants and another elderly author living in Europe. Another university archivist reported her search to discover that the copyright owner was an American university, and her frustration at receiving no response despite repeated requests for permission to put the document on her website. Alex commented that tracking down the copyright owners of items they wanted to use in their virtual exhibit was not their preferred choice (despite going to considerable effort to locate a copyright holder in a retirement home in another province, and the donor’s widow now living on the west coast),

Well, we go looking for the creators and see if we can locate them in the vicinity. We did that with probably half a dozen people, but to tell you the truth, we really try and focus in on using documents that are true to the theme and useful, but that don’t have that baggage.

Dick noted the anticipated complications of identifying and locating copyright owners in the photographs in the recently-acquired fonds of a film maker,

The photographs are very complicated because of the way in which they were taken…. Some were taken by the [film] studio; others were taken by the director’s assistant or publicist … In other cases they’re photographs that were taken personally by the film director or members of his family, … But this is beginning to loom large because they’re fantastic photographs which we would like to put on a web site we’re constructing about this individual’s life…, but it will involve of course trying to get clearance to do this.

Questionnaire respondents were then asked about the reaction of copyright owners they had successfully located to obtain authorization. Of the 33 respondents, 26 checked off more than one option. In all but two responses, the copyright owner’s reaction included pleasure that the document was being used, and 12 respondents (36% of the 33 respondents) reported that the copyright owner was unaware that they owned

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401 Question 16 asked, “Where your repository has successfully located the copyright owner to obtain authorization for the use of a document, what has been their reaction to your request?” and asked respondents to check off all that applied from a list of five options (plus a space to specify other possibilities).
copyright. Only three (9%) respondents reported that permission was declined. Nine respondents (27%) reported that the owner wanted royalties or licence fees. Three of these respondents provided further information about such situations. One indicated that the institution did not pay and did not use the images; another reported only one case of a copyright owner wanting fees; another reported that only institutional copyright owners, not individuals, wanted fees. One commented that a copyright owner requested “certaines limites technologiques [comme] le 'streaming' pour l'audio.” Another described copyright owners’ reactions as “generally nonchalant.” As far as paying licensing fees is concerned, six repositories (6% of the 98 respondents that answered the question) reported that they had paid a licence fee to a copyright owner to make a document available on the Internet; another 2 (2%) were not sure whether they had or not.

Questionnaire respondents were also asked at what point they stop trying to locate the copyright owner. Of the 31 responses, more than half (17 or 51%) were too general to be helpful (e.g., “after ‘reasonable’ attempt”), or did not address the question directly. The remaining 14 gave a variety of responses, some a list of specific sources that would be systematically checked, others based on the elapse of time or number of attempts without a response. Four respondents commented on the staff resources required to conduct such searches. One said, “It depends on how important the documents are to a particular project…. Staff time is an issue; several hours work for hundreds of pages might be worth it, but not for a single image or page.” One also noted that they keep records of attempts to contact the copyright owner, even if unsuccessful. In sum, while less than a quarter of the repositories in the study select documents in which the copyright is owned by third parties, those that do so appear to go to considerable effort to obtain the necessary permissions. They have a variety of strategies for locating copyright owners, although they also acknowledge the staff resources required.

In sum, repositories obtain authorization from copyright owners in order to make documents available on the Internet in two ways, i.e., the transfer of copyright to the repository during acquisition, and requesting permission from individual copyright owners at the time that the digital resource is being developed. It appears that repositories rely heavily on the former practice; however, even though archivists are aware that the donor is not always the copyright owner in all the documents acquired, most appear to
make some general assumptions about ownership that may not be well-founded. However, when it is known that copyright in documents selected for a digital resource is owned by a third party, repositories appear to make serious efforts to locate the copyright owner, despite the staff time and effort required.

5.3.2.3 Risk Assessment

Given the nature of archival material, archivists often have to consider whether it is appropriate to go ahead and use a document if the copyright holder cannot be identified or located. Copyright matters are not always clear cut, and dealing with copyright can involve a certain amount of risk assessment. This matter was explored in the questionnaire responses, in the interviews, and on the websites.

Thirty-one questionnaire respondents indicated what they did if the copyright owner could not be located or did not respond to their request; most checked off more than one option. Twenty-one (66% of the 31) said they did not put the document on the website, and twenty-two (69%) would substitute another document if possible. Nine (28%) would use the document with a disclaimer indicating that they had been unsuccessful in their attempts to locate the copyright owner; seven (21%) would use the document without a disclaimer. That two-thirds would not use the document or would substitute another suggests that archivists have a low tolerance for risk.

Their tolerance for risk is revealed in other questionnaire data and in the interviews. Four questionnaire respondents amplified their responses by describing, often in terms of “risk,” when they would go ahead and use a document even if they could not locate the copyright owner, e.g., “If the photographer/photography studio does not appear to be extant. There is not likely to [be] anyone with a financial interest in the use of the photos and it is considered to be a reasonable risk,” or “Consider age of document, and risk; if low risk then go ahead (For photos only).”

Fourteen interviewees mentioned risk assessment or risk management as a strategy in selecting material for Internet access. Of these, 11 said that they would use (or had used) a document if it was not possible to identify the creator, or if, after an attempt

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402 Question 15 asked, “What do you do if the copyright owner cannot be located or doesn’t respond to your request?” and asked respondents to check off all that applied from a list of four options (plus a space to specify other possibilities).
to locate the owner or obtain permission, there was uncertainty about its copyright status. As Pat said,

It would be only as a last resort that you’d kind of go “We’ve exhausted all these avenues.” We’ve legitimately tried to go and trace this down and we really can’t do that. The trail’s dead now. The creator died 40 years ago and we have no idea about successors or the heirs or whatever and we’ve actually tried to do this. Whether it’s successor companies in photographs or family members we just can’t—the trail’s gone. There again risk assessment. OK let’s put this up and see what happens.

Two others, however, would be less willing to take a risk. As noted earlier, Alex said, with reference to the repository’s first virtual exhibit, “So let’s face it, anything that appeared to be very difficult we avoided,” and Diane said she was not a risk taker.

Two interviewees with a great deal of experience putting holdings online mentioned what they would avoid. As noted earlier, one repository has found sound recordings and moving image materials to be problematic because they involve several “layers” of copyright. The other interviewee would be more careful with literary papers than administrative records. She also reported that, after receiving no response to repeated requests for permission to use a document, she decided to use the document anyway.

Four interviewees mentioned that senior management’s tolerance for risk was a key factor; in all cases, the interviewee’s boss was very keen on web access to holdings and was prepared to put archival holdings on the website, despite the uncertainty about copyright status. For example, as Laura said, “I know the way the director of my library feels is she wants as much access as possible and for people to use the material, so she would say put it up and then if, for whatever reason … we thought we had the copyright or that the copyright wasn’t an issue, and [we’re] mistaken …, then we would certainly take it down.”

Bill commented that digitization projects provided a chance to revisit earlier acquisitions to try to acquire the copyright in cases where the documentation was nonexistent or sketchy, and noted that there were situations in which they could not locate the donor. When asked what they did in such situations, he responded,
We’ve avoided it still. We’ve basically decided it’s just not worth the heartache of trying to make it all clear and trying to track down all the information on it. … We still do have quite a lot of quality material that we do know we have copyright on. …I’m sure there will come a day when we have to make these harder decisions but at this time we can still cherry-pick the really easy ones.

Seven repositories that go ahead and use a document, despite unsuccessful efforts to obtain copyright clearances, include a disclaimer noting their efforts and inviting copyright owners to come forward. One of the most comprehensive such statements is that of Repository 1C:

In a few cases, despite the best efforts of the [Archives], the copyright holder or performer has not been located. If you hold rights in any of the material displayed on this website and have not been contacted, please contact the [Archives contact info]. We would be pleased to discuss and receive your permission for materials for which you hold rights. If permission is not granted, the item in question will be removed from the website upon the right holder’s written request.

When asked what they would do if they were challenged by a copyright owner, interviewees invariably responded that they would remove the document, sometimes after investigating the claim. As Leslie said, “Don’t worry about putting a couple up that you’re not sure of because you can always take them down and talk your way out of it.” Laura elaborated on the reasoning of her repository’s administration, “from the library’s point of view they would rather err on the side of publication and remove it if somebody complains. Because all of it is free, and there is no money accruing to the university, and so as far as they’re concerned, their instructions to the archives would be put it up and if somebody complains, take it down and apologize….There is a tolerance for risk because there is no gain.”

A related questionnaire question asked respondents whether their repository had ever been challenged by a copyright owner about the use of a document on the repository’s website. Eight (7% of the 106 respondents) reported that this had occurred. Of these, only four of the challenges appear to have been well-founded. One respondent noted challenges related to privacy rather than copyright, and confirmed in the interview that the repository has never been challenged on a copyright matter. Of the remaining seven that were copyright matters, one involved an error in the credit for a photograph (which was corrected); one repository simply removed the documents in question; two
dealt with challenges from people who could not prove that they owned the copyright; two settled with the claimant. Three interviewees said that they had never been challenged, although as two of them noted, perhaps they had just been lucky. Leslie recounted a situation in which the repository was challenged regarding an image on its website,

We thought that the studio was defunct and we had no knowledge of where the images had gone. We put up an image … and we had a phone call the next day of course. I own those images, and there is a fee involved. We said fine, what would your fee be and the fee was more than we wanted to pay. It was a nice image, but we had no problem taking it down and putting it away.

Another statement in the questionnaire was intended to explore the extent to which archivists were willing to pay for a licence\(^403\) that would reduce the risk of legal consequences and provide them with more certainty about their use of documents. Respondents were asked to indicate their level of agreement or disagreement with the statement “My repository would be prepared to pay for a blanket licence (similar to that offered by Access Copyright for photocopying of published material) that covered the copying of unpublished material by any means (including digital copying).” Eighteen percent of the 104 respondents agreed with the statement; 44% disagreed or strongly disagreed, and 38% had no opinion. As noted earlier, 39 questionnaire respondents are the designated copyright specialist in their repository. Only 30% of the repository specialists disagreed or strongly disagreed with the statement that their repository would be prepared to pay for a blanket licence; in contrast, 50% of the non-specialists disagreed or strongly disagreed with the statement. The repository specialists (M = 2.975, SD = 1.074) are statistically more likely than the repository non-specialists (M = 3.5, SD = .932) to think that their repository would pay for a blanket licence that covered the copying of unpublished material by any means (t (104) = -2.652, p = .0092, two-tailed).

This question about blanket licences was explored in the interviews; 20 interviewees were asked why they had agreed or disagreed with the statement.\(^404\) Only four interviewees agreed with the statement in their questionnaire responses; of the ten

\(^{403}\) It must be noted that no such licence exists, and because of the nature of archival material, a number of problems would have to be addressed in order to develop a workable instrument.

\(^{404}\) One interviewee declined to respond to this question; he had checked off ‘neutral’ in his questionnaire response.
who indicated that their repositories would not be willing to acquire such a licence, seven said that the cost was an issue, and two others said that they already owned the copyright in the documents so there was no reason to pay a licence fee to use them. Of the eight that were neutral, five said that they did not have enough information, or did not have the authority to make such a decision. Of all the interviewees (including those who favoured such a licence), 11 mentioned cost as a factor; some repositories could not even consider it; others would have to take the funds from something else within an already tight budget; others would have to make the case for additional funds, although as Lee said, “But if it costs as much as the maintenance agreement on my reader printer, for instance, I might say, no, I’ll wing it for another while.” Four others saw no point in paying a fee if they already owned the copyright or if their existing practices (i.e., selecting only public domain material) precluded copyright infringement. Four others could see some of the not inconsiderable problems in the operation of such a licence.

In sum, risk assessment appears to be an aspect of repositories’ copyright practices in making their holdings available on the Internet. Some questionnaire data suggest that repositories’ tolerance for risk is low; however, other data from the questionnaire responses and the interviews suggest that some are risk takers, depending on the stance of senior management and the extent of the repository’s experience creating online resources. Strategies include the use of disclaimers and, if challenged, removing the document in question. Few would be willing or able to pay for a licence that would reduce the risk, although they may not have fully understood how such a measure would work. However, repository specialists are statistically more likely than the non-specialists to think that their repository would pay for a blanket licence that covered the copying of unpublished material.

5.3.3 Controlling Further Uses

As noted elsewhere, interviewees reported that increased access to holdings is the main reason why their repositories make their archival holdings available on the Internet. As well, making its holdings available online also provides the repository with a promotional vehicle that may raise its profile among resource allocators, users, or the broader community. For some, however, the potential for increased access and higher profile is tempered by concerns about the ease of copying and distribution in the digital
environment, and the extent to which users comply with repositories’ terms of use. Research Question 3c, “How do archival repositories attempt to control further uses of their Internet-accessible holdings, and why?” is addressed in website content, and was also explored in the questionnaires, the interviews, and the policy documents.

5.3.3.1 Reasons for Concern

The level of concern about the need to control further uses of documents on the website was explored in the questionnaires. Respondents were asked, “Is your repository’s administration concerned that visitors to your repository’s website may copy or download archival material from the website?” Fifty-eight (56%) of the 104 respondents reported that their administration is concerned about this; 46 (44%) indicated that their repository administration is not concerned. That the number of those who are concerned only slightly exceeds those who are unconcerned suggests that there are divergent opinions about this matter.

Questionnaire respondents were also asked to indicate their level of agreement or disagreement with the statement, “As long as the repository is credited as the source, it’s OK for members of the public to download documents from our website and use them in a publication or on another website.” Seventy percent of the 105 respondents disagreed or strongly disagreed with the statement; 20% agreed or strongly agreed, and 10% were neutral. Another question asked questionnaire respondents to indicate their level of agreement or disagreement with the statement, “It is important to restrict the ability of visitors to our website to copy or download documents from our website without our permission.” Fifty-seven percent of the 105 respondents agreed or strongly agreed; slightly over a quarter (27%) disagreed or strongly disagreed; 16% were neutral. One might expect that those who reported that their repository’s administration was concerned that visitors may copy or download archival material from the website would agree or strongly agree that it is important to restrict the ability of visitors to the website to copy or download documents from our website without our permission. However, of the 58 that said their repository administration was concerned, only 40 agreed that it was important to restrict people’s ability to copy or download documents from our website. These diverse opinions about controlling further uses of documents on the website were explored in the interview data.
Five interviewees recounted specific situations where they had seen copies of their online material (or in one case, photographic prints provided to a user) altered, used without permission, or sold. Dick summed it up well, saying, “You can’t always assume that even though you ask people to contact copyright holders or the owners of reproduction rights and so on they’re always going to do that.” To some extent, some archivists seem to mistrust their users and what they might do with their online materials.

The fifteen interviewees who indicated in their questionnaire responses that their repository administration was concerned that visitors to the repository’s website may copy or download archival material from the website were asked what their administration was worried about. Several areas of concern emerged, relatively few of which have much to do with copyright. The most common concerns had to do with financial matters. Four interviewees were concerned that their holdings would be used commercially to generate profit for others. This is seen as unfair; the most emphatic statement about this came from Leslie, who said,

> We don’t want material up any higher than [72 dpi resolution] because we are aware that there will be entrepreneurs who will take images like the [XX fonds] and print them off and make them available at the flea market on Saturday and charge 30 dollars each for them and retire millionaires to Bermuda. And we won’t—we'll still be slaving away here.

Related to this is the matter of revenue generation, which four interviewees mentioned as an important concern. Some repositories also want to (or are being pressured to) generate revenue from providing copies to users, so they do not want to provide high quality digital copies online that can be freely downloaded. If others will be making money from archival resources, repositories want a portion of the revenue, as will be seen in the later discussion of use fees.

The second most common area of concern, raised by six interviewees, relates to what could broadly be called authenticity. For a number of reasons, archivists want to control the uses of their holdings in order to be sure that documents and the context of their creation are presented accurately, that the item is labelled accurately, and that the repository is credited as the location of the original. As Donna said,

> I think we have a concern about people using it, you know, in a way that’s different from what the document was meant to be; they’ve misrepresented it or
they will sometimes put things out on their website, and things about the record or the series change, and they don’t have that information, so there are inaccuracies. Often when somebody does something like that with our records, we end up (besides not wanting anything to be misrepresented), we end up with a lot of questions that put us to a lot of work….. We lose control of it, and you don’t need control just to control, but for context, and anything that might be added, or those sorts of things won’t be picked up [if we don’t retain some control].

Other specific concerns were also raised. Two other interviewees noted a related concern about the reputation of the repository. As one said, “[We are] concerned that we don’t know … what are they using that image for, and how does that (whatever they’re doing with that image) reflect on the [repository] as an institution. That’s one of the concerns I know that the Director has.” Two were also concerned that their repository may incur some legal liability if a researcher's use of material from the repository website infringed copyright. One was concerned more generally that the absence of face-to-face contact with users removed a means of providing evidence of use and the value of archives that repositories have traditionally used to justify their program. Even those interviewees who reported that their administrations are not concerned about further uses of material on their websites nonetheless take some measures to limit further uses.

In sum, it appears that many archivists think that there is some need to control further uses of their website content; however, the questionnaire responses and the interviews elicited a range of divergent views about the issues and levels of concern. Repositories are concerned about loss of revenue (or others inappropriately profiting from use of the repository’s holdings); threats to the authenticity of documents through loss of contextual information or incorrect captioning; and no acknowledgement of the repository as the location of the original. Archivists wish to control how their holdings are used, but the reasons stated are not directly related to copyright.

5.3.3.2 Technical Measures

Technical measures can be used to limit further uses by preventing the copying of images from a website, by permitting copying but reminding the user of copyright matters, or by permitting copying but reducing the quality of the copied image. Disabling the right click prevents an image from being copied; click-through agreements remind users of their copyright responsibilities; and watermarks and low resolution images limit
the quality of the copy. The repositories in this study use these technical means, either alone or in combination, to limit further uses, as shown in Figure 21.

Figure 21
Technical Measures Used to Limit Further Uses
(N = 154)

Only five of the 154 repositories in the study (3%) prevent copying of at least some of the images on their websites. Four repositories disable the right click. Two disable the right-click only for enlargements, but permit right-click copying of thumbnails. In three cases, right-clicking the enlargement produces a message asking the user to contact the repository to order a copy or to receive further information about using the images. A fifth repository restricts copying from its visual images database in another way. The database contains three different image sizes; anyone can view and print the thumbnails or screen size images, but the high resolution images cannot be viewed or downloaded remotely. They can only be viewed at the repository, and printed on a self-serve printer in the reading room.

Five repositories (3%) use click-through agreements or otherwise require the user to navigate through a copyright information page before viewing a digital resource. Three repositories require the user to agree to a click-through agreement before they can proceed to a particular digital resource. The other two repositories do not require the user

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405 Right-clicking the mouse allows the user to copy and paste selected content and save it on one's own computer. Disabling the right click can be done with a JavaScript application.
to indicate their agreement with the terms of use, but do require the user to go first to a page that contains the terms and conditions of use before proceeding to the photo database search page.

Thirty-one repositories (20%) watermark in some way the documents used in fifty-four digital resources. A watermark is the visible information (such as the name of the repository, item number, a copyright statement, and the like) placed across the digital image or on its edge to inhibit unauthorized uses of the image. Only nine of these thirty-one repositories watermark items in all of their digital resources. The most common watermark, used by 16 repositories, is some combination of the name or initials of the repository and the copyright symbol. Nine more repositories combine the repository name with more detailed information about the source, i.e., the reference number of the item, or the name of the fonds or collection. Two repositories include the terms of use in the watermark (e.g., “Duplication with written permission” or “no printing without permission”), usually in combination with the name of the copyright owner or photographer. The remaining four repositories use other marks, such as the organization’s crest, or the name of the copyright owner.

Also of interest is how obtrusive the watermarks are, since there is little point in using watermarks that cannot be seen, or in making them so large that they obscure much of the image. Most watermarks are placed along the edge or in the corner of an image. Where they are larger, the text may be semi-transparent, e.g., Repository 5M has both the URL and the name of the repository on each image in a relatively large, but transparent, font. However, seven repositories use different watermarks or place them in more obtrusive places. For example, Repository 3H includes the crest of its parent body anywhere on each image where it can be seen clearly.

In the interviews, eleven interviewees commented on watermarks, either that they used them, or were aware of the existence of this technology (despite their decision not to use it). Diane’s repository had just purchased watermarking software to reduce unauthorized use of the repository's images, ‘I’ve actually seen our images elsewhere without that [name of repository on the edge of each image]. So this watermark software embeds the label right into the image, so you could not…. Well a hacker probably could
remove it, but it would be a lot harder.” Another who is about to add extensive content to his repository's website is also investigating watermarking.

The most common measure used by study participants to limit further uses is to limit the quality of the copy by reducing the resolution of the images to be delivered to the web. An overview of the place of resolution in digitization and web delivery is included in Appendix N. As discussed there, the use of low resolution images for web delivery has more to do with reducing the file size so images can be downloaded quickly; however, the reduced quality of the image can also be seen as a means of limiting further uses.

In the questionnaire responses, 83 repositories (79% of the 105 respondents) indicated that they use low resolution images as a means of limiting further uses, either as the sole such measure (25%), or in combination with other technical and non-technical measures (54%). However, while one can view the properties of each digital image on a website, it is not possible to calculate the resolution of any particular image without knowing the size of the original document; thus the extent of the use of low resolution images can be verified only if the resolution is reported elsewhere. Only 13 repositories indicate on their websites the resolution and file format for web delivery of 17 digital resources; of those, 11 repositories (in 15 digital resources) indicate that the documents are displayed on the web at 72 dpi in JPEG format; the other two repositories (in 2 digital resources) use the JPEG format at higher resolutions (100-150 and 300dpi, respectively).

The websites rarely state specific reasons for choosing a lower resolution and different file format for web display; only Repository 1X says it is done “to improve networked access and use of the images.” Only Repository 4W directly addresses the copyright issue by noting that copyright information is provided with the images, that the resolution is too low to make them suitable for publication, and, should unauthorized reproduction become a problem, the repository would consider watermarking the images.

The use of low resolution images was discussed in more detail in the interviews.\footnote{Two of the 22 interviewees did not address resolution specifically.} Twelve interviewees explicitly stated that they use low resolution images (72 dpi) in order to limit use, for example, Pat said, “We have reproduced stuff at relatively low resolution specifically to stop people from using the images, republishing
and reusing them.” Diane reported using a resolution of 300 dpi “but the images are small and if you print them off, they are quite blurry.” Only Laura reported that they use a high resolution for web delivery of the holdings in which they own the copyright, saying,

The ones that we put up that we own the copyright to, actually we put them all up at a high resolution [300 dpi, according to their website]. We don’t mind people using any of our copyright material. We’re happy for people to use them; we just want them to quote them or credit them. That’s mainly so that if people are interested in following up they can come back to us.

The contrast between Diane’s and Laura’s statements exemplifies the tension between archivists’ desire to make their holdings available and their wish to control others’ uses of these holdings. As Michelle said, “To limit the access to our pictures is not a good thing, but to have them use our pictures not in the ways that we want them is not a good thing either.” Richard went to the heart of the matter in saying, “The approach has been to produce almost like mediocre scans so they really become not something that somebody could heist. Which is kind of counter-productive in terms of researchers’ needs. If the image becomes so lousy that it’s not intelligible, what’s the point of doing this?”

Six interviewees expressed similar views about technological limits generally, believing that any protection measures likely to be within the means of an archival repository could easily be removed or circumvented by a knowledgeable person. A questionnaire respondent who reported that his repository did not take any measures to limit further uses said, “Have considered all of the above, and watermarks, etc., but someone determined to use an image will be able, therefore we let the issue go.”

Another interviewee noted that while they use low resolution images, most of the archival material on their website is in the public domain and people can do what they want with it. From a copyright perspective, there are no limits on the use of archival holdings in which the copyright has expired, but some repositories still want to retain control over uses of their holdings to ensure appropriate credits, image quality, authenticity, and the like. Three repositories have a digital resource that includes a statement that the images are all in the public domain; however two of these repositories still place conditions on their use. For example, Repository 2S states that the photos
available on its website are “free from copyright,” but it nonetheless prohibits any manipulation or reformatting, and specifies that only “personal, academic or any other non-commercial use[s]” are permitted. Repository M states,

This website can ONLY be copied or reproduced for reference and educational purposes. It is NOT intended for COMMERCIAL use, copying or reproduction, electronic or print [emphasis the repository’s].

The effort put into limiting further uses has little to do with copyright, but only two interviewees articulated the distinction between copyright and ownership of the archival materials, and their intention to continue to enforce their ownership rights even after the copyright had expired. As Larry said, “It’s probably not so much about copyright, but about ownership.”

Three repositories that currently use only low resolution as a means of controlling further uses noted that additional controls were being considered for future projects. Of these, one that is about to embark on an e-commerce initiative is investigating more restrictive measures, i.e., “how to disable the copying feature on people’s keyboards or work screens.”

On the other hand, thirteen repositories (8% of the 154 repositories whose websites were studied) encourage their users to reproduce documents from their websites. Nine repositories assist users of the website content by including “print” links or by instructing their users on how to print, or copy and save, although, as noted below, this assistance is in some cases combined with a restriction of some sort or a reminder about copyright issues. Of these, six repositories include a link (for at least some of their digital resources) that allows users to print the image or, in some cases, the image and its description. Of these, three repositories ensure that the resulting image includes a watermark or a copyright ownership statement on the resulting print.

Four other repositories go even farther than making it easy to print. For example, Repository 2J provides a “help” link on each page of its Online Research section which informs users that documents are available for download in PDF format, and tells them how to save documents in different web browsers using the right click. Repository 2M provides users with similar information within a larger policy document that includes copyright and terms of use information.
To sum up, the use of technical measures to control further uses of website content reveals some tension between access and control on the part of archival repositories. On the one hand, relatively few repositories (37 repositories or 24% of the 154 repositories in the study) prevent copying, remind users of copyright matters, or add watermarks. However, the majority of repositories in this study (83 repositories or 79%) reported that they use low resolution images as a means of controlling further uses of their website content. That low resolution images are widely used is corroborated to some extent by website and interview data; that low resolution is used to limit further uses of website content is supported by interview data. Even though the use of low resolution images is primarily about download speed, the reduced quality of the image is a by-product that archivists see as a means of controlling further uses. However, to some archivists, the Internet provides a new way to make archival holdings available to a wider audience, and it seems counter-productive to allocate resources to make them inaccessible. One archivist summed it up well when she compared technical measures with home security, saying,

Do you get the full home security or do you get a dead bolt? Because anybody, if they’re really determined, could probably take that watermark out, or I don’t know if there’s any way to upgrade resolution, but we thought those are sort of the most simple ways of doing it that still allow people to see fairly well, but don’t allow them to easily download it and print it off. So they would get...something that would not be worthy of publication and if they really wanted to try and put work into it, then they probably would be able to go over that, but we are trying to put in a lower level of security just to deter.

Furthermore, the desire to control further uses is not entirely a matter of copyright. While many repositories do select for web delivery material in which they own the copyright, and thus have a desire (and the right) to authorize uses beyond research or private study, they also have a long-standing practice of controlling the use of their holdings by virtue of their ownership of the physical material, not necessarily because of any copyright interest. They do not, however, clearly distinguish between diverse motivations for controlling further uses.

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407 Two repositories apply two technical measures to their online photos; two others use different technical measures for different digital resources.
5.3.3.3 Non-Technical Measures

Repositories also attempt to control uses of the repository's holdings in non-technical ways, mainly through statements setting out the terms and conditions on copying and use of the website content, and information about how to obtain copies from the repository.

5.3.3.3.1 Controlling Use of Online Content

Terms of use (TOU) statements represent a non-technical means by which repositories attempt to control further uses of their website content. Of the 250 policy documents available to this study, 128 of them (51%) are TOU statements that apply to website content. TOU statements are just that—the terms and conditions that the repository puts on uses of the archival material available online. Repositories recognize that visitors to the website are able to copy documents from the website without consulting the archives, and therefore have addressed (in various ways) what visitors can and cannot do with the website content.

Seventy-three repositories (47% of the 154 repositories in the study) have 128 TOU statements that apply to the website content, either to the entire website (18 TOU statements apply to 16 websites), or to individual digital resources (101 TOU statements apply to 141 digital resources), or both. The number and location of TOU statements pertaining to website content are summarized in Table 12.

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408 Two repositories have two TOU statements. In one case, one statement is the repository’s adaptation of the parent body’s model TOU statement; the other provides more specific details about the repository's practices. In the other case, one statement uses legal language; the other is in less formal language in the FAQ section.

409 As stated earlier, statements that set out terms of use of the parent body website are excluded from this study because they do not fall within this study’s definition of policy document because they were not created by the repository. However, it must be noted that the websites of 13 repositories contain a link at the bottom of every page of the repository’s website to the parent body’s ‘terms of use’ page or copyright page. Of these, ten are public sector repositories (provincial, municipal, or hospital archives). The remaining three are private sector institutions. Ten of the thirteen repositories have additional policy documents on their websites that address the repository’s specific copyright practices; however, the remaining three repositories (two churches, one provincial government) have no copyright policies on their sites other than a link to the parent body’s policies. It is also worth noting that one of the repositories that sent in policy documents with its questionnaire included a copy of the parent body’s website terms of use statement as one of its repository policy documents, suggesting that even though they did not write it, they very much consider it a part of their internally written policies. Another public sector repository’s ‘in-house’ terms and conditions of use statement contains wording identical to that of the parent body.
Table 12
Terms of Use (TOU) Statements Pertaining to Website Content
(N = 128)

<table>
<thead>
<tr>
<th></th>
<th>No. of Repositories</th>
<th>No. of TOU Statements</th>
<th>What They Apply To</th>
</tr>
</thead>
<tbody>
<tr>
<td>Website only</td>
<td>16</td>
<td>18</td>
<td>16 websites (401 digital resources)</td>
</tr>
<tr>
<td>Digital resources only</td>
<td>53</td>
<td>101</td>
<td>141 digital resources</td>
</tr>
<tr>
<td>Both</td>
<td>4</td>
<td>9</td>
<td>4 websites; 8 digital resources</td>
</tr>
<tr>
<td>TOTAL</td>
<td>73</td>
<td>128</td>
<td>20 websites; 149 digital resources</td>
</tr>
</tbody>
</table>

The number of TOU statements may seem low compared with the total number of digital resources identified in this study (1016). However, the TOU statements that apply to entire websites cover 401 digital resources. Combining the 141 digital resources that have their own TOU statements with the 401 digital resources covered by website TOU statements gives a total of 542 digital resources, or 53% of the 1016 digital resources in the study. Whether reported in terms of numbers of repositories (73) or in terms of numbers of digital resources (542), approximately half of the repositories (47%) or digital resources (53%) have TOU statements. It is clear from these numbers that even within the same repository, some digital resources have a TOU statement; others do not. For example, three of repository 1Y’s fourteen Virtual or Single Fonds Exhibits do not have a TOU statement. When asked about this, the interviewee from this repository said it was an oversight (in one case, “[digital resource] was contracted out so we probably just didn’t give him instructions”).

That only half of the repositories in the study inform their users of the terms and conditions that apply the further uses of their website content appears to be at odds with the finding noted earlier that 70% of questionnaire respondents disagreed or strongly disagreed with the statement, “As long as the repository is credited as the source, it’s OK for members of the public to download documents from our website and use them in a publication or on another website.” If the TOU statements are a means of controlling further uses of archival material, not all repositories use this means of informing users about how they may use website content.

Repositories have no legal or professional obligation to enforce copyrights when documents that the repository has made available online are used in various ways by
users of the repository website. They are, of course, entitled to enforce their own copyrights, and they are obligated to comply with the terms of contractual agreements made with rights holders regarding further uses of their works made available online. However, because the study did not examine every document on every website, and did not have access to the documentation required to ascertain that the repository owns the copyright, or the presence of particular conditions that are part of the acquisition arrangements, it is not possible to say whether repositories are placing conditions only on material in which they own the copyright. As indicated in Table 12, 16 repositories have only a TOU statement that applies to all parts of the website. This suggests that they do not distinguish between material in which they own the copyright, material in which the copyright is owned by third parties, and what is in the public domain. For example, Repository 2E’s website includes content of all three types, and Repository 5S’s website includes material that is likely in the public domain or in which the copyright is owned by third parties.

However, 57 repositories prepare separate statements for individual digital resources. There is some evidence that some repositories tailor their TOU statements to the requirements of the particular digital resource. For example, Repository 1C has two digital resources with similar TOU statements indicating that all uses require the repository’s permission, even though in one case, the material is very likely in the public domain because the creator died in 1815, and in the other case, the copyright in the documents used was bequeathed to the repository by the author. In a third digital resource in which the copyright in the majority of the items used is probably owned by third parties, the TOU statement indicates that further uses require the permission of both the repository and the copyright owner. However, another digital resource containing material that is entirely in the public domain has no TOU statement at all.

Of the 11 digital resources on Repository 1Y’s website that have a TOU statement, the permission of the repository is required to “reproduce, i.e., publish or publicly display” any image from various digital resources even in cases where most of the photos are in the public domain (three digital resources), where the material was created by the fonds creator as well as by third parties (three digital resources), or where the material was created by the parent body (two digital resources). In two other digital
resources, the copyright in the documents is owned by the creator, or co-owned by the creator and the repository. In only one digital resource is it indicated that the copyright is owned by the creator, and that further uses require the creator’s permission. Without the documentation about the acquisition arrangements, it is difficult to say; however, these two examples suggest that repositories impose terms and conditions of use well beyond what is required to enforce their own copyrights or to abide by contractual arrangements with donors.

The TOU statements available to this study represent a wide range of practice, and the analysis of TOU statements could be a study in itself. However, this study looks only at selected aspects relevant to the framework for this study, i.e., the “restrictiveness” spectrum. Thus, the TOU statements were analyzed in terms of approach, i.e., in terms of what uses, if any, the repository allows without a formal request for permission, what uses require permission, and any conditions placed on specified or other uses.

Of the 128 TOU statements considered in this study, 22 apply to entire websites and 106 apply to specific digital resources. The analysis of these TOU statements using the foregoing categories is presented in Table 13.
Table 13
Terms of Use (TOU) Statements by Permitted Uses and Further Conditions
(N = 128)

<table>
<thead>
<tr>
<th>Terms and Conditions</th>
<th>TOU Statements for Digital Resources</th>
<th>TOU Statements for Websites</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number (%)</td>
<td>Number (%)</td>
</tr>
<tr>
<td>All uses need permission plus further conditions</td>
<td>2 (2%)</td>
<td>2 (9%)</td>
</tr>
<tr>
<td>All uses need permission; no further conditions</td>
<td>30 (28%)</td>
<td>5 (23%)</td>
</tr>
<tr>
<td>Specified uses permitted plus further conditions</td>
<td>63 (59%)</td>
<td>13 (59%)</td>
</tr>
<tr>
<td>Specified uses permitted; no conditions</td>
<td>9 (9%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>No uses specified; conditions apply</td>
<td>2 (2%)</td>
<td>2 (9%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>106 (100%)</strong></td>
<td><strong>22 (100%)</strong></td>
</tr>
</tbody>
</table>

One way to look at this data is to compare the number of repositories that take a positive approach to uses of their online content (in that they inform users what they can do with the online documents without seeking permission) with those that take a proscriptive approach (in that they indicate that all uses require permission) or a neutral approach in that they indicate no uses at all. Figure 22 shows that a permissive approach predominates, in terms of TOU statements. In terms of repositories, of the 80 repositories represented here, 53 repositories (73% of the 73 that provide TOU statements that apply to website content) take a permissive approach and permit specified uses; 23 repositories (32%) take a proscriptive approach; 4 repositories (5%) specify no uses but impose conditions.  

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410 The total number of repositories exceeds 73 because different TOU statements from some repositories are coded in different categories.
Of interest is the extent to which the permitted uses specified in the TOU statements reflect the fair dealing provision of the Act. Most repositories that indicate permitted uses combine several uses in the same statement, e.g., “fins privées, éducatives, et non commerciales,” or “personal, educational, or non-profit purposes,” and most go beyond the purposes listed in the fair dealing provision to include non-commercial and educational uses. The most frequently used permitted purpose is “educational” (or scholarly, academic, etc.) which is used by 34 repositories in 49 statements. Next are “personal” or “private” uses (28 repositories in 45 statements), and “research” (22 repositories in 40 statements). “Non-commercial” or “non-profit” appears in 25 “permitted purposes” statements from 21 repositories.

Only four repositories (in five statements) use the wording directly from the fair dealing provision of the Act (i.e., “research or private study”); six other repositories (in eight statements) combine “research or private study” with additional purposes. Of those six, one repository mentions fair dealing and ties it to research and private study (“may
only be used for educational non-commercial purposes including any fair dealing for the purposes of private study or research, or use in schools”); however, it also implies that “use in schools” may also fall within the scope of fair dealing. Two other repositories, in identical wording, mention fair dealing, but broaden its scope, i.e., “only for non-commercial study or research purposes, in accordance with the fair dealing provisions of the Canadian Copyright Act.”

As seen in Table 13, most TOU statements include conditions on uses of documents from the repository website, regardless of whether the repository’s approach is permissive, proscriptive, or neutral. Only nine TOU statements applying to individual digital resources (from nine repositories) include no conditions on use. The most common condition is a requirement to obtain permission for uses that go beyond those specified, or (where a repository takes a proscriptive approach) for all uses. The 128 TOU statements were analyzed according to the nature of the permission requirement. The results are presented in Table 14.

<table>
<thead>
<tr>
<th>Permission Requirement</th>
<th>TOU Statements for Websites</th>
<th>TOU Statements for Digital Resources</th>
<th>Total TOU Statements</th>
<th>No. of Repositories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permission of repository</td>
<td>18</td>
<td>75</td>
<td>93</td>
<td>50</td>
</tr>
<tr>
<td>Permission of copyright owner (may be repository)</td>
<td>1</td>
<td>8</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Permission of both repository and copyright owner</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>No indication of who to ask for permission</td>
<td>2</td>
<td>18</td>
<td>20</td>
<td>18</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>22</strong></td>
<td><strong>106</strong></td>
<td><strong>128</strong></td>
<td><strong>82</strong></td>
</tr>
</tbody>
</table>

* The total exceeds 73 because repositories can have multiple TOU statements which may fall into different categories.

The majority of the TOU statements stipulate that the permission of the repository must be sought for further uses;⁴¹¹ of those, 15 TOU statements from 12 repositories require permission only for commercial uses. Nine TOU statements from nine repositories require the permission of the copyright owner (who may or may not be the repository); six TOU statements from five repositories require the permission of both the

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⁴¹¹ For one particular digital resource, the TOU statement names a third party as the copyright owner, but states that permission for further uses must be sought only from the repository.
repository and the copyright owner. Twenty TOU statements from 18 repositories provide no information about where to obtain permission for uses beyond those specified. Of those, one requires the permission of the photographer who took the contemporary shots illustrating aspects of the exhibit, but does not specify a source for permissions related to the textual documents from the repository. Two others that provide no information simply prohibit further uses (“any further reproduction or redistribution” in one case and “republication” [sic] in the other). In sum, for uses that require a formal request for permission, it is the repository’s permission that is required most frequently, even though the repository may not be the copyright owner. Few TOU statements explicitly require the permission of the copyright owner.

The TOU statements can also be analyzed by looking at other conditions placed on uses. Another common condition is a requirement that the repository be acknowledged as the source of the document used; 44 TOU statements from 33 repositories require this. Of those, 22 TOU statements from 17 repositories specify the wording to be used in the required credit line.

Few repositories impose conditions that address the ease of copying and manipulating documents in digital form. Ten repositories are concerned about changes to digital documents, although they do not express it in terms of moral rights. Eight repositories (in 11 TOU statements) stipulate that the document cannot be manipulated or changed in any way; four of these TOU statements apply to entire websites; the others apply to seven particular digital resources. Two other repositories (in two TOU statements) require that, where a document from a digital resource is used elsewhere, any changes to the document be indicated.

Eight repositories address digital copying. Four repositories (in one TOU statement applying to the entire website and three TOU statements applying to specific digital resources) require that the copyright information from the web page be retained in any reproduction. Four other repositories (in two TOU statements that apply to entire websites and eight TOU statements that apply to specific digital resources) explicitly prohibit copying of the repository website onto another web server. Two repositories address both types of issues; one (in the TOU statement applying to the website) prohibits changes as well as copying of the repository website onto another web server; the other
prohibits changes and requires that the copyright notice be retained for the same digital resource.

If repositories want users to comply with the requirements of the TOU statements, it seems logical that such statements would be located where they will be readily noticed. However, the following analysis of the location of the TOU statements shows that this is not always the case. The locations of the TOU statements were categorized, ranging from the most readily accessible (e.g., the text of the TOU statement is on every page) to not readily evident (e.g., through a link from “Important notices” or “About this site” that gives no clear indication that it relates to copyright or conditions on further uses of site content). The TOU statements that apply to entire websites and to individual digital resources are presented in Table 15. Taken together, 48% of the 128 TOU statements are found on every page or are linked from every page; 37% are on or linked from the home page only; 15% are “buried” in some way.

Table 15
Location of Terms of Use (TOU) Statements
(N = 128)

<table>
<thead>
<tr>
<th>Location</th>
<th>TOU Statements for Websites</th>
<th>TOU Statements for Digital Resources</th>
<th>Total TOU Statements Number (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOU statement on every page</td>
<td>3</td>
<td>8</td>
<td>11 (9%)</td>
</tr>
<tr>
<td>TOU statement on home page only</td>
<td>5</td>
<td>25</td>
<td>30 (23%)</td>
</tr>
<tr>
<td>Link to TOU statement from general copyright notice on every page</td>
<td>5</td>
<td>0</td>
<td>5 (4%)</td>
</tr>
<tr>
<td>Link to TOU statement from “copyright” link on every page</td>
<td>2</td>
<td>43</td>
<td>45 (35%)</td>
</tr>
<tr>
<td>Link to TOU statement from “copyright” link on home page only</td>
<td>1</td>
<td>17</td>
<td>18 (14%)</td>
</tr>
<tr>
<td>TOU statement not readily evident</td>
<td>6</td>
<td>13</td>
<td>19 (15%)</td>
</tr>
<tr>
<td></td>
<td>22</td>
<td>106</td>
<td>128 (100%)</td>
</tr>
</tbody>
</table>

While the TOU statements that apply to digital resources on repository websites (either to the entire website, or to individual digital resources) demonstrate a wide range of practice, certain characteristics may be summarized as follows. Approximately half of
the repositories in the study include on their websites TOU statements that apply to online resources; of those, the majority take a positive approach (in that they inform users what they can do with the website content), and the specified permitted uses are generally broader than the fair dealing provision of the Act. However, most TOU statements also impose conditions on what can be done with the website content, most commonly that the repository’s permission is required for at least some uses, and the repository be acknowledged as the source of the original. The TOU statements are not always located where the website user will readily encounter them.

5.3.3.3.2 Copies Made by Repositories

Repositories also attempt to control uses of their holdings by providing information about how to obtain copies from the repository and any conditions that apply to uses of these copies. As noted earlier, the digital images placed on websites tend to be at a resolution that is too low to be of publication quality, and the interview data reveals that archivists expect users wanting a higher quality image to order it from the repository. Sixty-nine repositories (45% of the 154 repositories in the study) include on their websites policy documents that provide information about how to obtain copies of documents in the repository's holdings (whether or not they are available online), and the terms and conditions of use that the repository places upon such copies.

A comprehensive analysis of repository practices relating to onsite copying in response to requests from users is outside the scope of the dissertation. However, selected aspects of onsite practices provide insight into archivists’ understanding of copyright and their desire to control the use of digital content. Thus, three particular aspects of these policy documents, i.e., ordering copies of documents from specific digital resources, the extent to which a repository will provide digital formats, and the charging of use or permission fees are examined in the following section.

Thirteen repositories (8% of the repositories in the study) provide specific information about ordering copies of documents in sixteen digital resources. Five repositories specify the uses that may be made of these copies, i.e., “personal use,” (2), “personal research or non-professional use only,” “personal research and study,” or “non-profit use.” Only four repositories impose any conditions that apply to copies of these particular resources. One specifies the wording of the credit and states that the user is
responsible for all copyright questions; two require the written permission of the repository for all further uses beyond personal research, and one requires the permission of the repository for publication, and implies that the permission of the rights holder may also be required.

Given the ease with which digital objects can be copied and transmitted, another way of controlling further uses of copies provided by the repository is to limit the extent to which a repository will provide digital copies, although this could simply be a reflection of the repository's reprographic equipment and technical expertise. Some repositories provide only digital images; conversely, others provide only photographic prints, but there is little evidence that this decision is related to copyright. Thirty-eight repositories of the 154 in the study (25%) supply copies in digital formats. Of these, three repositories clearly have copyright issues in mind when it comes to providing digital copies. For example, Repository 1Y states, “a digital copy will not be provided unless the image is in the public domain or the repository is the copyright holder.” Two other repositories will provide scanned copies only with the permission of the archivist, although copyright is not mentioned as the reason for this policy.

Another way of controlling further uses involves charging a use fee (i.e., a fee that covers more than just the cost of time and materials in making the copy). Repositories whose fee schedules include use fees often require the user to state how they plan to use the copy; the proposed use will determine the amount of the use fee. When asked whether or not they charge a fee to those who want to use a document from the holdings made available on website, 23 questionnaire respondents (22% of 103 respondents) reported that they do charge a fee; 42 (41%) do not; and 38 (37%) checked off “it depends.” Five who reported that they do not charge a fee annotated their responses, reporting that they would charge for higher quality images but they consider this a reproduction cost, not a rights fee.

The “it depends” responses were fairly consistent, in that those 38 repositories appear to have a two-tier system in which they do not charge for such things as personal

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412 One repository states on its website that a “desire to limit the wholesale reproduction of large amounts of material” is one of the four factors used to determine the prices charged to users for copies ordered from the repository.
413 Question 24 asked, “Do you charge a fee to those who want to use a document from the holdings you’ve made available on your website?” Respondents could check off “yes”, “no”, or “it depends.”
use, local media, and the like, but they do charge for commercial for-profit uses. Twenty-one reported that they charge for commercial revenue-generating uses, often with exceptions particular to their circumstances (e.g., local newspapers and broadcast media, academic or scholarly study, genealogy); twelve charge what appears to be a reproduction fee to cover the costs of producing higher quality images; two do both.

Website content reveals that 33 repositories charge a fee for commercial uses or for publication, or both. While most provide their fee structures (some very elaborate) on their websites, five indicate that the fee is discretionary and must be discussed with the archivist. As one interviewee remarked, “We don’t put our schedule of reproduction fees up on the website because they can vary, depending on the individual case. And we’ve just had a couple where they’re outside the parameters of what we’ve laid down, so you get into that sort of thing, so that’s why we really don’t want to put our reproduction fees on there.”

When asked to indicate their level of agreement with the statement, “Archival repositories should charge use fees when providing patrons with publication-quality copies of documents, in order to generate revenue,” questionnaire respondents indicated strong agreement, with 76% agreeing or strongly agreeing, and only 12% disagreeing. Despite the ambiguity of the question (it is not clear whether they are agreeing with the charging of fees, or the charging of fees to generate revenue), this is a relatively unequivocal response.

However, the interview data reveal a different story. Six of the 22 interviewees do not charge a use fee; of the 16 that do, 14 reported that it was not an important source of revenue. In part this is because the fees are often very modest, e.g., as little as five dollars in addition to the cost of materials, or because the fee is waived in many situations. As Pat said, “As far as I’m concerned, getting stuff out there, getting it used, is more important than the little bits of money that you’re going to generate.” Three interviewees justified the charging of fees for commercial or profit-making uses; as Richard stated, “If somebody is going to enjoy the benefits of a commercial production, we may as well take

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414 Two repositories have different fees for publication and for commercial uses; two other repositories have a commercial fee but no publication fee; one has a publication fee but no commercial fee.
a bit of a cut, given that we have to keep these records in perpetuity. That’s really all our thinking is.”

That repositories charge use fees even if the copyright has expired is a contentious issue among users. An interviewee noted the difficulty in explaining to users the difference between copyright and ownership of the physical item, saying, “Because that’s the biggest thing that I find in explaining to people is the difference between copyright and ownership. Because they say ‘Oh why do I have to get your permission; it’s in the public domain.’ So I have to go through an example and explain what the difference is between copyright and ownership.” Two repositories address this directly in their policy documents on their websites. For example, Repository 2C’s website states that its “permission fees are charged for non-exclusive, one-time use of public domain and copyright material.”

Repository practices in making copies in response to users’ requests provide insight into their desire to control the use of digital content. If repositories want users to order copies instead of making their own copies from the website, it is somewhat surprising that only 13 repositories provide information within the digital resource itself that copies of items from their digital resources can be ordered from the repository. Three repositories limit the provision of digital copies for copyright reasons. As far as use fees are concerned, three-quarters of the questionnaire respondents agreed that repositories should charge fees beyond simply recovering costs; however, less than a quarter of the repositories in the study charge fees for commercial or for-profit uses. Interview data revealed that even those whose policies include use fees do not consistently collect such fees, and they are not an important source of revenue. Nor is it clear that such fees have much to do with copyright; they appear to have more to do with ownership of the physical items.

5.3.3.4 Enforcement

In an attempt to discern archivists' attitudes about enforcement of the terms and conditions they impose on uses of their holdings, questionnaire respondents were asked to indicate their level of agreement or disagreement with the statement, “If someone copies a document from our website and uses it in a publication or on a website without obtaining the permission of the copyright owner, there is little we can do about it.” Fifty-
three percent of 105 respondents agreed or strongly agreed with the statement; 33% disagreed or strongly disagreed, i.e., believing that something could be done about it.

However, the views of questionnaire respondents were close to unanimous regarding the statement, “If we discovered that someone had published a document from our website in which we owned the copyright, without our permission, we should draw the matter to their attention,” with 95% of 106 respondents agreeing or strongly agreeing. However, there is limited evidence regarding the extent to which repositories actually do this, or even say that they will follow up on infringement. Only one policy includes procedures to deal with “violations” of copyright. Only two repository websites include statements that infringements will be followed up. One of these websites contains an unusually strong statement about unauthorized use of the contents of its website, and includes a statement that the repository “will enforce its intellectual property rights to the fullest extent permitted by law.” When interviewed, Donna explained that the statement was developed after discovering that someone “had ‘harvested’ one of [the] databases on our web site and was selling access or results to the public. This we saw as very problematic and quite troublesome. So amidst other steps such as talking to him, we came up with the stiff warning.” In another interview, Michelle, the archivist from a repository whose holdings consist entirely of the records of the parent body, reported that they enforce their copyrights in the following way:

*Michelle:* … if they download a picture and use them in commercial ways and we don’t know anything about it, well….. Until we find out, we can’t do anything.

*Interviewer:* Once you did find out, would you contact them?

*Micelle:* Oh yes. Oh yes. We will ask them how come you are using our picture and you’re a commercial company or a publishing company, and you did not ask us for any proper use of the picture. And I am certain that all of them will say OK, send us the paper and we will sign it.

However, another interviewee at an educational institution reported, “We want people to be following the copyright rules. But as to whether we would actually track people down or check or somehow…… we wouldn’t do that.” While some archivists may talk tough about following up on infringement or uses beyond their terms of use statements, they are likely to do so only once they become aware of such occurrences, and it is not evident
that repositories are proactive about detecting infringement or non-compliance with their terms of use.

This section has addressed Research Question 3c, “How do archival repositories attempt to control further uses of their Internet-accessible holdings, and why?” Archival repositories employ a number of techniques, technical and non-technical, to control further uses of the content on their websites. The principal technical measure employed by more than half of the repositories in the study is the use of low resolution images for web delivery; a much smaller number take additional steps to prevent copying, to bring copyright matters to users’ attention, or to reduce the quality of the copied image. The principal non-technical measure employed (by approximately half of the repositories in the study) is the inclusion on repository websites of terms and conditions that apply to the use of the repositories’ online resources. However, the use of such measures is by no means universal; many repositories take no steps to control further uses. Those that implement measures to control further uses appear to do so, partly to address copyright concerns, but also because of archival concerns about ensuring the authenticity and context of the documents; a desire to generate revenue (or prevent others from exploiting the repositories’ holdings for gain); and a desire to protect or enhance the reputation and profile of the repository.

5.3.4 Copyright Information for Users

Related to repositories’ efforts to control further uses of material on their websites is the matter of providing copyright information to users. Research Question 3d asks, “what copyright information is provided to users, and why?” Copyright information can take a variety of forms. However, for the purposes of this study, copyright information does not include terms of use statements, which, as discussed above, are considered to be a means of controlling further uses of website content. Instead, copyright information is understood to mean guidance provided on the websites to assist users in fulfilling their responsibilities for copyright compliance.\textsuperscript{415} For the purposes of this study, relevant aspects of the website content include the presence of standard copyright statements.

\textsuperscript{415} Questionnaire respondents were asked what copyright guidance, if any, their repository provides to visitors to the website; however, the responses are not particularly revealing because of the ambiguity of the term “copyright guidance,” and the fact that the choices were not rigorously defined. Thus, the responses to this question are not reported.
information about copyright status or rights holders provided in descriptions, and educating users about copyright.

5.3.4.1 Standard Copyright Statements

The presence of a standard copyright statement, i.e., “Copyright (or ©, or both) [Name of Repository] [Year]” or some variation, signals that the website and its contents are protected by copyright, and provides the name of the copyright owner. Ninety-nine repositories (64% of the 154 repositories in the study) have such a statement at least once on the website. Of those, 69 repositories (45%) have such a statement on every page; 14 (9%) have it only on the repository’s home page; the remaining 16 repositories (10%) have a general copyright statement on the home page of at least some of their digital resources (or in some cases, on every page). Of the 69 that have a general copyright statement on each page, 9 link those statements to the actual terms of use. Of the 83 that have a standard statement on the home page of the website or on every page, 15 also have a standard copyright statement on the home page of some (or all) of their digital resources (or in some cases, on every page). Four repositories have a standard copyright statement below each image in ten digital resources; a fifth repository has a standard copyright statement beside each image in all its digital resources; as well the standard copyright statement is automatically included in the printed version of each image. Nearly two-thirds of the repositories take this basic step to signal to users that their website content is subject to copyright protection.

5.3.4.2 Description

Copyright information also includes information about the copyright status or rights holders in individual documents. Although the focus of the study is the archival holdings that are available on the Internet, terms of use statements that apply to both onsite and online copying were available to the study, and 43 of the 154 repositories in the study (28%) include a statement in their terms and conditions of use that the user is responsible for all questions relating to copyright compliance in the use of the repository’s holdings. One way of assisting users in complying with such a condition is to

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416 Of the 154 repositories in the study, 55 (36%) have no standard copyright statement at all on their website; however, 20 of these repositories have clearly indicated terms of use statements.
include copyright information in the descriptions of the archival material. Of particular interest to users would be the copyright status (i.e., whether the copyright has expired or whether the work is still protected), the copyright owner (so that the user would know where to start the search to obtain any necessary authorizations for use), and the author (so that authorship can be attributed and any requests for permission to alter the work can be appropriately directed).

For this study, such information was most frequently found in the archival descriptions that accompany the documents on the websites; only one policy document addresses the matter of description of any sort.417 This document (which, like all the procedures for this particular digitization project, appears to have been done by student interns) documents the metadata guidelines for a project to digitize a collection of folklore material assembled from a variety of sources in the early 1940s. A collection of this sort presents many complex copyright issues that interns would likely be ill-equipped to deal with. The metadata is divided into descriptive metadata (which describes the original document), and administrative metadata (which describes the corresponding digital object). The descriptive metadata includes the name of the creator, the date the original document was created, the publisher (if published), and “Rights.Access” status (either “open access” or “restricted access”). It is not clear what the latter means, or how the status is determined, but it is noted in the guidelines that “restricted access” files or items must be clarified prior to making them accessible in the public domain.” The administrative metadata includes technical details such as resolution and date digitized, and “Rights.Copyright” (“used to record copyright clearance”). The default for this field is the repository; unfortunately no further details are given about how the copyright status is determined, and only the descriptive metadata is available online.

Occasionally, information about the descriptions of items within specific digital resources is provided to assist users in devising search strategies and understanding search results. Three repositories provide information about the descriptions of items that make up specific digital resources, indicating, for example, the level of description, the data elements used, and explanations about the sort of information associated with a

417 The arrangement and description section of Repository 2V’s policy and procedure manual states that they use the Canadian standard for archival description, but does not provide any detail regarding the optional elements used.
particular data element. Although each repository uses different copyright-related elements, such guidelines provide some insight into institutional description practice.

When it comes to actual descriptions of digitized archival materials, repository websites include both aggregate and item level descriptions. Aggregate level descriptions are invariably structured according to a recognized standard. However, they are rarely linked directly to digital copies of archival documents themselves. At aggregate levels of description it is very difficult to indicate copyright ownership or copyright status precisely unless the documents within the aggregation are homogeneous in the sense that they have the same copyright owner (e.g., an organization’s minute books) or are in a certain date range (e.g., prints or negatives of a photographer who died in 1933). Aggregate level descriptions are more likely to contain general information about copyright restrictions or terms of use relating to the material described that could affect access, use, reproduction, publication, or a combination thereof. However, such information is helpful to the user only if the user is required to view the description before viewing the documents, or if the aggregate level description is clearly available at beginning of the single fonds exhibit made up of documents from that fonds.418 Only ten repositories tightly link aggregate level descriptions to digitized documents from that aggregation; of those, only three require the user to connect first to a fonds level description that includes a terms of use element.419 One of the three repositories further raises the user’s awareness of copyright matters by having flashing buttons on either side of the copyright notice in one of its fonds level descriptions. The remaining seven give the user the option of linking to a fonds level description that includes a terms of use element, either from the home page of the single fonds exhibit, from an item level description with the image itself, or from a list of digitized items.

418 It is possible, depending on how the website is organized, and what the user is searching for, to encounter an aggregate level descriptions first. For the purposes of this study, however, the strategy for examining the websites was based on a search for digitized documents, not descriptions. For example, Repository 4V’s home page provides several links, including one to finding aids, and one to search digitized items, and one to a digital guide to a group of records. Someone looking for digitized documents would be least likely to choose the finding aids. It is possible to get to digitized documents from the fonds level description, but if the user chooses not to start with the finding aid, it is not necessary to read the finding aid at all.

419 This practice applies to 22 Single Fonds Exhibits prepared by these three repositories.
Turning to individual items, the vast majority of the documents on these repository websites are described in some way, ranging from a brief caption or title to a formal item level description structured according to a recognized standard. Most frequently used are unstructured captions that combine several data elements such as title, date, subject, etc. all together in one line, e.g., “[XYZ] Collection. St. Pierre – storing liquor before loading on runners, c. 1930. [Reference number].” However, it is the standardized descriptions that use structured data elements at the item level that are more likely to include copyright information and are relevant to this study.

Forty-four repositories (29% of the 154 repositories in the study) provide standardized item-level descriptions of the archival documents in at least some of their digital resources. Of those, 32 repositories (21%) provide on their websites structured descriptions that include copyright information of the archival documents in at least some of their digital resources only at the item level; 12 more repositories (8%) provide structured descriptions that include copyright information at both the item level and an aggregate level. The copyright information data elements most likely to be encountered at the item level in these descriptions include copyright status, copyright owner, author, and occasionally, copyright restrictions or terms of use. Table 16 shows the distribution. Each of these data elements is discussed in more detail below.

### Table 16

Copyright-Related Data Elements in Item-level Descriptions
(N = 154)

<table>
<thead>
<tr>
<th>Data Element</th>
<th>No. of Repositories</th>
<th>Percentage of Repositories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author</td>
<td>38</td>
<td>25%</td>
</tr>
<tr>
<td>Copyright owner</td>
<td>7</td>
<td>5%</td>
</tr>
<tr>
<td>Copyright status</td>
<td>5</td>
<td>3%</td>
</tr>
<tr>
<td>Terms of use</td>
<td>7</td>
<td>5%</td>
</tr>
<tr>
<td>Credit wording</td>
<td>2</td>
<td>1%</td>
</tr>
</tbody>
</table>

Providing the name of the author of a work is important if the archives (and its users) are going to comply with the attribution requirement of the moral rights provisions of copyright law. Even though the author of the work may not be the copyright owner, the author has the right to have his or her name associated with the work. Of the 44
repositories that provide item-level descriptions of the archival documents in at least some of their digital resources, 38 (86%) include at the item level a data element for author (or creator or photographer, depending on the nature of the material). In the many cases where the author or the photographer is not known, the element is either left blank or indicated as “unknown.” However, that only 38 repositories (25%) of the 154 in the study indicate the author in item level descriptions is somewhat misleading, since the author is often identified in other ways. For example, within a single fonds exhibit where all the documents were created by the same person, the name of the author is already known, or in the case of a letter (or painting), the author (or artist) is usually indicated on the work itself.

Twelve interviewees were asked if, when presenting documents on their repositories’ websites, they were concerned about crediting the author of each document used. Nine said that they would; of those, all but two qualified their response by adding “if we knew it” (i.e., the name of the author or photographer). As Jan said, “Sometimes it’s in a collection where either it’s obvious like it’s the [Smith] family photographs or whatever, and we know it’s the [Smith] family that took them or else we have no idea who took the photographs. I think probably a lot of times it doesn’t say who the photographer is. I think that’s the majority of the time.” Lee also noted that her repository was “probably more concerned about which collection it might have come from.”

However, the other three interviewees said that they do not credit authors. Pat appears to think that there is no requirement to indicate authorship of works from the records of the parent body; as he said, “Most of the stuff that we use belongs to us as the institution, so we’re not so concerned about it. And we wouldn’t use a lot of material from the private side of the collection so it wouldn’t be a huge issue, generally speaking, for us.” Laura cited the volume of documents as her repository’s reason for not crediting each image, saying, “Part of that is just the volume I think. We have done individual crediting of each image, but it’s a huge undertaking, and so what we’ve been doing then is going to the file level, and then saying this is the file, and here are the documents in that file.” Margaret was not sure why her repository did not always identify the author or
photographer even when known. As she said,

You know, if the photograph is by a local person; if it’s of some family snapshots, then we don’t identify the photographer even though we know it was the mother or the father of the family. They’re just generally lumped in as being the documents in such and such a family fonds. … I don’t know the reason for that. … I think that some collections [that] have come in have been the work of commercial photographers or … there may be some stipulation from the estate…. In that case some care has been taken to list the name of the photographer but unless there’s been some special presentation made, it hasn’t been done.

To the extent that item level descriptions are provided, and based on the interview data, it appears that archivists consider it important to attribute authorship in the documents they display on their websites. However, they are hampered by the fact that the identity of the author is not always known or easily determined. They do not appear to consider the issue of attribution as part of the moral rights aspect of copyright.

As noted earlier, identifying the copyright owner is often time-consuming. Only seven repositories indicate the copyright owner in their item level descriptions. As Colin commented, stipulating that it is the user's responsibility to clear the copyright is “a liability issue partly, but even more so it’s a resources issue. We hardly have the time to do reference on our own images, let alone tracking down copyright more generally.” Five repositories indicate on their websites that they will provide the user with the name of the copyright owner, if they know it. Bill commented that they will provide the user with “our best knowledge of the provenance of an image if we can’t guarantee copyright to it” but it is the user’s responsibility to obtain any necessary copyright clearances. However, Pat reported that repository staff will obtain permission on behalf of users wishing to use an image in which the copyright is owned by the repository’s parent body.

Copyright status indicates whether the copyright in a document has expired or whether it is still protected. Only five repositories indicate this in their item level descriptions; of those, four also indicate the copyright owner. As far as copyright restrictions or terms of use are concerned, they are more often found in places other than descriptions, and if they are in a description, they are more often found at aggregate levels of description; however, seven repositories include them at the item level. Similarly, information required to credit the repository as the source of the document is
more often found in terms of use statements; only two repositories include it in item level
descriptions.

Three repositories provide information about copyright status or copyright owner in places other than the description. A single fonds exhibit consisting entirely of photos includes a link to copyright information that indicates that the photos are in the public domain. That the letters and drawings (all created by the same person who died in 1931) are “assumed [to be]… in public domain” is indicated in the ‘Copyright holders' section of the description of Repository 2A’s project (although it also includes the standard terms of use statement which requires a licence if the images are going to be used for a commercial purpose). The same repository indicates copyright ownership in a different way in the introduction to its project to digitize a diary. Repository 2M uses a watermark across certain images to indicate the copyright owner.

Providing copyright information in descriptions can accomplish several purposes, i.e., attribute authorship to comply with moral rights provisions, assist users in complying with copyright by providing information about copyright status or copyright owner, and communicate terms and conditions of use. If repositories stipulate, as many do, that users of archival documents assume responsibility for copyright compliance, such information is most helpful to users at the item level, where the description appears with, or is tightly linked to, the document itself. Relatively few repositories provide copyright information in item-level descriptions displayed with the documents themselves.

5.3.4.3 Advising Users about Copyright

Questionnaire respondents were asked to indicate their level of agreement or disagreement with the statement, “It is our professional duty to educate our patrons about copyright.” The majority (79% of the 105 questionnaire respondents) agreed or strongly agreed with the statement; 8% disagreed, and 13% had no opinion one way or the other. Repository 4V’s position paper outlining copyright issues in the digital environment included the following recommendation, “Although it is ultimately the user’s responsibility to clear all rights attached to a digitized document, archivists should write pro forma digital dissemination guidelines to assist users in their use of digital archival materials.” However, the website content and the interviews reveal a different view of how archivists understand their role in educating their users about copyright.
Looking first at the website content, only 17 repositories (11% of the 154 repositories in the study) take any steps to provide their website visitors with additional information about copyright law. These measures are of three types: referrals to sources of additional information, providing an email link to a staff person responsible for copyright questions, or explaining particular provisions of the Act. Of these 17, the websites of four repositories include more than one of these three measures; thus the total exceeds 17.

Eight repositories suggest further electronic resources for the user wanting more information about copyright, and provide links from those websites. Seven of these repositories provide links to standard resources, including the Act itself, the Canadian Intellectual Property Office, the Copyright Board, the Department of Canadian Heritage Copyright Policy Branch, and Industry Canada. The eighth, however, despite a promising introduction (“The situation with respect to copyright is complicated. The user may wish to consult the following Canadian Government sites which attempt to explicate the regulations as they evolve”), directs the user to documents that are as much as ten years out-of-date.

Six repositories include an email link to a repository staff member who is the main contact for copyright matters. One of those also includes an email link to the university copyright officer, who is not part of the archives staff, but is apparently available for consultation. A seventh repository (also a university archives) includes an email link to the university copyright officer but not to repository staff.

Repositories that simply refer users to other sources of copyright information are probably on safer ground than the eight that attempt to summarize selected aspects of copyright for their users. Some summaries are correct, as far as they go; for example, Repository 4W does a reasonable job of explaining fair dealing, and Repository 4H is the only one to provide a link to a summary of the CCH case and the 2004 amendments.

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420 The user who arrives at the Industry Canada Strategis home page may not know enough to search for offices within the Department that deal directly with copyright, i.e., the Canadian Intellectual Property Office or the copyright policy branch of the Department.

421 Not included in this group are those repositories that provide a link simply to request permission to use one of the repository’s documents.

422 No repository provides a comprehensive or detailed overview of all aspects of copyright.

423 This summary was prepared by a copyright lawyer and consultant for distribution to the archival community.
Repository 2I provides examples of what it considers an insubstantial part (i.e., “one paragraph of a letter” and “a few sentences of a document”) and thus does not require the user to submit an application to the repository for permission to publish.\(^{424}\)

Other summaries are merely confusing. For example, Repository 2E has adapted, from the regulations, the wording of the sign that is supposed to be posted near self-serve copiers, incorporating within it the wording of the stamp to be used to mark copies, with confusing results. Similarly, Repository 2V’s reading room guidelines entitled, “New Copyright Regulations following 2004 amendments” is confusing in some respects, e.g., when the repository says it can make a “ONE TIME ONLY” copy\(^{425}\) [emphasis the repository's], users may think that only one copy of any particular document can ever be made, and if they are not the first to ask, they will be forever barred from obtaining a copy of that particular document.

However, things go awry on other repositories’ websites. Repositories 3A and 2V summarize the highlights of recent amendments pertaining to photos, but either omit or misrepresent certain important details. Repository 6J attempts a concise summary of term rules for unpublished works that is wrong in many respects. Repository 4R’s attempts to explain ownership and term rules are full of errors; matters are made worse by referring to superseded documents produced in the course of the government’s copyright reform process. For example, the website refers to a recommendation from the 2004 *Interim Report on Copyright Reform*\(^{426}\) that photographers be given the same authorship rights as other creators. The *Interim Report* was not adopted, but anyone who skims the copyright page of Repository 4R's website may think that the Report's recommendations pertaining to photographs are now the law.

In some ways, it is not surprising that so few repositories provide information to their users about copyright, when 43 repositories explicitly state in 60 policy documents that it is the user’s responsibility to ensure compliance with copyright laws. Of the 8 repositories that suggest further sources of copyright information, two provide a link to

\(^{424}\) As noted in Chapter 1, using an insubstantial part of a work or sound recording does not infringe copyright.  
\(^{425}\) The Act permits a LAM to make a single copy of a document in the holdings for a patron (ss. 30.2 (4)(b) and 30.21(3)(c).  
\(^{426}\) The *Interim Report on Copyright Reform* was presented to the House of Commons by the Standing Committee on Canadian Heritage in May 2004.
the Act immediately following a statement that it is the user’s responsibility to ensure copyright compliance. One goes further in saying that it is not the role of the repository to interpret the Copyright Act for users. However, at the same time that they state that users are responsible for copyright compliance when using copies of documents from the repository’s holdings, three other repositories say that archivists are available to answer questions about copyright. Another repository's policy document regarding making reproductions of archival holdings includes the statement that “[Repository 4V’s] archivists can only supply advice on copyright; this advice should not be taken in place of legal consultation. Ultimately users are responsible to fulfill all copyright obligations.”

The extent to which a repository should educate its users about copyright was explored in the interviews. Without exception, the interviewees strongly believe that copyright compliance is the user's responsibility. However, some archivists have concerns about users’ understanding of their copyright responsibilities; as a questionnaire respondent said, “There seems to be a prevailing attitude amongst uninformed patrons that it is perfectly alright to put anything on the web or to download anything without thought to ownership or copyright.” Consequently, some archivists believe that the repository has a responsibility to inform users of their basic copyright responsibilities, for example, by indicating that copyright applies to archival material, and that it is up to the user to obtain permission from the copyright owner for uses other than research or private study. Donna's response was typical, “I think archives do [have a role in educating users about copyright], yes, because people either have no idea about it, or a wrong idea, or an unreasonable idea …. We need to tell them what it is and why, what our responsibility is in it and their responsibility.” However, the copyright information on her repository’s website is not extensive; it informs the user of the terms and conditions that apply to the use of the website content by means of a link at the bottom of each page to the TOU statement for the website, and a link on each page of the photo database to its TOU statement.

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427 The interviewees’ responses to the questionnaire statement (“It is our professional duty to educate our patrons about copyright”) generally reflected the responses of the population, i.e., 82% of the 22 interviewees agreed or strongly agreed with the statement (as did 79% of the 105 questionnaire respondents); 9% disagreed (8%), and 9% (13%) had no opinion.
However, other interview data suggest that some archivists think it inappropriate to provide their users with detailed information about copyright. As Richard said, “Beyond telling people that they have a responsibility, I think it’s fairly risky for us to be trying to explain to somebody why a motion picture has all different terms of copyright and may have all types of multiple copyright holders and all this sort of thing.” Not only is it thought to be risky to provide detailed information about (say) term provisions; four interviewees noted that it is not the role of the archivist to interpret the copyright law for their users. As Richard went on to remark, “I just think it makes things a whole lot easier if we’re not trying to interpret, and quite possibly badly interpret, the law. We’re not lawyers.” Lee compared answering users’ questions about copyright with providing advice on the taxation implications of donations,

I feel much like this as I do about advising donors about Revenue Canada’s tax laws. I’d like to stay as far away from it as I possibly can. So if we think it’s an issue we will tell the person that we think it’s an issue and if they need the material for something they’re going to publish, then it’s their responsibility to solve it, not ours. Other than that I don’t really like to be advising people. If somebody asks me directly a question, I will try to find an answer but I don’t go around every day telling people about copyright.

Four interviewees noted that they did not have any information on their websites and thought it would be a good idea to add some. For example, Jan said, “I think we should be telling people what they can do and what they can’t because a lot of people really don’t know, and they’re not being malicious or anything else; they just don’t know. So we should be letting them know. Probably something about copyright on my web page would be a good idea, and it’s not there.” James, who is about to add extensive new content to his repository website, noted that he will have to consider what sort of copyright information should accompany the new content. Tony (one of the few who disagreed with the statement, “It is our professional duty to educate our patrons about copyright”) noted that there would probably be more copyright information on his repository’s website if he felt more confident in his knowledge of the subject.

Two interviewees noted the difficulty in explaining to users the difference between owning copyright and ownership of the physical item. As Margaret said, “I think that what’s most difficult is explaining to researchers that they can’t have a copy of that photograph because it’s under copyright and we don’t own it [the copyright].” The other
interviewee who raised this issue said, “Hopefully they’ll take my suggestion to put some sort of a copyright statement on the website. Something very basic, not too legalese. Just so that people understand about copyright. But not just about copyright, about ownership.”

However, four others expressed concern about the adequacy of information on their websites; they hoped that users followed it, but without a clear indication of the extent to which this was so, they wondered if it was enough. As Melissa said, “Well, the [standard copyright] statement is there [on our website], and we’d like to think they read it and understand what it says, even though it is a bit vague,” and Margaret remarked, “On the website I don’t know that we have much of a role because I don’t know if people pay attention to those copyright notices.” She went on to note, “I think we’re more trying to guard our belongings than we are trying to educate the public; I’m not sure we can do that. The education part takes place more in informal talks with other organizations [in the community].” This last comment is borne out by the fact that just over half of the interviewees spoke of educating users about copyright through activities that take place onsite, e.g., conversations with individuals, group orientation sessions (particularly in university libraries), warnings stamped on copies provided to users, and various forms and notices in the reading room, rather than relying on information on the website. As Pat noted, “I don’t know that we have any burning need to go out and educate the world about copyright. But I think just to keep in the mind of the users the fact that these things belong to somebody, and if you want to use them. It’s on a case by case basis and as necessary.”

As noted, copyright information is understood to mean guidance provided to users to assist them in fulfilling their responsibilities for copyright compliance. The website content and interview data provide evidence of the copyright information provided by Canadian archivists to their users. Of the three types of copyright information investigated, nearly two-thirds of the repositories in the study include a standard general copyright statement on their websites, although the frequency and consistency with which it is presented on any single repository’s website varies greatly. Less than a third of the repositories provide information about copyright status or rights holders in item-level descriptions, largely due to lack of administrative documentation, as well as the resources
to do the necessary research. Only 11% of the repositories provide users with more
detailed information about their copyright obligations through referrals or links to sources
of additional copyright information and summaries of selected provisions of the Act.
Although they see a need to inform users of their basic copyright obligations, they see
copyright compliance as the users’ responsibility, and they do not want to be put in a
position of giving legal advice.

5.3.5 Moral Rights

The issue of moral rights has been discussed at various points in the findings in
relation to acquisition, errors, terms of use statements, and description. Of the two
acquisition agreements available to the study, one did not address moral rights; the other
addressed moral rights by “extinguishing” moral rights instead of waiving them, and
assuming that the donor is also both the copyright owner and the author. While many
questionnaire respondents and interviewees spoke of transferring copyright at the time of
acquisition, none mentioned that they request a waiver of moral rights as part of their
acquisition agreements. As far as description is concerned, archivists consider it
important to attribute authorship in the item level descriptions of the documents they
display on their websites, although they do not appear to think of attribution in terms of
moral rights. Two other references to moral rights were discussed in relation to
archivists’ misunderstandings of aspects of copyright, one an erroneous understanding of
the duration of moral rights, the other a directive to website users regarding attribution
and prohibiting modification of the website content. In their terms of use statements, 10
repositories prohibit changes to digital content taken from their websites, or require that
any changes be indicated.

A further aspect of moral rights is the extent to which documents are altered for
presentation on the website. This matter was addressed on the websites themselves and in
the interviews. As discussed earlier, making changes to a work may infringe the author’s
moral rights if the changes are prejudicial to the author’s reputation. Seven repositories
(with reference to eleven specific digital resources) include a statement on their websites
about the extent to which they have altered the documents used. Based on the website
content, it appears that repositories take three possible approaches, i.e., no changes,
minimal changes fully documented, or unspecified enhancements for presentation
purposes. Two repositories make no changes; as Repository 1A’s description of its digital resources states, “All images [in all of its digital resources] are scans of aged documents or photographs and therefore contain blemishes, scratches, tears and other imperfections. The Archives made a policy decision that the images in this Collection will not be digitally enhanced during scanning. Our intent is to present history, not art.” Repository 1Y makes a similar statement for only one of its 15 digital resources; no such statement appears with the others and it is not clear why this particular resource has been singled out. When interviewed, the archivist from Repository 1Y reported, “For the most part, we’ll crop down to what the border was originally. We don’t do a lot of removing of stains. Certainly we’ll adjust for contrast and brightness, depending on what the image is, we sometimes just present a portion of it, especially in terms of oversize documents. But for the most part, it’s as is.”

Two other repositories indicate that the only manipulation of images took place where some large documents (or in one case, broken glass plate negatives) were scanned in parts and joined digitally. The remaining three repositories indicate that images have been digitally enhanced for presentation, but only one provides any details about the scanner settings and the amount of retouching done. Even though this repository claims that its priority is “to attain the best possible scan of the document and then we will do any changes we need to in the retouching stages,” they also claim to have “stayed away from doing any real complex changes, both because of time and authenticity.”

Eighteen interviewees were asked about the extent to which their repository makes changes to images of documents to be presented on the website (“In scanning documents for presentation on your website, do you make any changes to the digital copy that will be used for your website, e.g., removing stains, cropping edges, presenting only a portion of the original document?”). Of those, ten said they make no changes, largely for archival reasons; as Rose said, “When we put things on our website, they’re done just a raw scan; we do no fiddling with it because to do so would distort the information for the researcher….They should know the quality of the image.” Richard also noted, “We don’t do any of it [i.e., making changes]; it’s just warts and all. Sometimes it becomes an issue with the people you’re training because that’s their tendency to want to idealize an

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428 In the case of the negatives, the images affected are indicated with an asterisk.
object but no, it’s as is.” Five others said that they would clean the images up a bit by adjusting contrast, and the like, but that generally they would not make major changes. Three others had not really thought about it, and had no clear policy. Based on the website and interview data, it appears that archivists make no major changes to the digital images of the documents used in their digital resources. However, their reasons for doing so appear to relate to retaining the authenticity of the document, rather than an awareness of the moral rights aspects of copyright law.

In sum, archivists appear to be largely unaware of the moral rights aspects of copyright. The three repositories that explicitly mention moral rights (in an acquisition agreement, a terms of use statement, and a copyright policy) misunderstand it in some way. Regarding acquisition practices, it is difficult to draw conclusions about the extent to which moral rights are waived as part of acquisition procedures, since only two acquisition agreements were available to the study, and the matter was not raised in the interviews. However, we have a clearer picture of repository practices in terms of the right of integrity in the work and the right of attribution. Regarding the former, although archivists make no major changes to the digital images of the documents used in their digital resources, they see this practice, not in terms of moral rights, but in terms of retaining the authenticity of the document. As far as the right of attribution is concerned, while it appears that archivists consider it important to attribute authorship in the documents they display on their websites (to the extent that the author is known), no interviewees mentioned moral rights in their responses. In terms of the moral rights of integrity and attribution, archivists appear to be addressing moral rights for other reasons.
Chapter 6  Discussion and Conclusion

6.0  Introduction

The purpose of this study was to investigate the impact of copyright law on the practices of Canadian repositories in making their archival holdings available on the Internet. This concluding chapter begins with a discussion of the findings regarding archivists’ knowledge and perception of copyright, repositories’ reasons for making their holdings available online, and the place of copyright as a factor influencing their decisions in do so. The chapter then discusses the findings related to repository copyright practices in the context of the “restrictiveness” spectrum that serves as the framework for the study. A discussion of the contributions of this study, and its strengths and limitations follow. The chapter concludes with a discussion of possible areas for future research.

6.1  Archivists’ Perceptions and Knowledge of Copyright

At the heart of this study are the copyright practices of Canadian repositories in making their archival holdings available on the Internet. However, as stated earlier, the study assumes that repository practices are in large part the product of what repository staff know and think about copyright, although the study was not designed to link individual archivists’ perceptions and knowledge of copyright with their repositories’ practice. The discussion of the findings of the study with regard to archivists’ perceptions and knowledge of copyright, and the ways in which their perceptions and knowledge are transformed into the institutional practice of the repositories in which they work sets the stage for the discussion of the findings regarding repository practices in relation to the conceptual framework.

According to interview data, archivists appear to view copyright with varying degrees of apprehension, although perceptions of the magnitude of their concerns differ, ranging from “nightmare” to “just another task.” Eighty percent of the questionnaire respondents think copyright is a problem for archival repositories making their holdings available online, and half think there is some risk of legal consequences for copyright infringement involving archival material. Even those who see copyright as “just another
task” regard it as complex and difficult, and they lack the time, expertise, and administrative tools (e.g., documentation of copyright ownership within acquisition files) to address it properly. When asked in the questionnaire what they would change about copyright law as it affects their jobs, the most common responses called for simplification or clarification of the Act, and free access to expert assistance in interpreting and applying the law. Such responses suggest that archivists prefer to know exactly what they can and cannot do, without having to interpret the Act for themselves. These findings suggest that in their selection practices, archivists may take a more restrictive approach to copyright, because they recognize that they lack the time, the expertise, or both, to analyze copyright matters fully.

On the other hand, despite their desire for more certainty in dealing with copyright, and limited resources to devote to copyright issues, archivists have embraced the Internet as an opportunity to make their repositories’ holdings available to a wider audience. Their interest in greater access and use of their holdings is reflected in their suggestions for specific changes to the Act, including shorter terms of protection or more generous exceptions. Some respondents apparently are unaware that some of the changes they propose are already be available to them in the statute or supported in case law, and consequently they see copyright as a constraint that prevents them from making their holdings more accessible. Although further investigation is required, it may be that they would be less restrictive in their approach if they knew more. However, taking steps to learn more about copyright or allocate resources to engage expert advice requires incentives in the form of carrots (e.g., easy access to expertise), sticks (clear consequences that have a direct negative impact on the repository), or both. At the moment, neither is sufficient to convince repositories to devote additional resources to copyright matters.

Based on their suggestions for changes to copyright law, it appears that archivists would prefer to see an expansion of the specific exception for archives, rather than a higher-level clarification of broader issues (such as users’ rights), that would have a wider impact on other information institutions. They appear to view copyright narrowly, in relation to their particular concerns, and there is little evidence that they understand
that it is within their power to take a bolder approach in how they interpret the law or to call for a broader re-thinking of the Act.

Archivists get their knowledge of copyright mainly from workshops sponsored by professional associations, colleagues in the profession, books and newsletters, and the statute itself. Workshops addressing copyright from an archival perspective that were designed to be taught jointly by an archivist and a copyright lawyer received by far the highest ranking as the most important source of copyright knowledge. In seeking the answer to a specific question, archival colleagues (whether in the repository, in the wider profession, or the archives advisor) were most likely to be consulted first, followed by the statute itself, and books and newsletters. With respect to learning how to implement copyright law in practice, repositories appear to borrow from each other, or share information in various ways.

Although archivists may get their initial knowledge of copyright from those with legal expertise, they subsequently rely heavily on colleagues in the profession for guidance on institutional copyright practice or responses to specific questions. It appears that some archivists “filter” copyright law for their colleagues and their repositories.  

Consultants and outside legal counsel are unlikely to be consulted in response to a specific question, suggesting that archivists are more likely to consult sources that are available at no cost. Some archivists go to the statute; despite a widely-held view that the statute is complex and difficult to understand, a quarter of questionnaire respondents said they would consult the statute first, and interview data revealed that many archivists are accustomed to consulting legislation in a number of areas that affect their work.

Nearly half of the questionnaire respondents report that their repository has a designated staff member to be responsible for copyright matters. This is a higher proportion than that reported in the two studies that looked at the presence of copyright officers in academic libraries in the U.S. and the U.K. Shachaf and Rubenstein report that 15% of the academic library websites examined in their study indicated that they had a copyright librarian or a copyright committee. Maynard and Davies report that 22% of the higher education libraries surveyed reported employing a copyright officer; copyright

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429 As noted earlier, Kidder suggests that the impact of law is modified by filtering agents, including those who are the target of a particular law (p. 136).
430 Shachaf and Rubenstein, 99.
responsibilities are more commonly distributed throughout an institution. That a higher proportion of Canadian archival repositories have a designated staff member responsible for copyright matters could be explained by the fact that, unlike libraries, archives do not have blanket licences that cover many of their copying activities, and thus there is a greater need for in-house expertise to address a wide range of copyright questions.

However, the repository copyright designates do not stand out from their colleagues. The two groups’ questionnaire responses to the questions about their sources of copyright knowledge, the sources they would consult if they had a specific copyright question, and the sources they would consult first if they had a specific copyright question (Questions 32, 34 and 35) were compared. With alpha set at .05, the differences between the two groups are not statistically significant, suggesting that the copyright designates do not receive any special preparation for their role. The two groups’ responses to the 14 statements in Question 39 of the questionnaire were compared to see if the differences between their views about copyright were statistically significant. As reported previously, the results indicate statistically significant differences between the groups for only two statements.

As the findings indicate, the quality of archivists’ knowledge of copyright varies widely; those who turn to archival colleagues for copyright advice may be relying on those who are not themselves well-informed. Furthermore, not all of the written sources from which archivists obtain their copyright knowledge are authoritative or up-to-date. For example, the NA Staff Guide, the reference source mentioned most frequently, was published in 1999, and has not been updated and reissued. If the quality of archivists’ copyright knowledge is influenced by sources of their knowledge, the foregoing suggests that there may be weaknesses in their knowledge, which could affect their approach to copyright and thus their repositories’ practices.

Because the study was not designed to “test” archivists on their copyright knowledge, we have only indirect evidence of what Canadian archivists know about copyright. Nonetheless, within the limits of the study, it appears that Canadian archivists’ knowledge of copyright is uneven, both in terms of accuracy and currency. There is evidence of correct understandings of aspects of copyright, as well as specific

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431 Maynard and Davies, 13-14.
misunderstandings. Some misunderstandings have few serious consequences, but others may reduce online access to holdings, increase access (but put the repository in a position of infringing copyright), or mislead users (and possibly other repositories, given that repositories borrow from each other). As far as the currency of archivists’ knowledge is concerned, interview data suggest that archivists’ awareness of recent changes to the Act is lacking altogether, or is confused and incomplete.

Although further investigation is required, there appears to be some evidence that incomplete or out-of-date sources may result in inadequate knowledge. On the other hand, archivists’ self-assessment of the quality of their knowledge of copyright, expressed in terms of their confidence in their knowledge, is at odds with the study’s assessment of the quality of archivists’ copyright knowledge. Half of the questionnaire respondents say they are confident in their copyright knowledge, but the findings suggest that their confidence may not be entirely well-founded. Interview data and other questionnaire data include other indications that archivists are not confident in their copyright knowledge. Consequently, if some archivists are making decisions about copyright status or copyright ownership on the basis of incorrect knowledge, the result may be repository practices that are more or less restrictive than intended, depending on the nature of the error. For example, if archivists know that they could select non-original works for Internet access, but they decide not do so because they are not comfortable making judgment calls, their repository practice will be intentionally more restrictive than copyright law allows; however, if they are not aware that they could select non-original works, it is difficult to say whether that makes them restrictive (albeit unintentionally so) or just unaware. Similarly, some of the suggestions archivists make for changes to copyright law that would increase access to archival material are already in the Act or supported in case law. However, it is not clear whether knowing that these measures were already available to them would make their repository practices less restrictive or not. The relationship between the quality of archivists’ knowledge and repository practices is extremely complex and needs further investigation.

In sum, Canadian archivists see dealing with copyright as part of their job, albeit a task that is often complex, time-consuming, and somewhat disquieting. They attend workshops to learn about it and they accumulate reference material to consult when
dealing with copyright questions. They also share information and consult with professional colleagues in their own and other repositories. Half of the questionnaire respondents report that their repository has a designated staff member responsible for copyright matters. All this speaks to a view of copyright as an important professional matter. In dealing with legal issues, it is assumed that repository staff do not knowingly or deliberately break the law, but copyright is just one of many aspects of their work competing for attention and resources. Consequently, they do not always address copyright issues correctly, due to a lack of time, in-house expertise, or the financial resources to engage outside expertise. As a result, they worry about copyright. Half of the questionnaire respondents think that there is a risk of legal consequences using archival material generally, and 80% think that copyright is a problem for archival repositories making material available on the Internet. However, the reality is that there have not been any legal consequences, and the risk of adverse consequences resulting from their copyright activities appears to be low.

It was also expected that this study would shed some light on the relationship between the archivists’ knowledge and repository practices by exploring how repository practices emerge out of individuals’ knowledge and perceptions of copyright. However, repository copyright practices do not appear to be well-documented, and few policies or procedures were available to the study. The processes by which the knowledge and attitudes of staff archivists are transformed into repository practices appear to be largely informal. Where documented policies exist, their development appears to be a collaborative process involving several people from a repository. Only occasionally do repositories include outside expertise (e.g., copyright consultants or legal counsel). Where no documented policies exist, it appears that practice is based upon informal understandings, communicated orally. The apparent lack of formal processes and documented practice, combined with earlier findings about the sources of archivists’ copyright knowledge, suggest that repository practices may not be grounded in a thorough legal knowledge of copyright.

Before looking at specific repository practices, they must be set in the larger context of the study’s findings regarding the reasons that repositories are making their holdings available online at all, and the place of copyright in doing so. As described in
Chapter 3, repositories without websites and those that do not include documents on their websites were not studied; this study includes only those repositories that had at least five archival documents on their websites. Consistent with the fundamental mission of archival repositories to make their holdings available, interview data revealed that increased access to their holdings is the most common reason why repositories make their holdings available on the Internet. Pressure from, or expectations of, users, sponsors, and peers ranked second, followed by the opportunity to raise the profile of the archives with both users and resource allocators. Other motivations include reduced wear-and-tear on original documents, and reduced onsite user demands by giving users the means to access documents online. That access ranks first as a reason for digitization is consistent with the finding of Bültemann et al. in their cross-repository study of U.K. research libraries and archives; in their study, however, reduced handling of original documents ranked second.\textsuperscript{432} Their study also found that “the main reason for not digitizing [at all] was a general lack of resources, mainly funding, but also equipment and expertise. Copyright restrictions and low priority were ‘other’ reasons given.”\textsuperscript{433} Astle and Muir’s survey of 20 U.K. public libraries and archives looked at similar factors, not in terms of reasons to digitize (or not), but in terms of selection criteria once a repository had decided to digitize its holdings, and found that access ranked first, followed by preservation, and public demand.\textsuperscript{434}

The first research question explored the extent to which copyright was a factor influencing the decisions of Canadian archival repositories in making their archival holdings available on the Internet. Questionnaire data revealed that copyright ranked fifth behind four resource-related factors, i.e., the availability of financial, human, or technical resources, and the desire to increase web resources so that researchers can serve themselves. While some repositories ranked copyright as the most important factor, for Canadian archival repositories overall, copyright is just one of several factors that could influence their decisions in making their archival holdings available on the Internet.

\textsuperscript{432} Bültemann et al., 107.
\textsuperscript{433} Ibid., 108.
\textsuperscript{434} Astle and Muir, 73.
6.2 Repository Practices

The “restrictiveness” spectrum provides a framework within which to examine the copyright practices of archival repositories in making their holdings available on the Internet. This study categorizes the extent to which repositories overall are restrictive in relation to the specific aspects of their copyright practices that were explored as part of Research Question 3 (What are the copyright practices of Canadian archival repositories in making their archival holdings available on the Internet?).

The data to address this question comes from different sources, and I do not have a complete set of data from all repositories, e.g., only 106 of the 154 repositories whose websites were examined responded to the questionnaire; only 44 of the questionnaire respondents volunteered to be interviewed; and only 22 questionnaire respondents were actually interviewed. Furthermore, it was possible to link questionnaire responses to websites only where the questionnaire respondents gave permission to do so. Thus, the picture of how repositories are distributed along the spectrum can be but a general one. In order to present this picture, the spectrum has been divided into three categories labelled More Restrictive, Midpoint, and Less Restrictive, as indicated. For each aspect of repository practice, the main components were identified, along with an indication of how many repositories include that particular component in their practices. The components were analyzed in terms of restrictiveness, and each was then categorized. The results are presented in Table 17.

Given that increased access is their main motivation for making holdings available online, one might expect that Canadian repositories would make the “best” documents available, and would take whatever steps were necessary to ensure that their copyright practices were fully compliant with the provisions of the law, or even less restrictive than the law requires. The following section looks at their practices relating to what they select, the extent to which they obtain authorization from rights holders, and their attempts to control further uses.435 As noted in Chapter 2, repositories have no legal entitlement or professional obligation to enforce anyone’s copyrights other than their

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435 Research Question 3d explored the copyright information provided to users. However, in the course of the data analysis this was defined as guidance provided on the websites to assist users in fulfilling their responsibilities for copyright compliance, and is not directly related to the “restrictiveness” spectrum. This aspect of repository practice is discussed at the end of the section.
own, so control of further uses may not be entirely a copyright matter. However, that repositories attempt to control further uses, whatever the reason, suggests an approach that restricts access to, and use of, online holdings, so that aspect of repository practice is included in this discussion. be based on a good understanding of copyright law.

6.2.1 Selection and Authorization

The role of copyright in the selection practices of Canadian repositories can be discerned only indirectly. While the documents that appear on repository websites provide clear evidence of the repositories’ selection decisions, it is impossible to know the extent to which copyright considerations influenced the selection of any particular documents for Internet access. More generally, however, data from the questionnaire responses and interviews suggest that repositories prefer to select items that are perceived to incur little risk of copyright infringement (because the copyright has expired or because the repository owns the copyright), or those that require few or no resources to investigate copyright status or obtain copyright authorizations. For example, 80% of questionnaire respondents report that they select items in which the copyright has expired, or items in which the repository holds the copyright (86%); in contrast, just 36% report that they select documents in which copyright is owned by a third party. These findings are consistent with those of Astle and Muir, whose survey of 20 U.K. public libraries and archives found that “no copyright complications” placed fourth in the ranking of selection criteria for digitization, with the selection criteria of the digitization projects described by Tschabrun and Shepard respectively, and with Gilliland-Swetland’s finding that items in which the copyright is owned by other than the repository would be less likely to be selected.436

The findings of the present study suggest that archivists take a somewhat restrictive approach in their selection of items for Internet access in that they are not selecting documents that could be made available with the permission of the rights holder(s). Compared with the number of photos and literary works on repository websites, there are relatively few sound recordings or moving image materials which may suggest that repositories tend to avoid audio-visual materials that may involve multiple

436 Astle and Muir, 73; Tschabrun, 321; Shepard, 70; Gilliland-Swetland, 152.
rights holders and a time-consuming process to obtain all necessary authorizations. Furthermore, although repositories could select works that are not sufficiently original to merit copyright protection, this possibility was not directly addressed in the questionnaire or interviews, nor was it mentioned by respondents or interviewees. It may be that archivists are not aware of this possibility, or, judging from their calls for clarity and “more specifics” in the statute, it may be that archivists do not want to have to make judgement calls, either because they have no experience in doing so (in terms of guidelines on how to do it, or in terms of successful outcomes, i.e., no challenges), or because they lack the time required to apply the established criteria.

On the other hand, that some questionnaire respondents and interviewees mention risk assessment as part of their repositories’ selection strategies suggests a less restrictive approach on the part of some repositories. Reasonable assumptions about expiry or transfer, online statements that they have attempted to locate rights holders, and removal of infringing works if challenged are all indications that some repositories are prepared to take intentional risks that they may be infringing copyright in what they select for online access.

Others may unintentionally be taking a less restrictive approach. It is not always easy to be completely certain that the copyright has expired, or that the copyright has indeed been transferred to the repository, if the acquisition has not been documented, or if the donor is not also the copyright owner. As Brown notes, her repository’s digitization projects raised awareness of the importance of clarifying copyright ownership of holdings. The findings of the present study suggest that repository practices for determining expiry or ownership may not always be well-founded because they may be based on weak assumptions (e.g., about the capacity of their acquisition documents to transfer copyright, or the relationship between age of documents and expiry of copyright), less than rigorous research, a sometimes inaccurate or incomplete knowledge of copyright law, or combinations of these factors. Lack of resources, particularly in terms of staff time to conduct the necessary research to identify and locate rights holders, and in-house expertise in copyright (or access to copyright expertise) plays a role in this.

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437 That originality is a criterion for protection is discussed in the NA Staff Guide only in relation to making a copy of a photo from a book (p. 18).
438 Brown, 175.
As noted, obtaining authorization from copyright owners to make documents available online relates to two aspects of repository practice, i.e., transfer of copyright at the time of acquisition and case-by-case requests for permission. As far as transferring copyright is concerned, of the 36 questionnaire respondents that stated that their repositories own copyright in their holdings because their practice is to transfer copyright at the time of acquisition, only four noted that the transfer of copyright was limited by the extent to which the donor was also the copyright owner. However, interview data suggest that archivists are generally aware that their repositories’ acquisition procedures may not result in the repository owning all the copyrights in all of the acquired material, and they take that into account when selecting material. Nonetheless, selecting items in which they believe they own the copyright because it was transferred at the time of acquisition is evidence of practice at the Midpoint. However, as discussed above, if weaknesses in their acquisition documentation or other factors mean that the copyrights were not transferred, repositories may be taking a less restrictive approach than intended.

As far as case-by-case requests for permission to put items online are concerned, just 36% of the questionnaire respondents report that they select documents in which copyright is owned by a third party. However, those that do so make serious efforts to obtain the permission of the copyright owner. Furthermore, of those repositories that select documents in which the copyright is owned by a third party, two-thirds report that they would not use the document or would substitute another if they could not locate the copyright owner or did not receive a response. Few participants in the present study explicitly mentioned the staff time required to obtain authorizations from third party rights holders; however, the time and effort required to obtain authorizations and the dead ends encountered are reported by Brewster; Troll Covey; George; Pritcher; and Cave, Deegan and Heinink (the only ones dealing with unpublished material, who described the process as “a fearsome task”).

When it comes to third party copyright owners, Canadian repositories’ practices suggest a position at the Midpoint, in that these repositories want to be in compliance with copyright law, and they are not prepared to take risks that may put them in a position

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439 Brewster; Troll Covey, 58-9; Pritcher; George; Cave, Deegan and Heinink (unpaginated, ¶1 under heading “Copyright Issues”).
of infringing. However, only one-third of repositories select material in which the copyrights are owned by third parties. Far more repositories indicate that their selection decisions are based on a desire to avoid copyright complications than indicate a willingness to take risks in what they select. Thus, overall, as far as selection and authorization are concerned, Canadian repositories are placed in the More Restrictive category as indicated in Table 17.

6.2.2 Controlling Further Uses

A recurring theme in this study is the tension between an archival repository’s mandate to provide access to its holdings, and a desire to control further uses of them. In terms of access to, and use of, digital resources, Bültemann et al. found that “copyright is the most frequent hindrance to public access” (compared with other limitations such as fee-based access or onsite access only), and Breaden commented generally that copyright issues may limit end uses of online audio holdings.\(^{440}\) However, as noted in Chapter 2 of the present study, repositories have no legal or professional obligation to enforce copyrights when documents that the repository has made available online are used in various ways by users of the repository website. They are, of course, entitled to enforce their own copyrights, although this might be seen to be in conflict with their mandate to make their holdings available, given that making their holdings accessible to users is at the heart of the archival repository’s mission. They also are obligated to comply with the terms of contractual agreements made with rights holders regarding further uses of their works made available online. However, 80% of repositories report in their questionnaire responses that they select material that is in the public domain and subject to no copyright constraints. Nonetheless, the findings reveal that, when making their holdings available online, 80% of the repositories in the study employ on their websites various technical or non-technical measures to limit or control further uses of their website holdings. Although interview data suggests that this may be done for reasons other than copyright, 53% of the terms of use statements are hyper-linked from the word “copyright” or from the copyright statement, thus associating any limitations on further uses with copyright.

\(^{440}\) Bültemann et al., 110; Breaden, 53.
The technical and non-technical measures employed by the repositories in the study are discussed separately.

6.2.2.1 Technical Measures

Both the presence of technical measures and their degree of restrictiveness are indications of a repository’s approach. The technical measure most commonly employed (as reported by 79% of the questionnaire respondents) is the use of low resolution images for web delivery. Copies made from the website would be suitable for research, but users wanting publication-quality copies would have to order them from the repository. Low resolution images are routinely used to support efficient electronic transmission and rapid download, and require no extra effort on the part of the repository; the reduced quality of the image is a by-product that automatically precludes uses requiring high-quality images, and more than half of the interviewees consider the use of low resolution images as a means of limiting further uses. Use of low resolution images would be in the More Restrictive category, in that users can view images online and make copies of sufficient quality for research or personal uses, but not for commercial or other uses that require higher quality for wider dissemination.

Repositories that are even more restrictive would take additional steps to limit further uses by users. Based on website data, 37 repositories (24% of the 154 repositories in the study) implement additional technical measures (i.e., preventing copying, click-through agreements, or watermarks) to control uses of particular digital resources; two of the 37 can be said to be extremely restrictive in that they implement two technical measures on their online photos. Extremely restrictive are the five repositories (3%) that take various steps to prevent copying altogether. Still restrictive but less so are the 31 repositories (20%) that place watermarks on their images, and the five repositories (3%) that include on their websites click-through agreements or similar measures that alert users to copyright matters before they can view the online documents. At the Midpoint are the 12 repositories (11%) that reported in their questionnaire responses that they take no measures (technical or non-technical) to limit further uses, as well as the 13 repositories (8%) that encourage use by providing users with instructions for downloading, printing, and saving images for research or personal use.
With regard to the use of technical measures, repositories can be said to be restrictive in this regard. In contrast to the number of repositories that use low resolution images, far fewer make extra efforts either to limit or encourage further uses; however, more repositories implement technical measures to limit copying or further use than encourage use; thus the overall assessment falls within the More Restrictive category, as indicated in Table 17.

6.2.2.2 Non-Technical Measures

Non-technical measures used by repositories in this study to control further uses of website content consist mainly of terms of use (TOU) statements found on the websites. As with technical measures, the presence (or absence) of TOU statements, and how restrictive they are, indicate a repository’s approach. Seventy-three repositories (47% of the 154 repositories in the study) include on their websites TOU statements that specify permitted uses of at least some of the website content as well as any conditions on such uses. However those TOU statements apply to 53% of the digital resources. The other 81 repositories include no TOU statements on their websites. This suggests that just over half are in the Midpoint category in that they either place no conditions on further uses, or make no effort to inform users of such conditions in relation to their website content.

Of the repositories whose websites include TOU statements that apply to online resources, there is a considerable variation in how generous or restrictive these statements are. More than two-thirds of these repositories take a permissive approach in that they permit a range of specified uses without a formal request for permission, although the uses may be subject to certain conditions. That they specify conditions on further uses of their website holdings puts them in the More Restrictive category; however, in taking a permissive approach to access and use, they are more generous than the remaining third whose TOU statements are proscriptive in that all uses require permission.

With regard to TOU statements, the degree of restrictiveness can be assessed based on the presence (or absence) of such statements, and their degree of restrictiveness. Given that more than half provide no TOU statements, and that two thirds of those that do take a permissive approach that speaks to their interest in use of their holdings,
repository practice with regard to TOU statements has been placed in the Midpoint category, as indicated in Table 17.

Table 17
Repository Copyright Practices by Restrictiveness
(N = 154)

<table>
<thead>
<tr>
<th>Aspect of Practice</th>
<th>More Restrictive</th>
<th>Midpoint</th>
<th>Less Restrictive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selection and authorization</td>
<td>●</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Controlling further uses</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Technical measures</td>
<td>●</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Non-technical measures</td>
<td>●</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

As Table 17 indicates, Canadian repositories are overall more restrictive than copyright law requires in making their holdings available on the Internet. In creating online exhibits and collections to make their holdings more accessible, repositories may be seeking to benefit end-users, but the repositories themselves are also users of their holdings. In selecting what to make available online, they are protecting the copyright interests of rights holders, including the repository itself (or its parent body) or third parties. They are also protecting their property interests as owners of the physical objects in their holdings, in, as Hirtle said, “a kind of quasi-copyright-like control over further use of their holdings.”

In their use of technical and non-technical measures to limit or control further uses, repositories do not always clearly separate copyright interests from other interests arising out of archival concerns related to authenticity or context, or out of ownership interests related to revenue generation or the repository’s profile or reputation. For example, permission for use is more often required from the repository than copyright owner, and in some cases limits are placed on uses of photos that are in the public domain. Although there is little evidence that anyone has made a great deal of money from archival material, several interviewees spoke of the need to prevent entrepreneurial users from commercial exploitation of archival holdings that can be

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441 Hirtle, “Archives or Assets,” 240.
obtained at little or no cost, echoing the advice of Moss and Currall.\textsuperscript{442} The findings of the present study suggest that, compared with repositories’ interests in the intellectual and physical property, the rights of users, from the perspective of copyright, appear to be a lower priority.

On the other hand, the majority of the repositories with terms of use statements that apply to online resources take a permissive approach (in that they permit a range of specified uses without a formal request for permission), which speaks to their interest in access to their holdings. Few express these uses in terms of fair dealing, and there is some evidence that archivists do not fully understand fair dealing, and are generally unaware of the interpretation of fair dealing provided by the Supreme Court. Nonetheless, the widespread use of low resolution images and the permitted uses stated on their websites may provide some insight into how repositories understand fair dealing, or (given that half of the questionnaire respondents agreed or strongly agreed that the fair dealing provision of the Act should be more specific) how they would like to see fair dealing defined. The permitted uses specified by repositories on their websites generally go beyond the scope of the fair dealing provision to include educational uses, and there is an emphasis on non-commercial uses that is only indirectly addressed in the fair dealing case law. Making their holdings available for purposes that contribute to the public good is seen as a fundamental part of archives’ role in society, but use for commercial purposes is often subject to restrictions, including an additional cost.

6.2.3 Copyright Information for Users

When it comes to providing copyright information for users, Arms, Congleton, Coyle, and Shachaf and Rubenstein consider the provision of copyright information of various sorts to be an important means of assistance to users of online content wanting to sort out copyright matters.\textsuperscript{443} However, while 79\% of questionnaire respondents in the present study believe that it is the archivists’ professional duty to educate their users about copyright, and the ACA \textit{Code of Ethics} states that archivists “should … inform users that it is their own responsibility to obtain copyright clearance from the copyright

\textsuperscript{442} Moss and Currall, 131-2.
\textsuperscript{443} Arms, 405; Congleton, 62; Coyle, ¶3; Shachaf and Rubenstein, 97-98.
owners, few websites contain much guidance to assist users in fulfilling their responsibilities for copyright compliance. The study looked at three types of copyright information: general copyright statements, information about copyright status or rights holders provided in descriptions, and additional information about copyright law. While these are evidence of repository practices, they have not been included in the foregoing discussion of the “restrictiveness” spectrum because these practices do not affect access.

Nearly two-thirds of the repositories include a standard general copyright statement on their websites, although the frequency and consistency with which it is presented on any single repository's website varies greatly. If the purpose is to remind website visitors that copyright applies to website content, that message is diluted if the copyright statement (or a clear link to it) does not appear on every page.

Less than one-third of the repositories in the study provide specific elements of copyright information in their descriptions at aggregate and item levels. To the user wishing to sort out the copyright questions involved in using a document for purposes other than research or private study, the item-level descriptions are more useful than aggregate level descriptions because item-level descriptions are more likely to be displayed with the document itself, and because they provide information pertaining directly to the work itself. That so few repositories provide information about copyright status and ownership may be due to several reasons. For one thing, it is not necessarily easy to be completely sure that a work is in the public domain, or who the copyright owner is. In providing information in descriptions of archival material, repositories are hampered by lack of documentation about rights holders, authors’ identities or their vital dates, or copyright status, as well as a lack of resources to do the necessary research to find such information. Secondly, it may also be that they want the researcher to ask the repository for permission for use (even though no permission is required for public domain material) so that the repository can inform the user of its terms and conditions of use, including attribution to the repository; 73% of the TOU statements examined in this study stipulate that the permission of the repository is required for further uses.

Referrals or links to sources of additional copyright information and summaries of selected provisions of the Act are means of providing researchers with more detailed

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information about their copyright obligations. In contrast, however, to the ubiquity of general copyright statements, only 11% of the repositories provide additional copyright information by any of these means. Those that attempt to summarize provisions of the Act risk presenting misleading information to their website users. In some cases, the information is inaccurate; in others, it is simply out of date. Where the information is out of date, it is not clear if this is because they do not regularly review and update their websites.

The interview data provide a view of the reasons why relatively limited types and amounts of copyright information are provided on repositories’ websites. Consistent with the ACA Code of Ethics, archivists want users to assume responsibility for copyright compliance. As archivists see it; the role of the archivist is to provide enough information to make users aware of their basic copyright responsibilities, but they do not see it as their role to provide detailed information or advice about copyright law. Half are not (with some justification) completely confident about their knowledge of copyright, and (regardless of how confident they are) they wisely do not want to be put in a position of giving legal advice. Nonetheless, if repositories are going to provide information about the provisions of the Act on their websites, they should not attempt to do so unless they take steps to ensure that it is correct (e.g., have it reviewed by an expert) and kept up-to-date.

In sum, making archival holdings available for research and encouraging their use are fundamental goals of professional archival practice. Canadian repositories have seized the Internet as a new opportunity for wider access to their holdings. From the perspective of copyright, they make selected holdings available on the Internet in an uncertain environment without expert advice, and without conducting exhaustive research to be sure of every expiry date or rights holder. However, 80% of the questionnaire respondents think copyright is a problem for archival repositories making their holdings available online. Consequently, they are more restrictive than copyright law requires, both in terms of what they select for online access and in terms of their attempts to control further uses of their holdings for reasons that are associated (rightly or wrongly) with copyright.
6.3 Contribution of the Study

This study is the first to investigate the impact of copyright on the practices of Canadian repositories in making their archival holdings available on the Internet. As such, it adds to our knowledge of the copyright practices of cultural heritage institutions, the application of copyright to archival material, copyright education, attitudes to copyright, and the extent to which copyright is a factor in the selection of material for online access. As noted in the literature review, very little research addressing aspects of these issues is yet available. However, as noted in the discussion of the findings above, this study generally supports findings of the handful of studies that have looked at digitization projects in general. While the study confirms some small pieces of our knowledge, i.e., that increased access to holdings is the main reason for making holdings available on the Internet, that repositories select items that are in the public domain or that require few or no resources to investigate copyright status or obtain authorizations, and that archival repositories attempt to control further uses of their holdings for reasons other than copyright (although that is not always clear), its main contribution is to serve as a starting point for further research, as discussed in Section 6.5 below.

The study also provides a view of where archival repositories stand on the “restrictiveness” spectrum in relation to their copyright practices, and thus some insight into the professional culture of archives. Both archives and copyright law attempt to balance competing interests. As noted in Chapter 2, archival repositories are quite accustomed to providing access to their holdings within a framework of restrictions to protect the rights of donors, subjects, and creators. Copyright is seen largely as a tool to restrict access and use. However, this study suggests that the copyright balance within archival practice could be adjusted so that copyright is seen less in terms of restriction and more in terms of access.

If less restrictive practices are seen in terms of willingness to take risks, the study suggests that repositories could be bolder in what they put on Internet, at least when it comes to documents that were not created for commercial or artistic purposes. While repositories’ desire to be law-abiding is laudable, perfect compliance with copyright law is extremely difficult and costly in terms of resources, and the risk of adverse consequences for the repository is low. While a bolder approach may mean that some
protected items will appear on websites without authorization, that is probably happening now, with no worse result than the item being removed from the website should the rights holder come forward. Making more of Canada’s documentary heritage available online at the cost of minor copyright infringement in which the rights holder is unlikely to know or care would “recalibrate” the balance in archival practice by seeing copyright as something that does not need to be so restrictive.

The study also points out some of the problems in the ways that archivists learn about copyright. It is no secret that the Copyright Act is complex; one of the long-term items on the government’s copyright reform agenda is “clarification and simplification of the Act.”445 When (and whether) this will occur is debatable; however that this is on the agenda supports the conclusion of this study that many of the problems lie, not with the archivists, but with the law itself. Until the promised simplification and clarification is achieved, professionals such as archivists, who are not lawyers but are responsible for compliance with copyright (and other laws), need tools and resources to assist them in managing copyright efficiently. In light of the low risk discussed above, one might ask why anyone should bother developing such resources; however, it is important that archival repositories be seen to be complying with the law. This study makes it clear that the training offered has not been fully effective, and there are a number of weaknesses in the completeness, currency, and availability of the resources available to archivists and their repositories.

6.4 Strengths and Limitations

Like any dissertation, this study has a number of strengths and limitations. One of its strengths is the use of multiple sources of data, i.e., website content, questionnaire responses, policy documents, and interviews. While it would have been possible to conduct the study without the interviews, they provided an opportunity to ask questions about website content and clarify questionnaire responses, and to understand the reasons underlying archivists’ perceptions, attitudes or decisions, as well as a rich source of quotations to support and illustrate the study’s findings.

445 Supporting Culture and Innovation, 38.
Another strength relates to my position in the archival community. Traditionally, what the investigator brings to the study has often been treated as bias, to be eliminated or minimized in the research design. Increasingly, however, the investigator’s technical knowledge and personal experiences are considered to be valuable sources of insight and data, provided that the investigator is critically aware of the assumptions and values brought to the study.\footnote{Joseph A. Maxwell, \textit{Qualitative Research Design: An Interactive Approach} (Thousand Oaks, CA: Sage, 1996), 27-29.} Such is the case in this study. I bring to the study a knowledge of archival practice based on more than twenty-five years of experience as a staff archivist and an archival administrator. Service on the executives and committees of professional associations at the provincial, national, and international levels has resulted in a wide network of colleagues and knowledge of the archival community. My knowledge of copyright is the result of many years of participation in the Copyright Committee of the national professional association. Since 1997, I have developed and delivered training sessions for the archival and library communities, and have written a book on copyright aimed at researchers in Canadian libraries and archives.\footnote{Dryden, \textit{Demystifying Copyright.}} My position in the archival community and the community’s support for my research may in part be responsible for the high questionnaire response rate (69%) and for the richness of the interview data. However, as discussed in Chapter 3, this experience and knowledge comes with opinions about the issues being investigated, particularly the value of educating archivists about copyright matters and what they should know about copyright. Possible bias regarding copyright education was mitigated through the research design; regarding other aspects of archival practice, while conducting the interviews and during the data analysis process it was essential to be aware of my views and assumptions, and question my conclusions about what the data revealed.

Because this was an exploratory study, its scope was broad in that it covered all the repositories on the Archives Canada portal with a minimum number of archival documents on their websites. However, the decision to include a range of repositories meant that limits had to be imposed elsewhere, and it was determined that it was not possible to look at every document in every digital resource on every website. The sampling strategy used meant that not every document was examined in detail. Studies
limited to the detailed investigation of digitization projects involving particular document forms or particular types of repositories provide fruitful possibilities for future research. Ambiguity or lack of clarity in the wording of some of the questions in the questionnaire (or in one case, the instructions) contributed to the study’s limitations. For example, one question was not analyzed because the choices were not clearly defined, and respondents could interpret them in a variety of ways. As a consequence, some of the questionnaire data was not useful in addressing the research questions. The interview script was not intended to be tightly structured, in order to give interviewees an opportunity to raise different issues. However, while the script design allowed for flexibility in the order in which the questions were asked and in the ability to pursue particular responses, some interviewees were not asked every question with the result that the data are not consistent across all interviews.

Finally, as noted in the findings and the foregoing discussion, repositories’ copyright practices relating to making their holdings available on the Internet are not well-documented, and very few policies were available to this study. Although the website content, the questionnaires, and the interviews provide a range of indirect evidence of repository practices, having more documented policies and procedures would provide a fuller picture.

6.5 Future Research

An exploratory study, by its very nature, raises further questions and presents numerous areas that merit further investigation. The areas for further research raised by this study are grouped in the following categories: repository practices, public policy, copyright education, and digital preservation.

6.5.1 Repository Practices

This study looked across a range of different types of repositories and holdings. Further studies that investigate particular types of material or types of repositories would expand our knowledge. For example, one might explore the copyright issues and practices relating to textual documents or photographs. Different types of repositories may have different approaches to copyright practices, e.g., university archives may be different from government archives, and museums may differ from libraries.
One particular aspect of repository practice deserves further investigation. As noted, many repositories assume that they own copyright due to transfer of copyright by donors at time of acquisition, but only two acquisition agreements were available to this study. The validity of this pervasive assumption needs to be explored by examining acquisition documentation from these repositories to see exactly what these records say and how they are administered.

The present study looked only at the digitization of analogue material. However, a host of “born-digital” materials (such as word-processing files, digital video, websites, blogs, wikis, and the like, as well as others not yet conceived of) are potentially of enduring value and worthy of preservation in an archival repository. By providing a better understanding of archival repositories’ practices and choices based upon an examination of the case of digitized materials, the dissertation sets the stage for an examination of the implications of copyright for archival materials initially created in digital formats.

6.5.2 Public Policy

As stated in Chapter 1, certain characteristics of archival material make the application of copyright law particularly difficult, and the study’s findings confirm this. A number of participants in the study called for statutory amendments that would treat archival material differently within copyright law, and others called for the Copyright Act to be clarified or simplified. Making the holdings of Canada’s cultural heritage institutions available online has been a public policy initiative, encouraged by public funding, and many repositories would not be digitizing their holdings unless such funding was available. However, this study provides some evidence that archivists find copyright law complex and difficult. Copyright law is also a matter of public policy, and further investigation into possible solutions to the challenges of applying copyright to archival material in the digital environment is needed. Such research could, for example, examine whether special treatment of archival material is justified, and whether there are statutory amendments or licensing schemes that could facilitate the use of archival holdings. Since many archivists think that the fair dealing provision of the Act should be more specific, another useful study would be an investigation of exactly what archivists would like to see in any amended fair dealing section.
6.5.3 Copyright Education

Knowing about copyright, particularly in the digital environment, is an essential aspect of information literacy. This study looked at how archivists learn about copyright. In Kidder’s terms, archivists are filtering agents for copyright law, and their “filtered” knowledge makes its way into repository policies and practice and onto websites, with a resulting impact on other archivists’ knowledge of copyright, on repository practices, and on archives users.

Since the study provides evidence that this filtered knowledge is not always accurate or current, it would be interesting to do what this study did not do, i.e., investigate exactly what archivists do know about copyright. Of particular interest is the need to investigate the apparent lack of awareness of moral rights on the part of Canadian archivists and the reasons for this. Also of interest would be an investigation of alternative sources of copyright knowledge, and ways of delivering it, that would be more effective. The study’s findings suggest that copyright education is very much a matter of continuing education undertaken by professional associations after people have entered the profession. We do not know the extent to which copyright matters are covered in graduate education; this would be another fruitful area to investigate. It appears that archivists look at copyright largely as a restriction. To acquaint them with the access role of copyright, an analysis of the Act in terms of users’ rights (e.g., the right to use an insubstantial part of a work, or non-original works, or works in the public domain) may be useful in shifting their perception.

This study also looked briefly at what archivists think their users need to know. That repositories are, to a greater or lesser degree, concerned about further uses of their online holdings raises the question of the copyright practices of users of archival digital resources. It would be interesting to know what they know about copyright, how they learn about it, the extent to which they read, understand, and abide by the terms of use on repository websites, and the gap, if any, between what archivists think users should know and what copyright information is helpful to users.

6.5.4 Digital Preservation

The need to ensure the ongoing preservation and management of digital resources is an area of great concern. Although no clear best practice has yet emerged, the digital
preservation methods that are currently available involve a number of copyright issues. Ensuring ongoing access to the digital resources created by the repositories in this study was outside the scope of the study, but only one repository website includes a commitment that the virtual exhibit in question will be supported online until 2009. While a few repositories say that they are digitizing for preservation reasons, none appear to have addressed the ongoing preservation of the digital resources they have created. The copyright aspects of digital preservation need investigation if the digital heritage is to be accessible, not just until 2009, but to future generations.

6.6 Conclusion

This exploratory study arose out of a desire to investigate whether, and to what extent, copyright is a barrier to access to archival material. Copyright is widely perceived to be a problem when it comes to making cultural heritage available on the Internet, in that obtaining the necessary copyright clearances is often difficult and, according to digitization manuals, an item cannot be made available on the Internet without the appropriated permissions. The study examined a number of aspects of the copyright practices of Canadian archival repositories relating to making their holdings available on the Internet. There is some evidence that the “best” documents are not being selected for Internet access because repositories lack the resources needed to identify and obtain the necessary authorizations, or because repositories interpret copyright conservatively. In terms of further uses of online archival holdings, archival repositories, consistent with their onsite practices, want to control further uses of their online holdings in a “quasi-copyright-like” way. However, there is also evidence that much of the perceived copyright “problem” lies in copyright law itself, because of its complexity and because repositories lack reliable up-to-date tools and resources to assist them in administering copyright. The findings have possible implications for archival practice and public policy which merit further investigation.
Bibliography


Bureau of Canadian Archivists Copyright Committee. “BCA Copyright Committee 1998-9 Annual Report.”


Geist, Michael, ed. *In the Public Interest: The Future of Canadian Copyright Law.* Toronto: Irwin Law, 2005.


Hughes, Carolyn A. “Lessons Learned: Digitization of Special Collections at the University of Iowa Libraries.” *D-Lib Magazine* 6, no. 6 (2000).


Tjaden, Ted. *Fair Dealing Clarified: A Case Comment on the Supreme Court of Canada Decision in CCH Canadian Ltd. v. Law Society of Upper Canada*. Canadian Association of Law Librarians, 2004. [http://www.callacbd.ca/ip0a037e.html#1](http://www.callacbd.ca/ip0a037e.html#1).


**Statutes and Regulations**


**Jurisprudence**

*Bourassa v. Ouellet* (8 January 1970), (Que. S. C.) [unreported; referred to in Vaver, 211-12].


Robertson v. Thomson Corp., 2006 SCC 43


Norse v. Henry Holt & Co., 991 F.2d 563, 565 (9th Cir. 1993)

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998)

Appendices

Appendix A: Fact Summaries of Supreme Court Cases


The artist Théberge claimed that his copyright was infringed when a gallery transferred the ink from one of his paper posters to a canvas backing without his authorization. The Court, in a 4-3 decision, found that no reproduction had taken place. The significance of this case for the purposes of this study rests on the Court’s statement of the two-fold purpose of copyright, rather than the facts of the case.


Canadian legal publishers sued the Law Society for the allegedly infringing activities of the Law Society's Great Library in photocopying published legal materials in its holdings and faxing the photocopies to Law Society members upon request, and in providing onsite self-service photocopiers for members’ use. The Court found, in a unanimous decision, that the Great Library’s copying activities were fair dealing, and that simply providing self-serve photocopiers did not authorize infringement. A lower court had found that the legal materials were not sufficiently original to merit copyright protection; however, the Supreme Court found that such materials did meet the criteria for originality.


In 1995, SOCAN applied to the Copyright Board for approval of a tariff (Tariff 22) that would apply to the transmission of music on the Internet. Because the application raised new issues, the Board first had to determine where liability lies for copyright matters on the Internet. The Supreme Court, in a 8-1 decision, confirmed the Board’s findings that Internet Service Providers do not communicate music to the public as long as they simply serve as conduits (including providing cache or mirror sites to speed transmission) and are not involved in providing content; and that content providers authorize communication to the public when they post music to a host server (although it is not communicated until it is transmitted). The Court also found that for a communication to occur in Canada, the communication had to have a real and substantial connection to Canada, which would depend on the facts of each case.


Robertson brought a class action suit against the Globe and Mail on behalf of freelance writers. She objected to the Globe’s subsequent use of her articles (that had been published in the print edition) in electronic databases of newspaper articles and in a CD-ROM containing issues of the newspaper. The Court found, in a 5-4 split decision,
that the newspaper could reproduce the entire newspaper in a CD-ROM, but that it could not reproduce individual articles in electronic databases without the author’s consent.
Appendix B:  
Repository Websites Included in the Study

<table>
<thead>
<tr>
<th>Website</th>
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<tbody>
<tr>
<td>Acadia University Archives (Esther Clark Wright Archives)</td>
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<tr>
<td>Alberta Association of Registered Nurses Museum and Archives</td>
</tr>
<tr>
<td>Anglican Diocese of Ottawa Archives</td>
</tr>
<tr>
<td>Archdiocese of Halifax (Roman Catholic) Archives</td>
</tr>
<tr>
<td>Archives &amp; Collections Society</td>
</tr>
<tr>
<td>Archives de l'Université de Moncton</td>
</tr>
<tr>
<td>Archives de Montréal (Division de la gestion de documents et des archives)</td>
</tr>
<tr>
<td>Archives des Religieuses Hospitalières de St-Joseph</td>
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<tr>
<td>Archives du Centre acadien (Université Sainte-Anne)</td>
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<tr>
<td>Archives nationales du Québec</td>
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<tr>
<td>Archives of Manitoba</td>
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<tr>
<td>Archives of Ontario</td>
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<tr>
<td>Archives of the Canadian Museum of Nature</td>
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<tr>
<td>Argyle Township Court House and Archives</td>
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<tr>
<td>Amprior &amp; District Archives</td>
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<tr>
<td>Banff Centre Archives</td>
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<tr>
<td>Basilian Fathers Museum</td>
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<tr>
<td>BC. Central Coast Archives</td>
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<td>Bishop Arseny Archives, Archdiocese of Canada, Orthodox Church in America</td>
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<tr>
<td>Brandon University - McKee Archives</td>
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<tr>
<td>British Columbia Archives</td>
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<tr>
<td>Brock University Special Collections and Archives</td>
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<tr>
<td>Campbell River Museum and Archives</td>
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<tr>
<td>Canada Science and Technology Museum - CN Images of Canada Gallery</td>
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<tr>
<td>Canadian Architectural Archives (University of Calgary)</td>
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<td>Institution</td>
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<tr>
<td>Canadian Architecture Collection (McGill University)</td>
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<tr>
<td>Canadian Jewish Congress National Archives and Reference Centre</td>
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<td>Canadian Pacific Railway Archives</td>
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<tr>
<td>Carleton University Archives</td>
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<tr>
<td>CBC/Radio-Canada</td>
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<tr>
<td>Centre d'archives de la Côte-du-Sud</td>
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<tr>
<td>Centre d'archives du Séminaire de Sainte-Hyacinthe</td>
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<tr>
<td>Centre d'études acadiennes (Université de Moncton)</td>
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<tr>
<td>Centre for Canadian Landscape Architecture Archives (University of Guelph)</td>
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<tr>
<td>Centre for Mennonite Brethren Studies</td>
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<tr>
<td>Centre for Newfoundland Studies</td>
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<tr>
<td>Centre for Research on French Canadian Culture (University of Ottawa)</td>
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<tr>
<td>Centre régional d'archives de l'Outaouais</td>
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<tr>
<td>Charlotte County Archives</td>
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<tr>
<td>Cinémathèque québécoise</td>
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<tr>
<td>City of Calgary, Corporate Records, Archives</td>
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<tr>
<td>City of Edmonton Archives</td>
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<td>City of Regina Archives</td>
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<td>City of Richmond Archives</td>
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<td>City of Saskatoon Archives</td>
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<tr>
<td>City of Victoria Archives</td>
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<tr>
<td>City of Wetaskiwin Archives</td>
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<tr>
<td>City of Winnipeg Archives and Records Control</td>
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<tr>
<td>Concordia University Archives</td>
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<tr>
<td>Museum Name</td>
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<td>----------------------------------------------------------------------------</td>
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<tr>
<td>Corner Brook Museum &amp; Archives</td>
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<tr>
<td>Courtenay and District Museum - Archives</td>
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<td>Cranbrook and Railway Historical Archives and Reference Library</td>
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<td>Dalhousie University Archives</td>
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<td>Diefenbaker Canada Centre</td>
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<td>Eastern Irrigation District Archives</td>
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<td>Eastern Townships Research Centre</td>
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<td>Elgin County Archives</td>
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<td>Enderby and District Museum</td>
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<td>Fort St. John - North Peace Museum</td>
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<td>Fort Steele Heritage Town Archives and Library Holdings</td>
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<tr>
<td>Gabriel Dumont Institute</td>
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<tr>
<td>Glenbow Archives</td>
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<td>Guelph Public Library - Local History Archives</td>
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<td>Inuit Heritage Centre</td>
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<td>Kings Historical Society and Old Kings Courthouse Museum</td>
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<td>Kitimat Centennial Museum</td>
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<td>Kootenay Lake Archives</td>
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<td>Langley Centennial Museum</td>
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<td>Law Society of Upper Canada Archives</td>
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<td>Le Centre de recherches acadiennes de l’Île-du-Prince-Édouard</td>
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<td>Library and Archives Canada</td>
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<td>MacNaught History Centre and Archives</td>
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<td>McGill University Archives</td>
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<td>McMaster University: The William Ready Division of Archives and Research Collections</td>
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<td>Memorial University of Newfoundland Folklore and Language Archives</td>
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<td>Mennonite Heritage Centre Archives</td>
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<td>New Brunswick Museum</td>
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<td>North Vancouver Museum and Archives</td>
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<td>Northwest Territories Archives</td>
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<tr>
<td>Nova Scotia Archives and Records Management</td>
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<td>Oshawa Community Museum and Archives</td>
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<td>Osler Library of the History of Medicine (McGill University)</td>
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<tr>
<td>Peterborough Centennial Museum and Archives</td>
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<td>Presbyterian Church in Canada Archives and Records Office</td>
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<td>Prince Edward Island Public Archives and Records Office</td>
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<td>Prince Rupert City and Regional Archives</td>
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<td>University of Alberta Archives</td>
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<td>University of British Columbia Library - Special Collections Division</td>
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<td>University of British Columbia Library - University Archives and Records Management Services</td>
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<td>University of Calgary Library - Special Collections</td>
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<td>Whyte Museum of the Canadian Rockies Archives</td>
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<td>Yarmouth County Museum and Archives</td>
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<td>York University Archives and Special Collections</td>
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</table>
Appendix C:
Website Data Collection Sheet

Name of repository:       No.

<table>
<thead>
<tr>
<th>Statutory Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Textual documents                          Maps/plans</td>
</tr>
<tr>
<td>Transcripts of textual documents               Moving image clips</td>
</tr>
<tr>
<td>Pre-49 photos                                 Sound recordings</td>
</tr>
<tr>
<td>Post-49 photos                                Oral history transcripts</td>
</tr>
<tr>
<td>Documentary art</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Presentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virtual exhibits                                Samples of holdings</td>
</tr>
<tr>
<td>Searchable databases                           Documents from a fonds</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

Dates of online holdings

Enlargability, thumbnails, etc.

Controls on further uses without going through the archives

- Low-res images
- Copyright ownership statement across image
- Statement about terms of use across image
- Disable right click function
- No controls
- Other controls

Rights information

- Copyright owner each document
- Attribution of author
- Copyright status each document
- None given
- Disclaimer that they tried to obtain permission
- Indication that they obtained permission

General terms of use

- Copyright statement entire website/where?
- Copyright statement each page/where?
- Copyright statement each part of website/where?
- Copyright statement each digital resource/where?
- None given
Copyright info given in description
Terms of use element
Author's name (include photographer)
Level of description
How hard to find

More detailed guidance
Email link for copyright questions
Information about copyright law (incl. link to)
No guidance given

Ordering copies of documents
Order form
Price list
Conditions on use
Photos only/All categories of works
Use fee/permission fee          For what?
No info given

Policy Documents
Putting holdings on Internet
Making copies of holdings for users
Other
None given

Funding

Other
Appendix D: Questionnaire

Questionnaire Number________

Archival Material on the Internet:
A Survey of Canadian Repositories

Faculty of Information Studies
University of Toronto
140 St. George Street
Toronto, ON M5S 3G6

November 2005
Archival Material on the Internet: A Survey of Canadian Repositories

Purpose of the questionnaire

This questionnaire is one part of a research study that will investigate the practices of Canadian repositories in making their archival holdings available on the Internet. The results of this research will help us to understand better the factors that affect the digitization of archival holdings for Internet access.

Participants in the survey

The questionnaire is being sent to all repositories whose websites are included in the Archives Canada portal (www.archivescanada.ca) and contain digitized archival documents from the repository's holdings as part of their content. Archival documents could be presented in a variety of ways, e.g., in virtual exhibits, databases of documents such as photos, or as documents chosen simply to illustrate the repository's holdings.

Completing the questionnaire

The questionnaire should be completed by the person responsible for your repository’s initiatives to make digitized archival documents from your holdings available on the Internet.

The questionnaire has eight sections and should take about 30-45 minutes to complete. Please answer all questions to the fullest extent possible.

Should you have any questions or concerns, please feel free to contact Jean Dryden at 416-595-5818 or j.dryden@utoronto.ca, or Professor Wendy Duff at 416-978-3152 or wendy.duff@utoronto.ca.

About confidentiality

All data collected will be kept confidential, and will not be used for any purposes other than those related to this study. Individual questionnaires have been numbered for follow-up purposes only. The master list linking individual repositories with a questionnaire will be destroyed as soon as the follow-up procedures are completed. Unless you permit me to do so by agreeing to be interviewed in your response to the last question, I will not be able to associate a completed questionnaire with the repository submitting it. Participation in the survey is completely voluntary.

Returning the questionnaire

Please return your completed questionnaire within the next two weeks in the pre-addressed, stamped envelope provided to Jean Dryden, Faculty of Information Studies, 140 St. George Street, Toronto, ON, M5S 3G6. Thank you very much for helping with this study.
**A. Factors in Digitizing for Internet Access**

1. Your repository's website content includes documents from your holdings. Generally speaking, which of the following factors influenced your repository’s decisions about what documents to include?

   - Indicate all that are important by marking an X in the first column.
   - In the second column, rank the top 4 in order of importance, with 1 being the most important, 2 the next most important, and so on.
   - If there are other factors that influenced your decisions that are not listed here, please specify them under 'other' at the end of the list below, and include them in your ranking.

<table>
<thead>
<tr>
<th>Important?</th>
<th>Rank the top 4</th>
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</thead>
<tbody>
<tr>
<td>1. Availability of technical expertise and equipment</td>
<td></td>
</tr>
<tr>
<td>2. Feedback from researchers about what they want to see on the website</td>
<td></td>
</tr>
<tr>
<td>3. Desire to increase web resources so that researchers can serve themselves</td>
<td></td>
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<tr>
<td>4. Privacy issues</td>
<td></td>
</tr>
<tr>
<td>5. Availability of staff resources</td>
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<tr>
<td>6. Copyright issues</td>
<td></td>
</tr>
<tr>
<td>7. Availability of grant funding to create online content</td>
<td></td>
</tr>
<tr>
<td>8. Whether documents were arranged and described</td>
<td></td>
</tr>
<tr>
<td>9. Physical condition of documents</td>
<td></td>
</tr>
<tr>
<td>10. Other (please specify)</td>
<td></td>
</tr>
</tbody>
</table>

**B. Your Repository's Website Content**

2. In what year did you begin putting archival documents on your repository's website?
   
   Year ____________
3. In which of the following ways are digital copies of documents in your repository's holdings presented on your website? *Please check all that apply.*

- [ ] Virtual exhibits (If checked, approximately how many virtual exhibits? ________ )
- [ ] Searchable database of digital images of photos
- [ ] Digital images linked to finding aids
- [ ] Digital images of selected documents to illustrate aspects of holdings
- [ ] Other (please specify): ____________________________

4. How have you funded your repository's digitization project(s)? *Please check all that apply.*

- [ ] Government grant
- [ ] Repository's budget
- [ ] Private donation
- [ ] Other (please specify): ____________________________

5. If your repository received external funding (i.e., from sources other than the repository's budget), were copyright conditions imposed?

- Yes [ ]
- No [ ]  ➔ Go to Question 7

6. Briefly indicate the agency imposing the conditions, and the nature of the conditions.

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

C. Selecting Documents for Internet Access

7. In selecting documents from your holdings to be included on your repository's website, does the selection include documents in which the copyright has expired?

- Yes [ ]
- No [ ]  ➔ Go to Question 9
8. If you answered yes to Question 7, how is it determined that the copyright has expired in any particular document?

9. In selecting documents from your holdings to be included on your repository's website, does the selection include documents in which the repository owns the copyright?

Yes ☐

No ☐  ➔ Go to Question 11

10. If you answered yes to Question 9, how is it determined that your repository owns the copyright in any particular document?

11. In selecting documents from your holdings to be included on your repository's website, does the selection include documents in which the copyright is owned by someone other than your repository?

Yes ☐

No ☐  ➔ Go to Question 17

12. If you answered yes to Question 11, does your repository try to obtain the authorization of copyright owners to allow you to put digital copies of their documents on your repository's website?

Yes ☐

No ☐  ➔ Go to Question 19

13. If you answered yes to Question 12, what strategies are used to locate the copyright owner?
14. At what point do you decide to stop trying to locate the copyright owner?

15. What do you do if the copyright owner cannot be located or doesn’t respond to your request? Please check all that apply.

- Do not use the document
- Substitute another document if possible
- Use the document with a disclaimer (for example, that efforts to locate the copyright owners were unsuccessful but that copyright owners who come forward will be appropriately acknowledged)
- Use the document with no disclaimer
- Other (please specify): ____________________________

16. Where your repository has successfully located the copyright owner to obtain authorization for the use of a document, what has been their reaction to your request? Please check all that apply.

- Pleased that the document is being used
- Declined permission
- Wanted royalties or licensing fees
- Wanted credit line
- Unaware that they owned copyright
- Other (please specify): ____________________________

17. Has your repository ever paid a licensing fee to a copyright owner in order to make a document available on the Internet?

- Yes □
- No □ → Go to Question 19
- Not Sure □ → Go to Question 19
18. If you answered yes to Question 17, does your repository have an explicit policy on this matter, e.g., conditions that must be met before agreeing to pay a licensing fee?

Yes  ☐  Please describe.

No  ☐

19. Has your repository ever been challenged by a copyright owner about the use of a document on your repository's website?

Yes  ☐

No  ☐  → Go to Question 21

Not Sure  ☐  → Go to Question 21

20. If you answered yes to Question 19, please describe the most recent situation when this occurred and how you dealt with it.

________________________________________

________________________________________

________________________________________

D. Further Uses of Documents from Your Website

21. Is your repository's administration concerned that visitors to your repository's website may copy or download archival material from your website? Please check only one option.

Yes  ☐

No  ☐
22. What measures, if any, does your repository take to limit further uses? Please check all that apply.

- Low resolution images
- Statement about copyright ownership across the image
- Statement about terms of use across the image
- Statement on each web page about what uses are permitted
- Statement on each web page about prohibited uses
- Disabling the ‘right-click’ function
- None
- Other (please specify): ____________________________

23. What copyright guidance, if any, does your repository provide to visitors to your website? Please check all that apply.

- Information about the owner of the copyright in individual documents
- Information about the copyright status of individual documents (e.g., whether the copyright has expired)
- Copyright statement for the entire website
- Copyright statement for each virtual exhibit
- Copyright statement for each part of the website
- Email link specifically for copyright inquiries
- How to order copies of documents
- Information about copyright law
- Do not provide copyright guidance to visitors to our website
- Other (please specify)______________________________

24. Do you charge a fee to those who want to use a document from the holdings you've made available on your website?

[ ] Yes

[ ] No

[ ] It depends  Please explain.
E. Your Repository’s Copyright Policies

25. Does your repository have written policies, procedures, or guidelines relating to the administration of copyright in your institution?

Yes □

No □ ➔ Go to Question 32

26. If you answered yes to Question 25, when were your copyright policies/procedures/guidelines developed?

Year __________

27. Who developed your repository’s copyright policies/procedures/guidelines?

☐ Head of repository
☐ Senior management group
☐ Ad hoc staff committee
☐ In-house copyright specialist
☐ Outside consultant
☐ Other (please specify) ______________________________________________________________________

28. At what level in your organizational structure have your repository's copyright policies/procedures/guidelines been approved?

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

29. How are your repository's copyright policies/procedures/guidelines kept up to date?

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

30. When were they last revised?  Year __________

31. Who in your organization makes decisions in situations where the copyright policies/procedures/guidelines are difficult to apply? (Job title(s) please, not personal names)

________________________________________________________________________________________
### F. Learning about Copyright

32. Where do you get your knowledge of copyright?

- Indicate all that apply by marking an X in the first column.
- In the second column, rank the top 3 in order of importance, with 1 being the most important, 2 the next most important, and so on.
- If there are other factors that influenced your decisions that are not listed here, please specify them under 'other' at the end of the list below, and include them in your ranking.

<table>
<thead>
<tr>
<th>Applicable?</th>
<th>Rank the top 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colleagues in your repository</td>
<td></td>
</tr>
<tr>
<td>Colleagues in the profession</td>
<td></td>
</tr>
<tr>
<td>Provincial archives advisor</td>
<td></td>
</tr>
<tr>
<td>Professional association workshops</td>
<td></td>
</tr>
<tr>
<td>In-house workshops</td>
<td></td>
</tr>
<tr>
<td>In-house legal counsel</td>
<td></td>
</tr>
<tr>
<td>Outside legal counsel</td>
<td></td>
</tr>
<tr>
<td>Copyright consultant other than a lawyer</td>
<td></td>
</tr>
<tr>
<td>Books and newsletters</td>
<td></td>
</tr>
<tr>
<td>National or provincial archives listserv(s)</td>
<td></td>
</tr>
<tr>
<td>Statute and regulations</td>
<td></td>
</tr>
<tr>
<td>Case law</td>
<td></td>
</tr>
<tr>
<td>Other (please specify)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

33. How do you keep up to date with changes in the law?

____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
34. Which of the following do you consult if you have a specific question about a copyright matter? Please check all that apply.

☐ Statute and regulations
☐ Provincial archives advisor
☐ Copyright consultant other than a lawyer
☐ Books and/or newsletters
☐ In-house legal counsel
☐ Outside legal counsel
☐ National or provincial archives listserv(s)
☐ In-house copyright specialist
☐ Colleagues in your repository
☐ Colleagues in the profession
☐ Other (please specify):

35. Which of the resources listed in Question 34 would you consult first if you have a specific question about a copyright matter?

36. Does your repository have a designated staff member who is responsible for copyright matters?

Yes ☐

No ☐  ➤ Go to Question 39

37. If you answered yes to Question 36, are you that person?

Yes ☐

No ☐
38. What are the duties of the person responsible for copyright matters? Please check all that apply.

☐ Keeping up to date with changes to the law
☐ Responding to copyright questions from staff
☐ Responding to copyright questions from researchers
☐ Organizing training sessions presented by outside experts
☐ Delivering training sessions
☐ Negotiating copyright aspects of new acquisitions
☐ Obtaining permissions from copyright owners
☐ Keeping records of permissions obtained by the repository
☐ Keeping records of permissions granted by the repository
☐ Other (please specify):

G. Your Views about Copyright

39. Please rate the extent to which you agree or disagree with the following statements.

<table>
<thead>
<tr>
<th></th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Copyright is not a problem for archival repositories making archival material available on the Internet.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td>b. The risk of legal consequences for copyright infringement involving archival material is low.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td>c. I am reasonably confident that I can provide colleagues and researchers with accurate information and advice about copyright issues.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td>d. Dealing with copyright in the records of corporate bodies is easier than dealing with copyright in the papers of individuals.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td>e. The <em>Copyright Act</em> as it currently stands has achieved an appropriate balance between the rights of creators and the rights of users.</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td></td>
<td>The exception in the <em>Copyright Act</em> that permits non-profit libraries, archives, and museums to make a single copy of an unpublished work in their holdings for the patron’s research and private study (sec. 30.21) is adequate.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f.</td>
<td>○ ○ ○ ○ ○</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g.</td>
<td>The fair dealing provision of the <em>Copyright Act</em> should be more specific.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>h.</td>
<td>My repository would be prepared to pay for a blanket licence (similar to that offered by Access Copyright for photocopying of published material) that covered the copying of unpublished material by any means (including digital copying).</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i.</td>
<td>As long as the repository is credited as the source, it’s OK for members of the public to download documents from our website and use them in a publication or on another website.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>j.</td>
<td>Archival repositories should charge use fees when providing patrons with publication-quality copies of documents, in order to generate revenue.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>k.</td>
<td>If someone copies a document from our website and uses it in a publication or on a website without obtaining the permission of the copyright owner, there is little we can do about it.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>l.</td>
<td>It is our professional duty to educate our patrons about copyright.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>m.</td>
<td>It is important to restrict the ability of visitors to our website to copy or download documents from our website without our permission.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>n.</td>
<td>If we discovered that someone had published a document from our website in which we owned the copyright, without our permission, we should draw the matter to their attention.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
40. What, if anything, would you change about copyright law as it affects your job?

H. About You

41. What is your current job title?

42. Briefly describe your duties that relate specifically to making your repository’s holdings available on the Internet.

43. How many years have you worked in your present position?

☐ Less than 1 year
☐ 1-5 years
☐ 6-10 years
☐ 11-15 years
☐ 16-20 years
☐ 21-25 years
☐ 26-30 years
☐ More than 30 years

44. How many years have you worked with archival material?

☐ Less than 1 year
☐ 1-5 years
☐ 6-10 years
☐ 11-15 years
☐ 16-20 years
☐ 21-25 years
☐ 26-30 years
☐ More than 30 years
45. What is the highest level of education you have completed? Please check only one.

- High school or equivalent
- Community college
- Undergraduate
- Masters
- PhD
- Other (please specify): ________________________

46. In which type of repository do you currently work? Please check only one.

- National/Provincial/Territorial archives
- Municipal/County/Regional archives
- Religious archives
- University archives
- Corporate archives
- Historical society
- Museum
- Library
- Other (please specify): ____________________________

47. Please use the space below to comment on any other aspect of the foregoing topics that you think may be of interest to this study.

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________
48. If, in your response to Question 25, you indicated that your repository has written copyright policy or procedure documents, I would be most grateful if you would provide me with a copy of your policy and procedures, and send them along to me with the return of this questionnaire.

If it is not possible to send copies of the documents themselves, could you please list below the topics covered, or send a copy of their tables of contents (if applicable)? You may either retain or remove identifying information. If you do not remove identifying information, be assured that no reference to the identity of your repository will appear in my analysis of the material you send. The copies you send to me will not be used for any purpose other than those related to this study, and the copies will be destroyed or deleted two months after the dissertation defence.
Follow-up Interview

49. It is hoped that the data collection for this study will include interviews with respondents to this questionnaire who volunteer to be interviewed. Such interviews will provide the opportunity to explore in more depth issues arising from the questionnaire. Each interview session will take approximately 60-90 minutes.

Are you willing to be interviewed?

☐ Yes ☐ No

If yes, please provide your contact information below, and record the questionnaire number from the upper right hand corner of the first page. You will be provided with more detailed information about the interview session, and you will be given an opportunity to ask any questions that you may have about it.

Name: ___________________________________________

Mailing Address: __________________________________

______________________________

______________________________

E-mail: _________________________________________

Telephone: _____________________________________

Questionnaire Number: ____________________________
Thank you very much for responding to this questionnaire!

Please return your questionnaire in the enclosed envelope to:

Jean Dryden, Doctoral Candidate
Faculty of Information Studies
University of Toronto
140 St. George Street
Toronto, ON M5S 3G6
Appendix E:  
Questionnaire Advance Letter

[on FIS letterhead]

Archival Material on the Internet

Advance Letter (Questionnaire)

Date

Dear (name of the head of the repository)

I am writing to request your assistance in a research study that will investigate the practices of Canadian repositories in making their archival holdings available on the Internet. The study is part of my doctoral dissertation research at the Faculty of Information Studies in the University of Toronto. The results from this research will help us to understand better the factors that affect the digitization of archival holdings for Internet access. All data collected will be kept confidential, and will not be used for any purposes other than those related to this study.

A few days from now, you will receive in the mail a request to fill out a questionnaire that is part of this study. The questionnaire should be completed by whomever is responsible for your repository’s initiatives to make your holdings available on the Internet. If you are not that person, could you please let me know the name of the appropriate person so I can send it to directly to him or her?

Thank you for your time and consideration. It is only with the generous help of staff from institutions such as yours that this research can be successful. If, however, you do not wish to participate, please let me know as soon as possible.

Should you have any questions or concerns, please feel free to contact me at 416-595-5818 or j.dryden@utoronto.ca, or Prof. Wendy Duff of the Faculty of Information Studies at the University of Toronto at 416-978-3152 or wendy.duff@utoronto.ca.

Sincerely,

Jean Dryden  
Doctoral Candidate
Appendix F:
Cover Letter for Questionnaire

[on FIS letterhead]

Archival Material on the Internet

Cover Letter for Questionnaire

Date

Dear (name)

I am writing to ask for your help in a study that will investigate the practices of Canadian repositories in making their archival holdings available on the Internet. The study is part of my doctoral dissertation research at the Faculty of Information Studies in the University of Toronto. I am sending the enclosed questionnaire to all repositories whose websites are included in the Archives Canada portal (www.archivescanada.ca) and contain digitized archival documents as part of their content.

The questionnaire should be completed by whomever is responsible for your repository’s initiatives to make your holdings available on the Internet. If you are not that person, could you please pass the questionnaire and this covering letter on to the most appropriate person?

Your repository's participation in this survey is important. The information you provide will help us to understand better the factors that affect the digitization of archival holdings for Internet access.

Participation in the survey is completely voluntary. All data collected will be kept confidential, and will not be used for any purposes other than those related to this study. Individual questionnaires have been numbered for follow-up purposes only. The master list linking individual repositories with a questionnaire will be destroyed as soon as the follow-up procedures are completed. Unless you permit me to do so by agreeing to be interviewed in your response to Question 51, I will not be able to associate a completed questionnaire with the repository submitting it. The returned questionnaires will be destroyed five years after the dissertation defense.

The questionnaire can be completed in about 45 minutes. Please return your completed questionnaire in the pre-addressed, stamped envelope within the next two weeks. Thank you in advance for helping with this research. Should you have any questions or concerns, please contact me at 416-595-5818 or j.dryden@utoronto.ca, or Professor Wendy Duff at 416-978-3152 or wendy.duff@utoronto.ca.

As a token of appreciation, I am offering those who return the completed questionnaire postmarked by [date 3 weeks from date of sending] a chance to enter a draw for $250. If you wish to enter the draw, please complete the draw ticket and return it with the questionnaire.

Thank you very much for helping with this study. It is only with the generous help of people like you that this research can be successful.

Sincerely,

Jean Dryden
Doctoral Candidate

P.S. If you do not wish to participate, please return the questionnaire unanswered in the envelope provided.
Appendix G: 
Draw Ticket

[on FIS letterhead]

Archival Material on the Internet

Draw Ticket (Questionnaire)

As a token of appreciation, I am offering those who return the completed questionnaire by [date postmarked 3 weeks from date of sending] a chance to enter a draw for $250. If you wish to enter the draw, please complete the information below and return it with the questionnaire.

Upon receipt, this draw ticket will be separated from the questionnaire. The draw will be held on [date]. All tickets will be destroyed after the draw.

Name: _____________________________________________________

Mailing Address: ____________________________________________
_________________________________________________________
_________________________________________________________
_________________________________________________________

Email: _____________________________________________________

Telephone: ________________________________________________
Appendix H: 
First Follow-up Letter

[on FIS letterhead]

Archival Material on the Internet

Follow-up Letter #1 (Questionnaire)

Date

Dear (name)

Last week a questionnaire asking about institutional practices in making archival holdings available on the Internet was mailed to you. If you have already completed and returned the questionnaire, please accept my sincere thanks.

If you have not completed and returned the questionnaire, but you are willing to contribute to the study, please do so as soon as possible. I am especially grateful for your help; your response will assist in better understanding the factors that affect the digitization of archival holdings for Internet access.

If you did not receive a questionnaire, or if it was misplaced, please email me at j.dryden@utoronto.ca and I will send you another questionnaire. It is only with the generous help of people like you that this research can be successful.

Sincerely,

Jean Dryden
Doctoral Candidate
Appendix I:
Second Follow-up Letter

[on FIS letterhead]

Archival Material on the Internet

Follow-up Letter #2 (Questionnaire)

Date

Dear (name)

About three weeks ago, I sent you a questionnaire seeking information about institutional practices in making archival holdings available on the Internet. To date I have not received your completed questionnaire. I realize that you may not have had time to complete it; however, I would genuinely appreciate hearing from you.

The study is being conducted so we can better understand the factors that affect the digitization of archival holdings for Internet access. I am writing to you again because I want the findings of my dissertation research to be truly representative. This can be achieved only if I receive completed questionnaires from a large number of repositories.

If your questionnaire has been misplaced, a replacement is enclosed. If you have any questions about the study, please call me at 416-595-5818 or email me at j.dryden@utoronto.ca. If you do not wish to participate, please return the questionnaire unanswered in the envelope provided.

Thank you very much for considering this request.

Sincerely,

Jean Dryden
Doctoral Candidate
Appendix J:
Letter to Interviewees

Copyright & Archival Material on the Internet

Letter for interviewees
[on FIS letterhead]

Dear [name]:

Thank you for agreeing to participate in an interview, as indicated in your response to the questionnaire you recently completed. As promised in the questionnaire, I am contacting you to provide more detailed information about the interview session.

Enclosed is a description of the study and two copies of a consent form. I require your signed consent to participate in the study and to have the session recorded. Please read both documents carefully. If you have any questions or concerns, please feel free to contact me at 416-595-5818 or j.dryden@utoronto.ca, or Prof. Wendy Duff of the Faculty of Information Studies at the University of Toronto at 416-978-3152 or wendy.duff@utoronto.ca.

Please complete the consent form as soon as possible and return one copy in the stamped, pre-addressed envelope. You may wish to retain the second copy of the consent form for your records.

I am also writing to arrange a time for the interview. Please let me know which of the following dates/times you prefer [list available options]. If none of these times suits you, please suggest an alternative. You may contact me by telephone at 416-595-5818 or by email at j.dryden@utoronto.ca.

Thank you again for your assistance in this study.

Yours truly,

Jean Dryden
Doctoral Candidate
Appendix K:
Description of the Study for Interviewees

[on FIS letterhead]

Copyright & Archival Material on the Internet

Description of the Study (for Interviewees)

Digital and communication technologies provide unparalleled opportunities to increase access to archival material that traditionally has been available only in the repository where the physical documents are preserved. The purpose of this study is to investigate the impact of copyright law on the practices of Canadian repositories in making archival material available on the Internet. To this end, the study will collect data from a number of sources, including repository websites, institutional policy and procedure documents, questionnaires and interviews.

The interviews are the last stage of data collection. The interviews provide the opportunity to explore in more depth certain issues that are difficult to cover fully in a questionnaire. In preparation for the interview, I will review your questionnaire response, the content of your website, and any policy/procedure documents that you have provided. In order to achieve the richest possible analysis, it is important to be able to link the different sources of evidence from a single repository and, as necessary, report on them as a whole. However, although neither you nor your repository will be identified in the transcripts or in the reporting of the study results; complete anonymity cannot be guaranteed, because it may be possible to identify your repository and/or you from reported data about the repository website.

Participation in this study is completely voluntary. You may decline to answer any question, and you may withdraw at any time. All data collected will be kept confidential, and will not be used for any purposes other than those related to this study. The audio recordings will be destroyed once the transcripts have been verified, and (if you wish to do so) reviewed by you. The transcripts of the audio recordings and any notes taken by the interviewer will be destroyed five years after the dissertation defense.

The entire interview session should take between 60 and 90 minutes. The session will be audio recorded using a disc recorder, and I may also take notes during the session. A transcript will be made of the recorded interview. Once the interview has been transcribed, you will have the opportunity to indicate whether you wish to review the transcript to make sure that your remarks have been correctly recorded. If you wish to do so, I will send the transcript to you by email with a request that you review it, make any changes, and return it to me within a week.

Questions about this study may be directed to:

Jean Dryden          Professor Wendy Duff
Faculty of Information Studies   Faculty of Information Studies
140 St. George St.,     140 St. George St.
Toronto, Ontario M5S 3G6 Toronto, Ontario M5S 3G6
j.dryden@utoronto.ca wendy.duff@utoronto.ca
416-595-5818          416-978-3152
Appendix L:
Interviewees' Consent Form

[on FIS letterhead]

Copyright & Archival Material on the Internet
Consent Form (Interviewees)

Please sign below if you agree with all of the following statements:

• I have freely volunteered to participate in this study.

• I agree to having this session audio recorded.

• I have been informed in advance about the nature of the study and what procedures will be followed.

• I give the investigator permission to link the data from my questionnaire, the data from this interview, the data from any policies, procedures and/or guidelines provided, and the data from my repository's website in order to be able to analyze and report on these sources of evidence as a whole.

• I have been given the opportunity to ask questions and have had my questions answered to my satisfaction.

• I understand that the information I provide will be treated confidentially and that neither my identity nor that of my repository will be revealed in the transcripts or in the reporting of the study results.

• I understand that complete anonymity cannot be guaranteed, because it may be possible to identify my repository and me from reported data about the repository website.

• I understand that the information I provide will not be used for any purposes other than those related to this study.

• I am aware that I have the right to decline to answer any question, and may withdraw consent and discontinue participation at any time.

Signature: ____________________________ Date: ______________

Name (printed): ____________________________________________________

If you have any questions about this study, please contact Jean Dryden at 416-595-5818 or j.dryden@utoronto.ca or Professor Wendy Duff at 416-978-3152 or wendy.duff@utoronto.ca.

If you have questions about your rights as a research participant in this study, please contact Rachel Zand, Director, Ethics Review Office, University of Toronto at: 416-978-3389 or rachel.zand@utoronto.ca.
Appendix M:
Interview Script

Copyright & Archival Material on the Internet

Interview Session Protocol

PRE-SESSION SCRIPT
Thank you for agreeing to participate in this study.
You have received a description of my study, and you have completed and returned the consent form. Before we get started, do you have any further questions?
Respond to questions, if any.

Thank you for participating in this study. I am interested in learning about institutional copyright practices, and archivists' awareness and understanding of copyright. Your responses to my questions will help us to understand better the relationship between copyright and the digitization of archival holdings for Internet access.

I will be guiding the discussion by asking general questions.

I’d like to reiterate that all of your responses will be kept confidential. The audio recording will be erased after the transcript of the interview has been verified by me and (if you wish) reviewed by you. The transcripts of the audio recordings and any notes taken by the interviewer will be destroyed five years after the dissertation defense. The data collected will not be used for any purposes other than those related to this study.

In the transcripts and in any reports of the research, participants will be identified only by codes (e.g., participant 1). However, although neither you nor your repository will be identified in the transcripts or in the reporting of the study results; complete anonymity cannot be guaranteed, because it may be possible to identify your repository and/or you from reported data about the repository website.

You may decline to answer any question, and you may withdraw at any time.

The session should take between 60 and 90 minutes.

Before we begin, I would like to remind you to speak loudly and clearly as I will be taping our conversation.

Thank you. We’ll start now.

Start recording
SESSION SCRIPT

My first question is a general one: Why make your holdings available on the Internet at all?

The first area of discussion is your institutional copyright practices related to digitizing your holdings for Internet access.

A. Factors  Question 1

[If they checked copyright as a factor]

1A. I see that you checked copyright as one of the factors that influenced your decision about what holdings to make available on your website. In what ways is it a factor?
   How important is copyright in relation to the other factors that you checked off?

Go to Section B

[If they did not check copyright as a factor]

1B. I see that you did not check copyright as one of the factors that influenced your decision about what holdings to make available on your website. Why is that?
   How do you deal with copyright issues?

2. Even though you did not check copyright as one of the factors, have you had to deal with copyright issues in making your holdings available for Internet access?

B. Copyright policy/procedures    Section E of the Questionnaire

I now want to ask you some questions about your repository's copyright policies and procedures.

[If they indicated that they do NOT have a copyright policy]

3A. You indicated in your questionnaire that your institution does not have a documented copyright policy and/or procedures that guide you in making your holdings available for Internet access. Why is that?
   How do you deal with copyright issues?
   Who in your organization makes decisions about copyright matters?

Go to Section C.

[If they indicated that they have a copyright policy]

3B. You indicated in your questionnaire that your institution has a documented copyright policy and/or procedures that guide you in making your holdings available for Internet access.
   What does your copyright policy cover?
   Does it cover all copyright activities in your institution, or just the digitization of holdings for Internet access?
   Did you have a documented policy before you began digitizing holdings for Internet access?

4. How are your institution's copyright policies and practices developed?
   Tell me about the process.
   Do you have a copyright committee? If so, who are the members (positions, not personal names)
Who does the scanning?

C. Copyright Requirements of External Funding  Question 4 of the Questionnaire

[If they funded their project from sources other than the repository’s budget, go to Question 5; if the project was funded entirely from the repository’s budget go to Question 6.]

5. I see that you received external funding to digitize your holdings to make them accessible on the Internet. What, if any, copyright conditions did the funding impose? Were they different from your usual practice? In what ways?

D. Selecting Documents  Section C of the Questionnaire

I now want to ask you about how you select documents for digitization for Internet access.

6. Is the ownership of copyright in a particular document a factor in deciding whether or not to include that document on your website?
   From the perspective of copyright ownership, documents can be divided into 3 categories: those in which copyright has expired, those in which your repository owns the copyright, and those in which copyright is owned by a third party. Do you consider these categories when selecting documents to be digitized for Internet access? How?

In dealing with archival material, it isn’t always easy to be completely certain that copyright has expired, or to ascertain who owns the copyright. The next few questions ask how you deal with these situations.

7. If you select documents in which the copyright has expired, exactly how do you determine that?

8. If you select documents in which the repository owns the copyright, exactly how do you determine that?
   You also select documents in which the repository owns the copyright, either because they’re university records but also because the donor transferred copyright to the institution, but they’ll cheerfully sign anything, but they don’t always own the copyright in the things they donate so how do you deal with that?

9. If you select documents in which copyright is owned by a third party, do you try to obtain their authorization to allow you to put digital copies of their documents on your repository's website? If not, why is that?
   If so, what strategies do you use to locate copyright owners to obtain their authorization to make documents available on your website?
   When do you decide to stop trying to locate the copyright owner?

10. Tell me about a situation where you had difficulty locating the copyright owner of a document that you wanted to use. What did you do? What was the outcome?

11. Do you recall a situation where your repository was challenged by a copyright owner regarding your use of a document on your website? Tell me about that.

12. In the questionnaire were a number of statements, and you were asked to indicate your level of agreement or disagreement with each one. In response to the statement “my institution would
be prepared to pay for a blanket licence that covered unpublished material (similar to that offered by Access Copyright for the reproduction of published material)” you indicated that you disagreed/agreed with the statement. Why is that?

(Would your institution be prepared to pay for a blanket licence that covered unpublished material (similar to that offered by Access Copyright for the reproduction of published material)? Why or why not?

What should such a licence permit a repository to do?

What sorts of rights would such a licence cover?

E. Further Uses of the Documents on your Website  
Section D of the Questionnaire

I now want to ask about further uses of the documents on your website by visitors to the website.

13. You indicated that your administration is/is not concerned that visitors to your website may copy or download images of archival material? Why is that? What are they concerned about?

You indicated that you agree/disagree/don’t feel strongly one way or the other when asked to consider the statement it is important to restrict the ability of visitors to our website to copy or download documents from our website without our permission. Why?

14. What measures, if any, do you take to limit further uses by end-users?

Why did you decide on these measures?

Were there others that you considered?

One of them is to put up low-resolution images. What resolution do you use?

15. You indicated that you provide some copyright guidance to users of your website (in the form of a copyright statement for the website and how to order copies of documents)

How do you see your role in educating users of your website about copyright?

You indicated that you strongly agree with the statement “it is our professional duty to educate our patrons about copyright” Why is that? What should we do? Where is the fine line between being helpful and providing legal advice?

16. Do you charge a use fee to researchers who want to use a copy of a document from the holdings you've made available on your website? Why or why not?

How important are use fees as a source of revenue for your repository?

How did you decide to set the level of fees?

17. What is the most difficult copyright issue that you recall dealing with in relation to making your holdings available on your website?

The next area of discussion is archivists' awareness of copyright and their view of it.

F. Knowledge  
Section F of the Questionnaire

I first want to find out how you learned about copyright and how knowledge is disseminated.

18. Where did/do you get your knowledge of copyright?

Which source is most important?

How does the information in different sources overlap? Conflict?
19. If you go to a workshop or read a manual or an article about copyright, what do you do with what you learned?
   Do you share it with your colleagues?
   If so, how?

20. How do the other people who are involved in making your holdings available on the Internet (e.g., scanning technicians, web designers) learn about copyright matters?

In scanning documents for presentation on your website, do you make any changes to the digital copy that will be used for your website, e.g., removing stains, cropping edges, presenting only a portion of the original document?

In presenting documents on your website, are you concerned about crediting the author of each work that you use?

21. Who or what do you consult if you have a question about a copyright matter?

It seems as if copyright is changing all the time, and I know that it's difficult to keep up to date. The next few questions ask about your awareness of some changes that have occurred during the past two years. At this point, my interviewees usually say, oh I’m going to flunk this one, but the intention is not to grill you, but to take all of the responses together to get a sense of the community's awareness of certain events.

22. What is the most recent information you can recall about a change to copyright law that affected your institutional practices?

23. Do you recall hearing anything about the changes to the Act that occurred in 2004?
   If so, how did you learn about those changes, and what do you think about them?
   What impact have those changes had on your repository’s practices?

24. Do you recall hearing anything about the proposed amendments to the Copyright Act that have been introduced in Parliament?
   If so, how did you learn about the proposed amendments, and what do you think about them?
   What impact will the proposed amendments have on your repository’s practices?

25. Do you recall hearing anything about the Supreme Court decision in CCH v. the Law Society of Upper Canada (2004)?
   If so, how did you learn about this judicial decision, and what do you think about it?
   What impact has the decision had on your repository’s practices?

26. What do you think about the fair dealing provision of the statute?

G. Attitudes  Section G of the Questionnaire
27. What do you think about copyright as it affects your job? Why?

28. What, if anything, would you change about copyright to make your job easier?

H. Wrap-up
29. Is there anything you would like to add, or comment on, that has not been covered?
POST-SESSION SCRIPT
That is the end of the session. Thank you very much for participating in this study.

Stop Recorder

One last thing. In the past, when reading the transcripts, there are sometimes points that need clarification. In addition, once the interview has been transcribed, I would like to offer you the opportunity to review the transcript to make sure that your remarks have been correctly recorded. If you want to do this, I will send the transcript to you by email and will ask you to review it, make any changes, and return it to me within a week.

<table>
<thead>
<tr>
<th>In-person interviews:</th>
<th>Telephone interviews:</th>
</tr>
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<tbody>
<tr>
<td>Please indicate on this form whether or not it would be all right if I contacted you to clarify what you’ve discussed today, and whether or not you wish to review the transcript.</td>
<td>Do you still have the post-interview follow-up consent form that I sent you earlier? [If not, I will send you another one.] Please indicate on the form whether or not it would be all right if I contacted you to clarify what you’ve discussed today, and whether or not you wish to review the transcript, and return it in the stamped pre-addressed envelope provided.</td>
</tr>
</tbody>
</table>

Pass follow-up contact form – allow time for completion – place in file.

Thank you again. You have my e-mail address should you need to contact me for any reason.
Appendix N:
Post-Interview Follow-up Consent Form

[on FIS letterhead]

Copyright & Archival Material on the Internet

___________________
Participant ID

Post-interview follow-up consent

In verifying the transcript of your interview, there may be points that I would like to clarify.

May I contact you to briefly discuss your comments?

□ Yes  □ No

If yes, please complete the following:

Name  _____________________________________________________

I prefer to be contacted by:  phone ___________________________

email ___________________________

Once the interview has been transcribed, I would like to offer you the opportunity to review the transcript to make sure that your remarks have been correctly recorded. I will send the transcript to you by email and will ask you to review it, make any changes, and return it to me within a week.

Do you want to review the transcript?

□ Yes  □ No

If yes, please indicate the email address where the transcript should be sent, if it is different from that provided above: ________________________________
Appendix O: 
Resolution of Digital Images: Technical Details

Digitization projects most commonly create and use raster (or bit-mapped) images. Raster images consist of a matrix of pixels (picture elements); each pixel represents a piece of the original image. The amount of information in a raster image is determined by the spatial resolution, which is expressed in pixels (or dots) per unit of measurement, most commonly pixels or dots per inch (ppi or dpi). A low resolution means that there are fewer, more widely spaced pixels; for example, a 4” x 5” photo scanned at 300 dpi would consist of 1.8 million pixels (1200 pixels x 1500 pixels); the same photo scanned at 75 dpi would consist of 112,500 pixels (300 x 375). The higher the resolution, the larger the size of the resulting digital file.

It is possible to compress the files to reduce the size for storage or delivery; however, high compression rates may result in loss of quality and information. Four file formats are commonly used in digitization projects (TIFF, JPEG, GIF, and PNG). Within a digitization project, the appropriate file format depends on several factors, including the size and characteristics of the original documents (e.g., photographs are different from architectural plans), and how the image will be used (e.g., as the archival preservation master or for delivery to the web). While images are commonly captured in a high resolution TIFF format, this produces a very large file which would take a long time to load on the user’s computer. Therefore, most projects convert their images to the JPEG file format, which uses high compressions to reduce the file size. This is done by simplifying the image, reducing the resolution, and losing both information and quality, but what is lost in quality is gained in accessibility. The reduction in size makes it suitable for Internet delivery to a disparate audience when the repository has no control over the recipients’ bandwidth, output device capabilities, web browser, or intended use. While the image quality is acceptable for research purposes, a copy made from it will not be suitable for publication.