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Copyright Protection of Photographs Post-2012

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Copyright Protection of Photographs Post-2012

**Contribution of Dr. Margaret Ann Wilkinson, Western Law
(with assistance of Law student Tierney Deluzio)**

to

**“Copyright Update” session which included
other contributions by**

**Ann Ludbrook, Ryerson University,
Heather Martin, University of Guelph, and
John Tooth, University of Winnipeg**

Photographs post-2012: not so simple?

- Seven simple words?: “Section 10 of the Act is repealed.” [s.6 Copyright Modernization Act, in force Nov 7, 2012]
- But, without s 10, (unofficially headed “Term of copyright in photographs”), what remained?
- s 6:
The term for which copyright shall **subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.** [emphases added]
- Thus, all photographs in Canada are protected for the lifetime of the photographer plus roughly 50 years...
 - **OR**, as *some* argue, only *some photos* are...

Where does contemporary legal comment fall?

- Most legal commentators make no argument that the period of copyright for **any photograph** in Canada now, since Nov 7, 2012, anything other than the **life of the photographer plus 50 years...**
 - See, eg, currently, *Halsbury's Laws of Canada*, the *Canadian Encyclopediac Digest*, McKeown's *Fox on Canadian Law of Copyright and Industrial Designs*.
- The source of the contrary opinion, that **some** photographs **do not** enjoy protection for the life of the author plus 50 years, appears to originate in pre-2012 writings of David Vaver, Professor at Osgoode Hall Law School at York University...
 - *Copyright Law* (Toronto: Irwin Law, 2000) 104-107
 - *Intellectual Property Law: Copyrights, Patents, Trade-marks* 2nd Ed (Toronto: Irwin Law, 2011) 145-147.

Although Ysolde Gendreau, Professeure Titulaire, Universite de Montreal Faculte de Droit, did not interpret the law in the same way pre-2012 in

 - “Canada” in Gendreau, Axel Nordemann & Rainer Oesch (eds) *Copyright and Photographs An International Survey* (London: Kluwer Law International, 1999)
- Although Vaver has not published on this point since the 2012 amendments, archivist Jean Dryden appears to rely on his approach in her 2014 *Demystifying Copyright* 2nd ed (CLA) at 23-24.

Evidence surrounding the 2012 *Copyright Act* amendments supports the contention that government intent was to ensure ALL photos enjoy “life +50”

- All the references to the matter in Parliament during the passage of the *Copyright Modernization Act* support the proposition that all photographers were to benefit from the usual term of protection of “life + 50 years” ...
- The “parliamentary history” of an enactment is not always considered by courts in determining what an enactment means: only what the language actually says is interpreted, not what the legislators might have meant to have said. In 1998, however, in *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27, in a case under the *Ontario Employment Standards Act*, the SCC did consider such evidence, looking specifically to the Legislature of Ontario Debates – including the statement of the Minister responsible.

Copyright Modernization Act (Bill C-11) introduced into the House:

- Honourable James Moore (then **Minister of Canadian Heritage and Official Languages**) 1st session, 41st Parliament, v 146, no 031 Tues Oct 18, 2011”: “**Canadian photographers will benefit from the same authorship rights as creators.** Currently, photographers are not considered authors of commissioned works. This legislation changes that.”
- Wed Feb 8, 2012, Gordon Brown (Leeds-Grenville, PC): “I would also note that the bill would make photographers the first owners of copyright of their photographs. **The copyright would be protected for 50 years after the life of the photographer, harmonizing the treatment of photographers under Canada’s copyright law with that of other creators. It would also harmonize it with the laws of many other countries. ...**”
- Fri Feb 10, 2012, Corneliu Chisu (Pickering-Scarborough E, PC): “**Photographers will also be given the same rights as other creators.** They will be first owner of copyright in their photographs **and they will receive the same benefits as other creators.**”

Bill C-11 at Report Stage:

- May 15, 2012, Brian Storseth (Westlock-St Paul, PC): “The bill ensures that photographers are the 1st owners of copyright on their photographs, and that **copyright will be protected for 50 years after the photographer’s death.**”
- Same day, John Weston (W Vancouver-Sunshine Coast-Sea to Sky Country, PC): “**This copyright would be protected for the life of the photographer plus 50 years.**”

Bill C-11 in the Senate:

- Wed June 20, 2012, Hon Stephen Greene moving 2nd reading – “**Notably, this bill will finally give photographers the authorship rights that are already enjoyed by other creators.**”

What period of protection was “already enjoyed” by other authors?

- ***An Act to amend and consolidate the Law relating to Copyrights, SC 1921 c 24, into force 1924:***
 - s.5 [“Term of Copyright”] The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death.
 - Followed by a legislated “Proviso”
 - [There was a special term for photographs of 50 years from the making (s 7)]
- ***Copyright Act, RSC 1927 c 32 (including amendments to the 1921 statute made by the 1923 Copyright Amendment Act)***
- s.5 [“Term of Copyright”] The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death. ((no proviso)
 - [The special 1921 term for photographs was continued, now as s 9]

What was the general term prior to 1921?

An Respecting Copyrights, RSC 1906, c 70, s 4:

“term of 28 years, from the time of recording the copyright thereof in the manner hereinafter directed”

How was the change received when “subsist ...[for] the life of the author and ... 50 years” was enacted?

Since the passing of the English Copyright Act of 1911... which the [1921] Canadian Act follows closely, it is necessary to revise one's ideas of what copyright means and how it is secured. ... Copyright ...is a proprietary right which arises from authorship alone. It is sometimes called “automatic copyright,” for without any act beyond the creation of a ... work it is acquired by the author.

Gribble v Manitoba Free Press Co, 1931, Man CA (per Dennistoun JA, concurring in the result with Prendergast, CJ and Robson JA; Trueman JA dissenting) at para 38:

However, there is one explicit provision that might be thought to be relevant if cited in support of the proposition that, after the 2012 amendments, NOT ALL photos in Canada enjoy “life +50”:

Copyright Modernization Act s 59(1) (“Transitional Provision” not reproduced in the current *Copyright Act*):

The repeal of s 10 of the *Copyright Act* by s 6 [of the *Copyright Modernization Act*: “s 10 ... is repealed”] does not have the effect of reviving copyright in any photograph in which, on the coming into force of that s 6, copyright had expired.

But, looking closely at CMA s 59 (1), what is the term of copyright protection on photographs if s 10 is removed?

10(1) Where the owner referred to in ss (2) is a corporation, the term of which copyright subsists in a photograph shall be... fifty years.

10 (1.1) Where the owner is a corporation, the majority...owned by a natural person who would have been ... the author... except for ss (2), the term ... is the term set out in s 6.

10(2) [Defines authors, including corporations as authors.]

When s 10 is gone:

- corporations are not authors of photographs [s 10(2) is gone], only individuals are –individuals’ rights subsist in works not under s 10 but under s 6...
- once corporations are not authors of photographs (which relied on s 10(2)), then it follows that s 10(1) giving corporate “authors” only 50 years protection has no effect (and it was, indeed, also repealed)
- if no sized corporation can be an “author” (s 10(2) is gone), then s 10(1.1) giving small, individually controlled corporations protection under s 6 (life + 50) rather than s 10(1)(50 years) is unnecessary (and indeed, s 10(1.1) was also repealed) BECAUSE – **ALL** photographers are **authors** covered by s 6.

And if Parliamentary intent is not necessarily enough to determine the meaning of a statute ...

- And nor is the Government's official Summary affixed to the *Copyright Modernization Act*, which states
 This enactment amends the *Copyright Act* to...
 (f) given photographers the same rights as other creators
- The *Interpretation Act*, RSC 1985, c I-21, states in s 13
 Preamble – the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object
- And, the Preamble to the CMA 2012 says
 ... copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms
- And, Canada has now signed the *WIPO Copyright Treaty*
 - Article 9 states that there is no shortened term for copyright in photographs
 - Thus Article 7(1) of *Berne*, life of the author plus 50 years, governs...

Then when did the sections Vaver was writing about before 2012 come into effect and mean?

- Special terms of protection for photographs:
 - s 7 SC 1921 – 50 years from making
 - s 9 RSC 1927 – 50 years from making
 - s 10, SC 1993, c 44, s 58, -- 50 years from making
 - S 10, SC 1997, c 24, s7 (from Jan 1, 1998-Nov 6, 2012)
 - s 10 (1), if the initial owner was a [large] corporation of a photo, it had only 50 years protection;
 - s 10 (1.1), if the initial owner was a [small, individual-dominated] corporation it had protection of the life of the individual "at the heart" of the corporation as per s 6.
 - NOTE, if owner of photo at its creation was an individual, that person received the term of protection under s 6 (life + 50 years)

David Vaver's example, paraphrased from *Intellectual Property Law: Copyrights, Patents, Trade-marks* 2nd ed (Toronto: Irwin Law, 2011) 146.

- Yousuf Karsh took a photographic portrait of Winston Churchill in 1941
- Copyright protection expired in 1992
- Karsh was still alive on January 1, 1999
- Vaver argued s.54.1 of 1997 Act prevented Karsh from “recapturing” copyright protection in that photo...

But actually Karsh had copyright in all his *oeuvre*, all his photos, because s 6 “life + 50” applied to him after 1999 (through the 1997 statute)

An Act to Amend the Copyright Act, SC 1997, c 24, s 54.1 specifically states:

s 6 of the Copyright Act applies to a photograph in which copyright subsists on the date of the coming into force of this section, if the author is

- (a) a natural person who is the author of the photograph referred to in subsection 10(2).... [if Karsh was conducting his studio as a sole proprietorship]; or
- (b) the natural person referred to in subsection 10(1.1) ... [if Karsh operated his studio as a closely held corporation and not as a sole proprietor]

And thus **all** of Karsh’s work would be protected for his lifetime plus 50 years – Karsh died July 13, 2002 and his work will be in copyright, therefore, until December 31, 2053...

So the actual answer about the period of protection for photographs after Nov 7, 2012 is no more complex than it is for any other work in Canada:

- **ALL photographs are in copyright in Canada if the photographers are living... AND**
- **ALL photographs are in copyright in Canada if their authors have died within the past 50 calendar years...**
- **NO photographs are in copyright if the photographers died more than 50 years before December 31 of this year, 2015.**