

Copyright Analysis Tools

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Introduction

Purpose

This document provides tools for copyright analysis at the item level. It is presented in the form of a table with entries for specific types of materials. For each type, there are separate for columns for:

- Rules relating to ownership.
- Rules for calculating the term of protection.
- Considerations for risk assessment.

The risk assessments should be supplemented with the general considerations contained in the *Copyright Risk Assessment Criteria* (STN-8). The present document only highlights specific considerations that are relevant to a particular type of material.

"Risk" is understood in terms of the likelihood that online dissemination of materials without the permission of the copyright owner would lead to claims of copyright infringement or expose the university to liability or other damage.

- The Archives may disseminate *low-risk materials* without seeking the permission of the copyright owner.
- For *high-risk materials*, the Archives will seek the copyright owner's permission before disseminating.

When to use these tools

The Archives' workflow assumes most archival materials are original works (therefore subject to copyright protection) but low-risk. The *Copyright Analysis Tools* can be used to assess materials that have been identified in fonds-, series- or file-level copyright reviews as possible exceptions – i.e. materials that are potentially high risk.

The tools can also be used for assessing originality, determining copyright ownership, and calculating the term of protection as need arises in particular situations, e.g. the Archives wants to calculate a copyright expiry date or determine who is the owner of a high-risk work in order to seek permission to disseminate.

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Advertisements and commercials

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Definitions and application

Art and Architectural Thesaurus – Advertisements

"Public notices or paid announcements, especially those in print. For announcements paid for by an advertiser and broadcast on radio or television, use *commercials*."

In the Archives' holdings, third-party protected advertisements are typically found included in [collective works](#) like newspapers or yearbooks; commercials may be included in copies of [broadcasts](#) found in a fonds. For copyright purposes, advertisements are likely to fall under the category of [artistic works](#); while the content of a commercial would likely to be a literary or [dramatic work](#). Note that advertisements and commercials may themselves contain other protected works that were licensed for use in the ad or commercial (e.g. [photograph](#), music).

Ownership

Unless there is evidence suggesting otherwise, assume an advertisement / commercial is produced professionally by an advertising agency as a commissioned work produced for a client firm.

As a [commissioned work](#), owner = creator of the advertisement or commercial unless there is an agreement stating otherwise.

It will be difficult to know whether the ad or commercial was created by an employee as a [work made in the course of employment](#) (owner = the company rather than the individual employee) or as a contractor who retained ownership. Absent evidence, assume owner = advertising firm.

Duration

Unless a more specific rule applies, use general rule: term of protection = life + 50 (year in which creator of the work died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is typically *low-risk* because the works were created for a specific time and place and have little commercial value outside of that context with the passage of time; they are not typically commercially available elsewhere.

Considerations supporting high-risk assessment:

- Work has become a well-known artistic, literary or dramatic work in its own right.
- Work was created by well-known artist or director.
- Advertising agency can be identified and is known to make its archives available as a commercial service.
- The firm for whom the work was made is a high-profile company (may have retained copyright) and is known to actively defend its copyright.

Considerations supporting low-risk assessment::

- Work is being disseminated as part of a collective work rather than on its own.
- Advertising agency cannot be identified.

- Firm advertised is not a high-profile company.

Sources

Lisa P. Ramsay, "Intellectual Property in Advertising," *Michigan Telecommunications and Technology Law Review*, vol 12 (Spring 2006): pp. 205-206 (re: ownership in US context).

Architectural and technical drawings[Back to index](#)**Definitions and application***Art and Architectural Thesaurus* – **Architectural drawings**

"Drawings of architecture and drawings for architectural projects, whether the project was executed or not. The term may also refer to any image in a two-dimensional medium that serves this same purpose, including prints and computer images."

Rules for Archival Description – Glossary, **Architectural drawings**

"Graphic delineations made for the design and construction (or documentation of design and construction) of sites, structures, details, fixtures, furnishings, and decorations, as well as other objects designed by an architect or architectural office."

Rules for Archival Description – Glossary, **Technical drawings**

"Graphic delineations made for the design and construction (or documentation of design and construction) of civil, hydraulic, mechanical, and other engineering works or structural components."

The Archives holds a number of fonds from architects associated with the construction of SFU. As well, third-party protected architectural and technical drawings may be included in an organization's files relating to its facilities.

Ownership

Unless there is evidence suggesting otherwise, assume the works were produced professionally by an architectural firm as a commissioned work produced for a client.

As a [commissioned work](#), owner = creator of the drawing unless there is an agreement stating otherwise.

Absent evidence, assume the drawing was created by an architect working as an employee in the firm, therefore as a [work made in the course of employment](#) (owner = the company rather than the individual employee).

Duration

Use general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is typically *low-risk* because the works have little independent commercial value once the structure depicted has been built.

Considerations supporting high-risk assessment:

- Author is a prominent architect for whom there is a market in his or her unpublished materials or ephemera.

Sources

College Art Association, *Code of Best Practices in Fair Use for the Visual Arts* (February 2015), re: risk assessment.

Articles[Back to index](#)**Definitions and application***Art and Architectural Thesaurus* – **Articles**

"Literary compositions prepared for publication as an independent portion of a magazine, newspaper, encyclopedia, or other work."

Articles are typically part of [collective works](#) (e.g. newspapers, journals, magazines). In the Archives' holdings, third-party protected articles are sometimes included as copies in the fonds creator's subject and reference files.

Ownership

If author was a staff employee, owner = periodical unless an agreement stating otherwise.

If author was a freelancer, owner = author unless agreement stating otherwise.

Practice for academic journals varies, assignment of copyright to journal not uncommon; check journal's website for policy.

Absent evidence, assume:

- Newspaper: owner = periodical.
- Magazine: owner = author.
- Academic journal: owner = periodical.

See the tool for [Employment relationship](#) for guidance in determining whether the author is staff or freelance.

Note that where author is staff and the copyright owner is the periodical, the author still has the right to prohibit publication outside of a newspaper, magazine or similar periodical (unless there is an agreement stating otherwise).

Duration

Use general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is typically *high-risk* because articles were publications included in collective work that circulated for commercial purpose.

Considerations supporting high-risk assessment:

- Periodical still active.
- Periodical makes past content available as commercial service.
- Periodical defunct but widely available (e.g. libraries).

Considerations supporting low risk:

- Periodical defunct, back issues not readily available.
- Article is a short, unattributed (no author) piece of news reporting (e.g. press clipping).

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 109-110 (re: ownership).

Artistic works[Back to index](#)**Definitions and application***Canada Copyright Act* – section 2

"*artistic work* includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works."

Harris, *Canadian Copyright Law*

"The term artistic work is a generic term applying to works in a 'visual medium'" (p. 86).

Artistic works represents one of the main categories of materials protected by Canada's *Copyright Act*. The term is not used in RAD or AAT. Translated into RAD's GMD terms, artistic works include graphic materials, architectural drawings and cartographic materials. In the Archives' holdings, third-party protected artistic works are typically found among materials that the fonds creator collected or copied. See also the analysis tool for [Architectural drawings](#).

Ownership

Unless a more specific rule applies, use the general rule: owner = author (artist).

Cases where more specific rules may apply:

- [Commissioned works](#)
- [Photographs](#)
- [Works made in the course of employment](#)

Absent evidence, assume owner = artist.

Duration

Unless a more specific rule applies, use general rule: term of protection = life + 50 (year in which artist died + remainder of calendar year + 50 years).

Cases where more specific rules may apply:

- [Photographs](#)

Risk assessment

Assess on case-by-case basis. The greater the creative originality of the work, the higher the risk.

Considerations supporting high-risk assessment:

- Work was published or exhibited.
- Work was created with intent to publish or exhibit or sell.
- Work is by a prominent artist.
- Work is available elsewhere (especially high-risk if available on commercial basis).

Considerations supporting low-risk assessment::

- Work was not created for commercial or professional purposes by someone who is not primarily identified as an artist, and work is unique and not available elsewhere.
- Work is disseminated as part of a collective work

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 82 (definition), pp. 86–87 (re: ownership).

College Art Association, *Code of Best Practices in Fair Use for the Visual Arts* (February 2015), re: risk assessment.

Author / owner risk considerations[Back to index](#)

The author of a work and the copyright owner can be different. The author (creator) of a work is typically the first owner of copyright, but contractual arrangements may assign copyright to someone else. With some types of material, it is not straightforward who counts as the "author" or creator. And for [Works made in the course of employment](#), the employer rather than the author is the default owner unless there is an agreement which states otherwise.

Risk considerations

Answer "Yes" to one of the following questions = high-risk

1. Is the author a prominent public figure for whom there a market in his or her unpublished materials or ephemera?
2. Is the copyright owner known to actively defend their copyright?
3. Does the Archives or the university have a relationship with either the author or the owner which could be damaged by disseminating the work online without the owner's permission?
4. Is the author or owner a prominent figure in a community which with the university has a relationship such that disseminating the work online without the owner's permission could damage the university's reputation within that community?

Books[Back to index](#)**Definitions and application***Art and Architectural Thesaurus* – **Books**

"Items comprising a collection of leaves of paper, parchment, wood, stiffened textile, ivory, metal tablets, or other flat material, that are blank, written on, or printed, and are strung or bound together in a volume."

Art and Architectural Thesaurus – **Trade books**

"Books produced by commercial publishers for sale to the general public primarily through bookstores, as distinguished from a textbook edition, subscription book, or a book meant for a limited public because of its technical nature, specialized appeal, or high price."

The key idea for the Archives' purposes is that a book is a *publication* produced for sale, whether mass market, trade, monograph or textbook. The Archives has relatively few books in its holdings. The Press Gang Publishers fonds (F-184) includes a copy of all books Press Gang published.

Ownership

Typically the author retains copyright and licenses the work to the publisher. But there may be an agreement assigning copyright to the publisher.

Absent evidence, assume owner = author.

Duration

Use the general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is *high-risk* because books are publication that previously circulated for commercial purposes.

As a rule, do not disseminate without getting the copyright owner's permission. Generally it is better to make available only a portion of the work (e.g. table of contents plus introduction). This allows researchers to determine whether the work is relevant to their research and if so, to request a single copy for delivery outside the online access system.

There is really only one foreseeable use case for a low-risk assessment for online dissemination:

- Work is out of print and publisher is defunct and author cannot be located.

Even here (depending on the nature of the work or who the author is), the Archives may decide against dissemination of the entire work.

Books are also the one main exception to the

Archives' general policy of providing on request single copies of entire works for single researchers for a research purpose. In assessing requests for single copies, the Archives should only agree to provide a copy of the entire book if it is not commercially available elsewhere and not routinely available in libraries.

Sources

World Intellectual Property Organization (WIPO), *Managing Intellectual Property in the Book Publishing Industry - Creative industries - Booklet no. 1* (Geneva: WIPO, n.d.), p. 8 (re: typical practices for retention or assignment of copyright).

Broadcasts[Back to index](#)**Definitions and application***Art and Architectural Thesaurus – Broadcasts*

"Transmissions of signals, usually taking the form of programs consisting of images and sound, made public by means of television or radio."

Broadcasts also include programs disseminated over the Internet only (podcasts). In the Archives' holdings, third-party protected broadcasts are sometimes found as copies of sound recordings made or acquired by a fonds creator for reference or research purposes. For copyright purpose, broadcasts are "communication signals." Note that the content of the programs broadcast may include works that are separately protected as musical, dramatic or literary works, or as a performer's performance.

Ownership*Communication signal*

Owner = broadcaster who broadcast the signal.

The definition of "broadcaster" excludes bodies whose primary activity is retransmission of communication signals originating from others.

Content of broadcast

Apply the category most appropriate to the type of work.

Duration*Communication signal*

Year in which communication signal was broadcast + remainder of calendar year + 50 years.

Content of broadcast

Apply the category most appropriate to the type of work.

Risk assessment

Dissemination without permission is typically *high-risk* because broadcast signals are the primary product of bodies that create them with commercial intent; similarly the content (program) broadcast often has ongoing commercial value for the copyright owners.

Considerations supporting high-risk assessment:

- Signals were broadcast by a body that is still active.

Considerations supporting low-risk assessment::

- Signals were broadcast by a body that is defunct and it is reasonable to think that the program broadcast has no ongoing commercial value.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 119 (re: ownership), p. 133 (re: duration).

Commissioned works[Back to index](#)**Definitions and application***Art and Architectural Thesaurus – Commissions*

"Orders or authorizations, often including a contract, for the production of a thing, performance, written work, or other such activity."

Any type of material can be commissioned. The fact of its being commissioned mainly affects identification of ownership, rather than calculation of duration or assessment of risk. Commissioned works may be included in the fonds of the commissioner.

Ownership

Author (creator) of the work is typically the owner unless there is an agreement stating otherwise.

If commissioned work is a [Work created in the course of employment](#), owner = employer, unless there is an agreement stating otherwise.

Rules are different for commissioned photographs or portraits created before Nov 7, 2012.

- Owner = commissioner not the creator.
- Test for determining whether work was "commissioned": work was created on the order of the commissioner and commissioner provided a valuable consideration (money, services).

For commissioned photos and portraits created on or after Nov 7, 2012, owner = creator unless there is an agreement stating otherwise.

- But the commissioner has a right to use the work (or authorize its use) for non-commercial purposes.

Duration

Use general rule: term of protection = life + 50 (year in which author / creator died + remainder of calendar year + 50 years).

Risk assessment

Use the analysis tool appropriate to the type of material the work represents.

The fact that the work was commissioned may indicate that it has an independent commercial value (and supports an assessment of *high-risk*). But this is not always the case, e.g. a commissioned report may have no commercial value for anyone except the organization who commissioned it

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 113 (re: ownership).

Correspondence[Back to index](#)**Definitions and application***Art and Architectural Thesaurus* – **Correspondence**

"Any forms of addressed and written communication sent and received, including letters, postcards, memorandums, notes, telegrams, or cables."

In terms of the *Copyright Act*, correspondence represents a *literary work*. In terms of RAD GMDs, correspondence falls under *textual records*. Correspondence makes up the bulk of the records in a typical fonds. In any given fonds, most of the incoming correspondence (records received) will be third-party protected works.

Ownership

Unless a more specific rule applies, use the general rule: owner = author.

The main exception relates to business correspondence authored by employees in the course of the work. These are [works made in the course of employment](#), owner = employer.

Duration

Use the general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is typically *low-risk* because most correspondence was not created for a commercial purpose, was not intended for publication and commercial circulation, and has little independent commercial value.

Considerations supporting high-risk assessment (exceptions):

- Author is a prominent individual for whom there is a market in his or her unpublished materials and associated ephemera.
- Business correspondence includes commercially proprietary information.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 106 (re: ownership).

Crown works[Back to index](#)**Definitions and application**

Crown works are protected materials where copyright is owned by a government. Harris (*Canadian Copyright Law*) uses the terms "Crown work" or "Government material" interchangeably and defines it as "any work [that] is, or has been, prepared or published by or under the direction or control of any government department" (p. 116).

Rules for the federal government and for each provincial government can be different. "Generally, the works of municipal governments are not considered Crown works because municipal governments are not emanations of the Crown" (Harris, p. 92). The Archives' holdings includes Crown works in correspondence received by fonds creators from government departments and agencies.

Ownership

Apply test of whether work has been "prepared or published under the direction or control of any government department."

Duration

Term of protection = year of publication + 50 (year in which work was published + remainder of calendar year + 50 years).

Unpublished works have perpetual copyright.

Meaning of "publication" not entirely clear, but see Harris' comment in another context: "In copyright parlance, 'published' is a broader concept that includes making copies the work available to the public in quantities that satisfy the reasonable demands of the public, taking into account the nature of the work in question" (*Canadian Copyright Law*, p. 125).

Risk assessment

Crown works owned by the federal government can be reproduced in whole or in part without permission if for personal or public non-commercial purposes; reproduction must be exact.

Rules for provincially owned Crown works varies by province. For BC materials, see BC government's *Core Policy and Procedures Manual*, section 6.3.4.e "Crown copyright": third party reproduction requires permission.

Considerations supporting high-risk assessment:

- Work is a provincial publication.

Considerations supporting low-risk assessment:

- Work is a federal crown work.
- Work is a provincial crown work that is not a publication (e.g. [correspondence](#)).

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 92 (definition), pp. 116–117 (re: ownership), p. 131 (duration), pp. 270–272 (use).

Dramatic works[Back to index](#)**Definitions and application**

Copyright Act – section 2, Definitions

"*dramatic work* includes ... any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise."

Harris (*Canadian Copyright Law*, 4th ed.) – p. 81

"In order for a work to be considered a dramatic work, there must be some dramatic action. These elements need to be 'fixed' in some form in which the dramatic elements are recognized."

In the Archives' holdings, third-party protected dramatic works are typically found as scripts sometimes included in files. The Archives has a large run of student films, the production files for which (series F-109-14-2-2) may include scripts.

Ownership

Unless a more specific rule applies, use the general rule: owner = author.

Duration

Use the general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Assess dramatic works on a case-by-case basis.

Considerations supporting high-risk assessment:

- Work is commercially available elsewhere (e.g. in a publication).
- Work was created by a prominent playwright.

Considerations supporting low-risk assessment::

- Work is unique and not commercially available elsewhere.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 81 (re: definition), .

Grey literature

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Definitions and application

Art and Architectural Thesaurus – **term**

"Unpublished works, including documents not formally published or commercially available, including reports, internal organizational paperwork, or theses."

In terms of the *Copyright Act*, most grey literature represent *literary works*. In terms of RAD GMDs, grey literature falls under *textual records*. Grey literature are materials that were not formally published, but are distinguished from correspondence and other business records in that grey literature was typically intended for distribution to a wider audience than a single addressee (e.g. members of a committee or organization). In the Archives' holdings, third-party protected grey literature will be found among the records received by the fonds creator.

Ownership

Unless a more specific rule applies, use the general rule: owner = author.

Cases where more specific rules may apply:

- [Commissioned works](#)
- [Works made in the course of employment](#)

Duration

Use the general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Risk assessment

Dissemination without permission is typically *low-risk* because grey literature was not normally created for a commercial purpose, is not commercially available elsewhere, and has little independent commercial value.

Considerations supporting high-risk assessment (exceptions):

- Work contains commercial, proprietary information.
- There is evidence that the author deliberately intended to control dissemination (e.g. work carries a statement requiring permission to re-use).
- Work is a formal "Working paper" – "pre-published" document circulated for feedback prior to publication.

Sources

n/a

Joint vs. collective works[Back to index](#)**Definitions and application**

The *Copyright Act* distinguishes between *works of joint ownership* and *collective works*.

Canada *Copyright Act* – section 2

"*work of joint authorship* means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors."

"*collective work* means ... (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated."

In both cases, there are multiple authors involved. But a joint work has a single copyright that is shared by multiple authors. With a collective work, there are multiple copyrights, one for the work as a whole and separate copyrights for each part of the work.

In the Archives holdings, collective works often fall under [Grey literature](#). Examples include scrapbooks or yearbooks.

Ownership

The key question is whether or not the contribution of one author is distinct, can be separated, from the contributor of another.

If the contributions are not distinct, work is *joint work* and there is only one copyright shared by the authors.

If the contributions are distinct, work is a *collective work*.

- The person responsible for assembling or compiling the parts is the owner of the work as a whole.
- Each distinct part is a work onto itself owned by the author of that part.

Duration

Joint work:

Apply the general rule to life of the last surviving author: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Collective work:

Apply the general rule (life + 50) to work as a whole and to each part.

Note that different parts will come into public domain at different times; and that the work as a whole may come into public domain, but some parts still be protected (and vice versa).

Risk assessment

For *joint works* and *collective works* considered as a whole, use the analysis tool appropriate to the type of material the work represents.

When assessing dissemination of a *collective works*, consider also risk relating to the parts.

Considerations supporting high-risk assessment:

- Author of the part was paid to contribute the part.
- The part is a substantial work in itself representing a high degree of literary, artistic or professional skill and judgment.
- It is reasonable to think that the part could circulate on its own (independently of the other parts) for commercial purposes.

Considerations supporting low-risk assessment::

- Part cannot be linked to an identifiable author (orphan work).
- It is reasonable to think that the part has no independent commercial value.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 93-97 (definitions), pp. 110-112 (ownership), pp. 129-130 (duration).

Moving images

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Definitions and application

Rules for Archival Description – Glossary, **Moving images**

"Visual images, with or without sound, recorded on any medium, which, when viewed, may present the illusion of motion."

Art and Architectural Thesaurus – **Moving images**

"Visual works in which the image, by an optical trick, appears to be in motion. Media for moving images include motion pictures, video recordings, flip books, and some optical toys such as zoetropes."

Note that moving images are referenced in the *Copyright Act* as "cinematographic works" and in Harris' *Canadian Copyright Law* (4th ed.) as "audiovisual materials." The bulk of the Archives' non-SFU protected moving images are student productions included in fonds F-109 (School of Contemporary Arts).

Ownership

Ownership rules are complicated because the *Copyright Act* distinguishes between cinematographs that have or do not have an "original character."

Moreover, Harris notes that the identification of the "author" of a moving image is controversial: arguments have been made for the producer, the director or the screenwriter, and there is no settled Canadian case law on the issue.

Scripted work (has an original character):

Acting and arrangement of incidents follows a script, work typically overseen by a director, work is subject to editing.

Owner = maker of the work (i.e. person by whom the arrangements necessary for the making of the work were undertaken)

Unscripted work (does not have an original character):

No script, little editing, improvised, no control over dramatic events (e.g. home videos).

Made before Jan 1, 1994 – Owner = owner of the medium of fixation (negative or magnetic tape).

Duration

There is a different term of protection depending on whether the work is considered to have an "original character" or not – i.e. whether it is a scripted or unscripted work.

Scripted work (has an original character):

Term of protection = life of maker + 50 (year in which maker died + remainder of calendar year + 50 years).

"Maker" = person by whom the arrangements necessary for the making of the work were undertaken).

Unscripted work (does not have an original character):

Made before Jan 1, 1944 = public domain (term expired 50 years after date of making).

Made on or after Jan 1, 1944 and published or made available to the public within 50 years from the end of the year in which it was made = End of the year work was published or made available to the public + 50 years

Made on or after Jan 1, 1944 and NOT published or made available to the public within 50 years from the

Risk assessment

Dissemination of scripted works without permission is typically high-risk because these were typically created with commercial intent. For non-scripted works, key consideration is whether work was professional produced with commercial intent.

Considerations supporting high-risk assessment:

- Work was distributed commercially
- Work was produced with commercial intent.
- Work was scripted.
- Work was made by professional film-maker.

Considerations supporting low-risk assessment::

- Works was non-scripted and created for personal use by individual who did identify as a film-maker (e.g. home movies, vacation videos, footage created with digital camera or phone).

Made on or after Jan 1, 1994 and producer / director was an employee of a production company – Owner = production company. end of the year in which it was made = End of the year work was made + 50 years

Made on or after Jan 1, 1994 and producer / director was NOT an employee of a production company – Owner = maker of the work (i.e. person by whom the arrangements necessary for the making of the work were undertaken).

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 82–83 (definition), pp. 107–108 (ownership rules), pp. 128–129 (duration).

Originality[Back to index](#)

Under Canada's *Copyright Act*, works attract copyright protection only if they are "original." The meaning of originality was clarified by the Supreme Court in its 2004 *CCH Canadian Ltd. v. Law Society of Upper Canada* decision. "For a work to be 'original' within the meaning of the *Copyright Act*," the Court stated, "it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment" (CCH, para 16).

Note that the requirement of originality applies only to works (literary, dramatic, musical or artistic works), but not to "other subject-matter" (sound recordings, performer's performances, communication) that are also protected by copyright. Use the following guidelines for works only.

- Most archival records will meet the test for originality.
- Assume archival materials are original and look for exceptions (non-originals).
- Non-original works are not protected by copyright and can be disseminated online without requiring any permissions.
- Assess borderline instances case-by-case; if in doubt, it is better to assume works are original – these will typically be low-risk and therefore can be disseminated without requiring permissions.

Update the following lists as new examples come to light.

Not original

Criteria:

- Item only states facts.
- Item was prepared through a routine application of factual knowledge readily available.

Examples:

- Registers of factual information
- Meeting agenda
- Lists
- Announcements
- Completed forms giving routine factual information
- Fax transmission sheets
- Database output
- Tabular data
- Notices
- Terms of reference

Borderline

Criteria:

- Content is mainly factual, but required some decision-making in identification, selection and arrangement of facts.

Examples:

- Wide-distribution memo s
- Budgets
- Financial statements
- Statistics

Original

Criteria:

- Preparation required the author to make decisions drawing on professional, literary or artistic skill and judgment.

Examples:

- Correspondence
- Reports
- Publications
- Brochures, pamphlets
- Minutes
- Graphic materials
- Presentations

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 24-26 (re: definition).

Supreme Court of Canada, *CCH Canadian Ltd. v. Law Society of Upper Canada*, para 16 (re: meaning of originality).

Orphan works[Back to index](#)

"The term *orphan works* commonly is employed to refer to items which are presumptively protected by copyright but cannot be confidently traced to particular copyright owners" (*Report on Orphan Works Challenges for libraries, archives, and other memory institutions*, January 2013). Many of the third-party protected works in the Archives' holdings will be orphan works because there will not be enough information in the record to confidently identify the owner or, if identified, to enable the owner to be located.

Canada's *Copyright Act* provides for using protected works without the copyright owner's permission if the owner is unlocatable. This requires application to the Canadian Copyright Board, which has the authority to issue a license permitting use. Licenses are issued at the Board's discretion. The unlocatable owner provision, however, only applies to published works (Harris, *Canadian Copyright Law*, 4th ed., p. 274). Because most archival materials are unpublished, the unlocatable owner provision is of limited relevance for archives.

Use the following guidelines when determining whether or not to disseminate third-party protected works that have been identified as high-risk but are orphan works. Risk assessment can vary depending on whether the work is orphaned because (i) the identity of the owner cannot be known; (ii) the identity of the owner is not certain (but there are definite candidates); or (iii) the identity of the owner is known but he or she cannot be located.

Do not use these guidelines to low-risk orphan works – all low-risk materials can be disseminated without seeking permission.

(i) Owner unknown

Work is orphaned because:

- The work was authored anonymously.
- There is no attribution of authorship and there is no contextual evidence for who the owner might be.

Check whether or not the work is in public domain. The rule for term in works of unknown authors is the shorter of:

- Year of publication + 50 years; or
- Year of making + 75 years.

Action:

- Work is low-risk, disseminate without permission.

Examples:

- Work's author is identified as "Anonymous" or by a name that is known to be a pseudonym.
- Document gives no indication of author, there is no contextual evidence that it was a [work made in the course of employment](#).
- There is contextual evidence that the work was made in the course of employment, but it is not known who the employer was.

(ii) Owner uncertain

Work is orphaned because:

- It is reasonably certain that the owner is one of a limited number of possible candidates, but there is not enough information to enable a definitive determination of which of is actually the owner.

Action:

- Attempt to locate possible owners and seek clarification of ownership and permission.
- If no owner can be located, disseminate without permission.
- Document research into ownership and efforts to locate owners.

Example:

- Author was a consultant, but there is no contextual evidence of the contractual arrangements with respect to copyright.

(iii) Owner known, but cannot be located

Work is orphaned because:

- Identity of owner is known with reasonable certainty, but there is not enough information to locate the owner's whereabouts.

Action:

- Document efforts to locate owners.
- Assess on a case-by-case basis whether or not to disseminate.

Examples:

- Correspondence received from third party – identity of owner is known, but cannot be located (low-risk).
- Student film – student owns copyright, identity is known, but cannot be located (high-risk).

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 130 (re: duration of protect for works of unknown authors), pp. 273–278 (re: Copyright Board licensing of works of unlocatable owners).

Jennifer Urban et al, Report on *Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions* (Center for Social Media: January 2013), p. 3 (re: definition).

Photographs

[Back to index](#)

Definitions and application

Oxford English Dictionary – **Photograph**

"A picture or image obtained by photography."

Rules for Archival Description

RAD does not define "photograph" but includes it in the GMD *Graphic materials*. For copyright purposes, however, it is useful to distinguish these.

Art and Architectural Thesaurus

AAT distinguishes "photographs" in the analog sense from "digital images." For copyright purposes, however, it is useful to treat these as the same.

Canada Copyright Act, section 2

"*photograph* includes photo-lithograph and any work expressed by any process analogous to photography."

The *Copyright Act* treats photographs as *artistic works*, but there are special ownership and duration rules that apply to photographs but not other artistic works. Photographs are commonly founded throughout the various fonds in the Archives' holdings; it is often difficult to tell whether they were made or received by the fonds creator, and they are often orphan works.

Ownership

Rules for ownership of photographs changed with the November 2012 revision to the *Copyright Act*, and for photographic works created before that date, the old rules still apply.

Photo created on or after Nov 7, 2012:

- Owner = photographer.
- Exceptions: there is an agreement stating otherwise; photo is a [Work made in the course of employment](#); see also [Commissioned works](#).

Photo created on or after Nov 7, 2012:

- Owner = Person or corp body who owned first negative, plate or print.
- Note that plates and negatives have priority over prints, i.e. if a plate or negative exists, the owner of the first plate or negative is the

Duration

Rules for calculating term of protection for photographs changed with the November 2012 revision to the *Copyright Act*, and there are different rules depending on the date of the photograph.

Photo created on or after Nov 7, 2012:

- Term of protection = life + 50 (year in which photographer died + remainder of calendar year + 50 years).

Photo created before Jan 1, 1962 AND owner was a corporate body:

- Public domain.

Photo created between Jan 1, 1962 and Nov 6, 2012 AND owner was a corporate body:

- Life of the photographer + 50 year

Risk assessment

The key consideration is whether the photos were originally created for a commercial purpose.

Considerations supporting high-risk assessment:

- Photos were created by professional photographer for commercial or artistic purpose.
- Photos were included in a publication (e.g. book, newspaper).
- There is evidence that the photographer intended to control distribution (e.g. stamp on the back).

Considerations supporting low-risk assessment::

- Photos were created for purely personal reasons by individuals who were not professional photographers.

copyright owner; if there are no plates or negatives, the owner of the first print is the copyright owner.

Photo created before Jan 1, 1949 AND owner was a person:

- Public domain.

Photo created between Jan 1, 1949 and Nov 6, 2012 AND owner was a person:

- Life of the photographer + 50.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 106 (re: ownership), pp. 127–128 (re: duration).

Sound recordings[Back to index](#)**Definitions and application***Art and Architectural Thesaurus* – **Sound recording**

"Discs, tapes, filaments, or other media on which sound has been recorded."

Rules for Archival Description – Glossary, **Sound recording**

"A document on which sound has been recorded and may be played back."

Canada *Copyright Act* – s. 2 Interpretation

"*sound recording* means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work."

In the Archives' holdings, sound recordings will typically be owned by the fonds creator. Note that the content of the sound recording may be a separate protected work (dramatic, literary or musical work; a performer's performance; a [Communication signal](#) if it is a copy of a broadcast program).

Ownership

Unless a more specific rule applies, owner = maker of the sound recording.

"Maker" is the "person by whom the arrangements necessary for the first fixation of the sounds are undertaken" (*Copyright Act*, s. 2).

Cases where more specific rules may apply:

- [Works made in the course of employment](#)

Duration

If published within 50 years of fixation: term of protection = year of publication + remainder of calendar year + 50 years.

If NOT published within 50 years of fixation: term of protection = year of fixation + remainder of calendar year + 50 years.

Risk assessment

Determine whether the content of the recording is itself a separate protected work and if so, apply the appropriate analysis tool to it.

Considerations supporting high-risk assessment:

- Sound recording was originally made for a commercial purpose.

Considerations supporting low-risk assessment:

- Sound recording was created for purely personal reasons by an individual in an unscripted context.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), p. 100 (re: definition); pp. 118–119 (re: ownership); pp. 132–133 (re: duration).

Unexploited works[Back to index](#)**Definitions and application**

An unexploited work is a work that was not published, performed in public, or communicated to the public by telecommunication during the lifetime of the author. Formerly, unexploited works were protected "in perpetuity" until published (then protected for 50 years from date of publication). Perpetual copyright in unexploited works is being phased out, so that all works are subject to the same "life + 50 years." But there are transitional rules that apply to creators who died between 1948 and 1998.

- Note that the rules only apply to literary, dramatic and musical works or engravings; they do not apply to other artistic works.

The Archives has made a policy decision to restrict application of the rules for *unexploited works* only to materials that were created with an intent to publish or circulate commercially.

- Do not apply to routine business records, reports, correspondence and transactional records (use the standard "life + 50" rule in these cases).
- Do apply to manuscripts (fiction or non-fiction), screenplays, film scripts, plays and musical scores that were not published during the lifetime of an author who died on or before December 31, 1998.

Ownership

Unless a more specific rule applies, use the general rule: owner = author.

Cases where more specific rules may apply:

- [Commissioned works](#)
- [Works made in the course of employment](#)

Duration

Author died on or after Jan 1, 1999:

- Transitional rules do not apply.
- Apply the current general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Author died on or before Dec 31 1948:

- Works are in public domain (were protected until Dec 31 2003).

Author died between Dec 31, 1948 and Dec 31 1998:

- Transitional rules apply: work protected till Dec 31 2048

Risk assessment

Dissemination without permission is typically *high-risk* because unexploited works were created with an intent to publish or commercial and may retain commercial value to the owner (estate).

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 125-127.

Works made in the course of employment[Back to index](#)**Definitions and application**

There is no formal definition, but see tests under Ownership below.

In an archival context, most records authored by employees will be works made in the course of employment.

Ownership

Owner = employer.

Three criteria must be met:

1. Employee must be employed under a "contract of service."
2. Work must be created in the course of performing this contract.
3. Must not be a contract or provision in a contract stating that the employee owns copyright.

Harris (*Canadian Copyright Law*) sets out a number of factors to consider in determining whether there is an employment relationship.

- Did the employee conceive the work during employment?
- Did the employer give orders to create the specific work?
- Did the employer give orders on how the work was to be done?
- Was the work carried out under the supervision of the employer?
- Did the employer have control over the author's work?
- Was the work created as part of the ordinary duties of the creator?
- Was the work created in the course the employment or employment contract?
- Was the work created during the normal hours of employment?

Duration

Calculate term of protection from the life of the author (employee).

Unless a more specific rule applies, use general rule: term of protection = life + 50 (year in which author died + remainder of calendar year + 50 years).

Cases where more specific rules may apply:

- [Crown works](#)
- [Moving images](#)
- [Photographs](#)
- [Sound recordings](#)

Risk assessment

Use the analysis tool appropriate to the type of material the work represents.

- Was the work created on the employer's premises?
- Was the work created for the business (as opposed to being created for personal use)?
- Is the work closely related to the type of business of the employer?
- Was the work created for the exclusive use of the business?

If the three criteria are met and the answer is "yes" to the majority of these questions, the work was made in the course of employment, owner = employer.

Sources

Lesley Ellen Harris, *Canadian Copyright Law*, 4th ed. (New York: Wiley, 2014), pp. 114-115 (re: ownership).

Document Control

Indexing keywords			
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