

## Copyright in photographs in Canada: Reprise

By Jean Dryden\*

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### Introduction

Margaret Ann Wilkinson, Carolyn Soltau, and Tierney G.B. Deluzio addressed the matter of copyright in photographs in an article published in *Open Shelf*.<sup>1</sup> Wilkinson and Deluzio expressed similar arguments about the term of copyright in photographs in an article in *Canadian Intellectual Property Review*.<sup>2</sup> In both articles, the authors claim that, as a result of the 2012 amendments to Canada's *Copyright Act*, copyright exists in all original photographs in Canada created by living authors or authors who have died within the past 50 years.<sup>3</sup> In contrast, I argue that copyright has expired in a) photos taken before 1949, and b) photos taken before 1962 whose "authors" were deemed to be corporations, as a result of the transitional provisions of the amendments to the Act in 1997 and 2012.<sup>4</sup> In order to address the arguments of Wilkinson and her colleagues in a comprehensive manner, this paper refers to the relevant parts of both articles.

Wilkinson and her colleagues base their argument on three main points: interpretation of the transitional provisions, interpretation of the meaning of "subsist," and Parliament's intention. In

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<sup>1</sup> Margaret Ann Wilkinson, Carolyn Soltau and Tierney G.B. Deluzio, "Copyright in Photographs in Canada Since 2012" *Open Shelf*, 1 December 2015 <http://open-shelf.ca/151201-copyright-photographs/>.

<sup>2</sup> Margaret Ann Wilkinson and Tierney G.B. Deluzio, "The Term of Copyright Protection in Photographs," *Canadian Intellectual Property Review* 31 (2015), 95-109.

<sup>3</sup> Wilkinson et al., "Copyright in Photographs," 2, 6, 10; Wilkinson and Leluzio, "The Term of Copyright Protection in Photographs," 97.

<sup>4</sup> Statutes of Canada (SC) 1997 c24, ss 54.1 and 58; SC 2012 c 20, s 59.

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this article, I present an alternative argument based on a different interpretation of the transitional rules in the 1997 and 2012 amendments, a fuller consideration of statutory interpretation, and further evidence of Parliament's intent.

### **Legislative history**

Before the *Copyright Act* (CA) was amended in 1997, the term of copyright in photos was 50 years from the date of creation. The term of copyright in photos was changed significantly in 1997,<sup>5</sup> when the term became the life of the “author”<sup>6</sup> plus 50 years, provided that the author was a natural person (an individual) or a natural person who was the majority shareholder of a body corporate.<sup>7</sup> Photos whose “authors” were large corporations whose shares were widely held continued to be subject to a term of 50 years from the capture of the image.<sup>8</sup>

Despite this significant change, professional photographers continued to lobby for a change in ownership rules and an end to the bifurcated term rule. Professional photographers achieved their goal in 2012. The *Copyright Modernization Act* (CMA) repealed the special term rule for corporations (and the definition of the author of a photo),<sup>9</sup> and provided that all photos still in copyright at the time the amendments came into force would be protected for the term specified in section 6 of the Act (life of the author plus 50 years).<sup>10</sup>

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<sup>5</sup> SC 1997, c24, s 7. It is noteworthy, however, that this change was not in the bill introduced in Parliament in 1996. (Bill C-32 An Act to Amend the Copyright Act received first reading 25 April 1996). Rather, the amendment was added as a result of the report of the Standing Committee on Canadian Heritage, and an effective lobbying campaign by professional photographers (Bill C-32 An Act to Amend the Copyright Act Reprinted as Amended by the Standing Committee on Canadian Heritage as a Working Copy for the Use of the House of Commons at Report Stage and as reported to the House on December 12, 1996, s 7).

<sup>6</sup> Before 1997, photographs were treated differently from other works, not just regarding the duration of copyright, but also in terms of copyright ownership in that the author of a photograph (and thus the first owner of the copyright) was not necessarily its creator. Until repealed in 2012, s 10(2) of the CA defined the author of a photograph as the person (natural or corporate) who owned the initial negative or plate or (if there were no negative or plate) the initial photograph at the time it was made.

<sup>7</sup> SC 1997, c24, s 7 (which added s 10(1.1) to the Act) and SC 1997, c24, s 54.1 (which stated that the term of copyright in photos whose authors were natural persons is governed by s 6 of the Act, i.e., life of the author plus 50 years).

<sup>8</sup> SC 1997, c24, s 7 (which added s 10(1) to the Act).

<sup>9</sup> SC 2012 c20, s 6.

<sup>10</sup> SC 2012 c20, s 59(2). This section also provides for the copyright terms specified in other sections of the CA that are not based on the life of an individual, e.g., where the author is unknown (ss 6.1 and 6.2), where the rights holder is the Crown (s 12), and where the work protected is a cinematograph without dramatic character (s 11). Except for the latter case, these other term provisions apply to all categories of works (including photographs).

### Transitional provisions

Some of these changes were accomplished by transitional provisions of the amending statutes. These transitional provisions will now be examined in further detail, dealing first with the 1997 amendments. Section 58 provides that nothing in the statute shall be construed as reviving an expired copyright.<sup>11</sup> Section 54.1 covers the term of copyright in photographs that were protected by copyright as of the coming into force of section 54.1 and whose author is a natural person or the natural person who is the majority shareholder of a body corporate. The term of copyright in such photos is governed by section 6 of the Act, which provides that the term of copyright is the life of the author plus 50 years.<sup>12</sup>

Section 54.1 came into force on 1 January 1999.<sup>13</sup> The old term rule (creation plus 50) applied until that date. In other words, copyright in photos taken earlier than 50 years before 1 January 1999 (i.e., before 1 January 1949) had expired and there is nothing in the amendments that has the effect of reviving expired copyrights. Thus, the term rule in section 6 (life of the author plus 50) applies only to photos in which the copyright had not expired before 1 January 1999. This interpretation was widely disseminated at the time by a number of copyright authorities,<sup>14</sup> and generated no controversy.

Turning to the 2012 amendments, the *Copyright Modernization Act* repealed both the special term rule for photos whose deemed author was a corporation and the definition of author for photos.<sup>15</sup> As in 1997, the changes to the protection of photographs were accomplished in part by transitional provisions. Section 59(2) specified that photos would now be subject to the general term rule of life of the author plus 50 years (CA, s 6), or (as appropriate) the particular term rules

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<sup>11</sup> SC 1997 c24, s 58.

<sup>12</sup> SC 1997, c24, s 54.1.

<sup>13</sup> SI/98-45, *Canada Gazette* Part II, v. 132, no.7, p. 1149.

<sup>14</sup> David Vaver, *Copyright Law* (Toronto, 2000), 104-106; Normand Tamaro, *The 2001 Annotated Copyright Act* (Toronto, 2001), 259-60; Lesley Ellen Harris, *Canadian Copyright Law*, 3rd ed. (Toronto, 2001), 99; Wanda Noel, Staff Guide to Copyright: National Archives of Canada (Ottawa, 1999), 27, 109-110. Bob Tarantino includes this interpretation in his commentary on the 2012 amendments ("Canada's New Photography Copyright Regime: Clearance Challenges, 2012 (<http://www.entertainmentmedialawsignal.com/?s=copyright+photographs>)).

<sup>15</sup> SC 2012 c20, s 6.

for anonymous works (ss 6.1 and 6.2), works of joint authorship (s 9), or Crown works (s 12).<sup>16</sup> As well, Section 59(3) affirmed that, despite the repeal of s 10, where an individual had been deemed to be the author of a photograph (because that individual owned the majority of shares in the incorporated photographic enterprise in accordance with s 10(2)), that individual would continue to be the author of that photograph.<sup>17</sup>

More significantly for this discussion, another transitional provision addresses the matter of copyright expiry, stating that:

“The repeal of section 10 of the Copyright Act by section 6 [of the *Copyright Modernization Act*] does not have the effect of reviving copyright in any photograph in which, on the coming into force of that section 6, copyright had expired.”<sup>18</sup>

The provisions pertaining to photographs came into force on 7 November 2012.<sup>19</sup> Before section 10 was repealed, copyright in a photo whose deemed author was a corporation expired 50 years after it was made. Thus photos taken in 1961 entered the public domain at the end of 2011. Had the law not changed, copyright in photos taken in 1962 would have expired at the end of 2012; however because the life plus 50 term rule applies only to photos in which the copyright had not expired as of 7 November 2012, photos taken in 1962 whose deemed authors were corporations are now subject to the term specified in section 6. However, the change does not revive a copyright where the copyright had expired. Thus, copyright in photos of corporate authorship taken in 1961 or before has expired.

To support their claim, Wilkinson and her colleagues cite *Rizzo and Rizzo Shoes Ltd*,<sup>20</sup> which states that if there is doubt arising from “difficulties of the language,” it should be resolved in favour of the claimant (in this case the claimants are presumably the photographers, whose

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<sup>16</sup> SC 2012 c20, s 59(2).

<sup>17</sup> SC 2012 c20, s 59(3).

<sup>18</sup> SC 2012 c 20, s 59(1).

<sup>19</sup> SI2012-85, *Canada Gazette* Part II, v. 146, no.23, p. 2449.

<sup>20</sup> *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, para 36.

expired copyrights should be revived).<sup>21</sup> However, in light of the foregoing discussion of the transitional rules, it is not evident that there are any “difficulties of the language.” The transitional provisions are quite clear.

Furthermore, if the government had wanted to make a particular aspect of the amendments apply to photos in which the copyright had already expired, they would have said so. See, for example, the transitional provisions of the *North American Free Trade Agreement Implementation Act*,<sup>22</sup> which said, “subject to subsection 75(2) of this Act, section 10 of the *Copyright Act*, as enacted by subsection (1) of this section, applies to all photographs, whether made before or after the coming into force of this section.”<sup>23</sup> Subsection 75 reads as follows:

- (1) subject to subsection (2), amendments to the *Copyright Act* made by this Act relating to the term of copyright apply in respect of all works, whether made before or after the coming into force of this section.
- (2) Where the term of the copyright in a work expires before the coming into force of this section, nothing in this Act shall be construed as extending or reviving that term.<sup>24</sup>

In this case, the term rules did not change, so a term of creation plus 50 continued to apply to all photos whenever they were created. However, it is significant that these earlier amendments included an explicit provision that no expired copyrights were revived.

### **Statutory interpretation**

Further support for my interpretation of the transitional rules can be found in the *Interpretation Act*.<sup>25</sup> The authors suggest that the only provisions that apply to the term of copyright protection

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<sup>21</sup> Wilkinson et al., “Copyright in Photographs,” 7 n39; Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 101.

<sup>22</sup> *North American Free Trade Agreement Implementation Act*, SC 1993, c 44. This Act included amendments to many Canadian statutes. The amendments to the CA are found in sections 52-80. Although the CA underwent certain editorial changes, the same ownership and term rules for photos continued to apply.

<sup>23</sup> SC 1993, c 44, s 60(2).

<sup>24</sup> SC 1993, c 44, s 75.

<sup>25</sup> Interpretation Act, RSC, 1985 c I-21.

for photographs are the provisions in the *Copyright Act* itself,<sup>26</sup> and that the transitional provisions somehow do not count. Why would the transitional rules exist if they did not mean exactly what they said, i.e., that the change in term rules did not have the effect of reviving an expired copyright? Indeed, the *Interpretation Act* states: “An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.”<sup>27</sup>

In support of their argument that term rules count only if they appear in the CA itself, Wilkinson and Deluzio refer to another 1997 amendment that changed the term rules for posthumous (PH) works.<sup>28</sup> PH works are works that were not published, communicated to the public, or performed in public during the author’s lifetime.<sup>29</sup> Before the amendments, PH works were protected until 50 years from first publication, communication, or performance. The amendments provided that PH works would be subject to the same term rules as all other works, regardless of whether the work had been published, communicated, or performed during the author’s lifetime. The changes to the term of PH works were added to the CA itself (and not through transitional provisions).<sup>30</sup>

However, the fact that changes to the term of PH works were included in the text of the CA itself, and changes to the term of photographs were not, is not (as Wilkinson and Deluzio suggest) evidence that the government intended to restore expired copyrights in photographs. The difference in approach reflects two different situations. With regard to PH works, rights holders had full control over when publication/performance/communication took place, triggering the copyright term. A phased-in approach was required to give those rights holders a transition period in which to exploit their work before the copyright expired.

Photographers, on the other hand, were accustomed to copyright expiring annually 50 years after the image had been created. There was no need to give them a period in which to exploit their

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<sup>26</sup> Wilkinson et al., “Copyright in Photographs,” 6-7; Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 98, 101, 102-5.

<sup>27</sup> Interpretation Act, c I-21, s 42 (3).

<sup>28</sup> Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 102-3.

<sup>29</sup> CA, s 7.

<sup>30</sup> CA, s 7(3) and (4).

work before the copyright expired, and I can find no evidence that the photographers' submissions to the Standing Committee on Canadian Heritage asked to have expired copyrights restored or the new term rules applied retroactively. There was no need to "phase in" the term change for photographs.

Wilkinson and her colleagues do not address other principles of interpretation. The *Interpretation Act* also states, "Where an enactment is repealed in whole or in part, the repeal does not (a) revive any enactment or anything not in force or existing [e.g., expired copyright] at the time when the repeal takes effect."<sup>31</sup> Furthermore, in drafting amending legislation, it is important to indicate whether the changes are retroactive, or to apply from the time the amendments come into force. Gerald Gall, in his list of the principles of statutory interpretation, includes the Presumption Against Retroactivity, citing *Maxwell* in support of this presumption, "It is a fundamental rule of ... law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."<sup>32</sup> This is supported by Ruth Sullivan, "It is strongly presumed that legislation is not meant to be applied to facts that were already past when the legislation came into force."<sup>33</sup>

### **Parliament's intent**

As Wilkinson and her colleagues state, it is well-established that, when interpreting statutes, courts may look to evidence of the intention of the legislature.<sup>34</sup> Wilkinson and her colleagues cite various interventions by legislators during the progress of Bill C-11 (the CMA) through Parliament, stating that the amendments would mean that photographers would be subject to the same rules as other rights holders.<sup>35</sup> Some interventions cited explicitly addressed the term of

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<sup>31</sup> *Interpretation Act*, c I-21, s 43(3).

<sup>32</sup> Gerald Gall, *The Canadian Legal System*, 5<sup>th</sup> ed. (Toronto, 2004), p. 490 citing P. StJ. Langan, *Maxwell on Interpretation of Statutes*, 12 ed. (London, 1969), 215.

<sup>33</sup> Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto, 2016), p. 354.

<sup>34</sup> Wilkinson et al., "Copyright in Photographs," 8; Wilkinson and Leluzio, "The Term of Copyright Protection in Photographs," 107-8.

<sup>35</sup> Wilkinson et al., "Copyright in Photographs," 8; Wilkinson and Leluzio, "The Term of Copyright Protection in Photographs," 108-9.

protection, i.e., life plus 50, but none cited addressed revival of expired copyrights.<sup>36</sup> Wilkinson and her colleagues<sup>37</sup> also cite the Summary of the CMA, which states “This enactment amends the *Copyright Act* to ... (f) give photographers the same rights as other creators.”<sup>38</sup> While it is debatable whether the Summary can be considered part of the Act, the Summary and the interventions in Parliamentary debates are not convincing with regard to restoring expired copyrights, because they are general statements that could easily be understood to mean that, as a result of the 2012 amendments, photographers are subject to the same rules as other authors *going forward*.

Far more compelling is the Rationale section of the internal analysis of Section 59 prepared for the Ministers of Canadian Heritage and the Minister of Industry, which says:

“As a transitional provision, this clause [s. 59] ensures that copyright in a photograph that has expired prior to the coming into force of section 6 of the Bill is not revived by the coming to force of this latter section. An expired copyright in a photograph will remain expired. Under the current *Act*, the author of a photograph is the person who was the owner of the initial negative, plate, or photograph, at the time when it was made. This could include a corporation. In the case of the corporation being the author, the term of copyright is 50 years from the first fixation of the photograph. Subsection 59(2) of the Bill provides that in such cases, where copyright has not yet expired, the term of copyright will now be determined in the manner used for other works: i.e. for the life of the photographer, plus 50 years.

Subsection 59(3) of the Bill provides that, despite section 6 of the Bill, where an individual is deemed under the current *Act* to be the author of a photograph, that individual will continue to be the author for the purposes of the Act.”<sup>39</sup>

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<sup>36</sup> Wilkinson et al., 8; Wilkinson and Leluzio, 103, 108.

<sup>37</sup> Wilkinson et al., “Copyright in Photographs,” 8; Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 105-6.

<sup>38</sup> Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess. 41st Parl. 2011-12 (assented to 29 June 2012) SC 2012 20.

<sup>39</sup> [Clause-by-clause internal analysis of Bill C-32, 2010], Bill Clause No. 59 (Document released pursuant to the *Access to Information Act*). Bill C-32 was introduced in the House of Commons in June 2010, but died on the order



Based on this document, it is clear that the legislature did not intend that the 2012 amendments would revive expired copyrights.

### **Subsistence**

Wilkinson and her colleagues emphasize their claim that “the concept of ‘subsistence’ is key to interpreting the reach of the amendments made concerning photographs in both 1997 and 2012.”

<sup>40</sup> The term ‘subsists’ appears throughout the CA, often in relation to the term of copyright but in other contexts as well. It is sufficient to cite the provision that sets out the fundamental requirements for copyright protection:

“Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met: [connections with treaty countries].”<sup>41</sup>

It is clear that copyright ceases to subsist once the term has expired. The term rules are set out in the Act, but the transitional amending clauses may also affect the term of copyright, as was the case in 1993, 1997, and 2012. Despite the authors’ lengthy discussion of the matter, there appears to be little controversy about the meaning of ‘subsist.’ As Wilkinson and her colleagues state, ‘subsist’ means “to have being or existence.”<sup>42</sup>

### **Ownership of copyright in photographs**

The focus of this article is the term of copyright in photographs. However, as Wilkinson et al. note, the 2012 amendments also changed the provisions for copyright ownership in photographs.

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paper when Parliament was dissolved for the election of May 2, 2011. The same Bill was re-introduced in September 2011 as Bill C-11, received royal assent in June 2012, and (with the exception of a few clauses) came into force on 7 November 2012.

<sup>40</sup> Wilkinson et al., “Copyright in Photographs,” 7-8; Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 99-102, 104-5.

<sup>41</sup> CA s 5(1).

<sup>42</sup> Wilkinson et al., “Copyright in Photographs,” 8; Wilkinson and Leluzio, “The Term of Copyright Protection in Photographs,” 101.

<sup>43</sup> However, they do not mention the effect of the transitional provisions in the 2012 amendments on the ownership of copyright in photographs.

Before the amendments, the author of a photo (and thus the first owner of the copyright) was the owner of the initial negative or photograph.<sup>44</sup> As well, where photographs (of weddings, graduations, etc.) were ordered, the person ordering the photos was the first owner of the copyright (but not the author).<sup>45</sup> Both provisions were repealed in 2012.<sup>46</sup> The changes came into force on 7 November 2012.<sup>47</sup> As a result, the author (and the first owner of the copyright)<sup>48</sup> for all photos taken on or after 7 November 2012 is the photographer.

However, the transitional provisions address the ownership of copyright in photos taken before the changes came into force. As a matter of public policy, copyright owners could not be stripped of their copyrights by a statute without some sort of compensation. Thus the government decided that rights holders would retain their copyrights in photos taken before 7 November 2012. This was achieved through the transitional provisions, which provided that the pre-amendment rules about authorship will continue apply to photos taken before 7 November 2012. Section 59(3) provides that “where an individual [was] deemed [before s 10 was repealed] to be the author of a photograph [because s/he owned the initial negative], that individual will continue to be the author for the purposes of the Act.”<sup>49</sup> Corporations that were the deemed authors (and thus the copyright owners) of photos taken after 1961 will continue to own the copyright in such photos (although the duration will now be based on the life of the individual who created the photo).<sup>50</sup> For commissioned photos, the commissioner of a photograph ordered before 7 November 2012

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<sup>43</sup> Wilkinson et al., 2-4.

<sup>44</sup> CA, s 10(2).

<sup>45</sup> CA, s 13(2).

<sup>46</sup> SC 2012, c 20, s 6.

<sup>47</sup> SI 2012-85, *Canada Gazette* Part II, v. 146, no.23, p. 2449.

<sup>48</sup> Except in cases where the photo is taken by an employee in the course of employment, or where the photo is a Crown work, in which case the first owner of the copyright is the employer or the Crown, respectively.

<sup>49</sup> SC 2012, c 20, s 59(3).

<sup>50</sup> SC 2012, c 20, s 59(2). See Dara Lithwick and Maxime-Olivier Thibodeau, “Legislative Summary of Bill C-11,” Library of Parliament Publication No. 41-1-C11-E (2012), s. 2.11; Lesley Ellen Harris, *Canadian Copyright Law*, 4<sup>th</sup> ed., 106, 128.

will continue to be the owner of the copyright in the commissioned photos.<sup>51</sup> These pre-amendment ownership rules will continue to apply to photos taken (or ordered) before 7 November 2012 until the copyright expires.

### **Conclusion**

It is undeniable that the copyright provisions pertaining to photographs have changed dramatically over the past quarter-century. Going forward, the 2012 amendments at last brought an end to the treatment of photos as second-class copyright citizens. But certain aspects of the repealed laws remain. Based on the foregoing analysis, there is no confusion about the term of copyright in photographs. In sum, the situation is as follows:

- Copyright has expired in photos created before 1949, regardless of whether their authors are still living or have died within the past 50 years.
- Copyright has expired in photos created before 1962 whose “authors” were deemed to be corporations.
- Copyright in photos created after 6 November 2012 expires 50 years after the end of the calendar year in which the author died.
- Copyright in photos in which the copyright is owned by the Crown expires 50 years after the end of the calendar year in which the photo is first published.

With regard to authorship, the photographer is the author of photos taken on or after 7 November 2012. Unfortunately, the ownership of copyright in photos taken before that date continues to be more complicated. Information professionals whose holdings include photographs must continue to deal with the old ownership rules for some years to come.

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<sup>51</sup> SC 2012, c 20, s 60.