



CROWN COPYRIGHT AND THE PRIVATIZATION OF INFORMATION

Chabriol Colebatch
McMaster University
Hamilton, Ontario, Canada

Meeting: 87 Copyright and other Legal Matters with FAIFE
Simultaneous Interpretation: English, Arabic, Chinese, French, German, Russian and Spanish

WORLD LIBRARY AND INFORMATION CONGRESS: 74TH IFLA GENERAL CONFERENCE AND COUNCIL
10-14 August 2008, Québec, Canada
<http://www.ifla.org/IV/ifla74/index.htm>

ABSTRACT:

In today's information landscape, the continued existence of Crown copyright is both incongruous and inappropriate. In its most benign form, Crown copyright is an inconvenience, forcing the public to limit their use of government materials to that permitted under copyright legislation or existing licences or seek permission from the government for the use. In other cases, it is more than an inconvenience. It is a tool of censorship used to prevent dissemination. This paper highlights some of the ways in which Crown copyright has been used to restrict use of government materials, focusing on Canada, Australia and the United Kingdom. It describes government initiatives aimed at liberalizing access but argues that a comprehensive overhaul of Crown copyright is needed for the public to have any meaningful rights to government information. Because the right to access information is meaningless without the right to copy and distribute it.

PAPER:

Information is more accessible today than ever before. With the growth of the internet and developments such as Open Access publishing, Creative Commons licensing and Open Courseware,¹ seemingly limitless amounts of information are available for immediate, free and often unrestricted use. In this context, the continued existence and enforcement of Crown copyright is both incongruous and inappropriate. Found mainly in Commonwealth countries, Crown copyright is a special form of copyright which gives governments rights to restrict

1 Open Access publishing is a form of publishing in which users are given free, immediate, permanent, full-text, online access to materials. See Open Access Directory: http://oad.simmons.edu/oadwiki/Main_Page; Creative Commons licensing is a system of flexible licensing through which copyright works are licensed with only minimal restriction. See Creative Commons: <http://creativecommons.org/>; Open Courseware is an initiative started by M.I.T. to make educational course material available online for free. See the Open Courseware Consortium: <http://www.ocwconsortium.org/index.php> [Accessed May 20, 2008]

reproduction and dissemination of government materials.

The trouble with applying copyright to government materials is that it sits awkwardly with what we value in a democracy – government openness and accountability and free exchange of information. Copyright is the inverse of this. It creates private property rights in intellectual creations, with the purpose of protecting the income and assets of the creator, giving them an incentive to produce copyright materials. These objectives are inapplicable to governments. Governments do not need an incentive to produce copyright works and their business is not to produce income from copyright materials. When copyright is inserted into this context, it becomes an obstacle to the sharing of government materials and, in some cases, a tool for censorship. It detracts from Freedom of Information rights so that even where information may be accessible, the right to copy and share that information may be restricted.

This paper provides an overview of Crown copyright in Commonwealth jurisdictions, focusing on Canada, Australia and the United Kingdom.² It highlights some of the ways in which Crown copyright can and has been used to impede or restrict use of government information. It describes different government initiatives aimed at liberalizing access to government materials but argues that a comprehensive overhaul of Crown copyright is needed for the public to have any meaningful rights to government information. Because the right to access information is meaningless without the right to copy and distribute it.

What is Crown Copyright?

Crown copyright generally refers to the copyright held by certain governments in the works they produce. It originated in the United Kingdom in the 16th Century and was used by the monarchy to control the printing of books, both to protect its trade interests and to censor materials, particularly in relation to religion.³ Today, it remains in existence in many Commonwealth countries, such as Australia, New Zealand, Canada, India, Nigeria and Kenya.

Like regular copyright, Crown copyright gives the government the exclusive right to reproduce, publish, adapt and otherwise deal with government works, subject to limited statutory exceptions. This means that reproduction and distribution of “government” works, such as legislation, government reports, parliamentary hearings, maps, surveys, statistics and census information, may require prior permission from the government.

In some countries, Crown copyright gives the government broader rights than regular copyright holders. For example, in both Canada and Australia, Crown copyright covers any work made by or under the direction or control of the government as well as any work published by or under its direction or control, so that simply publishing or directing the creation of a work automatically gives the government ownership of it.⁴ In the United Kingdom

2 For an overview of Crown copyright in other Commonwealth countries, see Sterling, J.A.L., “Crown Copyright in the United Kingdom and Other Commonwealth Countries”, paper presented at *Crown Copyright in Cyberspace*, Centre du Recherche en Droit Public, Montreal, May 12, 1995: <http://www.lexum.umontreal.ca/conf/dac/en/sterling/sterling.html> [Accessed 10 June, 2008]

3 Ibid., see also Copyright Law Review Committee, *Crown Copyright Report*, 2005, at p.20: <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559> [Accessed 8 June, 2008]

4 *Copyright Act*, R.S.C. 1985, c. C-42 (“Canadian Copyright Act”) s. 12, ; *Copyright Act 1968* (Cth) (“Australian

and New Zealand, Crown copyright is similar but more limited in scope. It applies to works made by officers or servants of the Crown in the course of their duties,⁵ though New Zealand expressly excludes certain legal, parliamentary and other government materials from copyright protection, including bills, legislation, parliamentary debates, court judgments and reports of commissions and inquiries.⁶

What's so bad about Crown copyright?

At the heart of democracy lies active participation by citizens in public life. This demands a free-flow of information. Citizens should be free to exchange and share government materials, to criticize and publicize them and modify, adapt and build on them. Crown copyright in its least offensive form impedes such use. It automatically attaches to all government materials so that users must either limit their use of those materials to that permitted under copyright exceptions or hope that the government grants a licence to use the materials. At its worst, Crown copyright is a tool that can be used by governments to censor government documents. When used in this way, it makes rights to access government information under Freedom of Information legislation ineffective. After all, what good is the right to know government information, if you can't share it with others?

Contrast this with the treatment of federal government copyright in the United States. In the U.S. republican tradition, the government is seen as having been created by the people for the people, so that government information is expected to be accessible to the people. Because of these philosophies, under U.S. copyright law, copyright is "not available" for any work prepared by an officer or employee of the United States government as part of that person's official duties.⁷ While there are limitations and exceptions to this - for instance, it only applies to federal government works, not state, and doesn't apply to works produced by U.S. government contractors - the U.S. public, from ordinary citizens to NGOs, businesses and political parties, can freely copy and distribute any government materials. The report of the 9/11 Commission, for example, has been published in various forms by a number of publishers, making it more accessible, relevant and significant to the general public. Similarly, images and videos from NASA can be used freely in books, documentaries, television programs, even commercials, without needing to get permission or pay a fee.⁸ While the U.S. government continues to make its materials available, the free reign given to others to copy and distribute the materials enables the fullest possible access to U.S. government information, often at a lower cost.

European countries also limit government ownership of copyright materials. Most do not give copyright protection to "official works", such as legislation, judicial decisions and administrative texts.⁹ For example, in Germany, laws, ordinances, official decrees, notices,

Copyright Act") ss. 176 -178.

5 *Copyright, Designs and Patents Act 1988 (UK)* c.48 ("UK Copyright Act"), s. 163; *Copyright Act 1994 (N.Z.)* ("New Zealand Copyright Act"), s.26

6 *New Zealand Copyright Act*, *ibid*, s.27

7 *United States Copyright Act 1976*, 17 USC ("US Copyright Act"), s. 101 & s. 105

8 The only conditions are that the use must not explicitly or implicitly convey endorsement by NASA and there must be no reproduction of the NASA logo or seal. NASA, "Using NASA Imagery and Linking to NASA Web Sites:http://www.nasa.gov/audience/formedia/features/MP_Photo_Guidelines.html [Accessed June 20, 2008]

9 France, the Czech Republic, Germany, Netherlands and Spain, for example, all exclude official materials from copyright protection: see Krews, K. & Ramos, J., "Comparative Analysis of International Copyright Law Applicable to University Scholarship", Copyright Management Center, New York, 2004:

and decisions do not enjoy copyright protection and there is no copyright protection for other official works made public for general information in the public interest, except for the right to object to changes and the obligation to indicate the source.¹⁰ Similarly, legislation in the Netherlands provides that all works communicated to the public by or on behalf of public authorities are not copyright protected, unless the copyright has been expressly reserved.¹¹

In Commonwealth countries, the public is not so fortunate. They rely on discretionary government licenses to use government materials or must limit their use to that permitted under copyright legislation. While many uses will be covered by exceptions such as fair dealing,¹² reproducing and distributing a government work in its entirety to a large audience may not be allowed, particularly when there is a commercial flavour to it. In such cases, the user must seek a licence and in some cases pay a licence fee.

What follows are examples of the ways in which Crown copyright can or has been used to privatize what should be public information. In some cases, it is merely an inconvenience. A user may be uncertain whether his or her proposed use is permitted under either the relevant legislation or licence and so seek permission, which is generally granted. The information is ultimately available to share, but only after time, effort and sometimes money is expended in securing the right to do so. In other cases, the use of Crown copyright is not just an inconvenience, it is a bar to publication, used by the government as a tool for censorship.

Example 1: Online materials

A wealth of government information is available online at the click of a button and, generally, most of it can be used for free for non-commercial uses. For example, the Canadian federal government has replaced copyright notices on most of its websites with permission notices which give users the right to reproduce any material from the website provided that:

1. they exercise due diligence in ensuring the accuracy of the materials reproduced;
2. the government department or agency in question is identified as the source; and
3. the reproduction is not represented as an official version or as having been made in affiliation with or with the endorsement of the government.¹³

However, in almost all cases, the use is limited to non-commercial use. If you wanted to include a report on immigration by the Canadian Government in a book on immigration policy which you intended to sell, you would need permission from the government. Or if you were a documentary film-maker and wanted to reproduce a selection of Health Canada anti-smoking television commercials in a documentary on smoking, you would need to seek permission. While permission is generally granted, it is not automatic, may be time-consuming and can require payment of a fee.

copyright.surf.nl/copyright/files/International_Comparative_Chart_ZwolleIII_1104.pdf [Accessed June 20, 2008]

10 *German Law on Copyright and Neighboring Rights*, Art. 5(1) & 5(2)

11 *The Netherlands Copyright Act 1912*, Art. 11 & Art.15b.

12 Fair dealing, or fair use as it is known in some jurisdictions, is an exception found in most copyright regimes which allows use of copyright materials for purposes such as research and study, criticism and review, news reporting, and in some cases, parody and satire. See for example: Canadian Copyright Act (above note 4), s. 29 & the Australian Copyright Act (above note 4), ss. 40-42.

13 An example of such a copyright notice can be found on the Health Canada website: <http://www.hc-sc.gc.ca/home-accueil/important-eng.php#copyright> [Accessed June 20, 2008]

Example 2: Statistics

Reproduction of statistical information is even more restricted as statistics are often seen as a valuable source of income for governments. Like other Canadian government websites, the Statistics Canada website states that any of the information provided on the site for free can be used for non-commercial purposes but that any commercial redistribution requires written permission.¹⁴ While most personal and educational type uses are covered by this, any uses with a commercial aspect may not be. For example, what if a consultant wanted to include a Statistics Canada publication in a report prepared for a corporate client? Or if an events promoter wants to include a Statistics Canada report about public events in Canada in a package it sells to overseas clients to promote business opportunities in Canada? These uses may amount to commercial reproduction in which case they would require permission from the government and, potentially, the payment of a licensing fee, even though taxpayer dollars funded the reports.

And that's the free stuff – if you want to reproduce any of Statistics Canada's "priced information", you may find yourself hampered by an excessively restrictive licensing agreement. For example, under the standard end-user license agreement for its "data products", Statistics Canada includes the following restrictions:¹⁵

1. only 3 users can access the information (any more requires the payment of additional fees);
2. you may only cite "limited amounts of supporting data" from the "data product";
3. you must not use any of the information to develop or derive any other data product or data service for distribution or commercial sale; and
4. you must obtain approval from Statistics Canada before publishing any significant amounts of material from the data product.

These restrictions are onerous and can thwart many legitimate non-commercial public interest uses. For example, in 2005, as part of the Canadian federal election, a group decided to establish a website that included a search function allowing users to look up their postal code to find their electoral district and list of candidates.¹⁶ To do so, they needed to obtain an accurate table of postal codes from Statistics Canada, which licenses a database of Canadian postal codes. Not only did Statistics Canada charge a significant fee (\$2,900 for a one year subscription), the above licensing conditions meant that the website could not distribute its lookup table unless users first purchased the postal codes file from Statistics Canada. Such application of commercial licensing restrictions on what should be public information is an unfortunate consequence of the Crown copyright regime.

Example 3: Crown copyright as Crown censorship

Although permission to use and reproduce government information is often granted, there have been a number of cases in which it has been refused, often for political reasons. In the

14 Statistics Canada, "Copyright / permission to reproduce":
<http://www.statcan.ca/english/reference/conditions.htm> [Accessed June 8, 2008]

15 Statistics Canada, "Licence Agreement for CANSIM Retrievals":
<http://www.statcan.ca/english/CANSIM/itagrmnt.htm> [Accessed June 8, 2008]

16 McOrmond, R. "Excessive Terms in Crown Copyright End-User Licence Agreement", September 17, 2005:
<http://web.archive.org/web/20060304200602/www.digital-copyright.ca/node/1062> [Accessed June 15, 2008]

2006 – 2007 fiscal year in Canada, 5% of requests to reproduce Crown copyright were declined.¹⁷ Although many of the refusals stemmed from the fact that the government did not in fact hold the copyright in the material, some refusals were politically motivated. For example, a request by an educational institution to reproduce a photo of a Snowbird plane (Canada's military aerobatics flight demonstration team) was refused on the grounds that the photo was to be used in an article questioning the safety of the program.¹⁸ Similarly, the government refused a request to reproduce in an article a screen capture of the NEXUS cross-border program with the U.S. on the basis that the article was going to portray the program in an unfavourable light.¹⁹

On another occasion, the Canadian government not only refused permission to reproduce a government report but sued the publisher for doing so.²⁰ In 1981, the Canadian government's competition director released a 7-volume report on competition in the petroleum industry. The full report was available for purchase from the government for \$70. A small independent publisher called Lorimer wanted to publish a one-volume condensed version of the report, but needed to do so quickly in order to capitalize on the market interest. He sought permission from department officials for his proposal but was met with bureaucratic delays so proceeded to produce a condensed version, which was released for sale two weeks later for \$14.95. He offered the government an 8% royalty of sales of the book but the government refused the offer and took Lorimer to court and won, obtaining an injunction against further sales, damages on past sales and delivery of all existing stock.²¹ In doing so, the government used Crown copyright to prevent its work being made more accessible, affordable and useful for the general public.

More recently there have been reports that the British Columbia government is attempting to use Crown copyright to block publication of records obtained under Freedom of Information (FOI) legislation.²² A journalist reported receiving “notices” slipped inside packages of documents sent to him by the B.C. government in response to his FOI requests. The notices warned: “These records are protected by copyright under the federal Copyright Act, pursuant to which unauthorized reproduction of works is forbidden”. This is a clear example of how Crown copyright can compromise FOI rights.

Canadian governments are not alone in using copyright to suppress publication of government materials. In the U.K., copyright has been repeatedly raised to obstruct publication of the memoirs of government officers. Recently, the U.K. Foreign and Commonwealth Office (FCO) threatened to bring a copyright infringement claim against a former U.K. ambassador to Uzbekistan, Craig Murray, for publishing his memoirs. The memoirs expose the human rights abuses of Islam Karimov's regime and record Murray's

17 Geist, M. “Records indicate government misusing crown copyright”, *Toronto Star*, May 12, 2007: <http://www.michaelgeist.ca/content/view/2919/159/> [Accessed June 10, 2008]

18 Ibid.

19 Ibid.

20 Vaver, D., “Copyright and the State in Canada and the United States”, paper presented at *Crown Copyright in Cyberspace*, Centre du Recherche en Droit Public, Montreal, May 12, 1995: <http://www.lexum.umontreal.ca/conf/dac/en/vaver/vaver.html> [Accessed May 20, 2008]

21 *R. v. James Lorimer & Co Ltd* [1984] 1 F.C. 1065, 77 C.P.R.(2d) 262, 268 (C.A.).

22 Tromp, S., “Stonewalling Freedom: the latest ploy by B.C.'s allegedly 'open' government: Invoking Crown copyright as a tool of press censorship”, *The Vancouver Sun*, April 4, 2008: <http://www.canada.com/vancouversun/news/editorial/story.html?id=69970f8a-8f9a-4200-b41d-062707d8ea7c&p=1> [Accessed May 28, 2008]

confrontation with his superiors at the FCO, his allegations of intelligence obtained under torture, the FCO's rebuttal of his fears, and their alleged attempts to drive him out of office.²³ Although a claim was ultimately never brought to court, the government demanded that Murray remove from his website documents obtained from the FCO using provisions in the Data Protection Act and the Freedom of Information Act, including evidence that the UK government would knowingly use intelligence from Uzbekistan obtained under torture. The demand letter stated that Murray must remove the documents immediately or risk prosecution for copyright infringement, declaring:

All of the documents ... were produced by an officer or servant of the Crown in the course of their duties. As you do not have permission or a licence to reproduce these documents we consider that Crown copyright has been infringed ... even if a document has been released under the Data Protection or the Freedom of Information Act, that does not entitle you to make further reproductions of that document by, for example, putting them on your website or making further copies to be distributed to third parties. The copyright remains enforceable.

Rather than take the more appropriate route of breach of confidence, the government used Crown copyright to censor the information. It echoes the case of *A.G. v. Guardian Newspapers Ltd* (1990)²⁴ where the government sought to prevent publication of ex-MI5 agent Peter Wright's publication of *Spycatcher* by relying in part on Crown copyright.

In a similar case in Australia, a publisher was prevented from publishing extracts from government documents concerning the federal Government's relations with the government of Indonesia in connection with the 'East Timor crisis'.²⁵ The materials, which had been leaked by a government employee, were intended to be published in both a book and in a number of newspapers. The government failed in its attempt to stop publication on the basis of breach of confidence but succeeded on its claim of infringement of copyright.

As these examples illustrate, Crown copyright can be ill-suited to use in the public sector. Copyright was originally intended as a means of ensuring that a creator can make a living through disseminating their work. When put in the hands of government, it has been employed to ensure that materials do not get disseminated at all. Although such cases may be infrequent, they demonstrate the potential use of copyright as a tool of censorship.

What has been done to liberalize Crown copyright regimes?

The development of information technology is changing the relationship between citizens and governments. Governments now have the means to disseminate government information to the public and the public now expects free and immediate access to all government materials. In this climate, many governments are now realizing that strict enforcement of Crown copyright is ill-advised. As they themselves push for publicly-funded research to be made openly accessible,²⁶ governments have been forced to reconsider the ways in which they

23 Hogge, B., "The Crown's Copyright Con", www.opendemocracy.net, July 18, 2006:

http://www.opendemocracy.net/media/copyright_con_3746.jsp [Accessed June 18, 2008]

24 [1990] 1 A.C. 109 (H.L.)

25 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485

26 See the Canadian Institute of Health Research's new policy on open access which requires researchers to ensure that their research articles are available online for free within 6 months of publication: <http://www.cihr->

make their own information available. In doing so, some governments have limited the scope of Crown copyright or introduced more permissive licensing regimes, as the following examples show.

Limiting the scope of Crown Copyright

Both the U.K. and New Zealand have taken steps to restrict the reach of Crown copyright. In 1988, the U.K. narrowed the scope of Crown copyright to include only those works that were made by an officer or servant of the Crown in the scope of their duties, abolishing Crown copyright in works that were “first published” by the Crown or merely made under “its direction or control”. It also removed the perpetual protection that had been given to unpublished government works, creating a new term of protection of 125 years from the date of creation.²⁷

In a similar move, New Zealand has limited the range of materials that are protected by Crown copyright. In 2001, it abolished Crown copyright in certain legal, parliamentary and other government materials, including bills, legislation, parliamentary debates, court judgments and reports of commissions and inquiries, so that these materials are now in the public domain.²⁸

More flexible licensing

As well as limiting the reach of Crown copyright, the U.K. has introduced more flexible licensing arrangements for those materials that remain under Crown copyright. In 1999, the government implemented a new waiver regime, specifying eleven classes of Crown copyright protected material for which automatic waivers of the copyright would be given, including government press releases, ministerial speeches, unpublished public records, legislation and explanatory notes. The precise conditions attached to the waivers depend on the category the work falls into, but for most materials, users may copy, quote, index, transcribe, publish and broadcast the text of the material in all formats and media throughout the world without payment of a fee or requiring a specific license or approval - provided that the material is reproduced accurately and not in a misleading context and the source and status of the material is identified.²⁹ This initiative has liberalized the use of government materials in the U.K., though there are still significant amounts of material in which Crown copyright is not waived. However, to expedite the permissions process for those materials or uses that fall outside the scope of the waiver, the government offers an online, user-friendly 'click licensing' system.³⁰

Some governments are exploring the use of Creative Commons licensing to free-up use of their materials. Creative Commons licensing is a system of simple, flexible licenses that

irsc.gc.ca/e/34916.html; see also the Wellcome Trust's open access policy at: <http://www.wellcome.ac.uk/About-us/Policy/Policy-and-position-statements/WTD002766.htm> and the Australian Research Council policy details at: <http://www.sherpa.ac.uk/juliet/index.php?fPersistentID=15> [All accessed June 18, 2008]

27 U.K. Copyright Act, above note 5, s. 163(1) & s. 163(3)

28 New Zealand Copyright Act, above note 5, s. 27.

29 U.K. Office of Public Sector Information, “Copyright Guidance”: <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/> [Accessed June 20, 2008]

30 U.K. Office of Public Sector Information, “Click Use”: <http://www.opsi.gov.uk/click-use/system/online/pLogin.asp> [Accessed June 20, 2008]

enable users to freely use, copy and distribute works subject to only minor restrictions, such as attribution. The state government of Queensland in Australia established the Queensland Licensing Information Framework in 2006 to review and formulate best practices for the licensing of Queensland government information.³¹ Trials are currently underway to test the use of Creative Commons licensing for a range of government information, with collaborations in place with the federal government to extend the licensing regime to its data and information.

In a similar vein, the Australian equivalent of Statistics Canada, the Australian Bureau of Statistics (ABS), has made almost all of its statistics available online for free. Up until 2005, statistics produced by the ABS were generally only available for purchase. Now all publications, spreadsheets and Census data on the ABS web site are available free to any member of the public. Users may display, reproduce and distribute up to 500 cells of data without seeking formal consent.³² However, they may only reproduce the data in an unaltered form - any modifications or derivatives require formal consent as does any use of information that exceeds 500 cells of data.

The Canadian government also has taken some important steps towards opening up rights to use its information. In 1997, by an Order in Council, the federal Government introduced blanket permission for the public to reproduce federal statutes and decisions of federal courts and tribunals provided certain requirements relating to accuracy and authenticity were met.³³ More recently, in 2007, Natural Resources Canada made its electronic topographic mapping data available online free of charge for anyone to use, distribute, modify, develop and improve. The information, which includes maps and satellite photos, can be used for both commercial and non-commercial purposes by individuals, governments, academia and the private sector with the only condition being that the user acknowledges the source.³⁴

What more needs to be done?

The initiatives outlined above have gone a long way towards opening up government information, but greater rights to use and distribute that information are needed. Most of the measures that have been described are limited in some way, either in terms of the materials they cover or in the conditions that are attached. The result is a patchwork of rights to use some government materials, but not all, and to use the materials for only limited purposes.

A more comprehensive solution is needed. The waivers and exceptions should not just apply to materials like legislation and judicial decisions, but to all government information, such as environmental data, health information and government-owned scientific data. For example, while much of Canada's national framework mapping data may now be freely available, most

31 Queensland Government, Office of Economic and Statistical Research, "Government Information Licensing Framework (GILF) Project": <http://www.oesr.qld.gov.au/about-our-services/policy/gilf-project.shtml> [Accessed June 20, 2008]

32 Australian Bureau of Statistics, "ABS Copyright": <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%A9+Copyright?OpenDocument> [Accessed June 15, 2008]

33 Canada Order in Council dated January 8, 1997.

34 Natural Resources Canada, Geobase Project: <http://geobase.ca/geobase/en/index.html>; and Geogratis Project: <http://geogratis.cgdi.gc.ca/geogratis/en/index.html> [Accessed June 18, 2008]

national topographic system maps are still restricted,³⁵ prompting some in the industry to complain that only the out-dated, unimportant data is being released.³⁶

Moreover, the liberalization of Crown copyright should not just be limited to the federal government. Equivalent rights are needed for state, provincial and municipal materials. While a lot has been done at different levels of government, the measures are not always consistent. In Canada, the provinces differ significantly in the conditions attached to use of their legislative material. For instance, the Yukon provides that anyone can reproduce any of its legislative material, provided the reproduction does not suggest it is officially endorsed by Yukon Justice.³⁷ In contrast, Manitoba provides that its materials may be reproduced without charge or request for permission but only for “non-profit educational purposes”.³⁸ Any other use requires specific permission. These kinds of discrepancies should be resolved. Crown copyright licensing regimes should be consistent across all levels of government so that the nation’s public can obtain comparable materials throughout the country on equivalent terms.

Ideally, instead of relying on a mishmash of inconsistent and inadequate licences which could be revoked at any time, Crown copyright should be abolished, or at least formally waived, in as many cases as possible. While there may be some justification for the retention of Crown copyright for some materials, such as national security documents or Cabinet secrets, this should be the exception, rather than the rule, with the presumption being that all government material may be copied, modified, adapted, translated, published and distributed, unless there is a clear indication to the contrary and justifiable reasons for the retention of Crown copyright. Concerns about protecting the integrity of the material can be met through other legal and technological measures, such as official marks or moral rights type provisions.³⁹

This kind of overhaul may be difficult to introduce when government departments are increasingly forced to balance their budgets and are using copyright licensing fees to do so. The U.K. Ordnance Survey, for example, which licenses geographic data to government, businesses and individuals, is required to make a profit. It generates approximately 100 million pounds which it then hands back to the Treasury.⁴⁰ But in other cases, releasing the information to the public may in fact save money. Accordingly to one recent Canadian report, in the 2006-2007 fiscal year, licensing of Crown copyright materials generated less than \$7,000 CDN in revenue, yet the system cost over \$200,000 to administer.⁴¹

35 For example, if you want to reproduce any national topographic system map in a non-educational book and the map constitutes more than 1% of the book, you need a licensing agreement. See Natural Resources Canada, Centre for Topographic Information, “Permission to Exploit or Reproduce NTS Maps as Illustrations in a Book or Publication”: http://maps.nrcan.gc.ca/permission/edu_e.php [Accessed June 18, 2008]

36 See comments on the Free Our Data blog: <http://www.freeourdata.org.uk/blog/?p=119> [Accessed June 18, 2008]

37 Government of Yukon, “Disclaimer and Copyright Information related to this legislative material”:: www.gov.yk.ca/legislation/pages/copydsc1.html [Accessed June 20, 2008]

38 Province of Manitoba, Manitoba Justice “Disclaimer and Copyright”: www.gov.mb.ca/justice/disclaimer/ [Accessed June 20, 2008]

39 Governments could retain the right to obtain to prohibit distortions or misrepresentations of their materials or released certified versions of their materials which are marked with some form of official mark. See Judge, E. “Crown Copyright and Copyright Reform in Canada”, *In the Public Interest: The Future of Canadian Copyright Law*, (2005) Michael Geist ed., Irwin Law, Ch. 19, pp550-594 at p. 555: http://www.irwinlaw.com/PublicInterest/three_5_judge.htm [Accessed May 20, 2008]

40 Arthur, C. “Canada drops licences and adopts free model for map data”, *The Guardian*, April 22, 2007: <http://www.guardian.co.uk/technology/2007/apr/12/freeourdata.epublic> [Accessed June 19, 2008]

41 Geist, M. (2008), above note 17.

Is Crown copyright the problem or is it copyright itself?

Although this paper focuses on Crown copyright, it should be pointed out that its underlying concern is with the use of copyright to hinder or prevent dissemination of public information. Even in countries where there is no Crown copyright, governments may still have copyright assigned to them through contractual arrangements with their employees or contractors. In Switzerland, for example, laws and decrees as well as decisions and reports of public authorities are not eligible for copyright,⁴² but the federal authorities still hold copyright in many other materials. The website of the Swiss Federal authorities advises that all texts, illustrations, photos or any other data available on the Federal authorities' websites are the exclusive property of the federal authorities and any reproduction requires the prior written consent of the Swiss authorities.⁴³ This is so despite the lack of any express "Crown copyright" provisions.

Even in the United States, where there is no copyright in any works prepared by federal government employees, the state and local governments still hold copyright in works produced by their employees and all levels of government can, and frequently do, have copyrights transferred to them. The issue therefore is not limited to jurisdictions with Crown copyright, but to any country in which copyright is used by governments to obstruct or prohibit the free-flow of information.

Conclusion

Crown copyright is both a symbolic and real barrier to the sharing of government materials. Symbolic because it stamps government materials "property of the Crown" rather than "property of the people" and real because, as the above examples illustrate, it limits what the public can do with government materials, in some cases preventing them from sharing the materials altogether. Used in this way, Crown copyright represents an inappropriate application of private property rights to what should be public information.

Although governments throughout the Commonwealth have taken steps to improve the situation, both by limiting the scope of Crown copyright and by instituting more permissive licensing regimes, the progress has been slow, limited and haphazard. A more comprehensive solution is needed. Crown copyright needs to be more prominent on the copyright reform agenda because greater rights to reuse government information will enable better decision making by both the public sector and the private sector and may also promote economic activity. Reform of Crown copyright is also needed to ensure that Freedom of Information legislation does not become ineffective. Many important government abuses have been exposed through Freedom of Information requests. Without the right to publish information obtained through such requests, Freedom of Information becomes not so free and abuses will remain hidden. This paper calls on librarians to revive the debate about Crown copyright to ensure that the public has the both the right to access government information as well as the right to share it.

42 Swiss Federal Copyright Act of 1992, ref. 231.1, Article 5

43 Swiss Confederation Federal Administration, "Terms and Conditions":

http://www.disclaimer.admin.ch/terms_and_conditions.html [Accessed June 20, 2008]