

# Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings

Jean Dryden

## Abstract

This study investigated how archival repositories attempt to control further uses of their online holdings and their reasons for doing so. Archival repositories employ two types of measures to control further uses of their online holdings—technical, such as watermarks, and nontechnical, such as terms-of-use statements. They do not, however, clearly separate copyright interests from other motivations; restrictions on use are often conflated under the rubric of copyright. In doing so, they may be guilty of “copyfraud,” that is, asserting false claims of copyright. By invoking copyright in ways that impede access to, and use of, online documentary heritage, they may be compromising their core mission of making their holdings available for use.

The Internet provides exciting possibilities to increase access to archival holdings, and archival repositories have eagerly seized these new opportunities. For some, however, concerns about the ease with which digital documents can be copied and disseminated, and what end-users might do with the repository’s online content, temper the potential for increased access to holdings and a higher profile. This article explores the question “How do archival repositories attempt to control further uses of their Internet-accessible holdings and why?” It is part of a larger study that examined various copyright practices of Canadian archival repositories in digitizing their holdings and making them available online.<sup>1</sup>

Among other things, the study reveals that these repositories attempt, in various ways, to control further uses of their online holdings, often under the

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<sup>1</sup> Jean Dryden, “Copyright in the Real World: Making Archival Material Available on the Internet” (PhD diss., University of Toronto, 2008), <http://hdl.handle.net/1807/11198>, accessed 13 March 2011.

guise of copyright. For example, some place restrictions on uses of public domain photographs, and many more require the repository's permission for publication and other uses, even though the repository does not own the copyright in the works in question. The term "copyfraud" has been used to refer to false claims of copyright.<sup>2</sup> Are Canadian archivists guilty of copyfraud? Or do they have other legitimate reasons for wanting to control how their holdings are used?

Archival institutions acquire, preserve, and *make available for use* records of enduring value. The materials preserved in archival repositories are "the information by-products of organizational or social activity."<sup>3</sup> As such, they were not (for the most part) consciously authored for dissemination to the public; rather, they were created and accumulated naturally by a person, family, or organization in the conduct of their affairs and preserved because of the enduring value of the information they contain or as evidence of the functions of their creator. Consequently, archival records have certain characteristics that restrict the "making available" aspect of archival work. The archivist's interest in making all holdings available to users may be constrained by restrictions on access to, or the use of, archival material to protect the physical records; the privacy rights of the donors, creators, or subjects of the records; and other contractual or statutory obligations that apply.<sup>4</sup>

The unpublished nature of archival material has particular implications from the perspective of copyright. Archival material is not generally created for dissemination to the public, and the aggregation of documents in a collection or record group is unique. Consequently, the archival records of any particular individual or organization cannot be borrowed. Traditionally, those wishing to consult archival material have had to visit the archives and take notes or order copies. Responses to inquiries from remote users often include copies of items from the holdings. Consequently, archivists have well-established policies and procedures for making copies for their users. Users ordering copies of archival documents often ask for permission to use the copies in ways that involve further reproduction and dissemination of the works. Regardless of whether they own the copyright in their holdings, archival repositories usually own the physical property, and they often wish to control further uses of their holdings for various reasons. The result is that many repositories attempt "to maintain a kind

<sup>2</sup> Jason Mazzone, "Copyfraud," *New York University Law Review* 81 (2006): 1026–100.

<sup>3</sup> Judith Ellis, ed., *Keeping Archives*, 2<sup>nd</sup> ed. (Port Melbourne, Aus.: Thorpe, 1993), 477.

<sup>4</sup> A recent study of access restrictions in twenty-three European central archives reveals that thirteen of them restrict access (as distinct from making copies or dealing with requests for further uses) "for the protection of copyright." Jaak Valge and Birgit Kibal, "Restrictions on Access to Archives and Records in Europe: A History and the Current Situation," *Journal of the Society of Archivists* 28, no. 2 (2007): 204.

of quasi-copyright-like control over the further use of materials in their holdings.”<sup>5</sup>

As archivists digitize their holdings and make them available online, they are, in a sense, making copies for users, albeit not often in response to specific requests. While their reprographic policies and practices worked on-site, the online environment is very different. In particular, the application of copyright law in the digital environment raises many complex questions that have not been clearly resolved. This study looked at the ways that archivists attempt to control further uses of their online holdings and their reasons for doing so.

### Literature Review

Jason Mazzone specifically mentions archival institutions as perpetrators of copyfraud, particularly in their claims of copyright in public domain materials.<sup>6</sup> Several authors identify various copyright issues involved in the commercial exploitation of archival holdings or other forms of cultural heritage.<sup>7</sup> A study of 51 European libraries, museums, and archives that looked at pricing models for digital copies provided to users finds that some repositories are concerned about asserting their rights in items they make available on the Internet; however, considerations of trust and curatorial responsibility related to the preservation of an accurate facsimile of the original are stronger motivations than copyright or profit motivations.<sup>8</sup> Peter J. Astle and Adrienne Muir find that revenue derived from digitized material is generally insignificant.<sup>9</sup>

<sup>5</sup> Peter B. Hirtle, “Archives or Assets?,” *American Archivist* 66, no. 2 (2003): 240.

<sup>6</sup> Mazzone, “Copyfraud,” 1052–58.

<sup>7</sup> Hirtle, “Archives or Assets?,” 235–47; Teresa Grose Beamsley, “Securing Digital Image Assets in Museums and Libraries: A Risk Management Approach,” *Library Trends* 48, no. 2 (1999): 359–78; Diane M. Zorich, *Introduction to Managing Digital Assets Options for Cultural and Educational Organizations* (Los Angeles: Getty Information Institute, 1999); Lisa Brower, Cathy Henderson, Michael North, and Tara Wenger, “Licensing the Use of Special Collections Materials,” *Rare Books and Manuscripts* 3, no. 2 (2002): 124–44; Nancy E. Loe, “Avoiding the Golden Fleece: Licensing Agreements for Archives,” *American Archivist* 67, no. 1 (2004), 58–85; Richard Fyffe and Beth Forrest Warner, “Where the Giants Stand: Protecting the Public Domain in Digitization Contracts with Commercial Partners,” *Journal of Library Administration* 42, nos. 3–4 (2005): 83–102.

<sup>8</sup> Simon Tanner and Marilyn Deegan, “Exploring Charging Models for Digital Cultural Heritage in Europe,” *D-Lib Magazine* 9, no. 5 (2003); Tanner and Deegan, “Exploring Charging Models for Digital Library Cultural Heritage,” *Ariadne* 34 (2002–2003).

<sup>9</sup> Peter J. Astle and Adrienne Muir, “Digitization and Preservation in Public Libraries and Archives,” *Journal of Librarianship and Information Science* 34, no. 2 (2002): 74.

As cultural heritage institutions embarked on digitization projects, published manuals offered guidance.<sup>10</sup> While such manuals place considerable emphasis on copyright issues related to *selecting* items for digitization and online access, few address controls on further uses. One exception is Michael Moss and James Currall, who suggest that repositories embarking on a digitization project give some thought to how they “control” the digital content so that “it is not misused by those who might wish to profit from the digital objects that have been created.”<sup>11</sup>

However, the extent to which archives attempt to control further uses of their holdings, and their methods and reasons for doing so, have only recently begun to be systematically investigated. Amy L. Johnson’s survey of U.S. archives finds that 58% of the 38 repositories in her study are concerned that visitors to the repository website may violate the copyright in the original materials, and most employ a variety of strategies to “limit illegal use of their online holdings.”<sup>12</sup> Alexandros Koulouris and Sarantos Kapidakis, and Melanie Schlosser, examine copyright statements for digital collections; Nathaniel Poor looks at the copyright notices in media journals. All find that, to some degree, copyright is used to limit access to, and use of, cultural heritage resources.<sup>13</sup> Kristin Eschenfelder investigates the range of strategies used by cultural heritage institutions to prevent or discourage use of their online holdings.<sup>14</sup> User studies

<sup>10</sup> See for example, Maxine K. Sitts, ed., *Handbook for Digital Projects: A Management Tool for Preservation and Access* (Andover, Mass.: Northeast Document Conservation Center, 2000); Paula de Stefano, “Selection for Digital Conversion,” in *Moving Theory into Practice: Digital Imaging for Libraries and Archives*, ed. Anne R. Kenney and Oya Y. Rieger (Mountain View, Calif.: Research Libraries Group, 2000); Stuart D. Lee, *Digital Imaging: A Practical Handbook* (London: Library Association Publishing, 2001).

<sup>11</sup> Michael Moss and James Currall, “Digitisation: Taking Stock,” *Journal of the Society of Archivists* 25, no. 2 (2004): 131–32.

<sup>12</sup> Amy L. Johnson, “Implications of American Copyright Law for Policies and Practices Regarding the Digitization of Manuscript Collections” (master’s thesis, University of North Carolina, 2009), 41–42.

<sup>13</sup> Alexandros Koulouris, and Sarantos Kapidakis, “Access and Reproduction Policies of University Digital Collections,” *Journal of Librarianship and Information Science* 37, no. 1 (2005): 25–33; Melanie Schlosser, “Unless Otherwise Indicated: A Survey of Copyright Statements on Digital Library Collections,” *College and Research Libraries* (2009): 371–85; Nathaniel Poor, “Copyright Notices in Traditional and New Media Journals: Lies, Damned Lies, and Copyright Notices,” *Journal of Computer-Mediated Communication* 14 (2008): 101–26.

<sup>14</sup> Kristin R. Eschenfelder, “Every Library’s Nightmare? Digital Rights Management and Licensed Scholarly Digital Resources,” *College and Research Libraries* 69, no. 3 (2008): 205–25; Kristin R. Eschenfelder, “Controlling Access to and Use of Online Cultural Collections: A Survey of U.S. Archives, Libraries and Museums for IMLS” (Madison: University of Wisconsin-Madison School of Library and Information Studies, 2009); Kristin R. Eschenfelder and Grace Agnew, “Technologies Employed to Control Access to or Use of Digital Cultural Collections: Controlled Online Collections,” *D-Lib Magazine* 16, nos. 1–2 (2010).

find that copyright issues are potentially or actually an impediment to the download and use of digital content.<sup>15</sup>

In recent years, the practice of claiming copyright in public domain materials has come under increasing criticism, and some institutions, such as Cornell University, have completely changed their practices.<sup>16</sup> Others, such as the Library of Congress, the Smithsonian Institution, the Getty Research Institute, and Library and Archives Canada, have contributed their public domain photos to Flickr. The issues that arise in attempting to control further uses of public domain works have been explored within the art museum community in the course of legal analysis of the impact of *Bridgeman v. Corel*<sup>17</sup> and in studies of pricing of reproductions from art museum holdings.<sup>18</sup> While archival materials differ from art objects, many concerns are similar, and archivists trying to address the complex and conflicting issues that arise in attempting to control further uses of their holdings would do well to examine this literature.

### Research Design and Framework

This study employed multiple sources of evidence: the website content of 154 Canadian repositories whose websites featured archival material from their

<sup>15</sup> Pennsylvania State University, *Visual Image User Study*, <http://www.libraries.psu.edu/vius/summary.html> (2003), accessed 13 March 2011; Jennifer Trant and David Bearman, *Amico On-Line User Survey: Preliminary Results* (PowerPoint, 2003), [www.amico.org/univ/docs/AMICO.AMM0305UserSurvey.pdf](http://www.amico.org/univ/docs/AMICO.AMM0305UserSurvey.pdf), 11, accessed 13 March 2011; Daniel G. Dorner, Chern Li Liew, and Yen Ping Yeo, *A Textured Sculpture: The Information Needs of End-Users of Digitised Collections of New Zealand Cultural Heritage Resources* (Wellington, N.Z.: School of Information Management, Victoria University of Wellington, 2005), 29; Daniel G. Dorner, Chern Li Liew, and Yen Ping Yeo, "A Textured Sculpture: The Information Needs of Users of Digitised New Zealand Cultural Heritage Resources," *Online Information Review* 31, no. 2 (2007), 179.

<sup>16</sup> Peter Hirtle, "Removing All Restrictions: Cornell's New Policy on Use of Public Domain Reproductions," *Research Library Issues: A Bimonthly Report from ARL, CNI, and SPARC*, no. 266 (October 2009): 1–6.

<sup>17</sup> *Bridgeman Art Library Ltd. v. Corel Corp.*, 36 F.Supp.2d 191 (S.D.N.Y. 1999), found that a copy of a work of art was not sufficiently original to merit copyright protection; consequently, museums who claim copyright in the digital reproduction of a public domain work are on dubious legal ground. See Kathleen Connolly Butler, "Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions," *Hastings Communication and Entertainment Law Journal* 21, no. 1 (1998–99): 55–127; Susan M. Bielstein, *Permissions, a Survival Guide: Blunt Talk About Art as Intellectual Property* (Chicago: University of Chicago Press, 2006); Mary Campbell Wojcik, "The Antithesis of Originality: *Bridgeman*, Image Licensors and the Public Domain," *Hastings Communication and Entertainment Law Journal* 30, no. 2 (2007–2008): 257–86; Kenneth D. Crews and Melissa A. Brown, *Control of Museum Art Images: The Reach and Limits of Copyright and Licensing*, Social Science Research Network (2010), <http://ssrn.com/abstract=1542070>.

<sup>18</sup> Rights and Reproductions Information Network (RARIN) of the Registrars Committee of the American Association of Museums, "Draft Report of the AAM Member Museums Rights and Reproductions Survey 2003–04 Results" (2004), <http://www.panix.com/~squigle/rarin/RCAAMSsurvey2003-4.pdf>, accessed 13 March 2011; Simon Tanner, "Reproduction Charging Models and Rights Policy for Digital Images in American Art Museums: A Mellon Foundation Study" (London: King's Digital Consultancy Services, 2004), [http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum\\_SimonTanner.pdf](http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf), accessed 13 March 2011.

holdings; 106 responses to a questionnaire sent to those repositories; 22 interviews with repository staff members; and 250 copyright policy and procedure documents found on the websites or submitted with questionnaire responses. The 154 repositories that served as the research population for this study were identified using the Archives Canada portal,<sup>19</sup> which includes links to repository websites. To be selected for inclusion in the study, a repository's website had to contain archival material from the repository's holdings. Furthermore, the amount of archival material on the website had to be more than a token; those with websites containing five or fewer documents were also excluded. Between May and November 2005, 290 websites were examined. Based on the foregoing criteria, 154 repositories were identified as being within the scope of the study.

To obtain more structured data, a questionnaire consisting of 46 questions was sent to the 154 repositories in the study. The questionnaire addressed a range of issues; however, only the responses to questions relating to controls on further uses are reported here.<sup>20</sup> Completed questionnaires were received from 106 repositories, a response rate of 69%.

Interviews were conducted with staff members of repositories that responded to the questionnaire to explore the evidence of controls on further uses revealed in the website content and questionnaire responses. Interviewees were recruited through the questionnaire; 44 individuals were willing to be interviewed. To ensure that the interviewees were familiar with professional archival norms and their institution's copyright policies and practices, those who volunteered to be interviewed were screened on the basis of their questionnaire responses regarding the number of years they had worked with archival material, level of education, and the years spent in their present position. Twenty-two interviews, each lasting about an hour, were conducted in early 2006.<sup>21</sup> The repository's website content and questionnaire response were reviewed prior to each interview, and, where necessary, questions were added to the interview script to clarify specific aspects of the website, the questionnaire response, or both. Of the 250 policy and procedure documents available on the repository websites or submitted with the questionnaire responses, 128 included controls on further uses, mainly in the form of terms and conditions.

<sup>19</sup> Canadian Archival Information Network, <http://www.archivescanada.ca> As noted, data was collected from repository websites linked to this portal in 2005, and they have undoubtedly changed since then. To protect confidentiality of research participants, individual repositories are not identified in the reporting; thus URLs for individual repositories and access dates are not provided.

<sup>20</sup> The questionnaire is available in Dryden, "Copyright in the Real World," Appendix D, 278–95.

<sup>21</sup> The interview script is available in Dryden, "Copyright in the Real World," Appendix M, 304–9.

## Findings

This article focuses on the efforts of Canadian archival repositories to control further uses of their online holdings. However, one cannot understand these repositories' approaches to controlling downstream use without first understanding what they selected to be digitized and made available online. The larger study's findings in this regard are reported in detail elsewhere;<sup>22</sup> key findings relevant to the current topic are summarized here. One key finding is that Canadian repositories prefer to select items that present few copyright complications (either because the copyright has expired or because the repository owns the copyright) to avoid the need to devote resources to identifying or locating rights holder(s) and obtaining necessary authorizations.<sup>23</sup> Study participants reported that increased access to holdings is the main reason why repositories make their archival holdings available on the Internet; they also reported that making holdings available online provides a repository with a promotional vehicle that may raise its profile among resource allocators, users, or the broader community.<sup>24</sup> Presumably, they should have little interest in controlling access or use if wider access to holdings and promoting the repository are their goals. Despite these potential benefits, however, some were concerned about the ease of copying and distribution in the digital environment and the extent to which users comply with repositories' terms of use.<sup>25</sup>

## Reasons for Concern

Many respondents in this study believed there is some need to control further uses of their website content. Questionnaire responses and interviews elicited a range of divergent views about their reasons for doing so, as well as their degree of concern. Respondents' concerns relate to four areas: loss of revenue (or others inappropriately profiting from use of the repository's holdings); threats to the authenticity of documents (through incorrect captioning, loss of contextual information, or manipulation of the image); compromising the reputation or awareness of the repository (by not acknowledging the repository as the location of the original, or the inability of the repository to locate an image reproduced without an identifier); and fear of legal liability arising out of a researcher's use of materials from the repository website. Some repositories

<sup>22</sup> Dryden, "Copyright in the Real World," 165–89; Jean Dryden, "Copyright Issues in the Selection of Archival Material for Internet Access," *Archival Science* 8, no. 2 (2009): 129–36.

<sup>23</sup> Dryden, "Copyright Issues," 136.

<sup>24</sup> A fuller discussion of their reasons is found in Dryden, "Copyright in the Real World," 155–56.

<sup>25</sup> Dryden, "Copyright in the Real World," 157–58.

wished to control how their holdings are used, but for reasons largely unrelated to copyright.

Questionnaire respondents were asked, “Is your repository’s administration concerned that visitors to your repository’s website may copy or download archival material from the website?” That 56% of the 104 respondents to this question reported that their administration *was* concerned about this while 44% were not suggests that opinions about this matter diverge. Questionnaire respondents were also asked to indicate their level of agreement with the statement, “As long as the repository is credited as the source, it’s OK for members of the public to download documents from our website and use them in a publication or on another website.” Seventy percent of the 105 respondents to this question disagreed or strongly disagreed with the statement; 20% agreed or strongly agreed; and 10% were neutral. Another question asked respondents to indicate their level of agreement or disagreement with the statement, “It is important to restrict the ability of visitors to our website to copy or download documents from our website without our permission.” Fifty-seven percent of the 105 respondents agreed or strongly agreed; slightly over a quarter (27%) disagreed or strongly disagreed; 16% were neutral.

The 15 interviewees who indicated in their questionnaire responses that their repository administration was concerned that visitors to the repository’s website may copy or download archival material were asked what their administration was worried about. Several areas of concern emerged, relatively few of which have much to do with copyright. The most common concerns related to financial matters. Four interviewees were concerned that their holdings would be used commercially to generate profit for others, which they viewed as unfair. As Leslie<sup>26</sup> said,

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

Related to this is the matter of revenue generation, which 4 interviewees mentioned as an important concern. Some repositories also want to (or are being pressured to) generate revenue from providing copies to users, so they do not want to provide high-quality digital copies online that can be freely downloaded. If others make money from archival resources, repositories want a portion of the revenue.

The second most common area of concern, raised by 6 interviewees, relates to what could broadly be called authenticity. For a number of reasons, several

<sup>26</sup> Interviewees have been given pseudonyms.



of the respondents wanted to control the uses of their holdings to ensure that documents and the context of their creation are presented accurately, that the item is labeled accurately, and that the repository is credited as the location of the original. As Donna said,

I think we have a concern about people using it in a way that's different from what the document was meant to be; they've misrepresented it or things about the record or the series change, and they don't have that information, so there are inaccuracies.... We end up with a lot of questions that put us to a lot of work.... We lose control of it, and you don't need control just to control, but for context....

Two other interviewees noted a related concern about the reputation of the repository as reflected in an unknown or uncontrolled use of an image. Five interviewees recounted specific situations where they had seen copies of their online materials altered, used without permission, or sold. Two were also concerned that their repository may incur some legal liability if a researcher's use of material from the repository website infringed copyright. Even those interviewees who reported that their administrations are not concerned about further uses of materials on their websites nonetheless take some measures to limit further uses.

### Technical Measures

Technical measures can be used to limit further uses by preventing the copying of images from a website, by permitting copying but reminding the user of copyright matters, or by reducing the quality of the copied image. The repositories in this study used these technical means, either alone or in combination, to limit further uses, as shown in Figure 1.

Five of the 154 repositories in the study prevented copying of at least some of the images on their websites by disabling the right click.<sup>27</sup> Five other repositories used click-through agreements or otherwise require the user to navigate through a copyright information page before viewing a digital resource. Thirty-one repositories watermarked in some way the documents used in 54 digital resources.<sup>28</sup>

The most common technical measure used by study participants was limiting the quality of the copy by reducing the resolution of the images delivered to the Web. The use of low-resolution images for Web delivery has more to do with

<sup>27</sup> Right-clicking the mouse allows one to copy and paste selected content and save it on one's own computer. Disabling the right click can be done with a JavaScript application.

<sup>28</sup> For the purposes of this study, a watermark was considered to be the visible information (such as the name of the repository, item number, or copyright statement) placed across the digital image or on its edge to inhibit its unauthorized use.

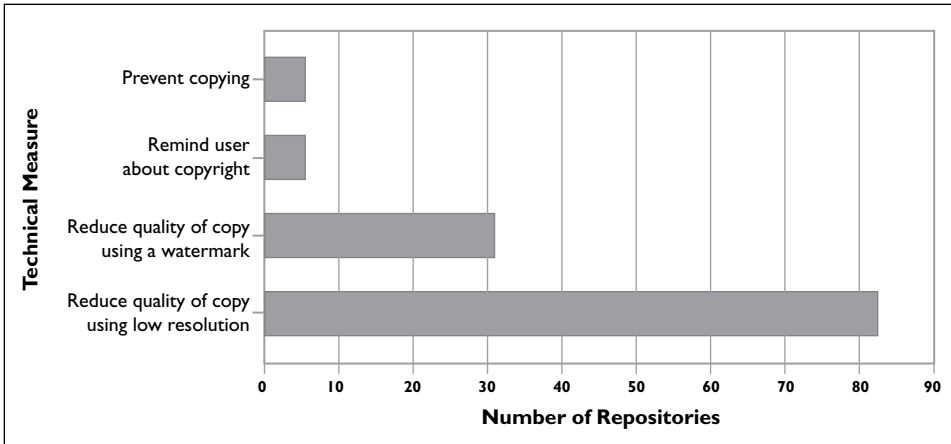


FIGURE 1. Technical measures used to limit further uses ( $n = 154$ ).

reducing file size so images can be downloaded quickly; however, 83 questionnaire respondents (79% of the 105 who responded to that question) indicated that they use low-resolution images as a means of limiting further uses, either as the sole such measure (25%), or in combination with other technical and non-technical measures (54%). Twelve interviewees explicitly stated that they use low-resolution images (72 dpi) to limit use. For example, Pat said, “We have reproduced stuff at relatively low resolution specifically to stop people from using the images, republishing, and reusing them.” Only Laura reported using a high-resolution for Web delivery of the holdings in which they own the copyright, saying,

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

The contrast between Pat’s and Laura’s statements exemplifies the tension between archivists’ mandate to make their holdings available and their wish to control others’ uses of these holdings. Richard went to the heart of the matter, saying, “The approach has been to produce mediocre scans so they really become not something that somebody could heist. Which is kind of counterproductive in terms of researchers’ needs. If the image becomes so lousy that it’s not intelligible, what’s the point of doing this?” Six interviewees noted that any technological protection measures (other than low-resolution images) likely to be within the means of an archival repository could easily be removed or circumvented by a knowledgeable user.

Another interviewee noted that while they use low-resolution images, most of the archival materials on their website is in the public domain and people can do what they want with it. Three repositories had a digital resource<sup>29</sup> that included a statement that the images are all in the public domain; however, 2 of these repositories still placed conditions on their use. For example, Repository 2S<sup>30</sup> stated that the photos available on its website are “free from copyright,” but it nonetheless prohibited any manipulation or reformatting, and specified that only “personal, academic or any other non-commercial use[s]” are permitted.

The effort put into limiting further uses appears to have little to do with copyright, but only 2 interviewees articulated the distinction between copyright and ownership of the archival materials, and their intention to continue to enforce their ownership rights even after the copyright had expired. As Larry said, “It’s probably not so much about copyright, but about ownership.”

In contrast, 13 repositories (8% of the 154 repositories in the study) encouraged their users to reproduce documents from their websites by including “print” links or by instructing their users on how to print, or copy and save (although this assistance is in some cases combined with a restriction of some sort or a reminder about copyright issues).

### **Nontechnical Measures**

Repositories also attempted to control uses of their holdings in nontechnical ways, mainly through statements setting out the terms and conditions of copying and use of the website content, and providing information about how to obtain copies from the repository.

### **Controlling Use of Online Content**

Terms-of-use (TOU) statements—the terms and conditions that the repository puts on uses of the archival materials available online—are a nontechnical means by which repositories attempted to control further uses of their website content. Of the 250 policy documents available to this study, 128 of them (51%) were TOU statements that apply to website content. Seventy-three repositories of the 154 repositories in the study had TOU statements that applied to their website content, either to the entire website (18 TOU statements applied to 16 websites containing 401 digital resources), or to individual digital resources (101 TOU statements applied to 141 digital resources), or both (9

<sup>29</sup> For the purposes of this study, *digital resource* is defined as a grouping of archival documents presented together on the repository website because of some relationship among them.

<sup>30</sup> Repositories have been given alphanumeric designations for reporting purposes.

TOU statements applied to 4 websites and 8 digital resources). Whether reported in terms of numbers of repositories (73) or in terms of numbers of digital resources (550 of the 1,016 in the study), approximately half of the repositories (47%) or digital resources (54%) had TOU statements.

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

However, because this study did not examine every document on every website and did not have access to the documentation required to ascertain whether the repository owns the copyright in the works it makes available online, it is not possible to say whether repositories were placing conditions only on material in which they owned the copyright. While there is evidence that some repositories tailor their TOU statements to the requirements of the particular digital resource (57 repositories prepared separate statements for individual digital resources), other repositories had blanket TOU statements (16 repositories have only a TOU statement that applied to all parts of the website). This suggests that they did not distinguish between works in which they own the copyright, works in which the copyright is owned by third parties, and works in which the copyright has expired. It could also be that repositories thought that they owned copyright in all the content, including the digital copies they have produced. It is interesting to note that only 2 repositories explicitly claimed copyright in the digital image as distinct from the underlying work.

The TOU statements available to this study represented a wide range of practice, and the analysis of TOU statements could be a study in itself. The study looked only at selected aspects relevant to the “restrictiveness” spectrum, as explained below. Thus, the TOU statements were analyzed in terms of what uses, if any, the repository allowed without a formal request for permission, what uses required permission, and any conditions placed on specified or other uses.

Of the 128 TOU statements considered in this study, 22 applied to entire websites and 106 applied to specific digital resources. The analysis of these TOU statements using the foregoing categories is presented in Table 1.

**Table 1.** Terms of Use (TOU) Statements by Permitted Uses and Further Conditions (n = 128)

Post-test	TOU Statements for Digital Resources Number (%)	TOU Statements for Websites Number (%)
All uses need permission plus further conditions	2 (2%)	2 (9%)
All uses need permission; no further conditions	30 (28%)	5 (23%)
Specified uses permitted plus further conditions	63 (59%)	13 (59%)
Specified uses permitted; no conditions	9 (9%)	0 (0%)
No uses specified; conditions apply	2 (2%)	2 (9%)
<b>Total</b>	<b>106 (100%)</b>	<b>22 (100%)</b>

One way to look at this data is to compare the number of repositories that take a positive approach to uses of their online content (in that they inform users what they *can* do with the online documents without seeking permission) with those that take a proscriptive approach (in that they indicate that *all* uses require permission) or a neutral approach in that they indicate no uses at all. Figure 2 shows that a permissive approach predominates, in terms of TOU statements. In terms of repositories, of the 80 repositories represented here, 53 (73% of the 73 that provide TOU statements that apply to website content) take a permissive approach and permit specified uses; 23 (32%) take a proscriptive approach; 4 (5%) specify no uses but impose conditions.<sup>31</sup>

Of interest is the extent to which the permitted uses specified in the TOU statements reflect the fair dealing provision of the Canadian Copyright Act.<sup>32</sup> Most repositories that indicated permitted uses go beyond the purposes specified in the act to include noncommercial and educational uses. Only 4 repositories used the wording directly from the act (“research or private study”); 6 others (in 8 statements) combined “research or private study” with additional purposes.

As seen in Table 2, most TOU statements included conditions on uses of documents from the repository website, regardless of whether the repository’s approach was permissive, proscriptive, or neutral. The most common condition was a requirement to obtain permission for uses that go beyond those specified, or (where a repository took a proscriptive approach) for all uses. The 128 TOU

<sup>31</sup> The total number of repositories exceeds 73 because different TOU statements from some repositories are coded in different categories.

<sup>32</sup> Fair dealing for the purposes of research, private study, criticism, review, or news reporting does not infringe copyright (Canadian Copyright Act, s. 29, 29.1, and 29.2). Unlike fair use in the United States, the list of permitted uses is exhaustive, not open-ended, and the factors that a court would consider in determining whether or not a dealing was fair are not embedded in the statute, but instead are determined by case law.

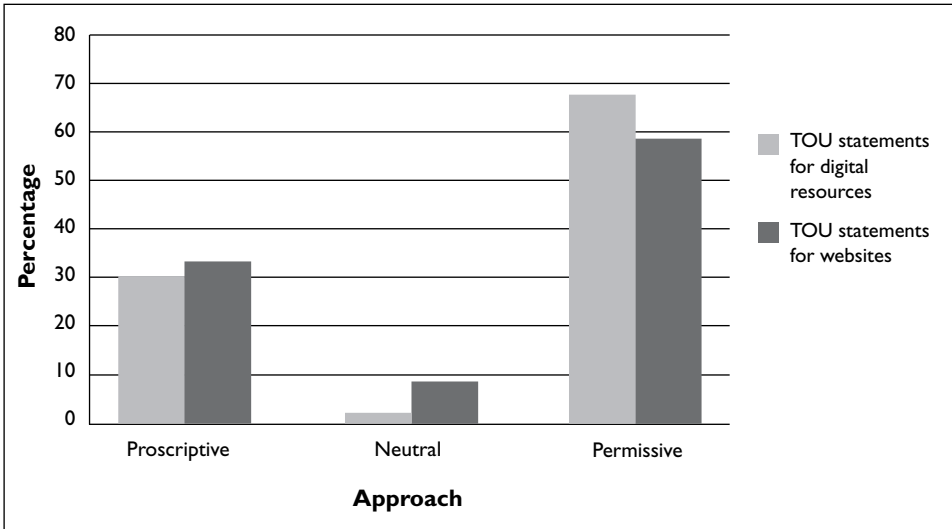


FIGURE 2. Terms of use (TOU) statements by approach ( $n = 128$  TOU statements from 80 repositories).

statements were analyzed according to the nature of their permission requirements. The results are presented in Table 2.

The majority of the TOU statements stipulated that the permission of the repository must be sought for further uses; of those, 15 TOU statements required permission only for commercial uses. Nine TOU statements required the permission of the copyright owner (who may or may not be the repository); six TOU statements required the permission of both the repository and the copyright owner. Twenty TOU statements provided no information about where to obtain permission for uses beyond those specified. In sum, for uses that required a formal request for permission, the repository's permission was required most

Table 2. Permission Information in Terms of Use (TOU) Statements ( $n = 128$ )

	TOU Statements for Websites	TOU Statements for Digital Resources	Total TOU Statements	No. of Repositories
Permission of repository	18	75	93	50
Permission of copyright owner (may be repository)	1	8	9	9
Permission of both repository and copyright owner	1	5	6	5
No indication of whom to ask for permission	2	18	20	18
<b>Total</b>	<b>22</b>	<b>106</b>	<b>128</b>	<b>82*</b>

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

frequently, even though the repository may not be the copyright owner. Few TOU statements explicitly require the permission of the copyright owner.

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

Few repositories imposed conditions that address the ease of copying and manipulating documents in digital form. Ten repositories were concerned about changes to digital documents, although they did not express it in terms of moral rights.<sup>33</sup> Eight repositories (in 11 TOU statements) stipulated that documents cannot be manipulated or changed in any way; 4 of these TOU statements applied to entire websites; the others applied to 7 particular digital resources. Two other repositories (in 2 TOU statements) required that, where a document from a digital resource is used elsewhere, any changes to the document be indicated.

Eight repositories addressed related issues. Four repositories required that the copyright information from the Web page be retained in any reproduction. Four other repositories explicitly prohibited copying of the repository website onto another Web server. Two repositories addressed both types of issues: one prohibited changes as well as copying of the repository website onto another Web server; the other prohibited changes and required that the copyright notice be retained for the same digital resource.

If repositories wanted users to comply with the requirements of the TOU statements, it seems logical that such statements would be located where they will be readily noticed, but an analysis of the location of the TOU statements shows that this was not always the case. Their locations were categorized: 48% of the 128 TOU statements were found on every page or are linked from every page; 37% were on or linked from the homepage only; 15% were “buried” in some way (e.g., through a link from “Important notices” or “About this site” that gave no clear indication that it related to copyright or conditions on further uses of site content).

### *Copies Made by Repositories*

Repositories also attempted to control further uses of their holdings as they responded to requests for copies. Sixty-nine repositories (45% of 154 repositories) included on their websites policy documents that provided information

<sup>33</sup> The Canadian Copyright Act includes a provision for moral rights that protects the reputation of the author and the integrity of the work (ss. 14.1-2, 28.1-2). The author of a work has the right to prevent modifications to the work that will be prejudicial to the reputation of the author.

about how to obtain copies of documents from the repository (whether or not they are available online) and the terms and conditions of use that the repository placed upon such copies. Three aspects are examined here: ordering copies of documents from specific digital resources, the extent to which a repository will provide copies in digital formats, and charging of use or permission fees.

Thirteen repositories (8% of 154 repositories) provided specific information about ordering copies of documents in 16 digital resources. Five repositories specified the uses that may be made of these copies: “personal use,” “personal research or nonprofessional use only,” or “nonprofit use.” Only 4 repositories imposed any conditions that applied to copies of these particular resources, such as the wording of the credit or requiring the written permission of the repository for all further uses beyond personal research.

Given the ease with which digital objects can be copied and transmitted, another way of controlling further uses is to limit the extent to which a repository will provide copies in digital form. Some repositories provided only digital copies; conversely, others provided only photographic prints, but there is little evidence that such policies are related to copyright. They could simply reflect a repository’s reprographic equipment and technical expertise. Thirty-eight of the 154 repositories (25%) supplied copies in digital formats. Of these, 3 repositories mentioned copyright issues in relation to this policy.

Another way of controlling further uses involves charging a use fee (that is, a fee that covers more than just the cost of time and materials to make the copy).<sup>34</sup> Repositories whose fee schedules included use fees often required users to state how they plan to use copies; the proposed use determines the amount of the fee. When asked whether or not they charge a fee to those who want to use a document from the holdings made available online, 23 questionnaire respondents (22% of 103 respondents) reported that they charge a fee; 42 (41%) do not; and 38 (37%) checked “it depends.” The “it depends” responses were fairly consistent, in that those 38 repositories had a two-tier system in which they did not charge for personal use, local media, and the like, but they did charge for commercial, for-profit uses. Website content reveals that 33 repositories charged a fee for commercial uses or for publication, or both. While most provided their fee structures (some very elaborate) on their websites, 5 indicated that the fee is discretionary and must be discussed with the archivist.

When asked to indicate their level of agreement with the statement, “Archival repositories should charge use fees when providing patrons with publication-quality copies of documents, in order to generate revenue,” questionnaire respondents indicated strong agreement, with 76% agreeing or strongly agreeing, and only 12% disagreeing. Despite the ambiguity of the question (it

<sup>34</sup> One repository states on its website that a “desire to limit the wholesale reproduction of large amounts of material” is one of the 4 factors used to determine the prices charged to users for copies ordered from the repository.



is not clear whether they are agreeing with the charging of fees, or the charging of fees to generate revenue), this is a relatively unequivocal response. However, the interview data reveal a different story. Six of the 22 interviewees' repositories did not charge a use fee; of those that did, 14 reported that it was not an important source of revenue because the fees are often very modest or because the fee is waived in many situations. As Pat said, "As far as I'm concerned, getting stuff out there, getting it used, is more important than the little bits of money that you're going to generate." Three interviewees justified charging fees for commercial or profit-making uses; as Richard stated, "If somebody is going to enjoy the benefits of a commercial production, we may as well take a bit of a cut, given that we have to keep these records in perpetuity."

That repositories charge use fees even if the copyright has expired is a contentious issue among users, and, as one interviewee noted, it is often difficult to explain to a user the difference between copyright and ownership of the physical item. Two repositories addressed this directly in their policy documents on their websites. For example, Repository 2C's website stated that its "permission fees are charged for non-exclusive, one-time use of public domain and copyright material."

### **Enforcement**

Questionnaire respondents were asked to indicate their level of agreement with the statement, "If someone copies a document from our website and uses it in a publication or on a website without obtaining the permission of the copyright owner, there is little we can do about it." Fifty-three percent of 105 respondents to this question agreed or strongly agreed; 33% disagreed or strongly disagreed, implying a belief that something could be done about it.

However, the views of questionnaire respondents were nearly unanimous regarding the statement, "If we discovered that someone had published a document from our website in which we owned the copyright, without our permission, we should draw the matter to their attention," with 95% of 106 respondents agreeing or strongly agreeing. However, evidence is limited regarding the extent to which repositories actually do this. Only one policy included procedures to deal with "violations" of copyright. Only two repository websites included statements that infringements will be followed up. One of these websites contained an unusually strong statement about unauthorized use of the contents of its website and included a statement that the repository "will enforce its intellectual property rights to the fullest extent permitted by law." The interviewee from that repository explained that the statement was developed after discovering that someone "had 'harvested' one of [the] databases on our web site and was selling access or results to the public. This we saw as very problematic and

quite troublesome. So amidst other steps such as talking to him, we came up with the stiff warning.” While some archivists may talk tough about following up on infringement or uses that violate their terms-of-use statements, they are likely to do so only after they become aware of such occurrences, and the study did not investigate the extent to which repositories are proactive about detecting infringement or noncompliance with their terms of use.

## Discussion

A recurring theme in this study is the tension between an archival repository’s mandate to provide access to its holdings and a desire to control further uses of them. This tension is clearly evident when we examine the findings in relation to a “restrictiveness” spectrum that ranges from practices that are more restrictive than copyright law requires to those that are consistent with the scope and intent of copyright law. Canadian repositories’ use of technical measures contrasts with their use of nontechnical measures.

The technical measure most commonly employed is the use of low-resolution images for Web delivery, which more than half of the interviewees considered a means of limiting further uses. In this case, copies made from the website are suitable for research or personal uses, but users wanting publication-quality copies would have to order them from the repository. Thus, use of low-resolution images is more restrictive than the law requires. Some repositories took additional steps to limit further uses by users. Thirty-seven repositories (24% of 154 repositories) used additional technical measures (i.e., preventing copying, click-through agreements, or watermarks) to limit uses of particular digital resources. Extremely restrictive are the 5 repositories (3%) that took various steps to prevent copying altogether. At the other end of the spectrum are the 12 repositories (11%) that reported taking no measures (technical or nontechnical) to limit further uses, as well as the 13 repositories (8%) that encouraged use by providing users with instructions for downloading, printing, and saving images for research or personal use. With regard to the use of technical measures, the overall approach can be considered more restrictive than the law allows. In contrast to the number of repositories that used low-resolution images, relatively few made extra efforts either to limit or encourage further uses; however, more repositories implemented technical measures to limit copying or further use than to encourage use.

Nontechnical measures used by these repositories to control further uses of website content consist mainly of terms-of-use (TOU) statements found on the websites. Seventy-three repositories (47% of 154 repositories) included on their websites TOU statements that specified permitted uses of at least some of the website content as well as any conditions on such uses. The other 81

repositories included no TOU statements on their websites. This suggests that the practices of just over half are consistent with the scope and intent of the law in that they placed no conditions on further uses of their website content. Of the repositories whose websites included TOU statements that apply to online resources, there is a considerable variation in how generous or restrictive these statements are. More than two-thirds took a permissive approach in that they permitted a range of specified uses without a formal request for permission, although the uses may be subject to certain conditions. That they specified conditions on further uses of their website holdings puts them at the more restrictive end of the spectrum; however, in taking a permissive approach to access and use, they were more generous than the remaining third whose TOU statements were proscriptive in that all uses require permission. Thus, the degree of restrictiveness can be assessed based on the presence (or absence) of TOU statements and their degree of restrictiveness. Given that more than half provided no TOU statements, and two-thirds of those that did took a permissive approach, repository practice with regard to TOU statements is consistent with the scope and intent of the law.

It appears, then, that archives' attempts to control further uses of their holdings were somewhat at odds with their fundamental mandate to make their holdings available for research, teaching, learning, or pleasure. This study found that archival repositories have embraced the Internet as a means of making their holdings more widely accessible to a host of end-users. In doing so, they preferred to select materials in which the copyright has expired or in which they own the copyright. The majority of the repositories with terms-of-use statements that applied to online resources permitted a range of specified uses without a formal request for permission, which speaks to their interest in access to their holdings. The permitted uses generally go beyond the scope of fair dealing to include educational uses, and there is an emphasis on noncommercial uses that is only indirectly addressed in fair dealing case law. Making their holdings available for purposes that contribute to the public good was seen as a fundamental part of archives' role in society, but use for commercial purposes was often subject to restrictions, including an additional cost.

In contrast, however, other findings reveal that 80% of the repositories in the study employed various technical or nontechnical measures to limit or control further uses of their online holdings. In doing so, repositories did not always clearly separate copyright interests from other interests related to archival concerns such as authenticity, context, or ownership interests. Nonetheless, 53% of the terms-of-use statements were hyperlinked from the word "copyright" or from the copyright statement, thus associating any limitations on further uses with copyright. It appears that archival repositories were invoking copyright in ways that may impede or discourage access to, and use of, online documentary

heritage, even if they had no copyright interests to protect. In doing so, they were compromising the interests of users and their core mission to make their holdings available for use.

Several explanations for this are possible. Primary among them is the repositories' eagerness to embrace this new technology and get some holdings online. In the early days of digitization projects, no clear best practices existed. Repositories saw the digital environment as an extension of existing practice and took their on-site practices online without evaluating the appropriateness of doing so. They already had established processes for making copies for users in response to specific requests; in digitizing their holdings and putting them online, archivists may have thought that they were still making copies that users would find useful, without having to order them.

A second, related, explanation is that archivists have not clearly articulated their various motives for controlling further uses. While archivists have legitimate copyright interests to protect, they more often wished to control how their holdings are used for reasons other than copyright, including concerns over authenticity, context, or ownership interests. However, these other concerns were rarely expressed in repositories' forms and policies pertaining to reproductions and permissions. Nor did they clearly communicate the rights and responsibilities of users with regard to copyright. Responding to requests for copies in the analog world was a mediated process that included an opportunity for communication between the archivist and the user that would allow the archivist to differentiate between copyright matters and other interests. But the user copying from the website sees only what is online, and if the guidance on reproduction and use is linked to copyright, it is difficult to escape the conclusion that any restrictions arise out of copyright. The findings of the study suggest that, compared with repositories' interests in their intellectual and physical property, the rights of users are a lower priority.

## **Conclusion**

It remains to answer the question posed in the introduction: Are Canadian archivists guilty of copyfraud, or do they have other legitimate reasons for wanting to control how their holdings are used? The findings of this study revealed a wide range of practice, and many repositories did not try to control further uses. Those that did, however, were to some extent guilty of copyfraud in that they attempted to control access and use of their online holdings under the broad rubric of copyright by listing terms and conditions on use under the heading of copyright or a link from copyright, by imposing terms and conditions on public domain works, and by requiring end-users to obtain the repository's permission to publish even if the repository has no copyright interest in the work involved.

If, however, one asks archivists why they are doing this, other issues emerge. Ownership interests and archival considerations such as authenticity or context are entirely legitimate concerns, but these complex issues must be clearly articulated and differentiated from each other and from copyright interests.

This exploratory study identified a number of fruitful areas needing more focused inquiry. If archival repositories interpret and present information about copyright in ways that impede online access to, and use of, a nation's rich documentary heritage, the phenomenon must be clearly understood. Reaching a more informed balance between wider online access to archival holdings and appropriate controls on further uses requires further research to investigate the nature of repositories' "quasi-copyright-like" claims and to distinguish between copyright matters and other motives for wanting to control further uses of their holdings. It would also be appropriate to engage the community in a discussion about the extent to which repositories *should* control access to and use of their collections. Another largely unexplored area is how users of online documentary heritage operate within the constraints of copyright and the efficacy of archivists' controls in regulating user behavior. If one of the roles of copyright is to facilitate access to copyrighted works to support further creation and growth of knowledge, those who wish to use online heritage materials to create new works must not be unduly constrained by the practices of archives or other cultural heritage institutions.

While further research may aid in clarifying and articulating archival repositories' current practices, more immediate action is needed. The findings of this study must be translated into professional practice. Eschenfelder's study asked respondents to rate the top 5 ways to "support the implementation of controlled online collections" and found that "develop policy/legal best practices and training" ranked first.<sup>35</sup> As digitization has matured, and repositories consider large-scale digitization projects, best practices are starting to emerge under the leadership of national organizations. For example, the third edition of the NISO *Framework of Guidance for Building Good Digital Collections* provides foundational principles for the building of good digital collections and related metadata, as well as extensive examples of good practices.<sup>36</sup> A dynamic online version of the *Framework* is available for discussion and contribution of new guidelines and examples as they materialize.<sup>37</sup> The Association for Research Libraries recently issued "Principles to Guide Large-Scale Digitization of Special Collections," which attempts to achieve an appropriate balance of interests through "... the

<sup>35</sup> Eschenfelder, "Controlling Access," 74–75.

<sup>36</sup> NISO Framework Working Group, *A Framework of Guidance for Building Good Digital Collections*, 3rd ed. (Baltimore, Md.: NISO, 2007), <http://www.niso.org/publications/rp/framework3.pdf>, 7–8, 11, 13–18, 81–82, accessed 13 March 2011.

<sup>37</sup> NISO, <http://framework.niso.org/node/5>, accessed 13 March 2011.

broadest possible user access to digitized content” (Principle 3); limited duration for restrictions on external access to copies of works digitized from a library’s holdings (Principle 6); and no fees for access to or noncommercial use of public domain materials (Principle 9).<sup>38</sup> Through their professional associations and networks, repository staff may increasingly become aware of these resources, and practices for creating and managing digital collections may become more consistent and of a higher standard.

These best practices must also be incorporated into professional education, within both graduate degree programs and ongoing professional development for those already in the field. The issues touch on a wide range of professional competencies, such as description, preservation, information law, digital technologies, and project management. While copyright is but one aspect of this broad area, it is of particular concern. The findings reported here suggest that archivists may conflate copyright with other constraints on use; other evidence suggests that archivists’ knowledge of copyright is not always correct or current.<sup>39</sup> Whether at the graduate level or as postappointment professional development, information professionals must be better informed about the complexities of copyright.

Are Canadian archivists copyfraudsters? To some extent yes, albeit inadvertently. They have legitimate archival reasons for wanting to control how their holdings are used, but they do not clearly articulate their motivations, and in the online presentation of their practices (through procedures and forms), they conflate other motives with copyright. While archival repositories have embraced digitization and the Internet as means of making their holdings more widely available, their copyright practices appear to compromise their mission to make their holdings available for use. Correcting this situation requires further efforts to extend this research, educate practitioners, and change institutional practice.

<sup>38</sup> Anne Kenney, “The Collaborative Imperative: Special Collections in the Digital Age,” *Research Library Issues: A Bimonthly Report from ARL, CNI, and SPARC*, no. 267 (December 2009), 20–29, <http://www.arl.org/resources/pubs/rli/archive/rli267.shtml>, accessed 13 March 2011.

<sup>39</sup> Jean Dryden, “What Canadian Archivists Know About Copyright and Where They Get Their Knowledge,” *Archivaria* 69 (Spring 2010): 77–116.