

Copyright in Fire Insurance Plans

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Résumé de l'article

Les plans d'assurance incendie comptent parmi les documents les plus importants pour témoigner du développement des villages et villes canadiennes vers la fin du XIXe et au XXe siècles. Plusieurs de ces plans sont préservés dans les archives et bibliothèques canadiennes. Toutefois, depuis près de trois décennies, la photocopie pour les chercheurs ou (plus récemment) la numérisation pour un accès en ligne ont fait l'objet de limitations liées aux droits d'auteur découlant de revendications des droits d'auteur faites par les compagnies ayant créé ces plans et leurs successeurs. Cet article relate l'histoire des plans d'assurance incendie canadiens préservés dans les dépôts et établit la situation actuelle des droits d'auteur s'y rattachant en fonction de la propriété et de la durée. Cet article explore ensuite à quel point les préoccupations en matière de droits d'auteur sont justifiées et offre des solutions potentielles.

Copyright in Fire Insurance Plans¹

JEAN DRYDEN

ABSTRACT Fire insurance plans are among the most valuable records documenting the development of Canada's cities and towns during the late 19th and 20th centuries. Many of these plans are preserved in Canada's archives and libraries. However, for nearly three decades, making copies for researchers and (more recently) digitizing for online access have been subject to a copyright "chill" as a result of the copyright claims of the companies that created these plans and their successors. This article recounts the history of Canadian fire insurance plans preserved in Canadian repositories and establishes their current copyright status in terms of ownership and duration. The article then explores the extent to which the copyright concerns are justified and offers possible solutions.

¹ This article benefited greatly from the assistance of those who have been directly involved in the acquisition and use of these important records. I am particularly grateful to Robert Hayward, formerly of the National Map Collection at the then-National Archives of Canada; Cheryl Woods, newly retired map librarian from Western University, who provided me with documents and details of the response to the copyright claims that emerged in the 1990s; and Matthew Thompson of Opta Information Intelligence, who provided useful background information. I would also like to thank those who responded to my inquiry to the ARCAN-L list with details of their institutional practices and encouragement to continue this research. Thanks are also due to the anonymous reviewers whose suggestions strengthened this article. The research was much delayed, in part because the copyright issues were more complicated than expected, but also because the COVID-19 pandemic closed libraries and archives, necessitating a frustrating wait for access to key sources available only in print in a reference collection that could not be borrowed.

RÉSUMÉ Les plans d'assurance incendie comptent parmi les documents les plus importants pour témoigner du développement des villages et villes canadiennes vers la fin du XIXe et au XXe siècles. Plusieurs de ces plans sont préservés dans les archives et bibliothèques canadiennes. Toutefois, depuis près de trois décennies, la photocopie pour les chercheurs ou (plus récemment) la numérisation pour un accès en ligne ont fait l'objet de limitations liées aux droits d'auteur découlant de revendications des droits d'auteur faites par les compagnies ayant créé ces plans et leurs successeurs. Cet article relate l'histoire des plans d'assurance incendie canadiens préservés dans les dépôts et établit la situation actuelle des droits d'auteur s'y rattachant en fonction de la propriété et de la durée. Cet article explore ensuite à quel point les préoccupations en matière de droits d'auteur sont justifiées et offre des solutions potentielles.

Introduction

Fire insurance plans are among the most valuable records documenting the development of Canada's cities and towns during the late 19th and 20th centuries. Initially prepared to enable insurance companies to assess the risk of fire, these plans also provide extensive information about increasing urbanization, the development of manufacturing and commerce, and the evolution of urban design. Many of these plans are available for research in Canada's archives and libraries.² However, for nearly three decades, making copies for researchers and (more recently) digitizing for online access have been subject to a copyright "chill" resulting from the copyright claims of the companies that created these plans and their successors. This article recounts the history of Canadian fire insurance plans preserved in Canada's libraries and archives and establishes their current copyright status. The article then explores the extent to which the "chill" is justified and offers several possible solutions.

The Plans and the Players

The copyright issues must first be set in context by describing the plans themselves, the individuals and the organizations responsible for their creation, and the chain of successor organizations that claim copyright in the plans. Fire insurance plans are detailed, large-scale coloured plans of urban areas that document the address, footprint, height, and purpose (i.e., commercial, residential, etc.) of each building. They identify construction materials as well as special fire hazards (e.g., chemicals, kilns, etc.) and high-risk industrial facilities (e.g., factories, mills, and warehouses). The width of streets and the proximity of fire services and water supplies are also noted. The skilful drafting and extensive detail can be seen in digital copies available online.³

Although the D.A. Sanborn Company of New York had begun to make fire insurance plans of Canada's largest cities in 1874, Charles Goad entered the field

2 Robert J. Hayward, *Fire Insurance Plans in the National Map Collection* (Ottawa: National Map Collection, Public Archives of Canada, 1977); Lorraine Dubreuil and Chery A. Woods, *Catalogue of Canadian Fire Insurance Plans, 1875–1975* (Ottawa: Association of Canadian Map Libraries and Archives, 2002).

3 A Google search for "fire insurance plans Ontario" will produce links to various archives and libraries whose websites include digital copies of fire insurance plans.

in 1875, and his name became synonymous with fire insurance plans in Canada. Charles Edward Goad (1848–1910) was born in England and, in 1869, came to Canada, where he was employed by various railway construction companies. The *Oxford Dictionary of National Biography* describes him as a cartographer and civil engineer; his knowledge of engineering and surveying was learned on the job.⁴ A born entrepreneur, he saw a need for detailed maps that described buildings and their environments from the perspective of risk to limit losses in the event of a fire. Some individual insurance companies prepared their own plans, a laborious exercise that involved “field surveying, chaining, plotting from chain notes, drawings from the surveyor’s sheets, lithographing, colouring, stenciling, printing, mounting and binding.”⁵ Goad thought that one company could supply plans to the entire industry.⁶ In 1875, he founded the Charles E. Goad Company in Montreal and began to produce fire insurance plans of Canadian cities, which he made available to insurance companies on a subscription basis.⁷ He apparently bought out Sanborn’s Canadian interests in 1881.⁸ In 1885, Goad opened an office in London, England, and began producing plans for British cities as well as for places in Europe, South America, and Africa. By 1885, he had produced surveys of 340 Canadian cities and towns, and by the time he died in 1910, his company had produced plans for more than 1,300 Canadian communities. Goad’s three sons continued to run the Goad Company after his death.⁹

4 Gwyn Rowley, “Charles Edward Goad,” *Oxford Dictionary of National Biography*, vol. 22 (Oxford: Oxford University Press, 2004), 530–31.

5 Underwriters’ Survey Bureau et al. v. Massie & Renwick Ltd., [1938] Ex. C.R. 103, 107, <https://reports.fja-cmf.gc.ca/fja-cmf/j/en/item/400228/index.do>.

6 Christopher L. Hives, *The Underwriters: The History of the Insurers’ Advisory Organization and Its Predecessors, the Canadian Fire Underwriters’ Association and the Canadian Underwriters’ Association (1883–1983)* (Toronto: Phelps Pub. Co, 1985), 35, <https://fireunderwriters.ca/About>.

7 Goad’s business circulars offering subscriptions to insurance companies and communities are available at the Canadiana Héritage project website, accessed July 28, 2020, http://heritage.canadiana.ca/view/oocihm.lac_reel_h1815/1?r=0&s=1.

8 Robert J. Hayward, “Chas. E. Goad and Fire Insurance Cartography,” in *Explorations in the History of Canadian Mapping: A Collection of Essays*, ed. Barbara Farrell and Aileen Desbarats (Ottawa: Association of Canadian Map Libraries and Archives, 1988), 183.

9 Elizabeth Buchanan and Gunter Gad, “GOAD, CHARLES EDWARD,” in *Dictionary of Canadian Biography*, vol. 13 (Toronto: University of Toronto; Quebec: Université Laval, 1994), http://www.biographi.ca/en/bio/goad_charles_edward_13E.html.

The Canadian Fire Underwriters' Association (CFUA) was founded in 1883 for the purpose of standardizing fire insurance rules. After its establishment, there were in Canada two classes of fire insurance underwriters, known as "Board" and "non-Board" companies. The former consisted of the insurance companies that were members of the CFUA, who agreed to quote identical insurance rates. Non-Board companies acted individually or in small groups, and independently determined the insurance rates charged for different risks.¹⁰

The fire insurance business depended on two types of documents: the plans and the rating schedules. The plans provided detailed pictures of the structures in a community from the perspective of the risk of fire (e.g., building size and layout, construction materials, distance from fire hydrants and alarm boxes, etc.). The rating schedules established the insurance premiums charged to the insured, which of course varied according to the risk depicted in the plans. Clearly, the plans were an essential tool in the conduct of fire insurance underwriting. As a CFUA employee told the Supreme Court of Canada, "our whole schedule rating system depends upon our plans."¹¹ Although the CFUA may have acquired plans from Charles Goad, the CFUA's plan department also produced fire insurance plans;¹² its rating department determined the premiums for insuring different classes of risk.

In 1911, the CFUA and the Goad Company entered into an agreement by which the Goads would create and revise plans for the CFUA exclusively.¹³ The agreement ended in January 1917, when the Goads stopped creating new Canadian plans and revising existing plans.¹⁴ In October 1917, the CFUA re-established its own plan-making department, which was separately incorporated and named the Underwriters' Survey Bureau Limited.¹⁵ The Underwriters' Survey Bureau (USB) produced plans for communities in eastern Canada; similar work

10 *Underwriters' Survey Bureau et al.* at 106–7.

11 *Massie G. Renwick, Limited v. Underwriters' Survey Bureau Ltd. et al.*, [1940] S.C.R. 218, 223, <https://www.canlii.org/en/ca/scc/doc/1940/1940canlii1/1940canlii1.pdf>.

12 *Underwriters' Survey Bureau et al.* at 109.

13 Hives, *The Underwriters*, 37; *Underwriters' Survey Bureau et al.* at 109–10.

14 *Underwriters' Survey Bureau et al.* at 110; Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs: Copyright Report* (Ottawa: Queen's Printer, 1957), 32.

15 Hives, *The Underwriters*, 38; *Underwriters' Survey Bureau et al.* at 108, 106; *Massie G. Renwick, Limited* at 226, 234.

was done in the Prairie Provinces by the Western Canada Underwriters' Association and in BC by the British Columbia Underwriters' Association.¹⁶

The Depression of the 1930s had a major negative impact on the insurance business generally and the CFUA in particular. The insurance business was quite fragmented in that CFUA member companies did not limit their business to fire insurance; they also insured against other areas of risk (e.g., automobile and casualty) that were represented by separate organizations. All areas of insurance were affected by the Depression as businesses failed and premiums dried up. In 1936, the CFUA was dissolved and amalgamated with the automobile and casualty insurance associations to form the Canadian Underwriters' Association (CUA). Its mandate was (in part) to "support and maintain sound principles, correct practices and security in the insurance business, in order that the public interest may best be served."¹⁷

Despite these good intentions, the CUA's attempts to regulate inequitable premiums and agents' commissions, control competing regional jurisdictions, and do away with the fierce competition between insurance companies were never fully successful. In 1965, the Insurance Bureau of Canada was founded to provide a forum for discussion between the CUA and its rival organization, the Independent Insurance Conference.¹⁸ The Western Canada Underwriters' Association and the British Columbia Underwriters' Association amalgamated with the CUA in 1965, and the USB became the plan division of the CUA.¹⁹ The CUA imprint replaced that of the USB on plans produced between 1965 and 1973.²⁰

In 1974, the CUA was dissolved and replaced by the Insurers Advisory Organization of Canada (IAO). Instead of regulation, the IAO's mandate was to provide its members with advice and information such as benchmark rates, supporting statistical data, and the like.²¹ The existence of mandatory building codes and

¹⁶ Hayward, *Fire Insurance Plans*, xii.

¹⁷ Hives, *The Underwriters*, 81, 84.

¹⁸ Hives, 123.

¹⁹ Dubreuil and Woods, *Catalogue of Canadian Fire Insurance Plans*, xii.

²⁰ Carolyn Gray, Lorraine Dubreuil, and Cheryl Woods, "Canadian Fire Insurance Plans: Two Conference Sessions," *ACMLA Bulletin*, 114 (Spring/Summer 2002): 13. It appears that the USB continued as a separate corporation to make plans for the exclusive use of CUA members, but it has not been possible to verify the USB's relationship with the CUA between 1937 and 1965.

²¹ Hives, *The Underwriters*, 136; Opta Information Intelligence, "Canada's Underwriting History: Opta Information

standards for fire services meant that data about firefighting, fire prevention services, and building construction could be acquired from municipalities. The insurance business had developed cheaper, less cumbersome ways of recording and analyzing liability data, and plans were no longer needed. Due to increasing costs and falling demand, the IAO produced its last plan in 1975 and sold its inventory of historical plans. Archives and libraries across the country seized the opportunity to purchase plans for their regions from the IAO or via resellers.²²

In 1992, the IAO was purchased by the Underwriters' Adjustment Bureau (UAB), an organization of 146 insurance companies formed in 1951 to improve the settlement of claims. The new organization operated as the UAB Group until 2002, when it was purchased by the business and IT consulting firm CGI and formed an integral part of CGI's insurance business services. In 2008, SCM Insurance Services²³ acquired CGI's claims and risk management operations. Opta Information Intelligence (Opta), created in 2012, is a division of SCM Insurance Services.²⁴ Opta's Enviroscan service is responsible for the historical fire insurance plans inherited from the IAO.²⁵

Copyright Issues

The story thus far has been about a small slice of Canadian business history of modest interest to those whose holdings include fire insurance plans. As stated, the IAO's 1974 decision to dispose of its inventory of plans resulted in significant collections in repositories across the country. However, the story did not end there. Various copyright aspects had to be considered.

Intelligence," Opta, accessed June 17, 2020, <https://optaintel.ca/About/Opta-History>.

- 22 See notice in *ACMLA Bulletin*, 19 (September 1975): 63; See also Gray, Dubreuil, and Woods, "Canadian Fire Insurance Plans," 13.
- 23 Founded in 1986, SCM is "the largest independent, privately owned provider of claims management, risk management, and related services in Canada," SCM Insurance Services, accessed May 29, 2020, <https://www1.scm.ca/About/Companies>.
- 24 Opta Information Intelligence, "Canada's Underwriting History."
- 25 Opta Information Intelligence, "Enviroscan," Opta, accessed June 17, 2020, <https://optaintel.ca/Solutions/Historical-Environmental>.

Increasing environmental regulation caused the IAO to reconsider its decision to dispose of the plans. Development of contaminated sites could be restricted until the source of contamination was cleaned up. Fire insurance plans were essential sources of information about the location of underground fuel storage tanks, chemical plants, or paint factories. The plans now had considerable business and financial value, and the IAO saw a business opportunity in providing clients with a service that would allow them to assess potential environmental contamination. To support this new service, the IAO developed the Historical Environmental Information Reporting System (HEIRS).²⁶

For the new service to be successful, the IAO had to address two problems. First, the HEIRS database was only as good as the number of plans in it. Given that the IAO had disposed of its inventory of plans nearly two decades earlier, the IAO approached archives and libraries that held fire insurance plans with a request to borrow the plans so it could copy them and incorporate them into HEIRS. Many institutions complied.

Second, the IAO also realized that potential clients might not be willing to pay for the IAO's services if the plans were available for public use in libraries and archives and they could get copies from the local archives at lower cost. Thus, the IAO asserted its claim to copyright in the plans. Its promotional brochure for HEIRS claimed, "The Insurers' Advisory Organization (1989) Inc. is the successor organization of the Canadian Underwriters Association (CUA). The assets of the CUA, including copyright to the plans and other documents produced by the CUA, have been transferred to the IAO by the process of succession."²⁷

26 Insurers' Advisory Organization (1989) Inc., "Are You HEIR to an Environmental Liability?" brochure, ca. 1992, copy in author's possession.

27 Insurers' Advisory Organization (1989) Inc., "Are You HEIR to an Environmental Liability?"

In early 1993, the IAO sent letters to institutions whose holdings included fire insurance plans, requesting their

co-operation with respect to the release of information to users who might be obtaining and using this information [contained on the maps] for commercial purposes. . . . It is not our wish to restrict access to the information by the public at large, such as users conducting personal searches, or students and academics etc. We do, however, wish to protect our commercial interests with respect to those who might be using the information for commercial purposes. Accordingly, . . . we would ask you to advise users who contemplate using and/or reproducing the information for commercial purposes, that they should seek our consent before doing so. . . . We trust you will understand our position on this matter and we look forward to receiving your co-operation in a spirit of harmony and good will as intended by us.²⁸

Later letters from the IAO were less cordial. A 1997 letter from the IAO's lawyers claimed that it was "an infringement of the IAO's copyright to make plans of and/or make use of these maps and plans for commercial purposes, profit or gain, without the IAO's permission." The IAO would "resort to any necessary legal action to prevent any organization or person from making copies of or making use of the IAO's maps and plans without its permission."²⁹ The IAO provided no evidence of its copyright claim.

Institutions responded to the 1993 letters in different ways. Some decided simply to advise their clients of the copyright claim, arguing that they would not take further action until the IAO provided proof that it owned copyright. Others not only stopped permitting copying of the plans; they also shut down all access to them.³⁰ The then-National Archives of Canada and the Archives of Ontario (AO) continued to provide access to the plans but stopped providing copies to researchers until a legal opinion could be obtained.³¹

28 Thomas Fowle (environmental engineer, IAO), letter to City of Toronto Archives, February 24, 1993, copy in author's possession.

29 Quoted in Gray, Dubreuil, and Woods, "Canadian Fire Insurance Plans," 13.

30 Gray, Dubreuil, and Woods, 13.

31 Staff memo to City of Toronto Archivist, April 26, 1993, copy in author's possession.

After protracted discussions, the AO and the IAO reached the following agreement (prefaced by the statement “this arrangement does not necessarily constitute a recognition by the AO of the IAO’s claim of copyright ownership in the plans”):

1. that the term of copyright in each plan would be 90 years after the most recent date on the plan;
2. that the AO would include statements in its inventories of the plans advising users wishing to use copies for commercial purposes to contact the IAO;
3. that the AO would reproduce plans at the request of users and researchers and for the purposes of conservation; and
4. that the IAO would not hold the AO liable for any use of the plans by users and researchers.³²

The agreement is particularly concerning because the 90-year guideline has no legal basis. It was devised to provide archivists with a means of determining when it was safe to assume that the copyright had expired in works for which the author’s death date was unknown. It assumed that the typical author was 40 years old at the time the work was created, that the author had lived to be 80 years old, and that 50 years had elapsed since the author’s death. This required a total of 90 years to have passed from the date of creation.³³

To assist other institutions in their discussions with the IAO, the Archivist of Ontario informed all institutions holding plans of this arrangement. How many archives and map libraries signed formal agreements with the IAO is not clear.³⁴ However, many repositories acted in accordance with the agreement and continue to do so. As noted, the IAO was succeeded by several organizations.

32 Letter from the Archivist of Ontario to institutions holding fire insurance plans, February 6, 1995, copy in author’s possession.

33 Wanda Noel, *Staff Guide to Copyright: National Archives of Canada* (Ottawa: National Archives of Canada, 1999), 32.

34 The Provincial Archives of Alberta came to a similar agreement, except that the PAA maintained that the term of copyright was 50 years from the date of creation. Keith Stotyn, “Copyright in Fire Insurance Plans,” *Archives Society of Alberta Newsletter* (September 1995): 14; The Provincial Archives of New Brunswick did not sign an agreement. PANB Manager of Services and Private Records, email to author, December 5, 2019.

With every change, the new owners took steps to remind repositories holding plans of their copyright claims.

While a comprehensive study of institutional practices regarding copyright in fire insurance plans is beyond the scope of this article, the following provides a snapshot of current practice based on two sources. A series of Internet searches sought institutional holdings of fire insurance plans and related copyright statements. A request to the ARCAN-L list in December 2019 resulted in more detailed information (not available on websites) from only six institutions, although other respondents expressed support for this research.

While many institutions hold fire insurance plans, few treat them as aggregations with specific copyright statements. Consequently, finding fire insurance plans via the Internet requires the researcher to navigate a wide range of information retrieval systems and descriptive practices. Some searches produced only lists (e.g., University of Calgary and University of Winnipeg).³⁵ Where they exist, item-level descriptions rarely include copyright information (e.g., University of British Columbia)³⁶ or contain only general copyright statements (e.g., Saskatchewan Archives Board [SAB]).³⁷ However, SAB carefully monitors copying of fire insurance plans and informs researchers requesting copies of Opta's claims. Reproduction requests for large orders must be discussed with the director of archival services.³⁸

The copyright statement in Library and Archives Canada's fonds-level description of the Fire Insurance Plans Collection is somewhat more specific: "Fire insurance plans published by the Underwriters' Survey Bureau and the Western

35 "Guide to Fire Insurance Plans & UC Holdings," University of Calgary, Libraries and Cultural Resources, accessed December 22, 2020, <https://library.ucalgary.ca/c.php?g=255407&p=1705375>; University of Winnipeg, "Fire Insurance Plans," University of Winnipeg Map Library, accessed December 22, 2020, <http://maplibrary.uwinnipeg.ca/thecollection/fireinsuranceplans.htm>.

36 UBC's guide to fire insurance plans does not mention copyright. "BC Fire Insurance Maps," University of BC Library, accessed December 22, 2020, <https://guides.library.ubc.ca/fireinsurancemaps>. However, in 2014, UBC signed an agreement with SCM (now Opta) that did not mention the 90-year guideline but did specify that "photocopying including taking digital images of our Fire Insurance Plans/Maps and or [sic] the use of the Plans/Maps for commercial purposes, profit or gain is strictly prohibited without [SCM's] prior written consent" (copy in author's possession).

37 "Item A0143 (S) – Insurance Plan of the City of Prince Albert, Saskatchewan," Provincial Archives of Saskatchewan, accessed December 22, 2020, <https://search.saskarchives.com/insurance-plan-of-the-city-of-prince-albert-saskatchewan>.

38 Director of Archival Services, SAB, email to author, December 16, 2019.

Canada Underwriters' Association may be subject to copyright. . . . Charles E. Goad Company plans copyright expired."³⁹ Surprisingly, the catalogue records for all but one of the 10 plans (dated 1954–60) held by the University of Northern British Columbia include Creative Commons public domain licenses.⁴⁰

Without extensive research, it is impossible to tell how many institutions apply the 90-year guideline. However, the following institutions explicitly do so. The Archives of Ontario's description of Fire Insurance Plans Series C 234-1 states,

The term of copyright for fire insurance plans is a period not exceeding 90 years after 1976, when production of the plans was discontinued. Fire insurance plans by the following creators are subject to a copyright claim: Chas. E. Goad, Civil Engineer; Chas. E. Goad Company; Canadian Fire Underwriters' Association; Underwriters' Survey Bureau Limited; Canadian Underwriters' Association; Insurers' Advisory Organization of Canada; Insurers' Advisory Organization Inc.; and the Insurers' Advisory Organization (1989) Inc. Researchers wishing to publish or use copies of these plans for historical purposes should contact Opta Information Intelligence. . . . There are no restrictions on reproduction for research and private study. If you wish to use these plans for purposes other than research and private study, please submit a Request for Permission to Publish, Exhibit or Broadcast form.⁴¹

Western University's web page describing its holdings of fire insurance plans states, "Please be aware that a 90 year copyright restriction applies. For inquiries on reproductions, please contact . . . the copyright owner, at Opta Information Intelligence."⁴²

39 The copyright information is found under "Ordering and Viewing Options." "Fire Insurance Plan Collection [cartographic material, graphic material, textual record]," Library and Archives Canada, accessed December 22, 2020, <https://www.bac-lac.gc.ca/eng/CollectionSearch/Pages/record.aspx?app=FonAndCol&IdNumber=5082220>.

40 University of Northern British Columbia, "Northern BC Fire Insurance Plans," UNBC Archival Resources, accessed December 22, 2020, https://libguides.unbc.ca/archivalresources/fire_insurance_plans.

41 The description of Series C 234-1 can be found by searching "Archives Descriptive Database," Archives of Ontario, accessed December 22, 2020, http://www.archives.gov.on.ca/en/access/our_collection.aspx.

42 Western University, "Fire Insurance Plan Holdings," Western Libraries, Map and Data Centre, accessed December 22, 2020, <https://www.lib.uwo.ca/madgic/fips.html>.

McMaster University's overview of fire insurance plans states,

Plans less than 90 years old are still restricted by copyright. Only their indexes have been made available on our website to display the coverage area. Copyright restricted plans must be viewed in person in paper, hardcopy format in the Lloyd Reeds Map Collection. Written permission of the **copyright owners** may be required for distribution, reproduction or other use of protected items beyond that allowed by fair use and other statutory exemptions. Responsibility for making an independent legal assessment of an item and securing any necessary permissions ultimately rests with persons desiring to use the item.⁴³

The foregoing provides only a selective impression of institutional copyright practices vis-à-vis fire insurance plans. A systematic survey is needed to understand fully what appears to be a wide range of practice that has evolved since the mid-1990s.

Copyright Ownership

It is not clear whether anyone involved in the AO agreement was aware that copyright in fire insurance plans had been at issue in a copyright infringement case heard by the Exchequer Court of Canada in 1937: *Underwriters' Survey Bureau et al. v. Massie & Renwick Ltd.* The Underwriters' Survey Bureau (USB) sued Massie & Renwick (an independent fire insurance company) for copyright infringement, claiming that Massie & Renwick (M&R) had copied the fire insurance plans without the USB's permission. In its defence, M&R questioned USB's title to the copyright in the Goad plans in particular and claimed that, by withholding copies from all but CFUA members, USB was unfairly creating a monopoly.

The Exchequer Court found that the plans were entitled to copyright protection and that M&R had infringed USB's copyright. The case was appealed to the Supreme Court of Canada, which upheld all but one of the rulings of the lower court (a ruling pertaining only to the rating material). At the time, decisions of the Supreme Court of Canada could be appealed to the Judicial Committee of the Privy Council in Britain, but leave to appeal was denied.

⁴³ McMaster University, "Fire Insurance Plans," McMaster University Library, accessed December 22, 2020, <https://library.mcmaster.ca/collections/fire-insurance-plans> (emphasis in original).

The value of the case is in both courts' tracking of the copyright ownership from Charles Goad to the Underwriters' Survey Bureau. The courts demonstrated that the USB owned copyright in the Goad plans, its revisions of Goad's plans, and the plans it produced itself. However, the copyright trail that led to those conclusions is complicated because the plans in question were created by different entities over a span of years and copyright changed hands due to contractual arrangements. Furthermore, significant amendments to Canada's copyright law, affecting the term of copyright and the status of unpublished works (such as the fire insurance plans), came into force on January 1, 1924.

Before 1924, unpublished works were protected under common law; that is, they were not subject to the statutory copyright created by Canada's earlier copyright statutes. Under common law, the author of a work had the right to withhold publication or to stop others from publishing the work. The copyright term of 28 years was triggered only by publication and registration of the copyright with the Minister of Agriculture, whose department was responsible for intellectual property at the time. Unpublished works could not be registered. If the work was never published and registered, copyright never expired.

The 1921 *Copyright Act* abolished common law copyright and conferred statutory copyright upon all works from the date they were created, regardless of whether they were published. As of January 1, 1924, all works, published and unpublished, could be registered, and a certificate of registration was prima facie evidence that copyright subsisted in the work and that the person registered was the owner of such copyright.⁴⁴ Those who held common law copyright in unpublished works before January 1, 1924, were granted the rights and the copyright term set out in the 1921 Act (i.e., the term changed to the life of the author plus 50 years after the author's death). In addition to abolishing common law copyright and moving to a life-based term, the Act (for the first time) defined *publication* as "issuing copies to the public,"⁴⁵ and stated that copyright in works created by employees belonged to the employer.⁴⁶

As a result, plans created before 1924 were subject to different copyright rules from those created from 1924 on. The following summarizes the chain of copyright ownership documented by the courts as a result of contractual

44 Copyright Act, S.C. 1921, c. 24, s. 35(2).

45 Copyright Act 1921, s. 3(2).

46 Copyright Act 1921, s. 11(1)(b).

agreements and statutory amendments. The plans created before 1924 can be divided into five groups:

1. Plans created during Charles Goad's lifetime (1875–1910)
2. Plans made by the Goad Company for CFUA (1911–16)
3. Goad plans revised by USB (1917–23)
4. Plans made by USB itself (1917–23)
5. Plans made by CFUA (1883–1911, 1917)

1. Plans Created during Charles Goad's Lifetime (1875–1910)

Goad made plans available to various insurance companies and registered the copyright in his name. The term of copyright at the time was 28 years from the date of registration; thus, copyright in any plans published before 1896 had expired by the end of 1923.⁴⁷ In 1911, copyright in plans made during Charles Goad's lifetime was transferred by the terms of his will to the company operated by three of his sons, who continued to create, revise, and sell plans in which the company owned the copyright.⁴⁸

2. Plans Made by the Goad Company for CFUA (1911–16)

From 1911 to 1916, the Goad Company agreed that it would make (and revise) plans exclusively for the CFUA.⁴⁹ The arrangement did not involve a transfer of copyright; thus, the Goad Company owned copyright in this group of plans. To maintain control over this vital business information, the CFUA made its plans available only to its members on the understanding that they were loaned and had to be returned either when the agent no longer represented a member organization or when the plan was reprinted.⁵⁰ The procedures through which this policy was implemented after the creation of the USB are documented in the Supreme Court decision.⁵¹ Given this arrangement, the court (writing after *publication* had been defined in the statute) found that the plans were not published within

⁴⁷ *Underwriters' Survey Bureau et al.* at 113.

⁴⁸ *Underwriters' Survey Bureau et al.* at 109, 110, 115; *Massie & Renwick, Limited* at 237–38, 241.

⁴⁹ *Underwriters' Survey Bureau et al.* at 109–10.

⁵⁰ *Underwriters' Survey Bureau et al.* at 108–9.

⁵¹ *Massie & Renwick, Limited* at 235.

the statutory meaning of publication.⁵² From a pre-1924 perspective, these plans were considered unpublished and thus subject to common law copyright.

3. Goad Plans Revised by USB (1917–23)

As noted above, in 1917, the Goad Company stopped making fire insurance plans. That same year, the CFUA created the USB to make plans for CFUA members. The USB's mandate went beyond creating new plans. As communities grew, the plans became outdated. Minor revisions were made by pasting new information reflecting the demolition or construction of buildings on top of old lots. In a community undergoing rapid change, a plan could accumulate several layers of pasted-on additions before it became necessary to revise and reprint individual sheets and, eventually, all the sheets comprising the plan for the entire community.⁵³ For example, what is catalogued as the 1892 insurance plan of Toronto is in fact a "layer-cake," current to 1892 with an 1880 base.⁵⁴ By means of a licence agreement, the Goad Company authorized the USB to prepare revisions of the Goad plans.⁵⁵ From a copyright perspective, each revised/reprinted plan was deemed to be sufficiently original to constitute a new work with a new copyright. Thus, while the USB had the necessary permissions to revise the Goad plans, the copyright in the USB's revisions of the Goad plans was owned by the USB.⁵⁶ Like all other plans made for the CFUA, these plans were not published and thus were subject to common law copyright.

4. Plans Made by USB Itself (1917–23)

The USB was, of course, creating new plans as well as revisions of its plans; copyright was owned by USB. These plans were not published and were subject to common law copyright.

⁵² *Underwriters' Survey Bureau et al.* at 109, 115, 120.

⁵³ The system of "paste over" revisions continued until 1950, when it became possible to print new sheets when revisions were required. Archives of Ontario, Series C 234-1, Fire insurance plans, Finding Aid, Scope and content note, n.d.

⁵⁴ Mark Fram, "A Primer on Goad's Atlases and Insurance Plans for Toronto" (handout prepared for Prof. Gunter Gad, n.p., 2010), 7, https://maps.library.utoronto.ca/docs/Goad_primer_2010.pdf.

⁵⁵ *Underwriters' Survey Bureau et al.* at 110; *Massie & Renwick, Limited* at 238.

⁵⁶ *Massie & Renwick, Limited* at 239, 240–41, 242.

5. Plans Made by the CFUA (1883–1911, 1917)

A small number of plans was made by the CFUA's plan department before this work was outsourced to the Goad Company in 1911 and before the USB was created in 1917.⁵⁷ The Supreme Court concluded that the copyright in these plans was owned by CFUA members.⁵⁸ The court considered it a "legitimate inference that these plans, with the consent of the plan committee representing the members of the Association, became the property of the Underwriters' Survey Bureau, Ltd., together with the incorporeal right of reproduction."⁵⁹ Because these plans were not published, they were subject to common law copyright.

The following table sums up the copyright status of the plans made before 1924.

TABLE 1 Copyright in pre-1924 fire insurance plans.

GROUP	NAME	RIGHTS HOLDER	STATUTORY OR COMMON LAW COPYRIGHT?
1	Plans created during Charles Goad's lifetime (1875–1910)	Goad Company	Statutory
2	Plans made by the Goad Company for CFUA (1911–16)	Goad Company	Common law
3	Goad plans revised by USB 1917–23	USB	Common law
4	Plans made by USB itself 1917–23	USB	Common law
5	Plans made by CFUA 1883–1911, 1917	USB	Common law

Effective January 1, 1924, the plans in all five groups were subject to the statutory copyright provisions set out in the 1921 Act. The USB continued to own copyright in plans made or revised before 1924. It also owned the copyright in new plans (and in revisions of pre-1924 plans) made from 1924 on. Copyright still owned

57 *Underwriters' Survey Bureau et al.* at 109; *Massie & Renwick, Limited* at 236.

58 *Massie & Renwick, Limited* at 237, 241.

59 *Massie & Renwick, Limited* at 244.

by the Goad Company was assigned to the USB in March 1931, when the USB purchased all the Goad Company's assets, including its stock of plans.⁶⁰ This transaction completed the transfer of copyright in all Goad plans to the USB. Copyright in all plans made after 1923 by employees of the USB and the CUA would be owned by the employer.⁶¹ The court also relied on a 1931 amendment to the Act, which applies to cases of infringement in which the plaintiff's copyright is put in question. In cases where no author's name appears on the work (as with the plans in question), the publisher or proprietor whose name is on the work (i.e., USB or CUA) is presumed to be the copyright owner.⁶²

The decisions of the courts predated the subsequent organizational changes affecting the USB, and we have no documentation of the transfer of assets to the USB's successor organizations. However, it seems reasonable to assume that the agreements documenting changes in ownership included the assignment of copyrights to the successor companies as claimed successively by the IAO, CGI, and Opta.

Duration of Copyright

The foregoing discussion settles the matter of copyright ownership; however, the 1921 Act also significantly changed the term of copyright. Effective January 1, 1924, the term for all works, published or not, became the life of the author plus 50 years⁶³ instead of a term triggered by publication and registration. In concluding that the USB (or CUA, depending on when the plans were made or revised) were the copyright owners, the court noted that the names of the authors were not recorded on the plans and therefore a term of life of the author could not be applied because the authors were not known.⁶⁴ In the absence of a statutory provision that addressed this situation, the Supreme Court stated, "If the owner of it [the copyright] cannot identify the author, the duration of it must be restricted to the period of 50 years from the date when the copyright or

⁶⁰ *Underwriters' Survey Bureau et al.* at 110; *Massie & Renwick, Limited* at 237–38, 241.

⁶¹ Copyright Act 1921, s. 11(1)(b).

⁶² An Act to Amend the Copyright Act, S.C. 1931, c. 8, s. 20(3)(b)(ii); *Underwriters' Survey Bureau et al.* at 121–22.

⁶³ Copyright Act 1921, s. 5.

⁶⁴ *Massie & Renwick, Limited* at 245.

common law right, as the case may be, came into existence.”⁶⁵

However, the authors *are* known because the USB registered the copyright in its plans. The plans were registered as “unpublished literary works,”⁶⁶ and the register and registration certificates included the names of the authors and their cities of residence. The term rule of creation plus 50 years established by the Supreme Court would apply only where the author truly could not be identified.⁶⁷

The situation changed in the early 1990s. In 1993, the Act was amended to address the unknown author situation and to codify the term rule established by the Supreme Court. The amendment provided that “where the identity of the author of a work is unknown,” copyright will subsist for the shorter of publication plus 50 years or, if the work is not published, creation plus 75 years.⁶⁸ The change came into force on January 1, 1994, and it was retroactive (i.e., it applied to all existing works still protected by copyright as well as to all works yet to be created).⁶⁹ However, it did not revive copyrights that had already expired.⁷⁰

Ironically, about the same time that the law changed, the publication status of the plans also changed. In 1992, the IAO began to sell copies of plans to clients as part of its environmental due diligence service. As its advertising brochure stated, “HEIRS™ provides copies of available Fire Insurance Plans, Inspection Reports and Property Plans.”⁷¹ The Act defines publication as “making copies of a work available to the public.”⁷² Thus all plans still protected by copyright can be

65 *Massie & Renwick, Limited* at 245. It is not clear why the SCC addressed this matter. The duration of copyright was not an issue in this case; the Exchequer Court did not discuss it at all.

66 The current *Copyright Act* places maps and plans in the category of artistic works, but until 1993, they were classed as literary works.

67 David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2nd ed. (Toronto: Irwin, 2011), 145, 246.

68 North American Free Trade Agreement Implementation Act, S.C. 1993, c. 44, s. 58. This provision was amended in 2020 to comply with the Canada-United States-Mexico Trade Agreement. It now provides that where the identity of the author of a work is unknown, copyright in the work shall subsist for 75 years from the creation of the work, but if the work is published before the copyright expires, copyright continues until the earlier of 75 years from publication and 100 years from the time the work was made (Copyright Act, s. 6.1(1)).

69 North American Free Trade Agreement Implementation Act, s. 75(1).

70 North American Free Trade Agreement Implementation Act, s. 75(2).

71 Insurers’ Advisory Organization (1989) Inc., “Are You HEIR to an Environmental Liability?” The brochure is undated, but it was enclosed with a letter sent to the City of Toronto Archives in February 1993. It is assumed that marketing to clients began in 1992.

72 Copyright Act R.S.C., 1985, c. C-42, s. 2.2(1)(a). See Jean Dryden, “The Meaning of Publication in Canadian Copyright Law: An Archival Perspective,” *Archivaria* 83 (Spring 2017): 1–34.

considered published as soon as the IAO offered its new service.

What does this mean for archives and libraries holding fire insurance plans? Two issues are involved here: (1) the legal duration of copyright protection and (2) the statutory copyright exceptions that enable libraries, archives, and museums (LAMs) to make copies for users without infringing copyright. The legal term of copyright protection is derived solely from the Act. The 90-year guideline set out in the AO agreement never had any legal basis in copyright law, and repositories are under no obligation to observe that copyright term. While the agreement has the advantage of “releasing” a new group of plans annually, to say that the copyright expires would be completely wrong because the basis for the agreement is without legal foundation. At the time of writing, plans created before 1930 are no longer subject to the agreement. Using this calculation, however, the last plans will not be released until the end of 2065.

Readers are reminded that copyright expires *legally* 50 years after the author's death. At the time of writing, copyright has expired in plans prepared by anyone who died before 1970, and it is likely that copyright will legally expire in a new batch of plans at the end of every year. The problem, of course, is that we do not know when the authors died. However, their names and the cities they lived in are recorded in the copyright registers at the Canadian Intellectual Property Office (CIPO) in Ottawa.

Copyright registrations prior to 1991 are not available online, but 12 registration certificates (1936–64) and 15 entries in the 1953 copyright register were available to the author. Of this sample of 27, all but four plans are works of joint authorship; for such works, copyright expires 50 years after the death of the author who dies last. While 37 authors are recorded in the 15 register entries, a closer examination reveals that the names recur and only five individuals, in various combinations, are represented. The same five names also appear on the registration certificates. Given that the number of surveyors appears to be relatively small, it should be possible to ascertain the authors' death dates and thus the *correct* date of copyright expiry in any of the registered plans. Such a project would require a search of the copyright registers at CIPO from 1930 to 1975 to identify all the surveyor-authors of plans created for the USB or CUA, followed by a search for their death dates by someone familiar with genealogical databases. Completion of such a project would render the agreement irrelevant. In the meantime, archives and libraries can rely on the users' rights in the Act.

Users' Rights

The agreement between the AO and the IAO was an arrangement arising from fear of litigation for copyright infringement. To what extent is that fear justified? For the answer, we must consider the users' rights in the Act that permit certain activities that otherwise would constitute infringement. It has long been established practice that archives and library special collections rarely lend their holdings because they are unique and irreplaceable. Instead, researchers have to visit the repositories and take notes or (more frequently) request copies. In providing copies for users, LAMs could rely on the fair-dealing provision, which has been part of the law since 1921 and which provides that dealing fairly with a work for the purposes of research or private study does not infringe copyright.⁷³ Unfortunately, neither the statute nor the limited jurisprudence gave much guidance about the scope of fair dealing. However, in 2004, the Supreme Court established a two-step test for determining whether a dealing was fair.⁷⁴ This ruling serves as the basis for the fair-dealing guidelines used in academic and educational institutions. The power of fair dealing as a users' right has been well established in practice and jurisprudence.

Specific users' rights for LAMs were added to the Act in 1997.⁷⁵ Subject to certain conditions, a library, archives, or museum is permitted to make a single copy for a user provided that the user is informed that the copy is for research or private study only and further uses may require the permission of the rights holder.⁷⁶ Many repositories also stipulate that it is the user's responsibility to obtain any necessary permissions. As long as LAMs comply with the conditions attached to these users' rights, making copies for research and private study under fair dealing or under the LAMs users' rights is not an infringement of copyright.

Furthermore, nothing in the Act provides that LAMs are liable for infringing uses by end users. It is the rights holder's responsibility to enforce its copyrights. If a user obtained a copy of a plan from an archives and decided to use the plan in a way that infringed Opta's copyright, the dispute would be between the end user and Opta. While Opta might include the repository in the action, the repository

73 Copyright Act R.S.C., 1985, s. 29.

74 C. CCH v Law Society of Upper Canada, [2004] SCC 13, para. 53–60.

75 Copyright Act R.S.C., 1985, ss. 30.1, 30.2, 30.21.

76 Copyright Act R.S.C., 1985, ss. 30.2, 30.21.

would not have infringed as long as it could demonstrate compliance with the user's right under which it made the copy. Despite threats, no repository holding fire insurance plans has been the target of legal action by Opta or its predecessors.

Digitization raises other copyright questions. In the quarter century since the agreement between the IAO and the AO, archivists have enthusiastically embraced the opportunities to reach remote audiences by digitizing their holdings and putting them online. Although one could argue that repositories are making copies available online for users' research or private study, the matter has not been judicially considered, and it is unlikely that the wide dissemination via the Internet would pass the fair-dealing test.

With a few exceptions, institutions have limited their online offerings of fire insurance plans to older plans. McMaster explicitly states, "**Plans older than 90 years are out-of-copyright** and have been digitized and made available on our website."⁷⁷ However, others have made digitized plans less than 90 years old available online. For example, the Historical Maps of Nova Scotia collection contains three digitized plans (1931, 1940, 1951). No copyright information is given.⁷⁸ The University of Northern British Columbia has digitized fire insurance plans of 10 communities in its region (1954–60) with a Creative Commons public domain licenses for all but one.⁷⁹ Digitized fire insurance plans (1957–60) from six Manitoba communities are part of an extensive collection of Manitoba historical maps posted on Flickr by Wyman Laliberte (GIS librarian at the University of Alberta), with a copyright statement that reads, "All rights reserved."⁸⁰ These institutions or individuals may be unaware of any copyright constraints; alternatively, they may wish to challenge the 90-year guideline.

77 McMaster University Library, "Fire Insurance Plans" (emphasis in original).

78 Province of Nova Scotia, "Historical Maps of Nova Scotia," Nova Scotia Archives, accessed December 22, 2020, <https://archives.novascotia.ca/maps/>.

79 University of Northern British Columbia, "Northern BC Fire Insurance Plans."

80 Wyman Laliberte (@wyman10), "Manitoba Fire Insurance Plans," Flickr photo collection, accessed December 22, 2020, <https://www.flickr.com/photos/manitobamaps/collections/72157621781299509/>.

Conclusion

Canadian archivists have long been irritated by the copyright “chill” imposed by Opta and its predecessors because they feel that insurance companies’ copyright claims are not justified. While the problem will eventually end with the passage of time, certain steps can be taken more immediately to address the issue. The following options for changing institutional policy are available to all. Institutions could remove all references to the 90-year guideline on their websites and in internal documents given to researchers so as not to perpetuate the idea that the guideline is based in law. Furthermore, unless they have agreements with Opta, institutions have no obligation to assist Opta in enforcing its copyright claim. Provided that they comply with the conditions governing statutory copyright exceptions for LAMs, institutions are legally entitled to make copies for research and private study; the recipients of the copies are responsible for any infringing uses.

For those who favour bolder action, digitization of fire insurance plans that are less than 90 years old could provide an opportunity to challenge Opta’s claims. Online digitized holdings are often accompanied by takedown policies that provide a means of responding to rights holders’ claims of copyright in the digitized material. Such policies provide that the allegedly infringing material is removed from the website while the institution investigates the claim. If the rights holder cannot substantiate its claim, the material is once more available online. Should Opta object to the online presence of more recent plans, Opta would have to verify its copyright claims – first, by producing evidence of the chain of copyright ownership from the USB through the various organizations to Opta and, second, by providing evidence of the death dates of the authors to ground its copyright claims in law. Alternatively, institutions could act together to challenge Opta’s claims. Institutions that have agreements with Opta or its predecessors could notify Opta that they are withdrawing from the agreements.⁸¹ They could also require Opta to validate its copyright claims as noted above. Such collective action would undoubtedly provide an opportunity for discussion that could change the situation for the better.

⁸¹ Although the terms of the agreements have evolved over time, none that I have seen includes an end date or a process for termination.

Finally, the archival community (possibly in partnership with Opta) could undertake the research project described above to ascertain copyright expiry based on authors' death dates. Archivists are skilled researchers, and many are specialists in genealogical research. With the certain knowledge that copyright had expired, institutions and their patrons could freely use all plans in the public domain.

It is regrettable that fear of copyright infringement has led many libraries and archives to place unwarranted restrictions on the reproduction and use of fire insurance plans. These restrictions have been a long-standing irritant for repositories and researchers. It is hoped that this article clarifies the current copyright situation and provides some solutions that will allow LAMs to fully achieve their fundamental mission to make their holdings available for research.

BIOGRAPHY Jean Dryden has many years of experience as a staff archivist and archival administrator at the National Archives of Canada and the Provincial Archives of Alberta and as Chief Archivist of the United Church of Canada/Victoria University Archives. Her doctoral dissertation investigated the copyright practices of Canadian archival repositories in making their holdings available online. While a faculty member at the University of Maryland, she completed a grant-funded comparative study of the practices of American repositories. In 2015, she completed a Master of Laws degree specializing in intellectual property at Osgoode Hall Law School. She has been active throughout her career on committees and boards of professional associations, and she currently represents the International Council on Archives at the World Intellectual Property Organization's Standing Committee on Copyright. In addition to being the author of numerous publications and presentations on copyright issues, she is the author of *Demystifying Copyright: A Researcher's Guide to Copyright in Canadian Libraries and Archives*, 2nd ed. (2014) and a past editor of *Archivaria*.